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# Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore (Mr. STEVENS).

## PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

God of grace and glory, open our eyes to the power You provide for all of our challenges. Give us a glimpse of Your ability to do what seems impossible, to exceed what we can request or imagine. Encourage us again with Your promise to never forsake us and to render ineffectual the weapons we face.

Strengthen the Members of this body in their efforts to do good, knowing that in due season You will bring a bountiful harvest. Sustain them during today's challenging labors. Give them more than human wisdom to solve the problems of these momentous times. Provide them with the insight to know what is right and the courage to do it. We pray in Your holy Name. Amen.

## PLEDGE OF ALLEGIANCE

The PRESIDENT pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

## RESERVATION OF LEADER TIME

The PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

## EXECUTIVE SESSION

### NOMINATION OF PRISCILLA RICHMAN OWEN TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT—Resumed

The PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session for the consideration of calendar No. 71, 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.

### RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The majority leader is recognized.

### SCHEDULE

Mr. FRIST. Mr. President, today we will resume executive session to consider Priscilla Owen to be a U.S. circuit court judge for the Fifth Circuit. We will continue the debate, as we did yesterday, by rotating back and forth between the aisle every 60 minutes. I think this orderly flow of debate will be helpful in terms of scheduling Members' speaking times. It worked well yesterday, and I would expect it to be orderly today as well. I know there is a large number of Senators who have indicated their desire to speak, and we will remain on the nomination to give everyone a chance to fully voice their concerns and their discussion on this very qualified nominee.

I am hopeful that at some point we will be able to schedule a vote on the nomination, and I will update Members later today on the upcoming schedule as it relates to the nomination of Priscilla Owen.

Mr. President, I will have a brief statement—the Democratic leader and I were just discussing our plans—and then he will have a statement, and then at that juncture I believe we will proceed as we set out the time schedule yesterday, alternating back and forth.

Mr. President, we did, yesterday, have a vibrant and spirited debate on the Senate floor. We have been debating a very simple principle—one based on fairness and one grounded in the Constitution. The principle is that judicial nominees, with the support of a majority of Senators, deserve a fair up-or-down vote on the floor of the Senate.

Yesterday, 21 Senators—evenly divided, I believe 11 Republicans and 10 Democrats—debated for over 10 hours on the nomination of Priscilla Owen. We will continue that debate—10 hours yesterday—maybe 20 hours, maybe 30 hours, and we will take as long as it takes for Senators to express their views on this qualified nominee.

But at some point that debate should end and there should be a vote. It makes sense: up or down, ''yes'' or ''no,'' confirm or reject; and then we move on in regular order.

Senators can vote to confirm or reject a nominee. But we should fulfill our constitutional responsibility to give advice and consent by voting up or down.

The nominee before us is Priscilla Owen, a Texas Supreme Court justice nominated to serve on the Fifth Circuit Court of Appeals. I have studied her record. I have had the opportunity to meet with her personally. I believe she would serve our Nation well as a circuit court judge.

Her academic and professional qualifications are outstanding. She graduated near the top of her class in law school, and she once achieved the highest score in the State of Texas on the bar exam. The American Bar Association unanimously rated her ''well qualified,'' its highest possible rating.

Her opponents suggest she is a judicial activist who is out of the mainstream. Her record simply shows that is not true. She was reelected by 84 percent of Texans. Are 84 percent of Texans really out of the mainstream? She is supported by Republicans and Democrats on the Texas Supreme Court. She has been endorsed by every major newspaper in her home State.

That is a mainstream record.

In her judicial decisions, some on the floor over the last day, and actually last week as well, have criticized her as a judicial activist in cases, and the focus has always been on these cases involving a parental notification law.

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

The law is not about whether a minor is able to have an abortion or whether a minor must receive parental consent before having an abortion. The law simply requires a parent to be notified if their child is having an abortion, except in certain circumstances.

The author of the law, and 26 other members of the Texas legislature, have defended Justice Owen's opinions, and it is spelled out clearly in a letter of May 16, 2005, that is signed by the author of the legislation itself and 26 other members of the Texas legislature.

The letter is interesting. It is a letter dated May 16, and it is a letter that was sent to Senator SPECTER, of the Judiciary Committee, and Senator LEAHY. The letter is indeed quite powerful. I would like to read just a couple sections from the letter.

Mr. President, I ask unanimous consent that following my remarks the entire letter be printed in the RECORD.

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

(See Exhibit 1.)

Mr. FRIST. The letter reads pretty clearly: ''Dear Chairman SPECTER''—and there was a copy sent to Senator LEAHY. This is from the author of the legislation of which these accusations of judicial activism have been floating around on the floor. These are the authors, the people who wrote—who wrote—the legislation. I quote from the letter:

I, along with my colleagues in the Texas Senate and Texas House of Representatives, am writing to express my full and unconditional support for Justice Priscilla Owen's nomination to the U.S. Court of Appeals for the Fifth Circuit. As the author of the Texas Parental Notification Act, I followed closely the Texas State Supreme Court rulings regarding that statute. As such, we are disturbed by the recent attacks on Justice Owen's review of the Texas Parental Notification Act. Justice Owen's opponents have characterized her as an activist member of the bench, and nothing could be further from the truth.

The letter continues:

To the contrary, her opinions interpreting the Texas Parental Notification Act serve as prime examples of her judicial restraint.

Mr. President, I will have my colleagues read the remainder of the letter. It goes on and gives examples in explaining that statement. And then, down in the following paragraph, I quote:

Throughout the series of cases, Justice Owen's interpretation of legislative intent were based on careful reading of the new statute and the governing U.S. Supreme Court precedent.

This is the final sentence of the letter:

In short, Justice Owen's academic and professional qualifications are beyond question. We strongly urge Senators to vote positively on her nomination.

Again, it is signed by the author, Florence Shapiro, and, again, 26 others from the house of representatives and senate in Texas.

In addition, a pro-choice Democratic law professor also has defended Justice Owen. This professor, Linda Eads, is a member of the Texas Supreme Court Advisory Committee that drafted rules to help judges deciding cases under this law, the parental notification law. She says Justice Owen's decisions ''do not demonstrate judicial activism. She did what good appellate judges do every day . . . if this is activism, then any judicial interpretation of a statute's terms is judicial activism.''

If you look fairly at Justice Owen's record, you will see a well-qualified, mainstream judge.

But I will say, as we step back and look at the larger debate, some Senators may draw different conclusions about Justice Owen, and they may decide she does not deserve confirmation. Indeed, they may decide that none of the President's nominees deserve confirmation. And they, as Senators, are entitled to that choice. But they should express that choice, give that advice and consent by a vote, an up-or-down vote, ''yes'' or ''no,'' confirm or reject. They should not hide behind a procedure that prevents 100 Senators from their responsibility, their duty to vote ''yes'' or ''no'' on the nominee, up or down.

As everyone knows, I have advocated fair up-or-down votes for judicial nominees again and again and again and will continue to do so. In the past, some of our colleagues on the other side of the aisle have shared this view. Many of them have argued forcefully and eloquently for up-or-down votes on judicial nominees. Let me share some of their arguments with you.

One Senator on the other side of the aisle, in opposition to giving up-or-down votes today, said:

[E]veryone who is nominated ought to have a hearing and to have a shot to be heard on the floor and have a vote on the floor.

Another Democratic Senator said:

A nominee is entitled to a vote. Vote them up; vote them down. . . . If there are things in their background, in their abilities that don't pass muster, vote no. Our institutional integrity requires an up-or-down vote.

Another Democratic Senator noted that:

According to the U.S. Constitution, the President nominates, and the Senate shall provide advice and consent. It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor.

These are all arguments from my Democratic colleagues in years past. These quotes capture what this debate today is all about. It is about fairness. It is about principle. It is about the constitutional duty of every Senator. The Senate must do what is right. We must do what is fair. We must do the job the American people elected us to do.

So let us continue to debate. Let Senators exercise their right to speak. We may not agree. We will not agree on every judicial nominee, but we can agree on the principle that every qualified judicial nominee deserves an up-or-down vote.

I yield the floor.

EXHIBIT 1

TEXAS STATE SENATE, DISTRICT 8,
*Plano, Texas, May 16, 2005.*

Hon. Chairman ARLEN SPECTER,
*Committee on the Judiciary, U.S. Senate, Russell Senate Office Bldg., Washington, DC.*

DEAR CHAIRMAN SPECTER: I, along with my colleagues in the Texas Senate and Texas House of Representatives, am writing to express my full and unconditional support for Justice Priscilla Owen's nomination to the U.S. Court of Appeals for the Fifth Circuit. As the author of the Texas Parental Notification Act (SB 30/HB 623), I followed closely the Texas State Supreme Court rulings regarding that statute. As such, we are disturbed by the recent attacks on Justice Owen's review of the Texas Parental Notification Act. Justice Owen's opponents have characterized her as an activist member of the bench, and nothing could be further from the truth.

To the contrary, her opinions interpreting the Texas Parental Notification Act serve as prime examples of her judicial restraint. Although some might try to hold up the Texas Parental Notification Act as a litmus test on abortion, they simply cannot make the case. The Act is not about whether a minor is able to have an abortion or must receive parental consent, but whether a parent should be notified. The Act recognizes that a girl may have an abortion and does not question whether the Constitution guarantees that right.

Throughout the series of cases, Justice Owen's interpretations of legislative intent were based on careful reading of the new statute and the governing U.S. Supreme Court precedent. For example, Justice Owen's opinion that a 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.'' This opinion is consistent with prior U.S. Supreme Court precedent stating: ''The waiting period, for example, may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family'' (Planned Parenthood v. Casey).

In short, Justice Owen's academic and professional qualifications are beyond question. We strongly urge Senators to vote positively on her nomination.

