amount of the grant, contract, or cooperative agreement awarded by the Director, or $500,000, whichever is the lesser amount. The Director shall waive the matching requirement for any institution or consortium with no endowment, or an endowment that has a current dollar value lower than $50,000,000.

SEC. 6. LIMITATIONS.

(a) IN GENERAL.—An eligible institution that receives a grant, contract, or cooperative agreement under this Act that exceeds $2,500,000, shall not be eligible to receive another grant, contract, or cooperative agreement under this Act until every other eligible institution that has applied for a grant, contract, or cooperative agreement under this Act has received such a grant, contract, or cooperative.

(b) AWARDS ADMINISTERED BY ELIGIBLE INSTITUTION.—Each grant, contract, or cooperative agreement awarded under this Act shall be made to, and administered by, an eligible institution, even when it is awarded for the implementation of a consortium or joint project.

SEC. 7. ANNUAL REPORT AND EVALUATION.

(a) ANNUAL REPORT REQUIRED FROM RECIPIENTS.—Each institution that receives a grant, contract, or cooperative agreement under this Act shall provide an annual report to the Director on its use of the grant, contract, or cooperative agreement.

(b) EVALUATION BY DIRECTOR.—The Director, in consultation with the Secretary of Education, shall—

(1) review the reports provided under subsection (a) each year; and

(2) evaluate the program authorized by section 3 on the basis of those reports every 2 years.

(c) CONTENTS OF EVALUATION.—The Director, in the evaluation, shall describe the activities undertaken by those institutions and shall assess the short-range and long-range impact of activities carried out under the grant, contract, or cooperative agreement on the students, faculty, and staff of the institutions.

(d) REPORT TO CONGRESS.—The Director shall submit a report to the Congress based on the evaluation. In the report, the Director shall include such recommendations, including recommendations concerning the continuing need for Federal support of the program, as may be appropriate.

SEC. 8. DEFINITIONS.

In this Act:

(1) ELIGIBLE INSTITUTION.—The term ''eligible institution'' means an institution that is—

(A) a historically Black college or university that is a part B institution, as defined in section 322(2) of the Higher Education Act of 1965 (20 U.S.C. 1061(2)), an institution described in section 326(e)(1)(A), (B), or (C) of that Act (20 U.S.C. 1063b(e)(1)(A), (B), or (C)), or a consortium of institutions described in this subparagraph;

(B) a Hispanic-serving institution, as defined in section 502(a)(5) of the Higher Education Act of 1965 (20 U.S.C. 1101a(a)(5));

(C) a tribally controlled college or university, as defined in section 316(b)(3) of the Higher Education Act of 1965 (20 U.S.C. 1059c(b)(3));

(D) an Alaska Native-serving institution under section 317(b) of the Higher Education Act of 1965 (20 U.S.C. 1059d(b));

(E) a Native Hawaiian-serving institution under section 317(b) of the Higher Education Act of 1965 (20 U.S.C. 1059d(b)); or

(F) an institution determined by the Director, in consultation with the Secretary of Education, to have enrolled a substantial number of minority, low-income students during the previous academic year who received assistance under subpart I of part A of title IV of the Higher Education Act of 1965 (20 U.S.C. 1070a et seq.) for that year.

(2) DIRECTOR.—The term ''Director'' means the Director of the National Science Foundation.

(3) MINORITY BUSINESS.—The term ''minority business'' includes HUBZone small business concerns (as defined in section 3(p) of the Small Business Act (15 U.S.C. 632(p)).

SEC. 9. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Director of the National Science Foundation $250,000,000 for each of the fiscal years 2004 through 2008 to carry out this Act.

The PRESIDING OFFICER. The majority leader.

RECESS

Mr. FRIST. Mr. President, I ask unanimous consent the Senate now stand in recess until 3 p.m. today.

There being no objection, the Senate, at 2:11 p.m., recessed until 3 p.m. and reassembled when called to order by the Presiding Officer (Mrs. DOLE).

EXECUTIVE SESSION

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

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session to resume consideration of Executive Calendar No. 86, which the clerk will report.

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

The PRESIDING OFFICER. The Senator from Maryland.

Ms. MIKULSKI. Madam President, I wish to speak about the nomination of Priscilla Owen. I thank the Senator from North Dakota for allowing me to go first.

I rise in opposition to the nomination of Priscilla Owen to the U.S. Court of appeals for the Fifth Circuit. I know the President has the constitutional responsibility to appoint Federal judges. I respect that right. In fact, I have voted for President Bush's judicial nominations 97 percent of the time. Yet the Senate also has the constitutional responsibility to advise and consent. We cannot rubberstamp nominations. Our courts are charged with safeguarding the very principles on which our country was built: justice, equality, individual liberty, and the basic implicit right of privacy.

When I look at a nominee, I have three criteria: judicial competence, personal integrity, and a commitment to core constitutional principles.

I carefully reviewed Judge Owen's rulings and opinions. I read the dissenting opinions of other judges and the views of legal scholars. I have concluded that Judge Owen does not meet my criteria. Her decisions appear to be driven by ideology—not by law. She appears to be far outside the mainstream of judicial thinking, and her extreme and ideological agenda would make her unsuitable to sit on the Court of Appeals for the Fifth Circuit.

What we are considering with an appellate nomination is a lifetime appointment for a court that is only one step below the Supreme Court. The decisions made by this court have a lasting impact on the lives of all Americans for generations to come. This court's decisions will affect America's fundamental protections involving civil rights, individual liberty, health, and safety, and the implicit right of privacy. We need to be very careful about what we do.

That is why President Bush and all Presidents should nominate competent, moderate judges who reflect broad American values. No President should try to place ideologues on the court. If they do, I am concerned that it will slow the pace of confirmations, backlog our courts, and deny justice for too many Americans. Yet in nominating Judge Owen, the President has chosen someone with an extreme ideological agenda on civil rights, individual rights, and the rights of privacy.

Judge Owen has pursued an extreme activist agenda. Can anyone be surprised that this nomination has so many flashing yellow lights?

When President Bush discussed what would be his criteria for nominating judges, he said his standard for judicial nominees would be that they ''share a commitment to follow and apply the law, not to make law from the bench.''

We applaud that criteria from the President. But I must say when we look at Priscilla Owen, that is exactly what she does. She makes law and does not limit herself to interpreting law, and, therefore, fails the President's own criteria.

The Texas court-watching journal, Juris Publici, said that Owen is a ''conservative judicial activist.'' That means she has a consistent pattern of putting her ideology above the law and ignoring statutory language and substituting her own views.

She has offered over 16 significant activist opinions and joined 15 others. Even White House counsel Judge Alberto Gonzales, who served with Judge Owen on the Texas Supreme Court, once called her dissent in the case ''unconscionable . . . judicial activist.''

In a different case, Judge Gonzales called a dissent by Judge Owen an attempt to ''judicially amend'' a Texas statute. A number of dissents she wrote or joined in would have effectively rewritten or disregarded the law usually to the detriment of ordinary citizens.

An example: Quantum Chemical Corp v. Toennies was a case concerning age discrimination based on a civil rights statute. The majority of the Texas Supreme Court found for the plaintiff. Owen's dissent stated that the plaintiff needed to show that discrimination was a motivating factor. Her dissent would have changed Texas law and

weakened Texas civil rights protections.

On the issue of individual rights to seek justice, I think we all believe the courthouse door must always be open. When you walk through that door, you must find an independent judiciary. Yet Owen's rulings show a bias against the rights of consumers, victims, and individuals. She has consistently ruled against workers, accident victims, and victims of discrimination. These decisions would impair the rights of ordinary people from having access to the courts to obtain justice.

In Montgomery Independent School District v. Davis, a case concerning a teacher whose contract was not renewed, the teacher requested a hearing, which is allowed under the Texas Education Code. The hearing examiner found that the school district didn't have a justification to fire the teacher and said her contract should be renewed. The school board fired her.

The majority of the Texas Supreme Court found the school board went over its legal authority, and Judge Owen's dissent ignored the language and it would have weakened the rights of this teacher and all of those before the court. The majority of the court found that Owen's dissent showed ''disregard of the procedural elements the legislation established to ensure the hearing examiner's process is fair and efficient for both teachers and school boards.''

On the right to privacy, zealous opposition to women's rights to choose is a hallmark of Judge Owen's legal rulings. She used her position on the Texas Supreme Court to restrict women's rights to choose by ignoring the statute to create additional barriers for women seeking an abortion. Her opinions have been biased and unfair.

An example: Texas law requires that a minor's parent be notified before she can obtain an abortion. Many of us agree with that. But we also agree with the fact that there is a judicial bypass enabling a mature, well-informed minor to obtain a court order permitting abortion without parental notification, which in several cases Judge Owen dissented vigorously from the majority of the court. That would have resulted in the rewriting of Texas law to place more hurdles in front of minors.

In Jane Doe, the majority actually included an extremely unusual section explaining the proper role of judges admonishing the dissent, including Owen's duty to interpret the law and not attempt to create policy. Judge Owen has ignored the law, seeking to impose new and impossibly high standards for minors who seek abortions.

Based on her rulings and written arguments, I can only conclude that Judge Owen would use her position to undermine existing laws and the constitutional protection of a woman's right to choose. When you do that, you undermine the principles related to the implicit right of privacy.

Also very troubling to me is that in her opinions Judge Owen has often substituted her authority for that of civil juries. She has a consistent and persistent pattern of overriding juries' decisions. When the jury has taken a position of awarding claims to accident victims and victims of discrimination, Judge Owen has tried to undermine them.

In Uniroyal Goodrich Tire Company v. Martinez, in a product liability suit brought by a man who was severely injured when a tire he was working on exploded, a jury found in favor of the plaintiff. A key issue was whether the manufacturer could be held liable because it knew of a safer alternative product design.

The majority of the Texas Supreme Court sided with the jury's verdict. But Owen dissented. Had her opinion prevailed, it would have overturned a jury verdict.

I could give example after example after example. I am not going to go on just for the sake of going on. There are others who wish to speak. I believe we should have full debate on the Owen nomination.

Let me conclude by saying that the President does have the right to nominate judges, but I cannot consent to the nomination of Judge Owen. My advice to the President is to give us moderate judges. We have approved of many of them. We want to be supportive. But in this instance, she is so far outside the mainstream of judicial thinking.

My advice to the President is to withdraw the nomination and appoint a nominee who will fairly interpret the law for all Americans, and follow the Bush test of interpreting the law and not making the law.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Madam President, I listened to my colleague from Maryland and appreciate her comments. Let me make a couple of additional comments with respect to this issue of judgeships.

I have spoken previously on the floor of the Senate about the Estrada nomination. What I indicated then was that Mr. Estrada, who aspires to have a lifetime seat on the second highest court in the country, the DC Circuit Court, did not answer basic questions put to him by the Judiciary Committee at his hearing.

The administration has not released the information that has been requested by Members of the Senate with respect to Mr. Estrada's work at the Solicitor General's Office. That is information that has been requested of him and the administration so we might understand a bit more about Mr. Estrada and his qualifications. Despite the fact that Mr. Estrada did not answer the basic questions at his hearing, the administration has not released the information that has been requested of his nomination.

There are some in the Senate—and perhaps some in the country—who believe there is a requirement for the Senate to proceed in any event to give Mr. Estrada his vote. There is no such requirement.

The Constitution provides the mechanism by which we give citizens of this country lifetime appointments to the judiciary on the Federal bench. And that Constitution provides two steps: One, the President shall propose, by sending a nomination to the Senate; and, second, the Senate shall advise and consent, by deciding whether they wish this candidate to have a lifetime appointment on the Federal bench. It is not some entitlement that any President—Republican or Democratic—has to be able to send a nomination to the Senate and have that nomination automatically considered. In fact, in recent years, this particular circuit court, the DC Circuit Court, has had a number of nominations sent to the Senate from another President of a different party, and the Senate not only did not bring it to the floor, the candidates did not even get a hearing—not a 5-minute hearing—let alone a hearing and a vote in the committee and then going to the floor and having a vote.

Those candidates never even got a hearing. Mr. Estrada got a hearing. He received the hearing I think he should have received, but he did not answer the questions at the hearing. And the administration and Mr. Estrada have not provided information requested of him. Therefore, Mr. Estrada's nomination is not proceeding.

The Members of the Senate have the right, and perhaps the obligation, if they choose, to stop a nomination they think represents a nomination offered by a President trying to stack the judiciary or pack the judiciary with those of a certain extreme philosophy. It is not out of bounds for any group of Senators to decide to say to the President: This is a partnership. You propose; we dispose. You nominate; we provide advice and consent.

In order to have candidates on the Federal bench, they have to be candidates who are going to be approved by the Senate. I expect a Republican President will nominate Republican judges. In North Dakota, we have had two recent open judgeships—one in Bismarck, one in Fargo. Both judgeships have now been filled by Republican judges. I am a Democrat. I supported both candidates. Both are exceptionally well qualified. I am proud of both of them. They have both assumed their duties. I voted for both. I told the President I fully supported both. That is the way this process should work.

Regrettably, it is not working that way with respect to some nominations. The White House, instead, is saying: We intend to strain candidates through a philosophical filter, and notwithstanding what we think might or might not happen in the Senate, we are going to send people to the Senate who are to the far edge of the philosophical spectrum. If the Senate does not like it, tough luck; we are somehow going

to auger up a lot of noise around the country that says the Senate has an obligation to proceed. We have no such obligation. The President and the Senate have an obligation in this partnership to make sure we get good judges on the Federal bench.

I just want everyone to be clear, I have voted for almost all of the nominations for Federal judges sent to us by the President. I voted, I believe, for 112 of them. I have only voted against a very few. I intend to support most of the President's nominees.

But when the President sends us the nomination of a candidate whose positions are well off the norm, way off to the side of the philosophical chart, we have every right—in fact, an obligation—to make our judgment known in the Senate. That is what is going to happen if Mr. Gonzales and President Bush decide they are going to try to stack or pack, as it were, circuit judgeships with candidates for those judgeships who philosophically are not anywhere near the center of Republican and Democratic philosophies in this country.

In any event, I just wanted to make that point. I think the comments made by the Senator from Maryland are right on point, and I hope at some point we are able to move ahead.