Very truly yours,

Sen. FLORENCE SHAPIRO,
*President Pro Tempore.*

Sen. Chris Harris; Sen. Jane Nelson; Rep. Brian McCall; Rep. Harvey Hilderbran; Rep. Suzanna Gratia Hupp; Rep. Betty Brown; Rep. Robert E. Talton; Rep. Kent Grusendorf; Rep. Gary Elkins; Rep. Edmund Kuempel; Rep. Joe Crabb; Rep. Leo Berman; Rep. Mike Krusee; Rep. Dianne White Delisi; Rep. Joe L. Driver; Rep. Frank J. Corte, Jr.; Rep. Fred Brown; Rep. Peggy Hamric; Rep. Joe Nixon; Rep. Mary Denny; Rep. Elvira Reyna; Rep. Geanie Morrison; Rep. Eugene Seaman; Rep. Anna Mowery; Rep. Richard L. Hardcastle; and Rep. Ray Allen.

RECOGNITION OF THE MINORITY LEADER

The PRESIDENT pro tempore. The Democratic leader is recognized.

Mr. REID. It is my understanding that we go to the debate on Judge Owen at what time?

The PRESIDENT pro tempore. We are on debate now.

Mr. REID. I ask unanimous consent that the time of the two leaders not

take away from the debate that will begin at 9:45. What I am saying is, whatever time we use, the debate should start immediately after our time, the incremental time.

The PRESIDENT pro tempore. The leader time is reserved. The Senator is entitled to take it. The controlled time does not begin until 10 a.m.

Mr. REID. I realize that. I would like to reserve my time and use this time to speak on the matter now before the Senate.

The PRESIDENT pro tempore. The time between now and 10 a.m. is not controlled.

Mr. REID. Just so I understand, it was my understanding the debate on Priscilla Owen was supposed to start at quarter to 10.

The PRESIDENT pro tempore. It is to start at 10 o'clock.

Mr. REID. I misunderstood. I apologize, Mr. President.

(Mr. VITTER assumed the Chair.)

Mr. REID. Mr. President, I have addressed the Senate on several occasions to do what I believe is setting the record straight about Senate history and the rules of this body. But, frankly, I would much rather address wage and health care costs, bringing down gas prices, talk about education, spiraling deficits we have. But the majority leader has decided we will spend this week and next week, or at least part of next week, talking about judges who I believe, Mr. President, are not in the mainstream of American jurisprudence.

I am happy to engage in this debate. I would rather not. But I do want the debate to be accurate. For example, my good friend, the distinguished Republican leader, issued a statement last Friday in which he called the filibuster a ''procedural gimmick.'' I took time yesterday to correct that assertion, setting forth in the RECORD what the word ''gimmick'' means. The dictionary defines it as a scheme, a new scheme. I indicated that certainly the filibuster was everything but that. It is not a gimmick. It has been part of the Nation's history for two centuries. It is one of the vital checks and balances established by our visionary Founding Fathers. It is not a gimmick.

Also, some Republicans have stated improperly the use of the filibuster. They have said time and time again that the defeat of a handful of President Bush's judicial nominees is unprecedented. In fact, hundreds of judicial nominees in American history have been rejected by the Senate, many by filibuster.

There was, of course, the most notable, the nomination of Abe Fortas, to be Chief Justice of the United States. He was successfully filibustered in 1968. Here, Mr. President, is a Washington Post which I read in the morning when I come in. It is from many years ago. The first sentence:

A full-dress Republican-led filibuster broke out in the Senate yesterday against a motion to call up the nomination of Justice Abe Fortas for Chief Justice of the United States.

''A full-dress Republican-led filibuster.'' We have had filibusters. That is what has been disappointing to me with some of my colleagues in saying there has not been a filibuster. There has been. During the Clinton administration, more than 60 judicial nominees were bottled up in the Judiciary Committee and never received floor votes. Of course, as indicated by my distinguished friend, the Republican leader, during that period of time Democrats were complaining about what was going on, saying there should have been hearings in the Senate, and even came to the floor—and these were accurate quotes of the majority leader—saying: Let's have some votes, let's have some votes on these people.

Well, Mr. President, we never said we would break the rules to change the rules. To change the rules in the Senate can't be done by a simple majority. It can only be done if there is extended debate by 67 votes. So I do not at all say that the statements made by the Republican leader were wrong about our wanting votes and we were disturbed that there are no votes, but we never, ever suggested that rules should be broken.

But in addition to the pocket filibusters—call them whatever you want—the 60, I think 69 nominations never made it out of the Russell Building, out of the Judiciary Committee, but in addition to those performances, Republicans engaged in explicit filibusters on the floor against a number of Clinton judges when they did get out of committee, and they defeated a number of President Clinton's executive branch nominees by filibuster.

It is the same advice and consent clause. Why, if a filibuster of Surgeon General Henry Foster was constitutional, is a Democratic filibuster of Fifth Circuit Court nominee Priscilla Owen unconstitutional? If Foster is constitutional, why wouldn't the same apply to Priscilla Owen? The Republican argument doesn't add up.

But I would say this to my friend, the Presiding Officer. I have said let's not dwell on what went on in the Clinton administration. Let's not dwell on what went on in the 4 years of President Bush's administration. I am sure there is plenty of blame to go around. As we look back, I am not sure—and it is difficult to say this, but I say it—I am not sure either was handled properly. I have known it wasn't right to simply bury 69 nominations, and in hindsight maybe we could have done these 10 a little differently. But the American people are tired of what we are doing, tired of the constant fighting going on. What is going to take place if this continues?

We will have a vote sometime next week. It will be a close vote, of course, We only need six Republicans. The Presiding Officer was formerly chairman of the powerful Appropriations Committee. It is very difficult at best to get appropriations bills passed. Most everything around here is done by unanimous consent. Things won't work as well as they could have. We need to avoid this. We are all legislators.

But, sadly, now the President of the United States has joined the fray and become the latest to rewrite the Constitution and reinvent reality. Speaking to fellow Republicans on Tuesday night, 2 days ago, he said the Senate ''has a duty to promptly consider each . . . nominee on the Senate floor, discuss and debate their qualifications and then give them the up-or-down vote they deserve.'' Every one of the 10 he speaks of had votes, every one of them. Right here on the Senate floor, people walked down to these tables and their name was called and they voted.

Referring to the President's words, duty to whom? The radical right who see within their reach the destruction of America's mainstream values. Certainly not duty to the tenets of our Constitution or to the American people who are waiting for progress and promise, not partisanship and petty debates.

The duties of the Senate are set forth in the U.S. Constitution. Nowhere in that document does it say the Senate has a duty to give Presidential appointees a vote. It says appointments shall be made with the advice and consent of the Senate. That is very different than saying every nominee receives a vote. I repeat, all of these about which we are concerned, including Priscilla Owen, have had a vote, right here. The fact was even acknowledged by the majority leader that a vote is not required. Senator BYRD asked the majority leader—Senator BYRD was here, the majority leader was here—last week, he asked the majority leader if the Constitution accorded each nominee an up-or-down vote on the Senate floor. The answer was no. Senator FRIST was candid. The answer was no. The language was not there, Senator FRIST said. He is correct. Senators should read the same copy of the Constitution Senator FRIST had memorized.

It is clear that the President misunderstands the meaning of the advice and consent clause. The word ''advice'' means advice. President Clinton consulted extensively with then Judiciary Chairman HATCH, and as a result of that we debated Ginsburg and Stephen Breyer to the Supreme Court, both fine minds, fine justices. In contrast, this President never sought or heeded advice of the Senate. Now he demands our consent.

That is not how America works. The Senate is not a rubber stamp for the executive branch. Rather, we are the one institution where the minority has the voice and ability to check the power of the majority. Today, in the face of President Bush's power grab, it is more important than ever. Republicans want one-party rule. The Senate is the last place where the President and Republicans can't have it all. Now the President wants to destroy our checks and balances to assure that he does get it all.

That check on his power is the right to extended debate. Every Senator can stand on behalf of the people who have sent them here and say their piece. In the Senate's 200-plus years of history, this has been done hundreds and hundreds of times—stand up to popular Presidents, to unpopular Presidents, arrogant with power, to block legislation harmful to American workers in the eyes of the Senator, and, yes, even to reject Presidential nominations, even judicial nominations.

Who are the nominees now before this Senate?

Priscilla Owen is a Texas Supreme Court justice nominated to the Fifth Circuit. She sides with big business and corporate interests against workers and consumers in case after case regardless of what the law is. Her colleagues on the conservative Texas court have written that she legislates from the bench. Her own colleagues have called her opinions ''nothing more than inflammatory rhetoric,'' her interpretation of the law to be ''misconceptions,'' and those are quotes, and even rebuked her for second-guessing the legislature on vital pieces of legislation. If she wanted to legislate, she should run for Congress. If she wants to interpret and uphold the law, she should be a judge. She cannot do both. And I might note that the Attorney General of the United States has called her activism unconscionable.

I read to the Senate yesterday what that word means. Unconscionable. It, Mr. President, means that her acts are out of the mainstream for sure. Let me flip open my dictionary here. ''Unconscionable.'' ''Shockingly unjust'' and ''unscrupulous.'' That is what the Attorney General of the United States said about Priscilla Owen. I repeat: ''shockingly unjust, unscrupulous.'' He served with her on the supreme court. He should know.

In case after case, her record marks her as a judge willing to make law from the bench rather than follow the language of the legislature judicial precedent. She has demonstrated this tendency most clearly in a series of dissents involving a Texas law providing for a judicial bypass of parental notification requirements for minors seeking abortion. She sought to erect barriers that did not exist in law such as requiring religious counseling for minors. Good idea, perhaps, but not something that you do from the bench. It should be done by the legislature.

Janice Rogers Brown, a supreme court justice from California, nominated to the DC Circuit, is using her seat on the bench to wage an ideological war against America's social safety net. She wants to take America back to the 19th century and undo the New Deal which includes Social Security and vital protections for working Americans like the minimum wage. Every Senator in this body should tell the more than 10 million working Americans already living in poverty on the minimum wage why someone who wants to make their life harder and destroy their hopes and dreams should be elevated for a lifetime to one of most powerful courts in the country. She has been nominated to a court that overseas the actions of Federal agencies responsible for worker protections, environmental laws and civil rights and consumer protection. She has made no secret of her disdain for Government. According to Justice Brown, Government destroys families, takes property, is the cause of a ''debased, debauched culture,'' and threatens civilization. That is her statement.

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

Mr. REID. I would be happy to yield for a question.

Mr. SCHUMER. I thank my colleague. I think my colleague was in the Chamber yesterday when Senator FRIST first rose to speak and talked about the 214 years of tradition of not doing filibusters of judges. I asked him about his vote on March 8, 2000, 5:51 p.m. He voted to filibuster Judge Paez. In fact, it was clearly a filibuster. The statement of the leader of that filibuster, who was Senator Smith, our former colleague from New Hampshire, is obvious. The Senator ''led a filibuster yesterday on the nomination of Richard Paez.'' You may remember that Senator FRIST said he would return to the floor yesterday and answer how he could distinguish between saying there is a grand tradition in the Senate of no filibuster, but he participated in one. Just 5 years ago. My colleague was on the floor—I was not—earlier this morning. I had hoped to get here when Senator FRIST spoke. I would just ask my colleague, did he hear any answer to that question which Senator FRIST has promised?

Mr. REID. I say through the Chair to my friend, I was present and participated in attempting to break the filibuster of Paez. I know how the distinguished Republican leader voted. I was here this morning, and I heard no answer to the question asked by the Senator from New York.

Mr. SCHUMER. So it would be fair to say that he has still not answered the question, even though he said yesterday that he would come back and answer it.

Mr. REID. He has not done that publicly. That is correct.

Mr. SCHUMER. I thank my colleague for yielding for a question.

Mr. REID. Justice Brown received a ''not qualified'' rating from the California judicial commission when she was nominated for the Supreme Court of California because of her tendency to inject her political and philosophical views into her opinions and complaints that she was insensitive to established legal precedent.

Speaking recently at church on ''Justice Sunday,'' Justice Brown proclaimed a ''war'' between religious people and the rest of America. Imagine that. Is this someone we want protecting the constitutional doctrine of the separation of church and state or freedom for all Americans to practice religion?

She has expanded the rights of corporations at the expense of individuals—arguing to give corporations more leeway against attempts to prevent consumer fraud—some of these things make you smile—to stop the sale of cigarettes to minors, to prevent discrimination against women and individuals. She may be the daughter of a sharecropper, but she has never looked back to ensure legal rights of millions of Americans still fighting to build better lives for their children and their children's children. They may not be sharecroppers, but they live like sharecroppers, and she has done nothing to protect them.

These are the nominees over which the Republican leadership is waging this fight, and they are prepared to destroy the Senate that has existed for 200 years to do so.

The Senate is a body of moderation. While the House is the voice of a single man, single woman, and the House of Representatives is a voice of the majority, the Senate is the forum of the States. It is the saucer that cools the coffee. It is the world's greatest deliberative body. How will we call this the world's greatest deliberative body after the majority breaks the rules to silence the minority? Breaking the rules to change the rules. This vision of our Government—the vision of our Founding Fathers—no longer suits President Bush and the Republicans in the Senate. They don't want consensus or compromise. They don't want advice and consent. They want absolute power.

To get it, the President and majority leader will do all they can to silence the minority in the Senate and remove the last check we have in Washington against this abuse of power. The White House is trying to grab power over two separate branches of government—Congress and the judiciary. They are enlisting the help of the Republican Senate leadership to do it. Republicans are demanding a power no President has ever had, and they are willing to break the rules to do it.

Make no mistake. This is about more than breaking the rules of the Senate or the future of seven radical judges. At the end of day, this is about the rights and freedoms of millions of Americans. The attempt to do away with the filibuster is nothing short of clearing the trees for the confirmation of an unacceptable nominee to the Supreme Court. If the majority gets its way, President Bush and the far, far right will have the sole power to put whoever they want on the Supreme Court—Pat Robertson, Phyllis Schlafly. They don't want someone who represents the values of all Americans, someone who can win bipartisan consensus. They want someone who can skate through with only a bare partisan majority, someone whose beliefs are on the fringes of our society. Nobody will be able to stop them from

placing these people on the highest court of the land—extremist judges who won't protect our rights and who hold values far outside the mainstream of America.

Here is what is really at stake: The civil rights of millions of Americans; voting rights of millions of Americans; the right to clean water to drink and safe air to breathe for millions of Americans; the right to free speech and religious briefs for millions of Americans; the right to equality, opportunity, and justice for millions of Americans; nothing less than the individual rights and liberties of all Americans.

It is up to us to say no to the abuse of power, to stand up for the Constitution. We need people who have the ability to be profiles in courage. Let the President and the Republican Party know that the Supreme Court is not theirs to claim.

The debate all comes down to this: Will we let George Bush turn the Senate into a rubber stamp to fill the Supreme Court with people from the extreme right's wish list, or will we uphold the Constitution's use of advice and consent powers to free the President to be like other Presidents have been, to force the President to look at the mainstream? I hope it is the latter. I know that is what my fellow Democrats and I will fight for, and I hope there are at least six responsible Republicans who will stand up and have the courage to join in this momentous battle.

Will the Chair advise me as to what the order is now for debate to go forward on the nomination?

The PRESIDING OFFICER. The time on the minority side has now expired, and the time from now until approximately 10:45 is under the control of the majority leader or his designee.

Mr. REID. And then after that, we will go an hourly basis.

The PRESIDING OFFICER. That is correct.

Mr. REID. I hope I didn't inconvenience the majority with taking too much time. If I did, we will try to readjust it later.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mrs. HUTCHISON. Mr. President, I am pleased the debate on Priscilla Owen is beginning to give her side of the story. We are finally getting past the sweeping mischaracterizations about her that have been put forward in the news media for years by interest groups—those who say she is outside the mainstream, or she is an extremist. But now on the floor of the Senate we are getting down to specifics.

Every single time we have been able to examine a specific criticism of a particular opinion by Justice Owen, that criticism has been clearly and decisively refuted. Justice Owen is a careful and thoughtful jurist. She is an extremely talented intellect. She uses her ability to read every statute and enforce it fairly. She is the very model of a judge who interprets the law and does not legislate on the bench.

Let's get to the heart of the matter. One of the major criticisms of Justice Owen is her effort to interpret a 1999 law passed by the Texas State legislature requiring parental notification before a minor can obtain an abortion. Most of the groups opposing Justice Owen strenuously opposed passage of that law in the first place. But the Texas legislature did approve a parental notification requirement with a strong bipartisan majority, favoring it in both the Texas House and Senate. The House was controlled by Democrats at the time, and it required any minor seeking an abortion to notify at least one parent, or receive permission from a judge to bypass that step. It was later up to the supreme court to interpret that bill.

The law did not provide clear direction to the justices on several key points. We are talking about 13 cases that came to the supreme court for review. As sometimes occurs, the court was divided in how to interpret the law, particularly the portion allowing a minor to bypass parental notification by going to court. Some justices—a majority—looked to other States on how their courts interpreted their parental notification statutes, even though those States that had different laws and different legislative histories. Other justices, including Justice Owen, looked first at the intent of the Texas legislature. She then looked to rulings of the U.S. Supreme Court. She reasoned, correctly, that the legislature had attempted to fashion the law to conform with Supreme Court rulings.

Still other justices, I should add, took a different approach to analyze the bypass provision and, in some cases, they would have required greater restrictions on use of the judicial bypass than Justice Owen would have imposed. One of Justice Owen's colleagues on the supreme court at that time was Alberto Gonzales, now the U.S. Attorney General. The opposition to Justice Owen rests much of its case on a single phrase in one of then Justice Gonzales's opinions in which he referred to judicial activism.

He later, and under oath, clarified what he was talking about. He said:

''My comment about an act of judicial activism was not focused at Judge Owen or Judge Hecht; it was actually focused at me.''

This is a tragically misleading statement to be used against Justice Owen. First, judges disagree. That is why we have a nine-member court. They argue with each other. They accuse each other of misreading the statutes. That is exactly the way it goes in many opinions. In fact, every member of the Texas Supreme Court was accused by one justice or another of judicial activism during the course of their service on the court.

Attorney General Gonzales has testified under oath that he was not referring to Justice Owen's opinion when he wrote the offending phrase. He said he was referring to himself. That by itself should dispose of the matter. Elsewhere in the same opinion, Justice Gonzales wrote another sentence. Curiously, that sentence is never cited by opponents of Justice Owen.

Let me quote what Justice Gonzales wrote:

> Every member of this court agrees that the duty of a judge is to follow the law as written by the legislature.

In other words, he specifically stated that none of the nine justices on the Texas Supreme Court is a judicial activist.

Finally, let me point out that Justice Gonzales was White House counsel when President Bush nominated Justice Owen for the Fifth Circuit in 2001. In other words, General Gonzales was in charge of the process that produced Justice Owen's nomination. Does anybody seriously believe he would select a nominee for this position if he thought she were a judicial activist?

I want to look at the 13 cases from a statistical standpoint. Justice Owen is solidly in the mainstream of her court. In these 13 rulings, Justice Owen was in the majority 10 times and found herself in dissent only on 3 occasions. She disagreed with the majority decision three times. In those 13 cases, the Texas Supreme Court required notification 6 times and facilitated a judicial bypass 7 times. So Justice Owen voted to require parental notification in nine cases and to facilitate the judicial bypass in four. Remember, no case on judicial bypass reached the Texas Supreme Court at all unless it had first been denied by two courts and by up to four judges. This is important, because under our system, the trial court is charged with ascertaining the facts in a case. In other words, Justice Owen is being faulted for being more willing to defer to trial court findings of fact because she knows trial judges have the unique ability to assess a witness's demeanor and credibility.