We have another Hispanic judge who has been waiting who has been cleared on the Judiciary Committee. We are wondering why that judge is not on the floor. He should be on the floor. Perhaps his nomination is coming to the floor, but we have been calling for that. I believe the minority leader yesterday asked unanimous consent to bring that judgeship to the floor. He has the support of most everyone.

FREE TRADE AGREEMENT WITH SINGAPORE

Mr. DORGAN. Madam President, on Thursday of next week, U.S. officials will sign a trade agreement with Singapore. It will be the first free trade agreement that is negotiated under so-called fast track. Fast track, incidentally, is a procedure that the Senate adopted in a Byzantine way. They did it without my vote, but enough Senators did it so that we have a fast-track procedure, which is a guarantee that your trade negotiators can go overseas, go in a closed room, close the door, keep the public out, and then you reach a negotiation with another country.

When you bring it back to the Senate, we will agree that none of us will be able to offer any amendment at any time. What we have said is, bring us a straitjacket so we can put it on and we can all grin.

It makes no sense. That is what the Senate has done. So now we will have a free trade agreement coming back to the Senate, the first one under the so-called fast-track procedure, and it is done with the country of Singapore.

Let me read what is in the trade agreement, just one piece. There are many, and I will talk about them in future days. All of this is cloaked in language that is hard to understand, but the implications are not hard to understand because it is related to American jobs. It all relates to waving goodbye to American manufacturing jobs. Article 32, treatment of certain products, under chapter 3: A party shall consider a good listed in annex 2 when imported into its territory from the territory of another port to be an originating good. Within 6 months after entry into force of the agreement, the parties shall meet to explore the expansion of the product coverage of annex 2.

This sounds like six or eight people sitting around drinking, but these are pretty smart people who have reached a trade agreement. This is the way they write it: A party shall consider a good listed in annex 2 when imported into its territory from the territory of another party to be an originating good.

What does that mean? What that means is that, in the circumstances of a free trade agreement with Singapore, products such as electronics, semiconductors, computers, telecommunications equipment, cell phones, fiber cables, optical cables, photocopy equipment, medical instruments, appliances, a wide range of high-tech products can come in through the free trade agreement with Singapore, even if they are not produced there. If they are produced elsewhere, they come through Singapore and come into this country under a free trade agreement.

It is fascinating to me that in the last 12 years we have lost 2 million jobs. I am not talking about decreasing the rate of growth of jobs. This country has lost over 2 million jobs. We are off negotiating new trade agreements—and, incidentally, proposing new fiscal policies that will exacerbate the loss of jobs with huge Federal deficits—and we say to other countries, by the way, we will give you a special deal. We don't care much about providing basic protection of fair competition for America's domestic manufacturers. We will give you a special deal.

The special deal is this, Singapore: You can move goods through Singapore, high-tech goods, the product of high-skilled labor, good jobs. You can move them through Singapore through a free trade agreement into the United States and displace American jobs. That is what this says.

In every single circumstance we have negotiated trade agreements—United States-Canada, NAFTA, the WTO—in agreement after agreement, we have said to American workers and companies producing goods, we want you to compete with others overseas that don't have to meet any basic standards. It doesn't matter if the country will not allow them to organize as workers, if they don't have worker rights, if they hire kids, work them 16 hours a day, pay them 16 cents an hour. That doesn't matter. They should be able to produce those products, these agreements say, and run them through Singapore, some other country, run them through Mexico, for that matter, and move them into Toledo and Pittsburgh and Bismarck and Los Angeles and Pierre, and then have American workers and businesses compete with that labor.

What does it mean? It means we can't compete. Is there an American worker who decides they can compete against 16-cents-an-hour labor performed by a 14-year-old who works 16 hours a day in a plant where they don't have basic safety standards, where they can pump pollution into the air and water; is there anybody who can compete with that? The answer is no. And they should not be expected to.

This Singapore free trade agreement is coming here under fast track. We cannot offer amendments. There isn't one single parliamentary step that will be missed as we move to try to consider this. When they sign this next Thursday—and they certainly should not sign it with this provision in it; this is a loophole big enough to drive a semi truck through—let them understand that there will be no unanimous consent agreement for anything under any circumstance at any step of the way to get this considered by the Senate.

They will get it considered, no doubt, and no doubt those Senators who decided they would like to put themselves in the straitjacket and prevent themselves from offering an amendment—God forbid they should try to correct this—they will vote for it. And no doubt the Senate will ratify this free trade agreement. I am just serving notice that it is going to take some time. We will have some lengthy discussion about it.

There is no justification, in my judgment, for this kind of nonsense. I will come to the floor in a day or so to also talk about China. We did a bilateral trade agreement with them 2 years ago that has not meant a thing. It is like spitting in a high wind. They agreed to everything so they could join the World Trade Organization. We have a $103 billion trade deficit with China. Our jobs have been exported.

The fact is, China has not done what they said they would do in the bilateral agreement. And nobody seems to care. We have all these bureaucrats running around, most of them negotiating incompetent trade agreements. We have a few of them down at the Department of Commerce who are supposed to enforce the trade agreements.

Take a look at what we have. We have this miserable skeleton of an enforcement unit. We have no more than a dozen people who are supposed to enforce the trade agreements in China. If you gave them a pop quiz, they would not have the foggiest idea of what is in the agreements, let alone enforce them. I think we have a growing scandal with the imbalance in Chinese trade, especially since we had a bilateral agreement 2 years ago with them and they have complied with none of it.

Madam President, I want to serve notice on the Singapore free trade agreement that there is a lot to fix in this agreement. It doesn't mean a thing when people such as I talk about this because our trade negotiators don't care; they don't see; they are in their little cocoon, and they will negotiate, and the success of their life is reaching an agreement—even if it is bad. They did a bad agreement with Canada, with NAFTA, and with the WTO, and a bad agreement with Singapore. Apparently, they have not done a bad one with Chile yet because we didn't know where they stood on Iraq. The fact is, it is time for them to stop doing bad agreements and time for them, on behalf of American workers and companies, to say we demand and insist on fair trade. That certainly will not be the case with respect to the agreements we expect in future free trade deals, with respect to labor protections and a whole range of issues in the Singapore agreement.

THE SIZE OF THE TAX CUT

Madam President, I want to talk for a moment about the front-page issue every day these days, and that is how big will be the tax cut. That misses the point. Our press almost always reports all this as a horserace. It is never much about the horse or jockey; it is about who is ahead down the stretch. Does he or doesn't he have the support to get 350, 550, or 750? What would be much more important would be to have a report that talked about: What does this really mean for our country? What are the experts really saying? What are the consequences? Where will this come from? Now, a tax cut.

Well, we have lost slightly more than 2.6 million jobs in the last nearly 2 ½ years, and that is unusual because in the last 50 years every single administration has seen a growth in jobs—some less than others; nonetheless, a growth. We have, in this circumstance, lost jobs—2.6 million in 2 ½ years.

You can make a case—and I think part of it is valid—that we had 9/11, the war on terror, the war in Iraq, the technology bubble bust, the collapse of the stock market, the bursting of the tech bubble, and we had the largest corporate scandals in the history of the country. So you can make a pretty good case that all of these things intersecting at the same time have caused a lot of havoc with this country and our economy.

But it is the easiest lifting in American politics for any politician at any time to say: Do you know what I stand for? I stand perpetually for reducing taxes and tax cuts.

If, in fact, cutting taxes always creates jobs, sign me up for $2 trillion in tax cuts. Just sign me up. Then I think the President's $700 billion proposal of permanent tax cuts is way too short. If this in fact creates jobs, let's do $4 trillion in tax cuts. But we know what is happening here. We know that 2 years ago we were told if we had very large tax cuts, and Congress voted for them, what we would be doing was giving back surpluses that would exist in our budget as long as 10 years down the line, as far as the eye could see. So the Congress supported very large permanent tax cuts. I did not, because I said at the time I thought we should do them on a temporary basis, in order to be a business conservative, and then figure out what is going to happen in the future.

What if something happens? It did. We found ourselves in a recession, a war, the bubble burst, and corporate scandals. Congress said: The heck with that; we see surpluses forever. Two years later, we have projections by all economists that we are going to have deficits forever. Even the President's budget has deficits predicted for 10 straight years. The President's budget—which was on our desks right here, and the Senate voted for it—said let's increase the Federal indebtedness from $6 trillion to $12 trillion in 10 years.

I am not making that up. It is on page 6 of the Budget Act that the Senate voted for and the President supported. It is what he wanted. Let's double the Federal debt. Now they say let's have very large tax cuts. Where do they come from? Every single dollar of the tax cut is to be borrowed. So we send our sons and daughters to war; and then we say: By the way, when you come back, you are going to pay the bill because we are not paying for that.

Just yesterday, the Wall Street Journal pointed out that the Federal Government will need to borrow $79 billion in this quarter. That is a reversal of the more than $100 billion that was estimated for this quarter. So we missed the economic results by $100 billion in this quarter. I think the Government spends too much in a range of areas. I think we ought to cut spending. I think we ought to make sure that those things that improve the lives of people in this country are the things in which we invest. I think we ought to make sure we deal with education, health care, roads, and the kinds of things that represent infrastructure that make this a great country.

But having said all that, I think to borrow $6 trillion more in 10 years in order to provide tax cuts, the bulk of which will go to the largest income earners in the country—if you do that, look at the economic data. They say if you earn $1 million a year, good, you are lucky because you are going to get an $80,000-a-year tax cut with the President's plan, on average. At this point, when we are choking on red ink and proposing to double the Federal debt from $6 trillion to $12 trillion, do we think those who earn a million dollars a year, on average, should receive an $80,000 a year tax cut? I don't think so. That ought not be the priority.

The very first priority might be to reduce the Federal debt and get our fiscal house in order; second, to invest in those things that make life worthwhile, improve our schools, do a range of things like that. In addition to that, we should, as many colleagues say, cut spending in areas where we spend too much—and there are plenty of them.

I find it bizarre that we are having a national discussion about this without any requirement for their being specific. If you want, at a time when we have very large budget deficits, to reduce the tax revenue by $550 billion or $750 billion over 10 years, then what don't you want to do? Do you want to increase defense spending? That is going to happen. Increase homeland security spending? That is going to happen. Have very large tax cuts? That is going to happen. So what don't you want to do? What is it in domestic discretionary spending? Educating our kids? Making sure grandma and grandpa have access to adequate health care? Having safe neighborhoods? What is it you don't want to do in that batch? How about building roads and bridges to make sure we have a good infrastructure? What is it you don't want to do? I think that is a question that needs to be answered.

Madam President, it is not answered by anybody. All the reporting is on the horserace—who is ahead coming around the turn? Does the President have the vote or not? Is this Senator or that Senator finally going to turn or relent? That is not the issue.

Take a look at the best economic thinkers in this country, 10 Nobel laureates, and ask them what they think of this country's economic future if we don't have some basic fiscal responsibility. I come from a small town, with 380 people or so. It has shrunk a bit since then. But most people in America's towns and cities think about all this in practical, candid terms, making sure it adds up. They say let's handle this as a business or a family.

Well, let's do that then. If you are short of revenue, do you want to cut your revenue further and increase spending? How does that add up? I didn't take higher math, but I learned that 1 plus 1 equals 2 in Kansas, in North Dakota, in New York, and all over the country—except in fiscal policy in Washington, DC, where 1 plus 1 equals 3, and apparently $12 trillion in additional debt. That is not a fiscal policy, in my judgment, that is good for my kids, your kids, or America's kids.

I am not saying one party is all right or wrong. I am saying this: There isn't any way we can reconcile this with what is happening in the country today. We have turned the largest surplus in American history into the largest deficits. Yes, you can make a case that a lot of things have happened that have intervened to make that happen that are outside of the control of the Congress and the President; yes, that is true. But if that is the case, then should we not recognize that? If 9/11 says we need more spending for homeland security, we just charge it to the future and say, well, we need to do that, but let's have tax cuts, too. If 9/11 says and Iraq means we need more

money for defense spending, we say, let's just charge that and we will have tax cuts, too. One way or another this has to be reconciled.

I am in favor of some tax cuts. I would like to see some tax cuts. I think the American people would like tax cuts. But when someone says let's have the American people keep more of their own money, the answer to that on the reverse side of the same coin is let's charge more to the American people because they are going to have to pay for it. One can argue trade deficits are going to have to be paid by a lower standard of living in this country, but our kids and grandkids are going to pay for a fiscal policy deficit. It is a selfish fiscal policy, in my judgment, and one we ought to reverse.

We ought to try to call on the best of what both parties have to offer this country, not the worst of each. In my judgment, the best both parties have to offer this country is some basic conservative values of saying let's do what is right to invest in what makes this a good country and at the same time let's pay for that which we want to consume. Let's have a fiscal policy that says to every American, this adds up. Let's say to our kids we are not going to have them shoulder the burden of what we are doing today. That is what our fiscal policy ought to do.

I yield the floor.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. Madam President, I will speak to the pending business, which is the nomination of Priscilla Owen to the circuit court of appeals. She is a highly qualified person who really needs to be recognized. We need to move through this rapidly.

The last 2 years, I was honored to be able to serve on the Judiciary Committee. We held extensive hearings on Priscilla Owen to be a circuit court judge. She went through those hearings in an extraordinary fashion. It was a learning experience. It was as if a professor was there teaching and going through with us, here is how I decided this case, here is hornbook law on this, here is how this should be decided, here is how I viewed the issue. She really has a fine-tuned legal mind. I was impressed by the legal mind she has.

I was impressed by the common sense she had with it as well. It was as if this was a highly trained legal mind well adapted to being able to judge, but also with a sense of values of the people, which is as one would expect because she was elected to the Texas Supreme Court. She has been around the public. She knows how people think.

When a lot of people look at the judiciary in the United States, they do not feel like they get a sensible approach to judging a fair amount of time. She is an extraordinary person to have both that depth of mental training and ability and a sensible touch that the people really desire and want to have in somebody on the judiciary.

What I am most distressed about is it appears as if now we are going to get our second filibuster of a circuit court judge from the Democratic Party. In the past, we have not had filibusters of judges. We have had them at a Supreme Court level but not the circuit or district court level. Now it appears as if we are going to get our second filibuster of a judge in a matter of a couple of months. This, of course, is to raise the vote standard so she does not have to get 51 votes, she has to get 60 votes to be able to go on the circuit court of appeals.

This is not advice and consent of the Senate, which is what our standard is held to. We are to give advice and consent on judges. They should be appointed by the administration and then there should be advice and consent. That should be a 51-vote margin. It should not be a 60-vote margin that now the other side is attempting to establish. This is a very distressing situation we are getting into.

How many more judges are we going to see like that who are nominated for the circuit court? Are we going to continue to put them forward and the other side will say we are going to filibuster for whatever reason? How many of these is it to be?

I recognize what the strategy is. It is to keep the circuit court reduced of judges, not to allow this President to appoint his judges, not to allow him to put his print upon the judiciary. I recognize that is what is happening on the other side of the aisle, but when they do that, one needs to recognize the long-term policy implications of so doing. Now they are saying a President cannot appoint his or her judges to the bench; that when they were elected and selected by the people of the United States, now they cannot appoint people to the court; that the other party, if they can control 51 votes, can block the President. This is not about advice and consent. It is about blocking a President from appointing his judges to the Federal bench.

We have not seen this strategy before. It was always the President puts forward his nominees, we hold hearings, and then if they can be blocked with 51 votes, they are blocked, but not filibustering of circuit court judges. This is a dangerous area.

On the other hand, we could say the other party is looking at this saying this represents a two-fer for us: We cannot only block the President from getting his judges on the bench, we can block the Senate from doing other business.

We do not normally take weeks on end to do a Federal circuit court nominee, but that is what we are ending up doing with Miguel Estrada and now with Priscilla Owen. We are spending weeks on end of Senate floor time on a circuit court judge. That is not how the system is set up.

These nominations should be taking a couple of hours, at most, for debate and voting, and then we should be moving on and debating fiscal stimulus, how do we get this economy growing, how do we create more jobs. We have a number of issues in regard to rural development. How do we get more people to move out into rural areas of Kansas. We have plenty of issues on foreign policy to debate. What about the new Iraqi leadership? What about the relationship of the United States to the U.N.? There is a whole litany of issues we could be taking floor time up with, but instead we are on circuit court judges that should be debated in an hour or two, voted up or down by advice and consent of the Senate, as it says in the Constitution, and moving forward. We are taking up valuable time instead, weeks on end, with circuit court judges that should have a clear vote up or down.

This hurts the country on two fronts. It hurts on the judiciary, on not having the people appointed to the bench that we need to have, and it hurts us by not being able to do other business we should be focused on in the Senate. That is not a useful way for us to conduct business in the Senate.

I urge the other side of the aisle to please step forward and stop the filibuster of circuit court judges. That is not the way we need to operate to be able to get the business done.

On top of that, we have circuit courts around the country that in some cases have only half of the judges that are necessary. The other half have resigned or left office and so we have enormous vacancies. Some people would say they like it that way because then two circuit court judges can pick a third one—maybe it is two liberal circuit court judges can pick a district court judge, bring them up to a three-judge panel to have a liberal-leaning panel and we can set policy and set law that way. But that is not the way the system is set to operate, even though it does operate that way. We really need to move forward in this area.

I do not normally come to the floor to harangue about what is taking place in the judiciary, but in this case this is beyond the pale. This is not what should be taking place. It is hurting us and it is hurting the country.

GROWING THE ECONOMY

I will take a minute or two to address some of the topics that came up about the economy. We need to get this economy growing and going. I will make a couple of brief observations.

At the Federal level, we have two major tools to grow the economy. We have monetary policy and we have fiscal policy. Monetary policy is set by the Fed, not by the Congress but by the Fed. The Fed can set interest rates high or low, control the supply of money. The Fed is doing the exact right thing to grow the economy today with low interest rates. That is as it should be.

On the other side of that is fiscal policy, and that is what the Congress does. We have tools at our disposal to try to grow the economy. One of the major tools is tax policy. Do we increase taxes, do we decrease taxes, in a way to stimulate the economy?

The most stimulative tool that is available to us is to lower tax rates. That grows the economy. It grew the economy when President Reagan cut taxes. It grew the economy when President Kennedy cut taxes. That is the way the economy grows.

Some people would say, look at the deficit we are in now; we cannot afford to reduce the taxes at this point in time. I would answer, we cannot afford not to reduce taxes to stimulate the economy. In the last 2 years, we have seen a reduction in Federal receipts of 9 percent, and an increase of Federal expenditures of around 12 percent. Quick math tells us we are going to be in a real problem when we have those two trend lines.

The Federal receipts have gone down 9 percent. That is not as a result of changes of tax policy. That is a result of the economy being soft and not producing the economic lift and push we need. And, frankly, the rest of the world needs a strong and robust U.S. economy as well.

How do we get the economy going again? We need to stimulate growth with tax cuts. I will give one quick fact. Last year we saw a reduction in capital gains tax receipts of about $80 billion. There has been $80 billion in loss in capital gains tax receipts. That is not the result of a tax policy shift. That is primarily the result of the stock market falling dramatically the last couple of years, the tech boom going bust, problems and fears of what has taken place around the world, 9/11, a series of things where people pulled funds out of the market; instead of having capital gains, they had capital losses.

Some say the stock market does not affect most people. Yet half of Americans have some investment or retirement tied into the stock market. What can we do there? We can do away with that double taxation of corporate dividends as a way to stimulate investment and stimulate growth in the stock market. Plus, it is just good tax policy to not tax something twice.

What about balancing the budget? I have been a part of a Congress that has balanced the budget. I came to the House of Representatives in 1994. One of our major pushes was to balance the budget, which had not been done since 1969, and then it was actually an accounting move that allowed us to balance the budget in 1969. It had not been done for 20 years prior to that, but from 1969 until we balanced it about 5 years ago, the budget had not been balanced.

One of our key pushes was to balance the budget. So I have been a part of a Congress that has actually balanced the budget. It is the Congress that balances the budget. We are the ones who write the checks. The administration, the Presidency, spends the money. They can spend less if they choose in some situations, but we are the ones who actually authorize and appropriate.

How do we balance the budget? I think we have found the formula for doing it. We grow the economy and we restrain your growth in Federal spending until the lines intersect and you get the economy growing strong, and then you restrain your growth in Federal spending until those intersect. That is how we balance the budget. We had a growing economy, but instead of spending this increase in Federal receipts, we restrained the growth of Federal spending and those intersected and we got 3 years of significantly balanced budgets, done by a Republican Congress. That is how you get it done.

What is our key now? Our key now is to get the economy growing, cut taxes to stimulate the growth, and restrain the growth of Federal spending. I put forward a bill with several people as one way of restraining Federal spending, to create a domestic program equivalent to the Base Closure Commission. We have a Base Closure Commission that has been very successful saying we have too many military bases; we need to eliminate some of those, consolidate them in fewer areas. To remove one or two at a time is an impossible task. So we have a commission that recommends 50 closures taking place and gives Congress one vote up or down whether to eliminate the bases altogether. It has been very successful in consolidating resources.

What about doing that in domestic discretionary programs where we have thousands of domestic discretionary programs? Have a commission to say these 100 were good when they started, but the reason for their creation has gone. They are effective but not yielding as much as they should. These 100 should be eliminated. The commission reports to Congress and requires Congress to vote up or down whether they agree or disagree, eliminate all 100 or keep all 100. It is a domestic Base Closure Commission equivalent type of program, so we can try to restrain some of the growth in Federal spending, consolidate it in fewer areas. Those are the sorts of things we need to do to balance the budget and get our spending under control.

We also need trade agreements to take place. I point out that Presidents of both parties have requested trade promotion authority and trade agreements. You cannot negotiate with another country and say, OK, give us your best offer and then do that; and then say, OK, we have to take it to the Congress, which may agree or disagree, and they will amend it and we will come back to you again. That sort of trade agreement does not work. The other country says: We want to wait and see your final offer. That is why the trade promotion authority is in place.

Trade has been good for this country and has expanded jobs and economic opportunities in the United States. It has been the right thing for us to do.

WAR IN IRAQ

I end with a personal comment about how the Bush administration has conducted the war in Iraq and the followon. I think one has to compliment this administration and the soldiers in the field for the way they have conducted this activity. Agree or disagree with going to Iraq, in the first place, we have liberated the people, the face of liberty of Baghdad looks the same as the face of liberty in Berlin when they see liberty. It has a beautiful face, to see liberty and see them kissing and hugging our soldiers developing liberty and finding a treasure trove of information of terroristic activities to make the world a freer place.

We have to compliment and say God bless the soldiers who have been over there, and we say thank you to them and to this administration for taking so bold a step forward for liberty in a tough region of the world, in Iraq.

I hope they continue to press for liberty in places such as North Korea against Kim Jong Il and his regime—this is the 50th year of the armistice we signed with North Korea—which has oppressed its own people. In North Korea you have a regime that exports missiles, technology around the world, that has a third of its people living on international food donations, many of them starving, walking out of the country. We think somewhere between 20,000 and 300,000 have walked from North Korea into China. We have a regime that operates a gulag system in North Korea, continues to operate a Soviet-style gulag. We have a regime there that imports millions of dollars a year in luxury cars and alcohol and tobacco. So while their own people by the millions starve, the regime that sits on top drives around in a Mercedes Benz, drinks fine wines, and smokes fine tobaccos.

When you turn the rock over in North Korea you will see the same, if not worse, type of deplorable living conditions for the people, and extraordinary situations of high-life living for the elite. I have no doubt from what we know already what has taken place in that regime. We will see a level of depravity from liberty and from the basics of human life from the North Korean people that would rival any on the planet. I hope the administration keeps the pressure on Kim Jong Il and his decrepit Stalinist regime so that the 22 million people of North Korea can one day be free.

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

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

The legislative clerk proceeded to call the roll.

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

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

NOMINATION OF EDWARD C. PRADO

Mr. LEAHY. Mr. President, I begin by thanking the Democratic leader and assistant Democratic leader for going to bat for Judge Edward Prado. They

apparently are now working on an arrangement, that I understand is close to being worked out with the Republican leadership, so this nomination can be considered without further delay. I appreciate the fact that the majority leader and the deputy majority leader, Senator MCCONNELL, are going to work with us to do that.

As I have noted on the floor before, basically before the recess, and since, we had checked on our side of the aisle and knew that nobody objected to going forward with a vote on Judge Prado. In fact, I suspect most are going to vote for him. I was not quite able to figure out why there was objection on the Republican side to going forward with his nomination. So I thank the leaders for now getting together so he will be allowed to go forward.

I also thank the Congressional Hispanic Caucus for its support for this nomination, working with the Senate to go forward.

I noted on the floor on Monday that Judge Edward Prado, being nominated to the United States Court of Appeals for the Fifth Circuit, was cleared by all of us on this side; all Democratic Senators serving on the Judiciary Committee had voted to report the nomination favorably. That is why we were concerned when it was held up on the other side.

We have worked hard to find judges who might be consensus judges, as he is. Interestingly enough, Judge Prado was originally appointed by Ronald Reagan. He is not a Democrat. He is a Republican. He considers himself a conservative Republican, but has a judicial record where he fits the test that I and many of us on both sides of the aisle certainly thought a judge should meet: When you walk into a courtroom, you should be able to look at that judge and say, Whether I am a Republican or a Democrat, rich or poor, White or Black, plaintiff or defendant, whatever, that judge is going to give me a fair hearing.

The current occupant of the chair has served as attorney general and justice of the Texas Supreme Court and he knows whereof I speak. Anyone who spends time in a court knows, looking at a judge, if they are going to get a fair shake with the judge or not. We all know there are some judges you want to avoid, other judges about whom you say, fine, I have to prove my case, but I feel I have a fair chance. I think that is the kind of judge Judge Prado will be.

When the Democrats took over the majority of the Senate in the summer of 2001, we inherited 110 judicial vacancies, primarily because during the last few years of President Clinton's term Republicans had blocked an unprecedented number of judges from going forward. But during the next 17 months, we confirmed 100 of President Bush's nominees, including some who had been rated as not qualified by the ABA, several who were divisive and controversial.

Forty new vacancies occurred during the normal course of deaths and resignations at that time. We still took the 110 vacancies we inherited and brought that down to 60, which is considerably less than what the Republicans have always referred to as being full employment.

On the Senate executive calendar, we also have the nomination of Cecilia M. Altonaga, of Florida, to be a Federal judge in Florida. She will be the first Cuban-American to be confirmed to the Federal bench—expedited at the request of Senator GRAHAM of Florida. I might say this is another case where we are ready to go forward any time he wants. The decision has not been made to go forward yet on the Republican side of the aisle. We hope to go forward soon. We have cleared that. We have cleared her and are happy to go forward.

Mr. President, we have another nomination before us—again from the State of Texas, the State represented ably by the distinguished Presiding Officer. We have had really unprecedented debate. We are asked to reconsider the nomination of Priscilla Owen to the United States Court of Appeals for the Fifth Circuit.

We have never had a case where President resubmitted a circuit court nominee that had already been rejected by the Senate Judiciary Committee for the same vacancy. Until a few weeks ago, never before had the Judiciary Committee proceeded for a second time on a nominee.

I have spoken about my concerns relating to Priscilla Owen. I have detailed some of the cases in which Judge Owen's views were sharply criticized by her colleagues on the Texas Supreme Court. I explained why I believe she should not be confirmed to the seat on the Fifth Circuit. Today I would like to talk about some more of the cases, involving a variety of legal issues, which show Priscilla Owen to be a judicial activist, willing to make law from the bench rather than follow the language and intent of the legislature.

I heard Senator CORNYN say the other day that just because you disagree with the outcome of a particular case does not give you the right to call the judge who wrote it an activist. I agree. I wish more Republicans had followed that rule when President Clinton was nominating qualified people to the Federal bench and a Republican majority was holding them up anonymously and voting against them. There are many cases before the courts of this Nation where reasonable people, reasonable lawyers and judges, could disagree on the outcome, could have a difference of opinion about interpreting a statute. There are many times when a statute is ambiguous, or a legal precedent unclear, and there is no right or wrong result. I could not agree more with the junior Senator from Texas on this fundamental point. I wish more Republicans had followed that rule when President Clinton nominated qualified people to the Federal bench and anonymous hold after anonymous hold was made on the Republican side. They were not allowed to go forward.