Now, was Justice Owen's approach in the mainstream? Earlier this week, the Senate was visited by a group of six Texans. They represent diverse views, but they came to Washington to support Justice Owen and asked for fair treatment of her. They included Tom Phillips, who was Chief Justice of the Texas Supreme Court for most of the time Justice Owen had served. It included Elizabeth Whitaker, past president of the State Bar of Texas—one of 15 past State bar presidents, Republicans and Democrats, who are supporting Justice Owen's nomination.

In the group was Linda Eads, a former assistant State attorney general, who is now a professor at the Southern Methodist University School of Law. She specializes in constitutional law. Linda Eads describes herself as strongly pro-choice. She also said she disagreed with Justice Owen on parental bypass. But she emphasized that Justice Owen's judicial approach to

these cases was thoughtful and rational. She said it was easily within the respectable judicial mainstream on interpreting legislation. She ended by saying she strongly supports the confirmation of Priscilla Owen.

Finally, I want to talk about the intent of the Texas Legislature. I served in that legislature for two terms, years ago. I know most of the members of the Texas House and Senate.

It is interesting to me that opponents of Justice Owen accuse her of misreading legislative intent by requiring more parental involvement than the legislators intended. I believe the opposite might well be true. In fact, the legislature is currently in the process of discussing a new law that would strengthen parental involvement and require parental consent, not parental notification. That bill has passed the Texas House and the Texas Senate. It is now in a conference committee.

Justice Owen is highly respected in Texas. Allow me to quote from a letter sent by Senator Florence Shapiro, the chief sponsor of the parental notification act approved by the legislature in 1999. She says:

As a Senator in the Texas Legislature, the manner in which the Texas courts review and interpret our laws is extremely important to me. Justice Owen's opinions consistently demonstrate that she faithfully interprets the law as it is written, and as the Legislature intended, not based on her subjective idea of what the law should be. I am saddened to see that partisan and extremist opponents of Justice Owen's nomination have attempted to portray her as an activist judge, as nothing could be further from the truth.

Her opinions interpreting the Texas Parental Notification act serve as prime examples of her judicial restraint . . . I appreciated that Justice Owen's opinions throughout the series of cases looked carefully at the new statute and at the governing U.S. Supreme Court precedent upon which the language of the statute was based, to detennine what the Legislature intended the Act to do.

I, along with many of my colleagues—Democrats and Republicans alike—filed a bipartisan amicus curiae brief with the Texas Supreme Court explaining that the language of the Act was crafted in order to promote, except in very limited circumstances, parental involvement.

Prior to the passage of the Act, a child could go to a doctor and have an extremely invasive procedure without even notifying one of her parents. At the same time, school nurses were not even permitted to give aspirin to a child without parental consent. Like legislators in dozens of states across America, we realized that something needed to be done to respect the role of parents—that at least one parent should be involved in a major medical decision impacting their minor daughter.

Because this was not an ''abortion'' bill but a ''parental involvement'' bill supported by lawmakers on both sides of the abortion debate, we were able to pass a bipartisan law that promotes the relationship between parents and their minor daughters and is exceedingly popular with the people of Texas.

Justice Owen is the kind of judge that the people of the 5th Circuit need on the bench—an experienced jurist who follows the law and uses common sense. I strongly urge the committee to reject the politics of personal destruction pushed by Justice Owen's extremist critics and vote positively on her nomination. She merits immediate confirmation.

That is a letter from State Senator Florence Shapiro.

Let's be clear about what is going on here. A number of interest groups fought against legislative enactment of the parental notification law. They lost. Now they are trying to undercut a judge who, as honestly and fairly as she could, attempted to interpret that law. They are entitled to their opinion. They should vote their convictions. Priscilla Owen deserves an up-or-down vote on her nomination to the Fifth Circuit.

I want to respond to the distinguished Democratic leader, who this morning said that Owen and 10 other nominees have all received votes in the Senate. Senator REID left out one important detail, and that is—if she had gotten a confirmation vote on the floor of the U.S. Senate, Justice Owen would be sitting on the Fifth Circuit today. Indeed, this Senate has taken four cloture votes on Priscilla Owen, and each time she has received more than a majority—the standard for confirmation in the Senate—until the Congress of 2 years ago.

She would be confirmed by the Senate. Senator REID is correct that nominees have received cloture votes, in an attempt to override filibusters. But requiring a 60-vote threshold to proceed to confirmation is not the Senate's practice. Justice Owen continues to wait patiently for the Senate to confirm her; she has been waiting for four years.

The Senate Republicans have asked the minority to allow the Senate to vote, but they have refused and continue to vote no on cloture, thereby changing the Constitution without going through the process of a constitutional amendment.

When the Constitution requires a supermajority, it is explicit. Just before the advise and consent part of the Constitution, it does have a standard of a two-thirds vote, but that was not put in the article on confirmation of judges. The clear constitutional interpretation is that if a supermajority is required, it is stated in the Constitution. And for over 200 years, this body has recognized that and has made a majority vote the standard until the last session of the Senate.

It is disingenuous for the other side to suggest that these 10 nominees have had votes because if they had, they would be sitting on the benches for which they were nominated. But instead, Priscilla Owen, after being confirmed by the Senate four times, is back again.

I think we can do better. I think we can acknowledge the Constitution and acknowledge that if we are going to amend the Constitution, the Senate should start the process of a constitutional amendment. The Constitution is clear that a majority vote is required, and that has been the standard for over 200 years in the Senate until the last session of Congress.

I hope Priscilla Owen will get an up-or-down vote, because if she does, the tradition of the Senate and our respect for the Constitution will be clear. Again, if they want to change it, perhaps they should go about it in the right way, and introduce a constitutional amendment to require a supermajority for confirmation of judges.

I think the Founding Fathers were geniuses and knew a balance of power had to be delicate among the three branches of Government. They envisioned a President appointing circuit court judges with the Senate having the authority to confirm or reject them with a simple majority vote. The balance of power in our Constitution has kept our country strong and has been the anchor for our democracy.

Priscilla Owen is a wonderful human being who has been demonized for 4 years. She has already displayed her judicial temperament by not responding to the unfair criticisms, by showing no bitterness, and by harboring no anger. But she is a human being, a good person, and she deserves an up-or-down vote. When she gets an up-or-down vote, she will be confirmed and become a brilliant member of the Fifth Circuit Court of Appeals.

I hope the Senate is on the brink of doing the right thing by these nominees, by acting as the lofty body it is, can be, and should be. I hope we will treat everyone who comes before us with respect. I do not think that has been the case for this very fine supreme court justice for the State of Texas. I hope that is going to change. I hope we will treat her as she should be treated. I hope she will get her up-or-down vote which will show that her 4 years of patience have allowed us to do the right thing and she will be able to serve our country in a way that I know she will make all of us proud.

I thank the Chair, and I yield the floor.

The PRESIDING OFFICER (Mr. ISAKSON). The Senator from Louisiana.

Mr. VITTER. I thank the Chair.

Mr. President, in recent weeks, the American people, including the citizens of Louisiana, have heard a lot about Senate rules, about historical precedent, about something very confusing called the filibuster, about the Senate's constitutional duty, and advice and consent. I think for the average American, for the average Louisianan, this seems pretty esoteric. This seems pretty out of touch with their everyday lives, this issue of how the Senate governs itself.

But there are issues at the heart of this which are important to those citizens, including my constituents in Louisiana. And those issues are: Is the Senate going to do its job? Are we as Senators going to do our job and do the people's business, address important issues of the day to build up our country and make it better?

Also, there is the fundamental issue of fairness. Are we going to be fair in this process to all concerned?

Those are themes, those are issues to which Americans all across the country, certainly my citizens in Louisiana relate and care about. Are we going to do the people's business? Are we going to act in a way that is fair to all? Those are issues directly at the heart of this debate—doing the people's business.

Last year, I ran for the Senate for the first time. In doing so, of course, I traveled all around Louisiana and talked to citizens of all walks of life in every corner of the State. One theme I heard over and over from all sorts of folks of both parties was: Please go up there and do what is right and do the people's business. Get beyond all of this bitter partisanship, this obstructionism, the filibuster. Do the people's business in terms of important issues of the day. That is what folks in Louisiana told me over and over again.

They care about putting good people on the bench and having our courts run properly and filling these vacancies. They also care about other important business—passing a highway bill, building infrastructure so we can create good jobs in this country and Louisiana, passing a national energy policy to get us on track in terms of energy independence. That is important for our national security, and that is important for our economic security.

Again, wherever I went, with whomever I talked—Black, White, Democrat, Republican, and everyone in between—folks said over and over: Look, we are sending you there to do our business, to face issues, to vote, to move forward as a country, not to obstruct, not to play political games, not to get mired in bitter partisanship, but to take care of us and to address our concerns. And that is important.

The other issue that is at the heart of this debate that ordinary citizens around the country and Louisiana care about is fairness. Are you going to act in a way that is fundamentally fair to everybody concerned? And, of course, that is at issue here as well.

We have judicial nominees who have been nominated not weeks ago or months ago but, in many cases, years ago; in some cases, over 4 years ago. Their lives have been disrupted. They have been attacked by interest groups around the country, as well as Members of Congress. Many charges have been leveled against them that are patently untrue and patently unfair. And after all of that turmoil, after all of those trials and tribulations, they do not even get an up-or-down vote on the floor of the Senate. There is no resolution to the trial, the jury never comes back. We do not get to vote and say this person should be on the court or this person should not be on the court. That is not fair. That is not fair in the minds of any ordinary American. It is not fair in the minds of the citizens of Louisiana.

We need to bring some fundamental fairness to this process. Sure, we need to have an important debate. Sure, we need to vet all the information. We can have differences of opinion. But then at the end of the day, we need to have resolution, we need to have an up-or-down vote. It is time to do that with all of these judicial nominees.

We have a historic opportunity in the Senate right now to address both of those concerns: to do the people's business, to do our job, to vote, and to move on to other key issues, such as the highway bill, building jobs, building energy independence—and we have the opportunity to act honorably and with fundamental fairness by treating all concerned in a fundamentally fair way in giving these nominees an up-or-down vote.

I stand on the Senate floor today to ask that we all come together to do that because that is the right thing to do, not for party leaders, not for the President, or for interest groups on the left or the right. It is the right thing to do for the American people. It is the right thing to do for the citizens of each of our respective States.

I make a plea in particular to my colleague from Louisiana, Senator LANDRIEU, to do that. She is in a unique position to reach out and achieve fundamental fairness and do the people's business in a constructive way.

Many folks, including me, quite frankly, were disappointed that a few years ago Senator LANDRIEU filibustered and supported that filibuster of Miguel Estrada, another highly qualified judicial nominee, after she had expressed strong support of that very nomination in her reelection campaign.

This is an opportunity to set that record aside and do the right thing and give all of these judicial nominees a fair up-or-down vote. That is what the folks of Louisiana want: to do the people's business, to do our job, to vote and to address other important issues and to act honorably and bring fundamental fairness, proper American values, Louisiana values to this process.

We are beginning with a very important nomination to the people of Louisiana, Priscilla Owen of Texas. It is particularly important to my citizens of Louisiana because the U.S. Fifth Circuit Court of Appeals, to which Judge Owen is nominated, serves Louisiana, covers all of Louisiana. There has been a vacancy in that position for years and years.

Judge Owen has been nominated for over 4 years. Her nomination has been thoroughly vetted, thoroughly debated and, yet we have never had that closure. We have never had that fair up-or-down vote. In fact, the vacancy which she would fill has been declared a judicial emergency in the Fifth Circuit Court of Appeals, impacting directly Louisiana because it has been open for so long.

So this is the perfect place to start for me, for Senator LANDRIEU, for those who are concerned about justice in the Fifth Circuit, taking care of that judicial emergency, and then we should move on and give all of these nominees a fair up-or-down vote.

Justice Owen has been maligned unfairly. All sorts of charges have been leveled against her, and I want to address some of those directly. She has been called fringe and out of the mainstream, way out of the mainstream of American opinion and everyday life. Yet if you take any serious look at the facts, that charge simply does not hold up.

Justice Owen has been on the Texas Supreme Court since 1994, but more significantly, when she was reelected to that position, she was reelected with 84 percent of the vote in Texas, with the endorsement of every major newspaper of the State and with bipartisan support.

Now, is every newspaper in the State fringe, out of the mainstream? Are 84 percent of Texas voters fringe and out of the mainstream? Obviously not.

In addition, in her nomination to the U.S. Fifth Circuit Court of Appeals, Justice Owen gained the highest rating possible from the American Bar Association.

She was nominated on May 9, 2001, nearly 4 years ago, and renominated January 7, 2003, and February 14, 2005. Her qualifications have been vetted and debated exhaustively.

Owen has significant bipartisan support, including three former Democrat judges on the Texas Supreme Court and a bipartisan group of 15 past presidents of the State Bar of Texas.

Owen has been a justice on the Texas Supreme Court since 1994 and was endorsed for reelection by every major Texas newspaper.

Owen previously practiced commercial litigation for 17 years. She also has a substantial record of pro bono and community activity.

Owen received her undergraduate degree from Baylor University and graduated third in her class from Baylor Law School in 1977. She was a member of the law review and has been honored as Baylor Young Lawyer of the Year and as a Baylor University Outstanding Young Alumna.

After graduating from law school, Justice Owen received the highest score in the State on the Texas bar exam in December 1977.

The American Bar Association unanimously rated Justice Owen ''well qualified,'' its highest possible rating.

Some weeks ago, I also spoke on this floor in support of Justice Brown, whose nomination recently cleared the Judiciary Committee for the second time. The President nominated her to the U.S. Court of Appeals for the DC Circuit Court nearly 2 years ago. One-fourth of the DC Circuit is currently vacant; and Justice Brown's nomination has strong support.

As I noted before, during Justice Brown's 9-year-tenure on the California Supreme Court, she has acquired a reputation as a fair and intelligent justice

who is committed to the rule of law. Justice Brown has served on the California Supreme Court since May 1996. Her appointment to that court was historic: Justice Brown is the first African-American woman ever to have served as an associate justice on the California Supreme Court.

Even more impressive, Justice Brown was recently returned to that court with the approval of 76 percent of California voters. In her retention election, Justice Brown had the highest vote percentage of all justices on the ballot.

Another sign of Brown's credibility is that, in 2002, she wrote more majority opinions than any of her colleagues on the California Supreme Court. As stated by a bipartisan group of Justice Brown's former judicial colleagues: ''she has quickly become one of the most prolific authors of majority opinions on the California Supreme Court.'' At least 12 judges have signed letters in support of her confirmation. Such numbers are indicators of the high esteem in which she is held by both the voting public in California and by her judicial colleagues.

I have heard arguments from some of my colleagues on the other side of the aisle that Justice Brown should not be confirmed by this Chamber. One argument is that she supposedly abhors Government. Another argument is that she is supposedly hostile to civil rights. Such arguments are entirely without merit, and I would like to respond to this attack on Justice Brown.

While her critics charge that Justice Brown abhors Government, this nominee is hardly an extremist when it comes to Government. Indeed, as a longtime public servant, Justice Brown has been part of our Government for 25 years. She thinks there are many things Government does well, many things only Government can do; and she has criticized the unintended consequences of some of the things that Government does. In her judicial decisions, Justice Brown strives to apply the law as it exists and she defers to the legislature's judgment on how to solve many social or economic issues.

This nominee's judicial opinions suggest that she fully appreciates the importance of having Government play an active role in certain areas, including efforts to protect the public's health and safety. That is why she voted to uphold State health standards for labeling milk products. That is why she agreed that faucets, which might contain lead, should be considered a source of drinking water, under the Government's Safe Drinking Water Program. And that is why she agreed that her State's regulations regarding overtime pay should be liberally interpreted to provide California workers with more protection than they would have had under Federal law.

Her opponents also have insinuated that Justice Brown is hostile to civil rights. But Justice Brown has stated in her judicial opinions that ''discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.''

In writing for a unanimous court, Justice Brown struck down a certain minority aid program because it violated Proposition 209, a provision of the California constitution that bars discrimination against, or preferential treatment to, any individual group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. Every judge in California who reviewed this program found it unconstitutional.

I find the argument that she is hostile to civil rights to be simply incredible, when you consider Justice Brown's personal history as an African-American who came of age in the South in the midst of Jim Crow laws. As someone who attended segregated schools, Justice Brown, better than anyone, can appreciate the importance of fighting discrimination. She grew up in Alabama, the daughter of sharecroppers, listening to her grandmother's stories about NAACP lawyer Fred Gray, who defended Dr. Martin Luther King and Rosa Parks. Her rise to the California Supreme Court from humble beginnings in the segregated South is absolutely inspiring. That may be why she has been sensitive to claims of racial profiling in cases where the facts strongly supported such an inference.

We all know that Justice Brown has risen to a prominent position on the California Supreme Court. But not everyone is aware of Justice Brown's record of activities on behalf of minorities, children, and the underprivileged. Let me take this opportunity to highlight a few such activities:

Justice Brown served as a member of the California Commission on the Status of African-American Males. The Commission made recommendations on how to address inequities in the treatment of African-American males in employment, business development, and the criminal justice and health care systems.

She served on the Governor's Child Support Task Force, which reviewed and made recommendations on how to improve California's child enforcement system.

While serving as a member of the Community Learning Advisory Board of the Rio Americano High School, Justice Brown developed a program to provide Government service internships to high school students in Sacramento, CA.

I close by citing a statement in support of Justice Brown by an executive director of Minorities in Law Enforcement: ''We recommend the confirmation of Justice Brown based on her broad range of experience, personal integrity, good standing in the community and dedication to public service. . . Justice Brown is a fair and just person with impeccable honesty, which is the standard by which justice is carried out.''

In closing, I urge my colleagues to allow both Justice Brown and Justice Owen to have a vote on the Senate floor. Let Justice Brown's judicial qualifications, rather than her political philosophy, be our focus in her confirmation process.

The PRESIDING OFFICER. At this time, the majority's time has expired.

The majority whip.

Mr. MCCONNELL. Mr. President, I ask unanimous consent for a couple of minutes to make requests for committees to meet in the Senate and to make just a brief statement, 2 minutes.

The PRESIDING OFFICER. Is there objection?

Mr. HARKIN. Mr. President, before I object, I could not hear the Senator.

Mr. MCCONNELL. I ask unanimous consent for 2 minutes to make a request for committees to meet, which my assumption is the Senator from Iowa will object to, and then just to make a very brief statement, a total of 2 minutes.

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

Mr. MCCONNELL. Mr. President, I have 10 unanimous consent requests for committees to meet during today's session of the Senate. They have the approval of the majority leader. I ask unanimous consent that these requests be agreed to and be printed in the RECORD.

The PRESIDING OFFICER. Is there objection? The Senator from Iowa.

Mr. HARKIN. Mr. President, on behalf of the Democratic leader, myself and, I might add, others on this side, because of the importance of the debate that is taking place on the Senate floor today, the Senate's attention ought to be turned to this and not to committee meetings, and therefore I object.

The PRESIDING OFFICER. The Senator objects.

Mr. MCCONNELL. If I could reclaim the balance of my brief time, what we have is a further effort to make it impossible to do the people's business in the Senate. The normal way we do business is for action to be going on on the floor, and additional action in committees at the same time. As a result of these objections, we have thwarted progress. We have thwarted progress on an energy bill, on a JOBS bill, on a disaster relief bill. Yesterday, an Intelligence Committee meeting had to be cancelled. Here we are in the middle of the war on terror and the Intelligence Committee was not allowed to meet.