It is interesting when we talk about political background of judges. Vermont is allowed one seat by tradition on the Second Circuit Court of Appeals. New York and Connecticut have the rest of the seats.

I went to President Clinton when there was a vacancy and recommended a sitting Federal judge in our State. He had been a Republican Deputy Attorney General—a conservative. I disagreed with some of his decisions. I disagreed with his legal reasoning. I thought he did a careful and reasoned job. I went to President Clinton knowing that there were a number of people who might be considered for that position—a number of them leading Democrats in our State. I told the President I thought this would make a good person, and it involved the nomination which he could rest easy on and not have to worry about. Shortly before he was about to make his decision, the Federal judge ruled strongly against a position of President Clinton. And when the President asked me about that, I said he could have made the ruling a week after you sent his nomination up, but that I thought he was honest. The President admired his courage, honesty and ability, and he nominated him. And this Senate voted as I recall unanimously to put him on the Second Circuit Court of Appeals where he does very, very well.

I voted on hundreds of hundreds of Republicans nominated by Republican Presidents. But just as I voted against those nominated by Democratic Presidents, I will vote against those nominated by Republican Presidents when they show that they are going to be activist judges who are not going to follow the law but rather follow the dictates of their own philosophy.

That is why I will continue to oppose Priscilla Owen. I did do as the President asked when I was chairman. I held a hearing for her. We had a very fair hearing, according to her, and actually put her on the agenda for markup on the day the President of the United States requested that she be put on. She was put over at a Republican request, but then she was voted down by the committee.

When I look at Justice Owen's record, I am not looking at the outcome of the cases in which Justice Owen ruled, and criticizing her as an activist just because I do not agree with a ruling or even a couple of rulings. I am looking at the substance of a number of her decisions, how she approached those cases and the propriety of her legal analysis. The conservative justices on the other sides of these cases, in many, many of those cases, are themselves extremely critical of her approach, her reasoning, her judging—in short, her activism. They have called her an activist, said one of her opinions was just ''inflammatory rhetoric,'' noted in other cases that she

went beyond the language of the law, ignored legislative intent, and gutted laws passed by the people's elected representatives. Like them, I disagree with Priscilla Owen's methods and activist judging.

In my last statement, I touched on some of the criticism received from the majority in the series of parental notification cases. In addition to cases dealing with parental notification, Justice Owen's activism and extremism is noteworthy in a variety of other cases, including those dealing with business interests, malpractice, access to public information, employment discrimination and Texas Supreme Court jurisdiction, in which she rules against individual plaintiffs time and time again.

In one case that is perhaps the exception that proves the rule, Justice Owen wrote a majority opinion that was bitterly criticized by the dissent for its activism. In In re City of Georgetown, 53 S.W. 3d 328, Tex. 2001, Justice Owen wrote a majority opinion finding that the city did not have to give the Austin American-Statesman a report prepared by a consulting expert in connection with pending and anticipated litigation. The dissent is extremely critical of Justice Owen's opinion, citing the Texas law's strong preference for disclosure and liberal construction. Accusing her of activism, Justice Abbott, joined by Chief Justice Phillips and Justice Baker, noted that the legislature, ''expressly identified eighteen categories of information that are 'public information' and that must be disclosed upon request . . . [sec. (a)] The Legislature attempted to safeguard its policy of open records by adding subsection (b), which limits courts' encroachment on its legislatively established policy decisions.'' The dissent further protests:

> But if this Court has the power to broaden by judicial rule the categories of information that are ''confidential under other law,'' then subsection (b) is eviscerated from the statute. By determining what information falls outside subsection (a)'s scope, this Court may evade the mandates of subsection (b) and order information withheld whenever it sees fit. This not only contradicts the spirit and language of subsection (b), it guts it. Id.

Finally, the opinion concluded by asserting that Justice Owen's interpretation, ''abandons strict construction and rewrites the statute to eliminate subsection (b)'s restrictions.''

These examples, together with the unusually harsh language directed at Justice Owen's position by the majority in the Doe cases, show a judge out of step with the conservative Republican majority of the Texas Supreme Court, a majority not afraid to explain the danger of her activist views.

I am also greatly concerned about Justice Owen's record of ends-oriented decision making as a Justice on the Texas Supreme Court. As one reads case after case, particularly those in which she was the sole dissenter or dissented with the extreme right wing of the court, her pattern of activism becomes clear. Her legal views in so many cases involving statutory interpretation simply cannot be reconciled with the plain meaning of the statute, the legislative intent, or the majority's interpretation, leading to the conclusion that she sets out to justify some preconceived idea of what the law ought to mean. This is not an appropriate way for a judge to make decisions. This is a judge whose record reflects that she is willing and sometimes eager to make law from the bench.

Justice Owen's activism and extremism is noteworthy in a variety of cases, including those dealing with business interests, malpractice, access to public information, employment discrimination and Texas Supreme Court jurisdiction, in which she writes against individual plaintiffs time and time again, in seeming contradiction of the law as written.

One of the cases where this trend is evident is FM Properties v. City of Austin, 22 S.W. 3d 868, Tex. 1998. I asked Justice Owen about this 1998 environmental case at her hearing last July. In her dissent from a 6–3 ruling, in which Justice Alberto Gonzales was among the majority, Justice Owen showed her willingness to rule in favor of large private landowners against the clear public interest in maintaining a fair regulatory process and clean water. Her dissent, which the majority characterized as, ''nothing more than inflammatory rhetoric,'' was an attempt to favor big landowners.

In this case, the Texas Supreme Court found that a section of the Texas Water Code allowing certain private owners of large tracts of land to create ''water quality zones,'' and write their own water quality regulations and plans, violated the Texas Constitution because it improperly delegated legislative power to private entities. The Court found that the Water Code section gave the private landowners, ''legislative duties and powers, the exercise of which may adversely affect public interests, including the constitutionally-protected public interest in water quality.'' The Court also found that certain aspects of the Code and the factors surrounding its implementation weighed against the delegation of power, including the lack of meaningful government review, the lack of adequate representation of citizens affected by the private owners' actions, the breadth of the delegation, and the big landowners' obvious interest in maximizing their own profits and minimizing their own costs.

The majority offered a strong opinion, detailing its legal reasoning and explaining the dangers of offering too much legislative power to private entities. By contrast, in her dissent, Justice Owen argued that, ''[w]hile the Constitution certainly permits the Legislature to enact laws that preserve and conserve the State's natural resources, there is nothing in the Constitution that requires the Legislature to exercise that power in any particular manner,'' ignoring entirely the possibility of an unconstitutional delegation of power. Her view strongly favored large business interests to the clear detriment of the public interest, and against the persuasive legal arguments of a majority of the Court.

When I asked her about this case at her hearing in July, I found her answer perplexing. In a way that she did not argue in her written dissent, at her hearing Justice Owen attempted to cast the F.M. case not as, ''a fight between and City of Austin and big business, but in all honesty, . . . really a fight about . . . the State of Texas versus the City of Austin.'' In the written dissent however, she began by stating the, ''importance of this case to private property rights and the separation of powers between the judicial and legislative branches. . .'', and went on to decry the Court's decision as one that, ''will impair all manner of property rights.'' That is 22 S.W. 3d at 889. At the time she wrote her dissent, Justice Owen was certainly clear about property rights for corporations.

At her second hearing, I know that Chairman HATCH tried to recharacterize the F.M. Properties v. City of Austin case in an effort to make it sound innocuous, just a struggle between two jurisdictions over some unimportant regulations. I know how, through a choreography of leading questions and short answers, they tried to respond to my question from last July, which was never really answered, about why Justice Owen thought it was proper for the legislature to grant large corporate landowners the power to regulate themselves. Again, I am unconvinced. The majority in this case, which invalidated a state statute favoring corporations, does not describe the case or the issues as the chairman and the nominee have. A fair reading of the case shows no evidence of a struggle between governments. This is all an attempt at after-the-fact justification where there really is none to be found.

Justice Owen and Chairman HATCH's explanation of the case also lacked even the weakest effort at rebutting the criticism of her by the F.M. Properties majority. As I mentioned, the six justice majority said that Justice Owen's dissent was, ''nothing more than inflammatory rhetoric.'' They explained why her legal objections were mistaken, saying that no matter what the state legislature had the power to do on its own, it was simply unconstitutional to give the big landowners the power they were given.

Another case that concerned me is the case of GTE Southwest, Inc. v. Bruce, 990 S.W.2d 605, where Justice Owen wrote in favor of GTE in a lawsuit by employees for intentional infliction of emotional distress. The rest of the Court held that three employees subjected to what the majority characterized as ''constant humiliating and abusive behavior of their supervisor'' were entitled to the jury verdict in

their favor. Despite the Court's recitation of an exhaustive list of sickening behavior by the supervisor, and its clear application of Texas law to those facts, Justice Owen wrote a concurring opinion to explain her difference of opinion on the key legal issue in the case—whether the behavior in evidence met the legal standard for intentional infliction of emotional distress.

Justice Owen contended that the conduct was not, as the standard requires, ''so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. . .'' The majority opinion shows Justice Owen's concurrence advocating an inexplicable point of view that ignores the facts in evidence in order to reach a predetermined outcome in the corporation's favor.

At her first hearing, in answer to Senator EDWARDS' questions about this case, Justice Owen again gave an explanation not to be found in her written views. She told him that she agreed with the majority's holding, and wrote separately only to make sure that future litigants would not be confused and think that out of context, any one of the outrages suffered by the plaintiffs would not support a judgment. Looking again at her dissent, I do not see why, if that was what she truly intended, she did not say so in language plain enough to be understood, or why she thought it necessary to write and say it in the first place. It is a somewhat curious distinction to make—to advocate that in a tort case a judge should write a separate concurrence to explain which part of the plaintiff's case, standing alone, would not support a finding of liability. Neither her written concurrence, nor her answers in explanation after the fact, is satisfactory explanation of her position in this case.

In City of Garland v. Dallas Morning News, 22 S.W. 3d 351, Tex. 2000, Justice Owen dissented from a majority opinion and, again, it is difficult to justify her views other than as based on a desire to reach a particular outcome. The majority upheld a decision giving the newspaper access to a document outlining the reasons why the city's finance director was going to be fired. Justice Owen made two arguments: that because the document was considered a draft it was not subject to disclosure, and that the document was exempt from disclosure because it was part of policy making. Both of these exceptions were so large as to swallow the rule requiring disclosure. The majority rightly points out that if Justice Owen's views prevailed, almost any document could be labeled draft to shield it from public view. Moreover, to call a personnel decision a part of policy making is such an expansive interpretation it would leave little that would not be ''policy.''

Quantum Chemical v. Toennies, 47 S.W. 3d 473, Tex. 2001, is another troubling case where Justice Owen joined a dissent advocating an activist interpretation of a clearly written statute. In this age discrimination suit brought under the Texas civil rights statute, the relevant parts of which were modeled on Title VII of the federal Civil Rights Act, and its amendments, the appeal to the Texas Supreme Court centered on the standard of causation necessary for a finding for the plaintiff. The plaintiff argued, and the five justices in the majority agreed, that the plain meaning of the statute must be followed, and that the plaintiff could prove an unlawful employment practice by showing that discrimination was ''a motivating factor.'' The employer corporation argued, and Justices Hecht and Owen agreed, that the plain meaning could be discarded in favor of a more tortured and unnecessary reading of the statute, and that the plaintiff must show that discrimination was ''the motivating factor,'' in order to recover damages.

The portion of Title VII on which the majority relies for its interpretation was part of Congress's 1991 fix to the United States Supreme Court's opinion in the Price Waterhouse case, which held that an employer could avoid liability if the plaintiff could not show discrimination was ''the'' motivating factor. Congress's fix, in Section 107 of the Civil Rights Act of 1991, does not specify whether the motivating factor standard applies to both sorts of discrimination cases, the so-called ''mixed motive'' cases as well as the ''pretext'' cases.

The Texas majority concluded that they must rely on the plain language of the statute as amended, which could not be any clearer that under Title VII discrimination can be shown to be ''a'' motivating factor. Justice Owen joined Justice Hecht in claiming that federal case law is clear—in favor of their view—and opted for a reading of the statute that would turn it into its polar opposite, forcing plaintiffs into just the situation legislators were trying to avoid. This example of Justice Owen's desire to change the law from the bench, instead of interpret it, fits President Bush's definition of activism to a ''T.''

Justice Owen has also demonstrated her tendency toward ends-oriented decision making quite clearly in a series of dissents and concurrences in cases involving a Texas law providing for a judicial bypass of parental notification requirements for minors seeking abortions.

The most striking example is Justice Owen's expression of disagreement with the majority's decision on key legal issues in Doe 1. She strongly disagreed with the majority's holding on what a minor would have to show in order to establish that she was, as the statute requires, ''sufficiently well informed'' to make the decision on her own. While the conservative Republican majority laid out a well-reasoned test for this element of the law, based on the plain meaning of the statute and well-cited case law, Justice Owen inserted elements found in neither authority.

Specifically, Justice Owen insisted that the majority's requirement that the minor be ''aware of the emotional and psychological aspects of undergoing an abortion'' was not sufficient and that among other requirements with no basis in the law, she, ''would require . . . [that the minor] should . . . indicate to the court that she is aware of and has considered that there are philosophic, social, moral, and religious arguments that can be brought to bear when considering abortion.'' That is In re Doe 1, 19 S.W.3d 249, 256, Tex. 2000.

In her written concurrence, Justice Owen indicated, through legal citation, that support for this proposition could be found in a particular page of the Supreme Court's opinion in Planned Parenthood v. Casey. However, when one looks at that portion of the Casey decision, one finds no mention of requiring a minor to acknowledge religious or moral arguments. The passage talks instead about the ability of a State to ''enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear.'' That is Casey at 872. Justice Owen's reliance on this portion of a United States Supreme Court opinion to rewrite Texas law was simply wrong.