Today's objections will shut down our meetings on the Energy bill, a closed CIA briefing on terrorism and proliferation of weapons in Iran, the Foreign Relations Committee, on strengthening America's workforce over at the Labor Committee, another Intelligence Committee shutdown by this action and, of course, the Judiciary Committee will not be able to continue its markup of the asbestos bill.

We are following the regular order. The majority leader simply called up a

judicial nominee to be considered by the Senate. There is nothing irregular in any way about the procedure that is being followed, and yet our friends on the other side of the aisle are shutting down the business of the Senate by making it impossible for committees to do the work of the American people on everything from intelligence matters to passing an energy bill when gas prices are at record highs. This is an incredibly irresponsible approach to the majority's efforts simply to move the people's business along by following regular order and moving toward a vote on the President's nomination for the court of appeals.

I yield the floor.

The PRESIDING OFFICER. The Senator yields back.

The time, until 11:45 a.m., is controlled by the Democratic leader or his designee.

The Senator from Iowa.

Mr. HARKIN. Mr. President, I yield myself such time as I may consume.

I rise today to speak about the prospect that at some point next week, according to all of the press reports and according to what I have heard on the floor, the majority leader of the Senate will take a course of action that has been dubbed the ''nuclear option.''

The majority leader will take a course of action that will tear down the rules by which we operate in the Senate, rules which have been laid down in some cases for almost 200 years, in some cases over 100 years.

I believe we should be taking our time in the Senate because of the effects that this step by the majority leader could have on how we represent our constituents. It can have such a profound effect that it behooves us all to think very deeply and carefully about it and to come to the floor to express our opinions.

By triggering this nuclear option, the majority leader would unleash forces he would regret and that everyone who loves this great Nation and its system of checks and balances would regret.

There is no question that by breaking the rules—that is what would happen, breaking the rules—the majority party would gain short-term advantage. They would be able to confirm every one of their judicial nominees, no matter how radical or out of the mainstream. But the long-term destructive consequences triggering the nuclear option would be profound for our system of Government.

For more than two centuries, Senate rules and traditions have respected the rights of the minority. That would be destroyed. For more than two centuries, thanks to those minority rights, the Senate has been a force for compromise, moderation, and reason. That would be destroyed.

For more than two centuries, the minority's power in the Senate has been essential to America's system of checks and balances. That would be destroyed. And something else of great importance would be destroyed: Respect for rules.

Playing by the rules is the American way. It is one of our core values. From childhood, we are taught to respect the rules, to follow the rules, to play by the rules. We are taught it is dishonorable to break the rules or to change the rules in the middle of the game, especially to gain an advantage or simply to win. Ask any child, and he or she will say that breaking the rules or changing the rules in the middle of the game is not only unfair, it is wrong.

America is a great country because playing by the rules and respecting rules is a core value. It is a way of life. It is at the heart of our athletics, our business dealings, our way of government. It is no exaggeration to say that if one destroys the idea of playing by the rules, then they invite distrust, disorder, and the disintegration of the American social fabric. They invite chaos, and chaos invites tyranny.

This is exactly why the Republican leadership's plan to resort to the nuclear option is so dangerous. Since 1790, the filibuster has been used in the Senate countless times, and nearly 100 years ago the Senate passed rule XXII, codifying the right of extended debate. We know what that rule says. It says that it takes 67 votes to change the Senate rules and 60 votes to cut off debate. Those are the rules. They are deeply conservative rules, rules that have been respected and honored for nearly a century, until now.

The Republican leadership is unhappy because a small number of judges, all of them I consider far out of the mainstream, have been filibustered by the minority. They are unhappy because they have been able to confirm only 95 percent of the President's judicial nominees and not 100 percent. This compares to only an 80-percent confirmation rate during the Clinton administration. The Republicans blocked 68 Clinton judicial nominees, including, I might add, Bonnie Campbell, from my State of Iowa.

Most of those nominees were blocked in the Judiciary Committee by just one Senator. Now, does the Republican leadership celebrate the fact that by playing by the rules they won 95 percent of the time? Do they now play by the rules and gather the votes necessary to change rule XXII governing filibusters? No.

They are going to employ a trick, a procedure, whereby the rules are overturned by one decision of the Presiding Officer backed by 51 votes. That will destroy the rules of the Senate. Now they say: Well, it only applies to judges now. It can apply to anything else down the pike.

Now, a mere 10 Bush nominees have been blocked, and what is the Republican leadership's response? It is to destroy the rules. Sweep aside more than 200 years of Senate tradition. In its place, they will make up their own rules, a new rule, that will allow them or any majority to change any rule at any time for any reason with only 51 votes. In other words, once the nuclear option is detonated and a new Senate precedent is established, this body will be subject to the whim of any group of 51 Senators who want to impose their will without any provisions for extended debate. Make no mistake, this will be the end of the Senate as we know it.

How ironic that this is being done by Senators who call themselves conservative. The truth is that resort to the nuclear option, breaking the rules, making up new rules convenient to the leadership, is a radical, unprecedented action with consequences that no one can predict. Because once the rules are broken and rules are made up as one goes along, seeds of anarchy, of chaos, are sown. An atmosphere of anything goes is created, and the end justifies the means.

We have already seen this in the actions of House Majority Leader TOM DELAY. We have an honored tradition that congressional redistricting occurs every 10 years after the decennial census, but the majority leader in the House wanted to increase his majority in the House. So what did he do? He tore up the rules and made up new rules, TOM DELAY's rules. But the real Tom DeLay rule is this: Anything goes. The end justifies the means. Situational ethics. I fear we are about to adopt that Tom DeLay rule in the Senate. This is profoundly bad news for this institution.

I am also concerned about the message it sends to businesspeople, to husbands and wives, to our people. The message is if our national leaders can break the rules as a matter of convenience, if they can write their own rules, impose them on others, then maybe it is okay for everyone else to behave just like that.

This is a deeply disturbing prospect. I implore the distinguished majority leader, Senator FRIST, to consider the law of unintended consequences. He is threatening to break rule XXII in order to pass 100 percent of the President's judicial nominees. Once the rule is destroyed, and once the majority leader imposes a new rule to his liking, then who is to say where it will lead? It will be like an out-of-control virus. If 51 Senators can change any rule at any time for any reason, then anything is possible. The metaphor Senators are using is a ''nuclear option,'' and I would say that is true, it is nuclear because it does blow up this place. But there may be another metaphor, too: that the majority leader is letting the genie out of the bottle and there will be no putting that genie back once it is out. It will wreak destruction in ways no one now can predict or foresee.

For example, once the Chair can make a determination about the rules and have that ruling upheld by 51 votes of the Senate, what is to say of the time-honored tradition we have in the Senate of a Senator being able to have the right of the floor and being able to speak for as long as he or she wants? That has been our right since the

founding of the Senate. Once a Senator is recognized, that Senator can speak until they drop. I think the record is 24 or 25 hours, by former Senator Strom Thurmond.

Who is to say if, in the future, someone gets up to speak but people want to move on and do something, that after that person speaks for 5 or 10 hours the majority leader would be recognized and make a point of order that the person is speaking unconstitutionally? They have the 51 votes to uphold the motion and that is the end of it. So a Senator's right to have the floor is subject to whatever the Chair wants. We may get it; we may not. We may not be able to speak for an hour or 2 hours or whatever we want. The Chair may say to the Senator from Iowa, You can speak for 3 minutes and then you have to sit down.

They do that in the House of Representatives. They have a 5-minute rule. I know, I served there. But that is not the Senate.

I am just saying who knows what might happen. It is possible. If we go down this road that is the precedent that is set.

I do not know why the majority leader is doing this. Possibly what we are seeing here is an attempt to seize absolute power and unchecked control of all three branches of Government. The Republicans already control the executive branch. A majority of Supreme Court Justices are Republican nominees. So are the majority of judges on our Courts of Appeal, the circuit courts. Indeed, there is a Republican majority on 10 of the 12 circuits. Republicans have an iron grip on the House of Representatives. They have a 55-seat majority here in the Senate. Only one barrier now stands in the way of the Republican Party seizing absolute control of every aspect of our Government, all three branches, and that is the right of the minority in the Senate to filibuster.

By unleashing the nuclear option, the Republican leadership would crush this last remaining check on its power. The filibuster is a more than 200-year-old tradition in the Senate; it has withstood the test of time.

I do not believe the nuclear option reflects the desires or values of the American people. Americans are extremely wary of one-party dominance and control. This is a prime reason why so many voters split their ballots In the election last November. Republicans won the White House with less than 51 percent of the popular vote. The Republicans have a 52-percent majority in the House. They have a 55-percent majority here in the Senate. But they want to seize 100-percent control of the Government, including the third branch, the judicial branch.

It is not healthy for our country. It is not healthy for our democracy. I do not believe for 1 minute this power grab reflects the wishes of the American people. When it comes to government, there are certain values and principles that the vast majority of Americans share. We prize our system of checks and balances. We respect minority rights and dissent. We want to ensure that minorities are protected. We understand the danger of majorities acting without check or restraint, running roughshod over those who would disagree.

As a well-known minister once said:

> Democracy exists not just when the majority rules, but when the minority is absolutely safe.

> The rules of the Senate and the rule of extended debate give the minority that absolute safety. You take that away and you take away the minority rights in the Senate. Most Americans understand that checks and balances are the key to preserving our liberty.

James Madison wrote:

> The accumulation of all powers, legislative, executive and judiciary, in the same hands may justly be pronounced the very definition of tyranny.

But that is exactly the goal of the Republican leadership today. They seek the accumulation of all power—legislative, executive, and judiciary—in the same hands, their hands. This is profoundly dangerous. By resorting to the nuclear option, the majority would break the rules in order to change the rules. Under the rules of the Senate, it takes 67 votes to change the rules, 60 votes to end debate on a judicial nominee. But by resorting to this parliamentary gimmick, this nuclear option, the majority would change this rule with only 51 votes. The result would be to destroy any check or restraining influence on the power of the majority. This is not the American way. It is certainly not the wishes of the American people.

In debate in the Constitutional Convention in Philadelphia, James Madison said the Senate would have two roles:

> first, to protect the people against their rulers, secondly, to protect the people against the transient impressions into which they themselves might be led.

By attacking the filibuster, the Republican leaders would destroy the ability of the Senate to ''protect the people against their rulers.'' The Senate would lose its capacity to stand up to an out-of-control majority. Instead, the Senate would be turned into a rubberstamp for the majority's agenda, just as the House is a rubberstamp for the majority's agenda right now. That would be a betrayal of the Senate's traditional role as envisioned by the Founding Fathers.

The Constitution gave Senators 6-year terms so they would not bend to the political passions of the moment. I remind my colleagues of the famous exchange between Thomas Jefferson and George Washington. On his return from France, Jefferson asked Washington at the breakfast table why he favored the creation of a second Chamber, the Senate.

Washington replied with the question, ''Why did you pour that coffee into your saucer?''

Jefferson said, ''To cool it.''

To which Washington reportedly said: ''Even so we pour legislation into the senatorial saucer to cool it.''

For two centuries that is exactly how the Senate has worked. Because of the tradition of free speech and minority rights, specifically because of the threat of filibuster, Senators have a strong incentive to act with moderation and restraint, to make compromises, to accommodate the legitimate concerns of the minority. That is exactly what the nuclear option would demolish.

The majority party in the Senate, whether Democratic or Republican, has always been frustrated by the minority's use of the filibuster. But I submit that frustration is the necessary by-product of an effective system of checks and balances. It is the price we pay to safeguard minority rights.

For decades, a determined conservative minority used the filibuster to block civil rights legislation and deny an up-or-down vote to a liberal Supreme Court nominee, Abe Fortas. Progressives were extremely frustrated by this exercise of minority rights and minority power.

Now it is the Republicans' turn to be frustrated by the filibuster. They are frustrated because they can't get their way on judges 100 percent of the time. They have gotten their way on 95 percent of judicial nominees, but not 100 percent, and they believe this justifies breaking the rules, to get rid of the filibuster.

I submit the Republicans' very frustration is evidence that the system of checks and balances here in the Senate is healthy and working, working exactly as it should.

In 1995, I proposed to modify rule XXII in a way that would have given the minority an incentive to limit the use of the filibuster. It would not have taken it away. However, my proposal bore no resemblance to the nuclear option. First, I did not propose to break the Senate rules. I played strictly by the rules. I pursued my rule change through normal Senate procedures as a floor amendment. It would have taken the requisite 67 votes to pass on the floor, which is entirely appropriate when changing a time-honored Senate rule. By contrast, this nuclear option discards the rules. It would impose the Republicans' radical change with only 51 votes.

Ten years ago I proposed to modify the filibuster rule as a matter of principle. Today the Republican leadership wants to modify the filibuster as a matter of political expedience, to make it possible to stack the courts with radical judges. They are pursuing unchecked power, the absolute control of all three branches of Government. In this context, the filibuster takes on even new importance.

It is all that remains to check the majority's quest for absolute power.

By the way, I might note parenthetically that 24 current Republican Senators actually voted against my proposed change to the filibuster back in 1995. The distinguished majority leader, Mr. FRIST, was one of those Republicans opposing any change to the filibuster. Indeed, as has been noted time and time again, the majority leader voted in the year 2000, 5 years ago, to sustain a filibuster of a Clinton nominee, as did many other Republicans.

Those same Republicans, who now say President Bush's judicial nominees have a constitutional right to an up-or-down vote on the Senate floor, denied that alleged right to scores and scores of President Clinton's judicial nominees, including, as I said earlier, a distinguished Iowan, Bonnie Campbell. Ms. Campbell, a former Iowa attorney general, respected Justice Department official, was nominated for the Eighth U.S. Circuit Court, but her nomination was blocked in committee.

Let's be clear. If the issue is denying nominees an up-or-down vote by the full Senate, there is no practical difference whatsoever between blocking a nominee in committee or by filibuster on the floor. During the Clinton years, Republicans blocked judicial nominees again and again and again. They did it in committee, they did it by blue slip, or they blocked them on the floor. It didn't matter. But the nominees were denied an up-or-down vote on the floor of the Senate.

The nuclear option is a flagrant abuse of power. The minority party, the Democrats, will resist it vigorously within the rules of the Senate. We have a responsibility, an oath of office to defend our constitutional system of checks and balances. We have a responsibility to defend the Senate's unique function as the last bastion of minority rights, as the last check on an abusive, out-of-control majority.

But this should not be just the responsibility of the minority party. It should be the responsibility of all Senators who respect the rules and traditions of this body. It should be the duty of all Senators who value our democratic principles, our system of checks and balances, protection of minority rights.

The very nature of the Senate as an institution is at stake. More than that, the very nature of how we operate as a government is at stake. As I said, when you destroy the rules by not following the rules, you invite chaos. Chaos invites tyranny. This is the time to look beyond party, to look beyond short-term partisan advantage.

I have every hope there will be enough Senators, Democrats and Republicans alike, to disarm this destructive nuclear option. I have every hope that a critical mass of Senators will be true to the rules and traditions of this body and that we will act to preserve the integrity and independence of this great institution.

I yield the floor.

The PRESIDING OFFICER. The assistant Democrat leader.

Mr. DURBIN. I thank the Senator from Iowa for making clear that when he offered his change in the rules relative to the filibuster, he did it according to the rules. When Senator HARKIN suggested that we change the number of votes necessary for a filibuster, he used the rules of the Senate, he followed the rules of the Senate. He understood it would take 67 votes for him to succeed and he pressed forward.

If the Republican majority today did exactly as Senator HARKIN did, there would be no discussion of a nuclear option. We would move to that point in the calendar, we would take the vote according to the rules, and no one would be paying much attention because that is the routine of the Senate. We would be following the rules of the Senate.

The unique situation now presenting itself with the nuclear option is that the Republican majority is going to break the rules of the Senate in order to change them. Instead of following Senator HARKIN's model and example of 67 votes, they will bring Vice President CHENEY to the chair, they will ask him to rule as a Presiding Officer of the Senate that the rules are going to be changed, he will make that pronouncement, and that is the end of the story. They will be breaking the rules of the Senate to change them.

That is the unique difference between what Senator HARKIN did many years ago and what the Republican majority does today. It is historic. That is why so many people are following this debate. People who never heard of the nuclear option are following this debate. They understand something historic is about to take place: changing a tradition, changing something in the Senate, a rule that has been in place for over 200 years. With the wave of his hand, Vice President CHENEY will take away a rule that has applied for 200 years.

Some argue this should be viewed as another routine day in the Senate. I disagree. This is a historic debate and one on which I hope the American people are focusing. Changing the rules in the middle of the game is not accepted in most conduct in America. It shouldn't be accepted in the Senate. Changing the constitutional balance of the Senate and the White House is historic and should be followed closely by every single American.

My colleague, the Senator from Kentucky, came to the Senate earlier and suggested that we should go about the routine business of the Senate while this debate continues. We see it otherwise. We believe we should focus in the Senate, as the people of America should focus on this critical debate, with very few exceptions. If there are exceptions relating to committee activity on national security or things of that nature, we will consider each and every one of those, but the routine business of the Senate must be held up while we engage in this.

The core reason for this debate is the approval of judges. Since President Bush was elected, more than 95 percent of his judicial nominees have been approved, the highest approval rating of any President in the last 25 years. Again, 208 have been approved, 10 have not been approved, and the President says: That's not good enough; I want them all. No dissent, no disagreement, give me every single judge.

That is the reason we are here debating. To make it clear to those following the debate, we are prepared, on a bipartisan basis, to work with the White House and the Republicans to continue to approve judges, as we have already done 208 times with this administration. I am about to make a unanimous consent request that will be followed by another, and let me describe it first before I make it. We have had one man's name on the calendar longer than the pending nominee, Priscilla Owen: Thomas Griffith of Utah, nominated to serve as circuit judge for the District of Columbia. I voted for him as a Democrat, coming out of the Senate Judiciary Committee. He has been on the calendar since April 14.

As a show of good faith, as a show of bipartisanship, to demonstrate we can work together, we can achieve things when we speak to one another and when we respect one another, I will make a unanimous consent request to move from the current business immediately to the Executive Calendar to bring his name to the Senate with debate of, say, 1 hour, and that he be voted on today.

Then when I am finished, as the minority leader, Senator REID, did yesterday, I will ask that we discharge the Senate Judiciary Committee and immediately consider the Michigan Circuit Court nominees of Griffin, McKeague, and Neilson. I will, of course, allow that unanimous consent request to be amended in terms of debate time necessary for each nominee, but we can in a matter of a few hours move four circuit judges through this Chamber on a bipartisan basis and demonstrate that there is no need to describe our situation as a crisis. There is no need to change a 200-year tradition of the Senate. There is no need to call in Vice President CHENEY to wipe out a rule that we can work on together. I think that is what we should do.

I ask unanimous consent we move to the nomination of Thomas B. Griffith of Utah to be U.S. circuit judge for the District of Columbia and that Mr. Griffith's nomination be considered with 1 hour of debate equally divided, and then have a rollcall vote. I make that unanimous consent request.

Mr. MCCONNELL. Reserving the right to object, and I will object, let me say to my good friend from Illinois, this is a scheduling issue. His party was in the majority for 18 months between 2001 and 2002. Then, Majority Leader Daschle got to decide the order of matters to be considered in the Senate. That is the prerogative of the majority leader.

I am certainly pleased to hear of the enthusiastic support of my good friend from Illinois for the nominee, Griffith. Nevertheless, the majority leader, Senator FRIST, is charged with the responsibility of determining the order in the Senate. We are on a nomination that enjoys bipartisan support, a majority of bipartisan support, and that is Texas Supreme Court Judge Priscilla Owen.