As she did in answer to questions about a couple of other cases at her July hearing, Justice Owen tried to explain away this problem with an after the fact justification. She told Senator CANTWELL that the reference to religion was not to be found in Casey after all, but in another U.S. Supreme Court case, H.L. v. Matheson. She explained that in, ''Matheson they talk about that for some people it raises profound moral and religious concerns, and they're talking about the desirability or the State's interest in these kinds of considerations in making an informed decision.'' But again, on reading Matheson, one sees that the only mention of religion comes in a quotation meant to explain why the parents of the minor are due notification, not about the contours of what the government may require someone to prove to show she was fully well informed. Her reliance on Matheson for her proposed rewrite of the law is just as faulty as her reliance on Casey. Neither one supports her reading of the law. She simply tries a little bit of legal smoke and mirrors to make it appear as if they did. This is the sort of ends-oriented decision making that destroys the belief of a citizen in a fair legal system. And most troubling of all was her indicating to Senator FEINSTEIN that she still views her dissents in the Doe cases as the proper reading and construction of the Texas statute.

I have read her written answers to questions from Senators after her second hearing, many newly formulated, that attempt to explain away her very disturbing opinions in the Texas parental notification cases. Her record is still her record, and the record is clear.

She still does not satisfactorily explain why she infuses the words of the Texas legislature with so much more meaning than she can be sure they intended. She adequately describes the precedents of the Supreme Court of the United States, to be sure, but she simply does not justify the leaps in logic and plain meaning she attempted in those decisions.

As I have mentioned with regard to some specific cases, Justice Owen's responses at her second hearing failed to alleviate these serious concerns nor did Senator HATCH's ''testimony'' at her second hearing, where he attempted to explain away cases about which I had expressed concern.

The few explanations offered for the many other examples of the times her Republican colleagues criticized her were unavailing. The tortured reading of Justice Gonzales' remarks in the Doe case were unconvincing. He clearly said that to construe the law in the way that Justice Owen's dissent construed the law would be activism. Any other interpretation is just not credible.

Or why in Montgomery Independent School District v. Davis, the majority criticized her for her disregard for legislative language, saying that, ''the dissenting opinion misconceives the hearing examiner's role in the . . . process,'' which it said stemmed from ''its disregard of the procedural elements the Legislature established . . . to ensure that the hearing-examiner process is fair and efficient for both teachers and school boards.'' Or why, in Collins v. Ison-Newsome, a dissent joined by Justice Owen was so roundly criticized by the Republican majority, which said the dissent agrees with one proposition but then ''argues for the exact opposite proposition . . . [defying] the Legislature's clear and express limits on our jurisdiction.''

I have said it before, but I am forced to say it again. These examples, together with the unusually harsh language directed at Justice Owen's position by the majority in the Doe cases, show a judge out of step with the conservative Republican majority of the Texas Supreme Court, a majority not afraid to explain the danger of her activist views. No good explanation was offered for these critical statements last year, and no good explanation was offered two weeks ago. Politically motivated rationalizations do not negate the plain language used to describe her activism at the time.

I would like to explain again that Justice Owen has been nominated to fill a vacancy that has existed since January, 1997. In the intervening 5 years, President Clinton nominated Judge Jorge Rangel, a distinguished Hispanic attorney from Corpus Christi, to fill that vacancy. Despite his qualifications, and his rating of well qualified by the ABA, Judge Rangel never received a hearing from the committee, and his nomination was returned to the President without Senate action at the end of 1998, after a fruitless wait of 15 months.

On September 16, 1999, President Clinton nominated Enrique Moreno, another outstanding Hispanic attorney, to fill that same vacancy. This Harvard educated attorney, who received a unanimous well qualified from the ABA, did not receive a hearing on his nomination either—for more than 17 months. President Bush withdrew the nomination of Enrique Moreno to the Fifth Circuit and later sent Justice Owen's name in its place. It was not until May of last year, at a hearing chaired by Senator SCHUMER, that the Judiciary Committee heard from any of President Clinton's three unsuccessful nominees to the 5th Circuit. Last May, Mr. Moreno and Mr. Rangel testified along with a number of other Clinton nominees about their treatment by the Republican majority. Thus, Justice Owen was the third nominee to this vacancy but the first to be accorded a hearing before the committee.

In fact, when the committee held its hearing on the nomination of Judge Edith Clement to the Fifth Circuit in 2001, it was the first hearing on a Fifth Circuit nominee in seven years. By contrast, Justice Owen was the third nomination to the Fifth Circuit on which the Judiciary Committee, under my chairmanship, held a hearing in less than one year. In spite of the treatment by the former Republican majority of so many moderate judicial nominees of the previous President, we proceeded last July with a hearing on Justice Owen and, for that matter, with hearings for Judge Charles Pickering. We proceeded with committee debate and votes on all three of President Bush's Fifth Circuit nominees despite the treatment of President Clinton's nominees by the Republican majority.

President Bush has said on several occasions that his standard for judging judicial nominees would be that they ''share a commitment to follow and apply the law, not to make law from the bench.'' Priscilla Owen's record, as I have described it today, and as we described it a few weeks ago in committee and last September, does not qualify her for a lifetime appointment to the Federal bench.

As I have demonstrated many times, I am ready to consent to the confirmation of consensus, mainstream judges, and I have on hundreds of occasions. But the President has resent the Senate a nominee who raises serious and significant concerns. I oppose this nomination.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

The Senator from Washington is recognized.

Mrs. MURRAY. Mr. President, I come to the floor today to join my colleagues to discuss the nomination of Priscilla Owen to the Fifth Circuit Court.

Mr. President, someone watching this debate on C–SPAN today might wonder why the Senate is spending so much time on a judicial nomination. They may watch all our discussions about circuit courts and wonder, how does this affect me? Well, the truth is that it affects all of us. Our Federal courts impact the opportunities, rights, and lives of every citizen, and that is why the appointments to our courts must be made with great care.

Since the founding of our Nation, our courts have changed our history, helping us to live up to our ideals as a society by protecting our rights and defending our freedoms. Our courts affect us at the broadest level, from interpreting environmental standards of clean air and water, to guarding important safety and consumer protections.

Our courts have changed millions of lives at the individual level by knocking down barriers. The courts have helped end the segregation of our schools, worked to stop discrimination, and protected the voting rights of our citizens.

Mr. President, these decisions don't just happen. They are made by people. According to our Constitution, those people are appointed by the President and confirmed by the Senate. Today, we are at an important step in that constitutional process. I care about our judges because I was elected to ensure that the people of my State have opportunities and to protect their rights. That is why I work on issues such as health care, education, economic development, to give Washingtonians opportunities. But those opportunities would mean nothing if the basic rights and freedoms of our citizens were undermined by judicial decisions.

This debate is also about the legacy that we leave. As Senators, our legacy is not just in the bills we pass or the laws we change, it is in the people we approve to interpret those laws. Those judges serve lifetime appointments. The precedents they set or break will impact the opportunities of American citizens long after all of us are gone.

So the debate we are having today is part of a process that impacts the rights and freedoms of every American, and we have a responsibility under the Constitution to carry out our role in this critical process. Now, some in the majority may suggest this filibuster is somehow new or unique. It is neither. Every Senator is familiar with the filibuster process. It is one of the many tools available to every Senator. It has been used for decades. It has been used on judicial nominations, and even on Supreme Court nominees.

In fact, a filibuster has been used on judicial nominees by members of the current majority party. This is nothing

new. At the same time, a filibuster is not a step we take often or lightly, especially on judicial nominations, but I believe in this case it is clearly warranted.

As I look at what Americans expect from our judges, I see that this particular nominee falls far short. Not only that, but this nominee's confirmation poses such a risk that the Senate must send a signal we will not confirm judges who represent an attack on the basic rights and freedoms which the courts themselves must safeguard.

What are those qualities we look for in those who serve on the Federal bench? Qualities such as fairness, trust, experience, temperament, and the ability to represent all Americans, and safeguard their rights. It is our duty in the Senate to defend these principles. We are setting no new precedent with this debate. We are simply exercising our right as Senators to defend the principles we believe we must defend.

Why do we feel so strongly about the nomination of Priscilla Owen? Justice Owen's record clearly illustrates she fails the test of meeting the requirements that she be fair, that she engender trust, that she has the proper experience and temperament, or that she has the ability to represent all Americans, and safeguard their rights. Justice Owen has frequently ignored current Supreme Court precedent and State law in favor of imposing her own personal moral and religious beliefs from the bench.

Do not just take my word for it. Let's examine what others, including White House counsel Alberto Gonzales, have said about some of Justice Owen's decisions. Justice Owen is a vigorous dissenter, and her colleagues, including Justice Gonzales, have had a lot to say about her opinions. In one, her colleagues described her dissent as ''nothing more than inflammatory rhetoric.'' In another instance, Justice Gonzales wrote that Owen's dissenting opinion, if enacted, ''would be an unconscionable act of judicial activism.''

Those are pretty strong statements and they provide a window into what kind of judge Priscilla Owen would be on the Fifth Circuit.

It is the judgment of this Senator that Priscilla Owen cannot render impartial justice to the people who appear before her court, that she will not seek to safeguard individual rights, and that her temperament is incompatible with serving on the Fifth Circuit.

This is not an easy decision for me. Thus far, the Senate has confirmed, if my math is correct, 119 of President Bush's judicial nominees. By any standard, that is a notable record. We have tried hard to work with the administration to fill court vacancies in a fair and thoughtful manner. Unfortunately, by every measure, this nomination fails the test. If I agreed to put this judge on the Fifth Circuit Court, I would not be doing my job of protecting the citizens I am here to represent.

This is a critical debate. It is worth the time it takes because the judges we appoint will affect the lives of millions of Americans. We have a special responsibility. Let us carry out that responsibility well, because our legacy is not just in the laws we pass. It is also in the people we appoint who will interpret those laws over a lifetime. The precedents they will set or break will live on longer than any of us.

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

The PRESIDING OFFICER (Ms. COLLINS). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Ms. CANTWELL. Madam President, I rise to speak on the pending business.

The PRESIDING OFFICER. The Senator may proceed.

Ms. CANTWELL. Madam President, I rise as a former member of the Senate Judiciary Committee to discuss something that is very important to all of us: How we should proceed on nominees for our Federal court system. And how we make sure we confirm nominees who will enforce the law and not nominees who might seek to bend the law or interpret it to their own desires. The American people deserve judges who hold the mainstream values of our country and our legal system. They deserve a Federal judiciary willing to interpret the laws as they are, rather than as the judges might want them to be.

The American people believe that the Senate needs to do our job. Not to be a rubberstamp on nominees, but to thoroughly evaluate judicial nominees and determine whether they will continue the tradition of the Federal judiciary by being balanced and impartial, and serving as a countercheck for the executive branch and for us, the legislative branch. That was the role the Founding Fathers gave to the Senate, and I believe that is a role the American people think we should play.

That is why I don't think it is surprising, that 74 percent of the public believes that the question of judicial views and judicial philosophy should be something we consider in the Senate confirmation process, and that we should get answers to questions about judicial philosophy from nominees.

More importantly, a majority of Americans also believe we should not vote to confirm a nominee who might otherwise be qualified if we don't think their views on these important issues reflect mainstream American viewpoint. I believe that the nominee we are debating, Justice Priscilla Owen, fails to meet this test.

As a former member of the Judiciary Committee, I attended a hearing on Priscilla Owen that lasted a full day. During that hearing, Owen's record showed a particular disregard for precedent and the plain meaning of the law.

Anyone who walks into a courtroom as a plaintiff or a defendant in this country should do so having the full confidence that there is impartiality on the part of the judge on the bench. They should have total confidence that the rule of law will be followed, and believe the issues will be judged on their merits rather than viewed through the prism of an individual judge's personal values or beliefs.

There is reason to be concerned about the record of Priscilla Owen. Time after time, even her own Republican colleagues, on a predominantly Republican Texas Supreme Court bench, criticized her for failing to follow precedent or interpreting statutes in ways that ignore the clear intent of the law. Just yesterday a key newspaper in her State, the Austin American Statesman, wrote:

> Owen is so conservative that she places herself out of the broad mainstream of jurisprudence. She seems all too willing to bend the law to fit her views.

I ask unanimous consent to have that editorial printed in the RECORD.

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

[From American-Stateman, Apr. 29, 2003]

OWEN DESERVES A NOTE BUT NOT A CONFIRMATION

The U.S. Senate is expected to resume debate soon over President Bush's nomination of Texas Supreme Court Justice Priscilla Owen to the 5th U.S. Circuit Court of Appeals, which hears federal appeals from Texas, Louisiana and Mississippi. We have argued before that she deserved a hearing, and she finally got one from the Senate Judiciary Committee. That said, however, she should not be confirmed.

There's no question that Owen is qualified for the 5th Circuit by her legal training and experience. She was a standout at the top of her Baylor University Law School class; she became a partner at a major Houston law firm, Andrews & Kurth, where she practiced commercial litigation for 17 years; and she was elected in 1994 to the Texas Supreme Court, and re-elected in 2000. She received the highest rating, ''well-qualified,'' from an American Bar Association committee that reviews judicial nominations.

But Owen is so conservative that she places herself out of the broad mainstream of jurisprudence. She seems all too willing to bend the law to fit her views, rather than the reverse.

One example was the state Supreme Court's interpretation of the then-new Parental Notification Act regarding abortions sought by minors. In early 2000, the nine justices, all Republicans, took up a series of ''Jane Doe'' cases to determine under what circumstances a girl could get a court order to avoid telling a parent that she intended to get an abortion.

Owen and Justice Nathan Hecht consistently argued for interpretations of the law that would make it virtually impossible for a girl to get such an order.

Finally, in one Jane Doe case, another justice complained that ''to construe the Parental Notification Act so narrowly as to eliminate bypasses, or to create hurdles that simply are not to be found in the words of the statute, would be an unconscionable act of judicial activism.''

The justice who wrote that was Alberto Gonzales, who is now Bush's general counsel.

Owen also could usually be counted upon in any important case that pitted an individual or group of individuals against business interests to side with business.

Owen is being appointed to a lifetime position in the judicial branch of government, not to a post in which her duty is to carry out the will of the president. And given the narrowness of his 2000 election victory, Bush is not in a position to argue that the public has said it wants ultra-conservative judges.

If the Senate Democrats invoke their power to filibuster, Owen would be the second judge nominated by Bush to be blocked in such a way. The other is Miguel Estrada, who was nominated to the U.S. Circuit Court of Appeals for the District of Columbia, and who Democrats suspect is a radical, ideological conservative.

Democrats are not blindly opposing all of the president's judicial nominees. Many have been confirmed by the Senate, and others have won committee approval without controversy, including Edward Prado of San Antonio, a federal district judge who was nominated to the 5th Circuit.

But Owen should not be confirmed.

Ms. CANTWELL. What some of Owen's colleagues on the bench have said about her opinions I think is important. In a case dealing with a developer seeking to evade Austin's clean water laws, her dissent was called ''nothing more than inflammatory rhetoric.''

In another case, her statutory interpretation was called ''unworkable.'' In yet another case, the dissent she joined was called ''an unconscionable act of judicial activism.''

Some of our other colleagues have already mentioned that particular quote. One of the reasons we all find it somewhat unbelievable is the fact that it was made by her then-colleague on the Texas Supreme Court, now the White House General Counsel Alberto Gonzales, who is in charge of pushing her nomination.

But the criticism of Owen comes not only from her colleagues but from across the country. The San Antonio Express calls her nomination misguided. The Atlanta Journal called the Judiciary Committee's original objection to her nomination ''the right decision for the American people.'' The New York Times wrote last week that it was abundantly clear at her hearing that her ideology drives her decisions. The Kansas City Star even said there are better nominees and better ways for the executive branch to spend its time than re-fighting these battles.

There is another reason this nomination is so important. I believe this is critical to all the nominees we are considering for appointment to the Federal bench. That is, what is the judicial philosophy and commitment to upholding current law as it relates to a citizen's right to privacy. I asked Justice Owen at her hearing about her beliefs on the right to privacy. I asked her if she believed there was a constitutional right to privacy and where she found that right in the Constitution.

She declined at the time to answer that question without the relevant case information and precedents before her. When Senator FEINSTEIN followed up with a similar question, Owen again would not answer whether she believes a right to privacy does exist within the Constitution.

The question of whether a nominee believes that the right to privacy exists with regard to the ability to make decisions about one's own body is only the tip of the privacy iceberg. I believe that we are in an information age that poses new challenges in protecting the right to privacy. We are facing difficult issues including whether U.S. citizens have been treated as enemy combatants in a prison without access to counsel or trial by jury, whether businesses have access to some of your most personal information, whether the Government has established a process for eavesdropping or tracking U.S. citizens without probable cause, and whether the Government has the ability to develop new software that might track the use of your own computer and places where you might go on the Internet without your consent or knowledge. There are a variety of issues that are before us on an individual's right to privacy and how that right to privacy is going to be interpreted. A clear understanding of a nominee's willingness to follow precedent on protecting privacy is a very important criteria for me, and it should be a concern for all Members.

Of course, some of my concern and skepticism about Justice Owen's views on privacy results from the opinions she wrote in a series of cases interpreting the Texas law on parental notification. In 2000 the State of Texas passed a law requiring parental notification. But they also included a bypass system for extreme cases.

Eleven out of 12 times Owen analyzed whether a minor should be entitled to bypass the notice requirement, she voted either to deny the bypass or to create greater obstacles to the bypass.

Owen wrote in dissent that she would require a minor to demonstrate that she had considered religious issues surrounding the decision and that she had received specific counseling from someone other than a physician, her friend, or her family. Requirements, I believe, that go far beyond what the Texas law requires.

In interpreting the ''best interest'' arm of the statute, Owen held that a minor should be required to demonstrate that the abortion itself—not avoiding notification—was in the individual's best interests. In this particular case, I think she went far beyond what the statute required.

Where does that put us? Women in this country rely on the right to choose. It is an issue on which we have had 30 years of settled law and case precedent. In the Fifth Circuit, there are three States that continue to have unconstitutional laws on the books, and legislatures that are hostile to that right to choose. The Federal courts are the sole protector of women's right to privacy in these states. I do not believe that the rights of the women of the Fifth Circuit can be trusted to Justice Priscilla Owen.

Owen's rulings on privacy and not following precedent raise grave concerns. But this is not the only area where Justice Owen has been criticized. She also has been criticized in areas of consumer rights and environmental law.

The Los Angeles Times singles her out as a nominee who disdains workers' rights, civil liberties and abortion rights. And even a predominantly Republican court—one considered by legal observers and scholars to be one of the most conservative in this country—Justice Owen still seems to go further than a majority on that court. Time after time, Justice Owen has ruled in favor of business interests over working people, against women, against victims of crime and negligence, and against the environment. Over a career a judge can have many controversial cases. But, as the Austin Statesman points out, Justice Owen is widely known as a nominee that ''could usually be counted on to side in any important case that pitted an individual against business interests to side with business.''

I don't think that is the type of representation that we want to have on our courts. Her controversial rulings include an opinion that a distributor who failed to conduct a background check on a salesman was not liable for the rape of a woman by that salesman.

In a case challenging the ability of Texas cities to impose basic clean water control, she held the legislature had the power to exempt a single developer from city water pollution controls by allowing the developer to write their own water pollution plan. The majority called her dissent ''nothing more than inflammatory rhetoric.''

There are other cases dealing with Texas public information law which I think are important for all of us, for all of our citizens to have access to public information.

She wrote that a memo prepared by a city agency about an employee should not be subject to disclosure under the Texas Public Information Law because it discussed ''policy,'' an exemption that a majority of others on the board said would be ''the same as holding there is no disclosure requirement at all.''

In another similar case about public information laws, she held that a report prepared by the city of Houston and financed by taxpayers could not be disclosed under the Texas Public Information Act. Again, her colleagues criticized her decision not only as ''contradicting the spirit and language of the statute, but gutting it.''

It is possible to find cases or points to argue in the record of almost any judge, but because of the reaction of her own colleagues to her decisions. I find the constant criticism and rebukes that run through the opinions of

Owen's colleagues surprising. They consistently indicate that they think she has overstepped or misinterpreted the law to such a degree that they have used the words ''gutting'' or ''judicial activism'' or ''overreaching.''

As do many of my colleagues, I believe that we should move off this nomination and on to more important matters. We in the Northwest have an economy that has failed to recover. We in America are looking for an economic plan to move our country forward. There are many issues of national security that we must continue to debate.

I think that we could do better than renominating Priscilla Owen, and others who have already been rejected by a previous Senate Judiciary Committee. The fact that we are even debating this nominee is unprecedented. While I respect the President's right to renominate her, I find his decision to do so given the breadth of opposition and genuine questions that have been raised by her troubling.

The American public cares about us doing our job on nominees. It cares about us asking the right questions. It cares about us making sure that judicial nominees are following important laws that are already on the books. I believe the majority of Americans are becoming more and more concerned about their right to privacy and how it might be protected in the future.

With all the issues that we are facing on our judicial nominees, I say to my colleagues that it is time to move off this nominee—not to move forward on it and instead to the important business that needs to be done for this country and specifically for the Northwest.

I ask my colleagues to oppose the motion to proceed to a vote on this nomination and turn instead to the business that the people of America want us to address: our economic livelihood and how we can all work together to provide better opportunities for Americans.

I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. Thank you, Madam President.

I think it was a young kid who turned to ''Shoeless Joe'' Jackson when members of the Chicago White Sox were charged with corruption in baseball and said, ''Say it ain't so, Joe.''

Tell me that we are not back again in these hallowed halls visiting the issue of a nomination of a circuit court judge, trying to do what the Constitution has given us the authority to do since the birth of this magnificent country, the right to advise and consent but ultimately to choose, to advise and consent and cast your vote up or down for a judicial nomination.

I am here to talk about the nomination of Texas Supreme Court Justice Priscilla Owen to sit on the U.S. Court of Appeals for the Fifth Circuit in support of that nomination.

The American public is going to hear these facts again and again. They are going to hear about Judge Owen, who has been unanimously rated well qualified by the American Bar Association, which my colleagues on the other side have called the gold standard in the past; the way you want to measure; you don't want to measure them by political affiliation, you don't want to measure them by what an interest group thinks.

The American Bar Association, certainly not a bastion of conservative American values, unanimously has rated Justice Owen as well qualified. She comes before us with a history of serving presently as a justice on the Texas Supreme Court. She has been partner at a law firm and has handled a broad range of legal matters. She has been admitted to practice at various State and Federal trial courts.

She is a leader in her community. I understand she teaches Sunday school. She serves as the head of an altar guild. She is a great American. She is well qualified. She has an opportunity now to serve on the Federal bench. And all that is being sought is for this Senate to do its constitutional duty.

I have made some of these remarks in regard to the Estrada nomination, and we may well be getting back to that. I fear we are getting back to another filibuster, with my colleagues on the other side not allowing the Senate to do its business.

We have a lot of business to do in America. These are difficult times and challenging times. We have just seen the miracle of the American military do great things in Iraq. But there is work to be done, and our citizens at home are worried about jobs and worried about health care, worried about the future. We need to get to those issues. We can get to those issues if we simply do our business and move on.

If you do not support Priscilla Owen, if you do not think she has the qualifications, if you do not agree with her principles, vote against her, but give us a chance to have a vote. That is my concern.

What we are doing here, and what we saw first happen with the Estrada nomination—and I fear we are stepping into the same swampland—is we are undermining the Constitution of this great country. The Constitution is one of those certifiable miracles of the modern age. It has flourished and survived for 214 years. And I think providence has inspired it. When you think how delicate and finely balanced the document is, it has survived a Civil War, and several wise and unwise attempts to amend it, and many constitutional crises. That is our strength. I think our adversaries do not understand the strength of this country lies in this remarkable document and the care of our leaders to live within its boundaries.

That is why an attempt to tamper with this delicate balance of power must be met with suspicion, and repelled with conviction. I said that in regard to Miguel Estrada. I say that in regard to Priscilla Owen: An attempt to tamper with the delicate balance of the Constitution must be met with suspicion and repelled with conviction.

We have the opportunity to have endless debate in this body, but, in the end, in the history of this country, we have had circuit court nominees getting a chance to be voted on. The Estrada nomination set a terrible new trend, one I hope we overcome. Never before have we had a partisan filibuster of a circuit court nominee, and now it appears we have not one but two. Say it ain't so. Say it ain't so.

I told a story in regard to the Estrada nomination. I want to repeat that story. It is a true story. A friend of mine who worked here for many years gave it to me. He told me, many years ago, when the Senate was the Supreme Court's upstairs neighbor in this building, a significant event took place which provides us with a further warning. A young architect of the Capitol wanted to improve the sight lines in the Supreme Court Chamber on the first floor.

Calculating that one of the supporting pillars was unnecessary, he brought in a crew to remove it from that Supreme Court Chamber. Halfway through the project, the ceiling fell in on the Supreme Court Chamber, which was also the floor of the Senate above, destroying both Chambers for a while.

The lesson is when you tamper with one branch of Government, it can affect the others in ways you cannot anticipate. That is what is really going on here.

The Constitution of the United States gives this Senate the important authority to advise and consent, and we do it by a majority vote. Treaties, on the other hand, require a supermajority. But when you have a filibuster, as we have seen with Estrada, and we now, I fear, will see with Priscilla Owen—and I hope not and again say: Say it ain't so—what happens is we are changing the constitutional standard.

You have to think about some of the consequences. Some of the obvious ones. There may be some we do not see today. One of them is if this is now the standard, that you need 60 votes, we are not going to get qualified and talented people to serve on our highest courts in the land. They are not going to make it through. I dare say, Justice Scalia would probably not make it through. Ruth Bader Ginsburg, a liberal Supreme Court Justice, who graduated from the same high school I graduated from in Brooklyn, New York, James Madison High School, may not have made it through. Anybody who has been out there articulating a particular position, a perspective, would not make it through.

Here is the fallacy of the argument of my distinguished colleagues on the other side. They want fealty to their judicial philosophy. They want the candidate to say: Here is a principle in

which I believe, and you have to tell me you believe in that. But that is not what our system is supposed to be. What judges are supposed to do is not to say this is their own vision and their own view and their own philosophy, and regardless of what the constitution says, that is what they are going to apply. What the Constitution requires, what rules of court require, what we as Americans should require is that judges simply uphold the Constitution and to say they will follow established case law, that they will follow established precedence, by the way, even if they do not agree with it.

That is what we require of judges. It is not about taking your own judicial philosophy and kind of driving it forward, come heck or high water. It is about a willingness and a commitment to uphold judicial precedent. That is what Justice Owen understands. That is what she represents. That is what Miguel Estrada represents.

We have business to pursue, important business. But of all the things we do, if we take this Constitution and we disregard it, if we, in the halls of this Senate Chamber, in the year 2003 simply say we are going to cast the Constitution aside, we are going to set a new standard—not a majority but a supermajority, 60 votes—that we on one side—and this time it is my distinguished colleagues across the aisle; they are going to turn down folks because they are not pledging abeyance, not giving fealty to their philosophy; and down the road, if there is a Democrat President who puts forth candidates, if the folks on our side say, hey, the rules have been changed, the Constitution, we are no longer listening to it, it is now 60 votes, and we are not going to approve anybody who is a Democrat who has some philosophies different than our own—our country is going to be in deep trouble.

I hope I get to serve in this institution a long time. The people of the State of Minnesota have given me an opportunity to serve. They have given me at least 6 years. But I will tell you, I will try to conduct myself in a way that when a candidate comes forward, I apply the same standard, whether that candidate is being put forth by a Republican President or a Democratic President. That standard is pretty simple: Are they willing to commit themselves to follow established case law. Do they have the right kind of judicial temperament. And—again, we have the American Bar Association giving the gold standard—then we should not be having these debates right now. Again, let us be very wary of efforts to change the constitutional standards.

Let us discuss the merits of these nominees, their qualifications, judicial temperament, but then let us follow the constitutional process we have followed for two centuries and vote yes or no on our advice and consent to the President's nominee to the court of appeals.

I hope, Madam President, we give Justice Owen that right. I am going to be voting yea. My colleagues on the other side may disagree and vote nay, but let's make sure we get a vote, that we do not change the constitutional standard.

Madam President, I yield the floor.

The PRESIDING OFFICER (Mr. ALEXANDER). The Senator from Michigan.

Ms. STABENOW. Mr. President, I rise to discuss the nomination of Priscilla Owen to the Fifth Circuit Court of Appeals. I begin by saying, as have others, that the Senate has a constitutional obligation to advice and consent on a Federal judicial nominee. This is a responsibility I take seriously, as do my Senate colleagues from both sides of the aisle. Unlike other nominations that come before the Senate such as ambassadorships or executive nominees, Federal judicial nominations are lifetime appointments. These are not decisions that will affect our courts for 3 years or 4 years but, rather, 30 years or 40 years, making it even more important that the Senate not act as a rubberstamp.

Having said that, to review the record of where we are under this President and his judicial nominations, to date the Senate has confirmed 119 Federal justices and rejected two—not exactly a partisan example of how we are moving forward on judgeships: 119 approved; two rejected. Ironically, one of those already rejected is the person now in front of the Senate again.

As a part of the important responsibility we have, I have examined Justice Owen's record. I am concerned that this is a nominee who has repeatedly disregarded the language of the law and has instead substituted her own political and personal views. This is a nominee who has been criticized by her own Republican colleagues on the bench for being a judicial activist. She is one who has consistently overreached in her decisions to justify her extreme personal positions.

I begin by talking briefly about the Texas Supreme Court. In Texas, Supreme Court judges are elected for 6-year terms. They run as party candidates, as they do in many States, as Republicans or Democrats. This is a conservative court and currently an all-Republican court. This is important because when one reads Texas Supreme Court opinions, Justice Owen is outside of the mainstream even among those of her own party who have been recognized as serving on a conservative court.

In fact, a review of the court's opinions shows that since Justice Owen joined the court in January of 1995 through June of 2002, just prior to her July 2002 judicial committee hearing, she was the second most frequent dissenter among the justices then serving on the court. The content of these dissents also shows that she is often out of touch with the law and significantly more extreme than her Republican colleagues on the court.

For example, in the 12 cases before her involving minors seeking judicial bypass to obtain an abortion under Texas parental notification laws, Owen joined the majority in granting a bypass only once. That was a case which was decided after her nomination to the Fifth Circuit.

In re Jane Doe 1, where a bypass was granted, the Republican majority opinion sharply rebuked Owen and the other dissenter's attempts to substitute their own personal views for the law instead of interpreting the law itself. They stated:

> We recognize that judges' personal views may inspire inflammatory and irresponsible rhetoric. Nonetheless, the issue's highly charged nature does not excuse judges who impose their own personal convictions into what must be a strictly legal inquiry.

Those are harsh words.

> As judges, we cannot ignore the statute or the record before us. Whatever our personal feelings may be, we must respect the rule of law.

How many times have we heard colleagues speak about respecting the rule of law? Here was someone rebuked by her own Republican colleagues for not respecting the rule of law.

In a concurring opinion on the same case, then Justice Alberto Gonzales, the Bush administration's current White House counsel, described the dissenters, including Justice Owen, as attempting to engage in ''an unconscionable act of judicial activism.'' These are the words of the current White House counsel when he was serving with her, that she attempted to engage in ''an unconscionable act of judicial activism.'' Those are very powerful words.

This criticism is very serious. It does not come from Senators. It comes from Justice Owen's own Republican colleagues. That is significant.

In another parental notification case, In re Jane Doe 3, the minor testified that her father was an alcoholic who would take out his anger toward his children by beating the mother. Justice Owen once again substituted her own personal views for the law and would have required a higher evidentiary standard for showing the possibility of abuse under the law. Republican Justice Enoch wrote, specifically to rebuke Justice Owen and her fellow dissenters for misconstruing the definition of the sort of abuse that may occur under the bypass law—a Republican colleague on the bench—''Abuse is abuse. It is neither to be trifled with nor its severity to be second-guessed.''

Justice Owen's judicial activism extends way beyond these cases. Justice Owen has been out of step with Republican justices of the Texas Supreme Court on everything from environmental cases to consumer protection to workplace discrimination cases. In Read v. Scott Fetzer, Kristi Read was raped in her home by a door-to-door salesman hired by the Kirby vacuum distributor. If the distributor had conducted a background check or even checked the salesman's employment references, they would have learned

that women at his previous places of employment had complained about his sexually inappropriate behavior and that he had pled guilty to a charge of sexual indecency with a child and was fired as a result of that incident.

The Republican majority in this case ruled that the victim was entitled to damages from the distributor that hired the salesman. Justice Owen, however, joined a dissenting opinion saying the victim was not entitled to any damages from the distributor, arguing that since the salesman was considered an independent contractor, the distributor had no duty to perform any background checks. This is yet another example where Priscilla Owen is out of step with even her colleagues on the Texas Supreme Court, much less mainstream America.

President Bush has said he wants judges who are not judicial activists and who will interpret the law, not make the law. Justice Owen fails this test by any measure. When one examines Justice Owen's record, her pattern of judicial activism becomes clear.

During her tenure on this conservative Republican court—and I say that only to say that these were Republican colleagues on the court who were making the statements about the inappropriate judicial activism—Justice Owen has dissented in 66 cases and has been criticized by her colleagues, including White House Counsel Alberto Gonzales, on the bench for her judicial overreaching.

This is a nominee who has been divisive not only on the Texas Supreme Court but in the U.S. Senate. I have received over 2,500 letters and e-mails from my constituents in Michigan opposing Priscilla Owen's nomination. I have received letters from over 60 different organizations, including civil rights groups, advocacy groups, women's groups, environmental groups, and other citizens opposing this nomination.

In addition, Justice Owen's nomination was rejected last year by the Senate Judiciary Committee, and her reconsideration is unprecedented. Never before has a nominee been voted on and rejected by the committee or the Senate and subsequently renominated for the same seat.

Mr. President, I urge my colleagues to say yes to a balanced Federal judiciary that will interpret and not make the law, and to say no to the Owen nomination.

I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SESSIONS. Mr. President, I want to share some comments about Priscilla Owen. I could not disagree with my distinguished colleague more. Priscilla Owen, I believe, is one of the great justices in America. She has served on the Texas Supreme Court with distinction. She has received support from all the Texas Supreme Court judges. They like and admire her. She has an extraordinary record—a record of public service and private litigation.

Her background and study capabilities have been reviewed by the American Bar Association—the gold standard, the Democrats tell us, for whether or not a person should be confirmed. They have—15 lawyers—reviewed her record. I think it is normally 15. They are lawyers in the community and others who review the record. They interviewed litigants who come before Judge Owen. They interviewed her law partners in the firm where she worked as a private attorney. They interviewed opposing lawyers in cases she was on, judges in the community who know her, leaders of the bar association and presidents of the bar association. They evaluate whether or not a judge is a fair and objective judge. After a complete evaluation of this excellent jurist's career, they have unanimously voted that she is ''well qualified,'' which is the highest rating they can give.

So to come in here and say she is an ''extremist'' who will not follow the law and abuses the law is simply not correct. To just say that she dissents on cases is not fair. Great judges who love the law and care about the law tend to dissent more. It is easy just to sign on to majority opinions. Judges who really care and are really concerned tend to review opinions and offer either concurring opinions or objections. Oftentimes, that is a great compliment—that the jurist is concerned about the law and wants to do it right.

Prior to her election in 1994 to the Supreme Court of Texas, she was with the Houston law firm of Andrews and Kurth, where she practiced commercial litigation for 17 years. In private practice, she handled a broad range of civil matters at both the trial and appellate levels. She was admitted to practice before various State and Federal courts, as well as U.S. courts of appeals—Federal courts—for the Fourth, Fifth, Eighth, and Eleventh Circuits. She is nominated to be a member of what I call the old Fifth Circuit. Alabama and Georgia used to be in the Fifth and they split.

Priscilla Owen is a member of the American Law Institute, American Judicature Society, American Bar Association, and a Fellow of the American and Houston Bar Foundations. She was elected to the Supreme Court of Texas in 2000, garnering 84 percent of the vote, having been endorsed by every major newspaper in Texas. A pretty good record. Is this the record of some sort of extremist? No, it is not.

She served as a liaison to the Supreme Court of Texas's Court-Annexed Mediation Task Force, and that is a good thing. We need to have more mediation and conciliation and less litigation, frankly. I am glad to see she is concerned with that. She has been on statewide committees on providing legal services to the poor and pro bono legal services. She was part of a committee that successfully encouraged the Texas Legislature to enact legislation that has resulted in millions of dollars a year in additional funds for providers of legal services to the poor.

Priscilla Owen also served as a member of the board of the A.A. White Dispute Resolution Institute. Additionally, Judge Owen was instrumental in organizing a group known as Family Law 2000—an interesting group. It seeks to find ways to educate parents about the effects a dissolution of a marriage can have on children, and to lessen the adversarial nature of legal proceedings while a marriage is being dissolved. This is a lady who cares about children, who cares about families, and wants to do the right thing for them.

Among her community activities, Justice Owen served on the Board of Texas Hearing and Service Dogs for the Disabled. She is a member of the St. Barnabas Episcopal Mission in Austin, TX, where she teaches Sunday school and serves as head of the altar guild. I guess some might think that maybe she is too religious. We are hearing complaints about that today. I, frankly, think that being a member of the Episcopal mission, serving on the altar guild, and being a Sunday school teacher is an honorable thing to be recognized and is a positive contribution to the community. I suggest it demonstrates certain values.

She has a tremendous academic record. She earned her bachelor's degree cum laude from Baylor University, where she also graduated from law school, in 1977, cum laude with honors. She was a member of the Baylor Law Review, for graduating seniors or juniors to participating in the school's law review, is the highest honor a good law student can receive. It goes beyond grades, but grades are an important part of it. She was honored as the Baylor Young Lawyer of the Year and received the Baylor University Outstanding Young Alumna award.

If anybody has any doubts about her abilities—and you cannot always tell from grades—she made the highest score in the State of Texas on the bar exam. I am telling you, they have people from Harvard, Yale, the University of Texas, and all of those schools taking this exam. She made the highest score on the Texas bar exam. I suggest to you there were some talented people taking that exam. She made the highest possible score. She has the intellectual capabilities that everybody who knows her says she has.

So what does this boil down to? It boils down to a complaint about her interpretation of a poorly written—because I was at the committee hearing—Texas statute dealing with parental notification. The Supreme Court of the United States and 80 percent of the American people believe that if a young minor, a child, is contemplating an abortion, she ought not to be able to go to the abortion doctor and have that done without at least notifying her parents.

Parents love children. I know there are some parents who are abusive and there are difficult circumstances, but most parents are not that way. Most parents love their children. Most parents would be helpful to a child who has difficulties and most parents would be able to discuss that with them in a rational way.

The Texas law was attempting to provide that. It was not a bad law, but it was not written with sufficient clarity that a group of judges could get together and always agree on exactly what it meant. Anybody here knows if someone practices law that those circumstances happen. So this is basically what the complaint about her is, over this one subject.

A parental notification law says a parent of a young minor girl seeking an abortion should be notified if the teenager is going to have the abortion. Notification does not mean a parent has to agree to the abortion, or to even say it is okay. That would be a consent requirement. Parental notification laws do not require consent. Notification is simply telling a parent a child is about to undergo a major medical procedure.

School teachers will not allow a child to take an aspirin without calling the parent, and yet the pro-abortionists think it is perfectly all right for a 13, 14 or 15-year-old, who has gotten themselves in trouble, gotten themselves pregnant, that they should not even tell their parents and go off with some older man perhaps and conduct this procedure. That is the sad reality of it.

So even if a parent were to object to this abortion, the teenager could still go forward with it. It would not stand in the way of them going to an abortion clinic.

Eighty percent of Americans believe that it is appropriate that parents should get notification. Let me explain how these laws work in Texas. If a teenage girl becomes pregnant and does not want to follow the notification law to give her parents an FYI, she is allowed to petition the court for a waiver. In other words, she can go to the court and say, judge, I do not want to have to tell my parents I am pregnant and I am contemplating an abortion. Tell me I do not have to do so. Give me authority not to do so.

She might want the waiver for several reasons. She might be afraid to tell her parents because she is afraid they would become angry or because there might be violence.

A teenage girl is given an opportunity to explain to a trial judge what her problem with notification is and to demonstrate to the judge she is mature enough to make a decision on her own. That is what the Texas law provides. A trial court hears that and he observes the teenager. The trial judge sees the teenager personally and is able to enter into a discussion and colloquy with her. After discussing the steps she has taken to become informed, such as talking to a counselor or considering alternatives to an abortion, the judge makes a decision on whether or not the waiver should be granted and whether the girl should be allowed to have an abortion without the knowledge of a parent.

Because some of my colleagues seem to be so determined about their support of abortion on demand, I assume they consider this as a right of privacy or something, they insist that no one, for any reason, can even be advised that a minor child would have an abortion. They are not happy with these laws and object to these laws. The National Abortion Rights League and that type of group have opposed these laws, but these laws have been supported by the American people consistently and they have passed.

But I guess they would want the judge to grant a waiver in every single case. Well, I do not think anyone would say the court should grant a waiver in every case. Every case is different. So each case should be evaluated and be ruled on on the merits. It is the court's duty to examine the facts in each waiver case to determine if the waiver is suitable. That is what a judge does.

If the teenager goes before the trial court and the trial court grants her waiver and says you do not have to notify your parents, she can get an abortion without notifying either one of her parents. If the trial court denies that waiver after a hearing and says she should tell the parents, the teenager can either notify one of the parents or can appeal to the court of civil appeals.

At the court of civil appeals level, a minimum of at least three judges review the record of the trial judge to determine whether or not the judge made an error and whether or not the teenager should be able to have an abortion without notifying either parent. The judges look again at the reason behind the waiver request, the maturity of the teenager and her decision-making process. After a complete review of the trial judge's decision, the appeals court either grants the waiver and allows the abortion to go forward without notification or affirms the trial court's denial.

If the court of appeals denies the waiver, the girl either notifies one of her parents or can appeal to the state supreme court, such as the Texas Supreme Court where Justice Owen sits.

So by the time this case reaches the supreme court where Justice Owen sits, at least four judges will have either seen the teenager or reviewed the record carefully and ruled a notification should be made to at least one parent before an abortion takes place. So that is how the system works. By the time the case reaches the Texas Supreme Court, two other lower courts will have already said the girl should provide the parents the courtesy of telling them their daughter is about to undergo such a major operation.

So this is what the issue is all about. This is what the opponents are unhappy about, and they talk about it aggressively.

Justice Owen has never made an initial decision to deny a waiver. Her position on the Texas Supreme Court does not permit that. Her position only allows her to review denials of waivers already made by lower courts. In upholding the lower court's denial of a waiver, Justice Owen is only agreeing with the trial judge, the judge who had the opportunity to visualize and see the teenager and to observe her, and also the judges on the court of appeals, the intermediate level court. Justice Owen simply did what appellate judges do. Appellate judges allow the trial court to be the trier of fact and in most instances only review their decisions on abuse of discretion grounds.

So to break it down, Justice Owen merely ruled in a few parental notification cases that a trial judge and at least three judges on the court of civil appeals did not abuse their discretion by having a teenage girl notify her parents she intended to have an abortion. That is, I submit, far from being some sort of judicial activist, rogue judge who does not adhere to the law.

An FYI to a parent before a major surgery, that is what this filibuster is all about. Some of my colleagues are really strongly committed to an almost absolutist position on abortion. They oppose limiting partial-birth abortion. They oppose any limitation whatever.

Now we are at the point of seeing this sterling nominee, so well qualified, subjected to a filibuster because she did her best to evaluate and interpret the Texas law. In each case, her decision was in conjunction with and to affirm the decision of a trial judge and a three-judge civil appeals panel below her.

When my colleagues talk about being out of the mainstream, I suggest they should look at themselves. This accusation against Justice Owen is the only thing that is out of the mainstream. We are not talking about requiring parental consent for abortions. We are only talking about notice. If a parent objects, a doctor is still required to perform the abortion and allowed to perform the abortion if the child wants. In Justice Owen's State of Texas, the law does not allow a teenager to get an aspirin in school without parental consent. If a teenager wants to get a tattoo, the law requires parental consent. If a teenage girl wants to get her ear pierced, parental consent is required. So if a girl wants to take an aspirin in school, get a tattoo or have her ear pierced, her parents not only have to have notification, they have to consent. They have to sign off on it. That is not the case with abortion. In my view, giving a parent notice about an abortion for a teenage girl is nowhere outside the mainstream of American policy or American law.

Justice Owen is one of the finest nominees this Senate has ever had the opportunity to consider. For her nomination to be filibustered is an atrocity

of the confirmation process and to the tradition of this Senate. I strongly support her confirmation. I believe if logic and reason prevail, we will confirm her instead of filibustering this nomination.

This nominee is sterling. She has the highest possible rating of her peers. She has performed as one of Texas's finest litigators and has won election to the Supreme Court of Texas with 80 percent of the vote, having the support of every major newspaper in her State. I find it difficult to see how we now are not even allowing her to have a vote in this body.

They say she was rejected once. I was on the committee. That was when the Democrats were in the majority. They voted a straight party line in committee after I thought she testified brilliantly in examination. That never happened in the 8 years President Clinton was President.

Never did we vote down a nominee in committee on a party-line vote. They say, well, only two of them have been blocked here. In 8 years, there were 377 confirmations of President Clinton's judges. One was voted down. None were voted down in committee. She was voted down on a party-line vote in the Senate Judiciary Committee, but she had not been rejected by the full committee.

If they think she is going to be rejected again, why don't they let us have a vote? Let's vote on it. I suggest this nominee is going to win a majority of the votes in this Senate.

The Constitution makes clear that the Senate has an advice and consent power. It notes, with regard to treaties, that the Senate shall advise and consent provided two-thirds agree. Then with regard to the confirmation of all other offices, it just says the Senate shall advise and consent.

Since the founding of this country, we have understood that to mean the Senate will have a majority vote on the confirmation. There is no other logical thing it could mean. So now we have ratcheted up the game.

I recall distinctly a little over 2 years ago when my Democrat colleagues went to a private retreat. A number of law professors, Lawrence Tribe, Cass Sunstein, and Marsha Greenberg went there, professors all who advised them to change the ground rules on the judicial nominations. It is written in the New York Times. Since then, there has been a systematic change in the ground rules of judicial confirmations. When they had the majority, they attempted to kill nominees in committee on a party-line vote, which had never been done before. And now, amazingly, they are going to the filibuster.

The American people need to understand something important. In the history of this country, there has never been a filibuster of a circuit or district judge. Never. It has always been an up-or-down vote.

I remember when some did not like some of President Clinton's judges and they said we should filibuster; Chairman HATCH said, No, we do not filibuster judges.

When holds went on too long—the way you defeat a hold is to file a motion for cloture—and a cloture vote was moved for by Republican leader TRENT LOTT to bring up Democratic Bill Clinton's judges. I voted for cloture on each one of them. Sometimes I voted against the judge, but I voted for cloture to bring the vote up because I did not want to participate in a filibuster.

We have a big deal here. Why someone would seek out this magnificent nominee, this person who is not only qualified for the Fifth Circuit Court of Appeals but qualified to sit on the U.S. Supreme Court, and filibuster their nomination, is beyond me. It is just beyond me.

I conclude by saying I spent over 15 years of my professional career trying cases in Federal court as a U.S. attorney and assistant U.S. attorney. I appeared before courts of appeal. I wrote briefs to courts of appeal. I appeared before Federal judges. I think I have looked at her record carefully. I have heard the explanations she has made in committee. I think they are imminently sound and reasonable. I think President Bush could not have found a finer nominee. I have every confidence that she would be a superior judge on the court of appeals, and I am absolutely confident, were she given an up-or-down vote, she would be confirmed.

We need to take seriously our responsibilities here. Let's have an up-or-down vote. Let's confirm this fine nominee. She will serve us and America well.

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. 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.

UNANIMOUS CONSENT REQUEST—EXECUTIVE CALENDAR

Mr. FRIST. Mr. President, for the past 2 days, we have been working on an agreement looking for an orderly, systematic process by which we could consider some of the pending judicial nominations. It had been our hope we could reach an agreement to consider these nominations this week and early next week. Unfortunately, after a lot of discussions—and we worked on both sides of the aisle in good faith—but after a lot of discussions, it does not appear we will be able to reach the consent agreement.

On our side, we have been prepared to consider and vote on all of the circuit court nominations that are on the calendar now. I believe my Democratic colleagues, at this point, are prepared to vote on just one of these judges. Therefore, unless we can reach a consent agreement tomorrow, following the cloture vote in the morning on the pending Owen nomination, it will be my intention to proceed to the Prado nomination. And following disposition of the Prado nomination, it would be my expectation to proceed to the Cook nomination. I hope both of these nominations, which have received, by the way, bipartisan support, will be considered and confirmed this week.

I think at this point I will go ahead and put forth the unanimous consent request. And then we will have some comment and discussion about where we are.

Mr. President, I ask unanimous consent that on Thursday, at a time determined by the majority leader, after consultation with the Democratic leader, the Senate proceed to executive session and the consideration of calendar No. 105, the nomination of Edward Prado, of Texas, for the Fifth Circuit; further, that there be 3 hours for debate, equally divided between the chairman and ranking member or their designees; I further ask consent that following the use or yielding back of time, the Senate vote, without intervening action, on the confirmation of calendar No. 105; I further ask consent that following the vote, the President be immediately notified of the Senate's action.

I further ask unanimous consent that on Monday, May 5, at a time to be determined by the majority leader, after consultation with the Democratic leader, the Senate proceed to executive session for the consideration of calendar No. 34, the nomination of Deborah Cook, of Ohio, to be a U.S. circuit judge for the Sixth Circuit; provided further, that there be 4 hours for debate, equally divided between the chairman and ranking member or their designees; further, I ask consent that following the use or yielding back of that time, the Senate proceed to a vote on the confirmation of the nomination, again, with no intervening action or debate.

Finally, I ask unanimous consent that when the Judiciary Committee reports the Roberts nomination, it be in order for the majority leader to proceed to its consideration, and it be considered under a 2-hour time limitation, and that following that time, the Senate proceed to a vote on the confirmation, with no intervening action or debate.

The PRESIDING OFFICER. Is there objection?

The Senator from Nevada.

Mr. REID. Mr. President, reserving the right to object, I have, along with Senator DASCHLE, worked very hard on this request the majority leader has read into the RECORD. Senator MCCONNELL and the majority leader have also worked very hard. Over the years I have been involved in other matters where we have had very complicated, substantive issues we have been able to work out. I am very disappointed we

cannot work this out because this really does not compare to some of the difficult issues we have been able to resolve previously. But we have not been able to resolve this.

I am really disappointed for a number of reasons. It involves individual Senators who have also devoted a lot of time on this issue, both Democrats and Republicans. But if there were ever an effort in good faith by the two sides, this has been it.

I hope my objection, which I will enter in just a few moments, will not be the end of this. I hope we can, with a night's rest, work something out. For the last two nights we have come within a whisker of an agreement on these three judges. But in the Senate sometimes a whisker stops us, and it has done that.

So I reluctantly object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, I say to my friend from Nevada, I share his frustration. These are three nominations that are going to be approved, one of them probably unanimously. The assistant Democratic leader and I have wrestled around with this now for the last 2 days, and we find ourselves still not in a position to lock in a vote on Cook and Roberts.

So tomorrow is another day, and we will try again. But it is sort of an indication of where the Senate stands these days, that even in a situation where you have three judges we know are going to be confirmed, we have not been able to reach an agreement after 2 days' work to conclude the inevitable, which is confirmation of these three judges.

Hopefully tomorrow will bring better results.

I yield the floor.

The PRESIDING OFFICER. The majority leader.

Mr. FRIST. Mr. President, I am very hopeful we will be able to make progress. Again, the three Senators who are speaking now, with Senator DASCHLE, have been working very hard with our colleagues to try to reach an agreement. But we have been unsuccessful. We will keep moving ahead, and I am optimistic these three nominees will be confirmed shortly.

I do want to add, really for the benefit of my colleagues, that progress is being made. As my colleagues know, one of the nominees, Roberts, went back to committee, and the understanding was that with him going back to committee, we would have votes, up-or-down votes, on both Roberts and Cook. That is the background. We have been working on that for actually several weeks, and that process is underway. So we look forward to having that become a reality.

That first step, with Roberts going back to committee, was taken. And now the expectation is, and the general agreement is, we are moving in the direction that we will, at some point in time—we have not been able to lock in the time—have votes on both Roberts and Cook.

Mr. REID. Mr. President, if the majority leader will yield, I know the hour is late. I don't want to talk longer than necessary. I just want the record to be spread with the fact that we have a couple of Senators who have a different understanding as to what the majority leader and the minority leader and Senator MCCONNELL and I thought had been agreed to. Senator MCCONNELL was not on the floor; just the three of us thought it had been agreed to. There is an honest dispute as to a fact or two. This is just me speaking personally, not for my colleagues. I really think we should be able to work our way through this. It should not be as difficult as it is.

The Democratic leader and I acknowledge that the majority leader intervened right before the recess to get Roberts back for a hearing. We know that wasn't easy for him to do. We acknowledge that. We appreciate that. And we hope we can resolve this procedural quagmire. There certainly has been no bad faith by the leadership on the Republican side or the Democratic side.

Mr. FRIST. Mr. President, let me say, once again, that we will have a cloture vote on Owen tomorrow. And if cloture fails, we will go to Prado and, once Prado is completed, go to the Cook nomination. That will be the general plan.

MORNING BUSINESS

Mr. FRIST. Mr. President, I ask unanimous consent that the Senate proceed to a period for morning business.

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

NOMINATION OF PRISCILLA OWEN

Mr. KYL. Mr. President, I rise in morning business for a moment to speak about the nomination of Priscilla Owen of Texas to the Federal bench.

This is really an extraordinary nomination. It is very troubling to me that it appears most of our colleagues on the other side of the aisle are willing to keep Justice Owen from getting a vote. In the past, even with very controversial votes on Justices to the Supreme Court—and I have, for example, Justice Clarence Thomas in mind, and there was significant opposition to the confirming of Justice Thomas, primarily by Members of the other side of the aisle—the leaders of the Democratic Party understood that tradition called for a vote—probably knowing they would lose the vote. They, nevertheless, refused to support any kind of filibuster and they voted against Justice Thomas's confirmation. But he was confirmed 52–48.

I always respected the things they said at or about the time of that confirmation—that they would not ever support a filibuster, regardless of their particular feelings about the nominee. I thought that took courage, and I respected it, coming, as it did, from some of the key leaders of the Democratic side of the Senate. It confirmed to me that the tradition of the Senate relationship of comity we have with the President in dealing with his nominees, and the importance of our responsibilities with respect to confirming Justices of the Supreme Court and members of the Federal bench generally, is such that partisanship and tactical advantage could be laid to the side for the good of the country and these nominations could be voted on.

Now, there have been votes—sometimes—where the nominee lost. Most of the time, when votes are allowed to happen, the nominees prevail. But the new situation we have in this body, starting out with the President's nomination of Miguel Estrada—and now sadly, it seems, with the nomination of Priscilla Owen—we are going to require that unless 60 Members of the Senate agree to allow a vote, we don't get a vote. A filibuster, in other words, becomes the benchmark, the standard for confirmation of judges.

It has never been that way. There has only been one successful filibuster, and that was a very strange situation. There has never been a partisan filibuster in this body until now. It is especially remarkable because, in the case of Justice Owen, for example, one cannot claim, as has been claimed with regard to Miguel Estrada, that her record is unknown or unclear, or that there is more information that needs to be gleaned. She appeared not once but twice before the Judiciary Committee. The reason I wanted to take the floor briefly today is to say to my friends I don't think I have ever seen a nominee who handled herself or himself better than Justice Owen did at those hearings. She was forthcoming, brilliant in her exposition of the law, measured, and she clearly has the temperament to be a good judge.

She has been serving as a justice of the State Supreme Court of Texas. She has the support of another former justice of that court, Judge Gonzales, who obviously is now acting as the President's counsel, and the support of Democrats and Republicans alike.

The American Bar Association, as with Miguel Estrada, has recommended her for confirmation. She stayed at the hearing for as long as Members wanted her to stay. She answered all of the questions. So the same argument cannot be made that has been made about Miguel Estrada.

In fact, one of my colleagues on the other side of the aisle made it clear, in discussing the nomination of Miguel Estrada, that the only thing standing in the way of a vote—they would not necessarily commit to voting for him but at least allowing a vote on him—was producing this information which they say they want from the Justice