I am of the belief that some of the efforts to shut down the activities of the Senate may be coming to a close, and I will seek the floor for the purpose of offering a unanimous consent to allow the Foreign Relations Committee to at least meet, which is good news. Unfortunately, other committees are still shut down by not following the normal procedure in the Senate where committees are busily at work while action is occurring on the Senate floor. As a result of actions in the last 2 days, the Energy bill is thwarted, the JOBS bill is thwarted, disaster relief is thwarted, and a closed intelligence meeting was not held again today. The Energy bill, the HELP Committee is out of action today. Asbestos is not going forward.

All of these efforts to delay activity in the Senate, to shut down the Senate are not necessary. It is routine in the Senate for committees to be doing work while we have debate on the floor. Nothing extraordinary is happening on the floor. We are following regular order. The majority leader, as is his right, had called up a nomination, and we are debating it.

We will get around to Mr. Griffith, and I am certainly pleased to hear that the assistant minority leader is in favor of him. That is good news. That is one, when we turn to him, I look forward to confirming with not a great deal of debate.

With regard to the current consent agreement, I object.

The PRESIDING OFFICER. The objection is heard.

Mr. DURBIN. Mr. President, let me say it is clear now this is not about moving judges forward because I have offered an opportunity for the Republican majority to move a circuit judge in Utah forward on a bipartisan basis, as most of President Bush's nominees have been moved forward. It is about the fact that President Bush has not had every single nominee he sent to Congress approved. More than 95 percent have been approved.

There is another controversy relating to the State of Michigan—and I see my colleague, Senator STABENOW, is here—a controversy that goes back to the Clinton administration when a systematic effort was made to deny any nominee, virtually any nominee sent by the Clinton White House to the Senate Judiciary Committee, the opportunity for a hearing and fair consideration.

Naturally, the Senators from Michigan were upset that very qualified men and women were not given a chance to present their credentials and to come to a hearing and have a committee vote. Over the years they have expressed that concern and asked there be some balance in the nominations to fill the vacancies.

At this point, I ask unanimous consent we set aside the pending business of the Senate, discharge the Senate Judiciary Committee from further consideration and immediately consider the nomination of Michigan Circuit Court nominees Griffin, McKeague, and Neilson.

Mr. MCCONNELL. Reserving the right to object, and I will object, once again, it is good news to hear the Senator from Illinois is going to be supportive of three circuit judges from Michigan who have been denied an opportunity to have an up-or-down vote for many years. The majority leader certainly has on his list for very near future consideration all of those judges, and I am pleased to hear they will be in all likelihood approved when they are brought up at a time of the majority leader's designation.

Let me repeat, all we are looking for is an up-or-down vote. We are not looking for a guaranteed outcome. But my friend from Illinois is probably suspicious that there will be success if up-or-down votes are granted because all of the judges who have been pending have bipartisan majority support.

We will look forward to dealing with all of the judges the Senator from Illinois would like to schedule, instead of the majority leader, in the very near future, but in the meantime we are dealing with the nomination of Justice Priscilla Owen to the Fifth Circuit.

Mr. President, I object.

Mr. DURBIN. Let me close briefly and say if the argument is being made by the Republican side that there is committee activity that should go on that is more important than this constitutional debate on the floor of the Senate, I would also make the argument that there is important floor activity that just could have taken place. We could have approved four more judges for President Bush at the circuit level, moved forward on a bipartisan basis, and done it before lunch.

It was the decision on the Republican majority side that rather than bring this to a vote, bring it to closure, make progress, show we are working together on a bipartisan basis, instead they are going to continue to press for the so-called nuclear option so that Vice President CHENEY can wipe away a 200-year tradition in the Senate with the wave of a hand. Unfortunately, that is a sad commentary on where we stand today.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Ms. STABENOW. Mr. President, I rise today to speak about both the pending nomination and also the overall process involved in the debate on free speech and checks and balances.

Let me first thank and support the efforts of our Democrat minority leader from Illinois and thank him for his eloquence on this issue and indicate that despite concerns about the process now and the lack of bipartisanship in the Sixth Circuit for the last 4½ years and the lack of ability to come together in a way to jointly support nominees given the context of this larger debate right now and the critical importance of maintaining the minority views in the Senate and our ability to fight for our States and what is important for us both, Senator LEVIN and I have agreed to allow us to move forward in a show of bipartisan cooperation, a show of good faith with our colleagues on the other side of the aisle, to move forward with three nominees for the Sixth Circuit.

It is very disappointing to once again see that motion has an objection rather than moving ahead. In fact, last week, when our leader, Senator REID, made that motion to move forward on three judges in order to be able to get us moving in the right direction in terms of bipartisanship, the majority leader objected to moving forward on the three Michigan nominees and immediately went to a press conference with House Republicans from Michigan to criticize us for not being willing to compromise and move forward on Sixth Circuit nominees.

This kind of politics is very disturbing and very unfortunate when we are trying very much to move forward and to break this gridlock and create an atmosphere where we can continue to work together on the issue of judges. Again, let me say that it is very unfortunate that the majority leader said that three out of four judges was not enough. There is an objection, a concern on both sides of the aisle, of one of the nominees, but we have been willing in good faith to move forward with three of the nominees and have for 4½ years been meeting with the administration, with colleagues on both sides of the aisle, offering bipartisan solutions such as what other States do in terms of bipartisan commissions to be able to move us forward. At every turn we have been told, ''no.''

Now when we come forward and say, let's move to three of those judges in the interest of the larger picture in terms of what is happening in the attempt to eliminate checks and balances in our constitutional process, we, once again, are hearing, ''no.''

I find that very unfortunate. But I think it points to the fact that what we are seeing is a fundamental debate, not about judges, but it is about free speech. It is about our constitutional system of checks and balances. We have to constantly refer to the fact, as has been said before on the floor, that if it was about judges, the administration should be celebrating the best record in 25 years of Presidents of either party: 208 to 10. There have been 208 judges confirmed on a bipartisan basis, to 10 whom we have objected to because they are incredibly outside of the mainstream of American thought. The best record in 25 years: 208 to 10.

What is this debate about? Well, unfortunately, it is about the fact that

we have one party—we respect that. We understand one party is in control of the White House, the House, and the Senate, but they do not have 100 percent. There are people who elected others, elected Democratic Senators or Democratic House Members. They want their views to be represented as well in this democracy, where we work together to find compromise and balance and what is best, ideally, for everyone but certainly for the majority of Americans on any one decision.

But we are hearing, instead: No, we want total, absolute, complete power over what happens in the United States. That is not a democracy. In fact, we are very fortunate that our Founders understood the importance of checks and balances in putting together not only a House of Representatives, that reflects the instant will of the people, but also a Senate, with a longer term—instead of a 2-year term, a 6-year term—that is charged with carefully evaluating the impact of legislation in a longer term view. In other words, the House is the ''gas pedal,'' and the Senate was designed as the ''brake.'' So we can have the important debates occurring in the House, and in the Senate have them as well, but allow minority views to be represented in a different kind of way.

On the issue of judges, our Founders were very clear. It is the third branch of Government, with lifetime appointments. It is not the President's Cabinet. I supported nominees to the President's Cabinet who personally I would not have selected. But the President has a right, within every reason, to his team for his 4 years. I have supported those.

But this is a third branch of Government, with lifetime appointments, so our Founders said: We are going to give half of that responsibility to the President and half of that responsibility to the Senate. So given our half of the responsibility, again, we have agreed to 208 judges on a bipartisan basis. And using our half of the responsibility, we have objected to 10. That is the record: objected to 10. And why? Because those individuals, again, do not represent mainstream thought and would be filling lifetime appointments—not for 3 or 4 years, but for three or four decades—long beyond any of us in our participation here in the Senate or this President.

So it is important to remember that in putting together our Constitution and our Bill of Rights, our Founders, were very wise. I think we are very fortunate we had a group of people come together to create these checks and balances.

It is not about just partisanship, Democrats and Republicans, it is about big States and small States. It is about Great Lakes States and States that do not have water. The reality is, we have a system of checks and balances that has allowed us to come together and create compromise, allowed us to create more mainstream decisions, because we have something called a filibuster which says a Senator can stand up, and as long as their legs will allow or their voice will allow, they can stand up and speak their mind on behalf of the people they represent, and they have the opportunity to put forward their view.

It is the minority view—not the minority party view. It may be a single person's view, but the minority view can be heard. And because a Senator or two or three or four believe so passionately about something, the rules then require you have to get a few more people to agree, you have to get 60 votes, rather than 51, because of the strong concerns raised by individual Members.

Now, what does that mean for us in Michigan? This is not just about judges. In Michigan, we are very proud of our Great Lakes. We are proud of the fact that we not only have our Great Lakes for drinking water, but for boating and tourism and economic activity. But one of the things we are concerned about in Michigan is the fact that someday the States in the West and the South that do not have a lot of water may decide they might want our water. Well, we do not like that very much.

Right now, I feel very confident that Senator LEVIN and I, and other Great Lakes Senators, would be able to stand up and present the minority view, to be able to use the rules of the Senate to protect our water. What happens if that is gone? What happens if we no longer can express as to and fight for our State because the checks and the balances have changed?

This is not just about judges. What about Social Security? If, in fact, the rules can be changed on judges, what about privatizing Social Security? Right now, we have a significant number of people to be able to stop the movement to dismantle Social Security, the great American success story. But what if the rules change and the checks and balances change?

The whole point of checks and balances, the whole point of allowing extended debate and forcing compromise and people coming together, is to bring people with calmer minds to be able to listen to each other and to be able to forge a bipartisan compromise. For Senators, whether it is their view as a Democrat or Republican or their view from their State or their view because of some other consideration which causes them to feel so passionately that what is being put forward is wrong, it forces us to work together. That is a great thing. That is something we have benefited from as a country. We need to protect that as Americans.

Let me say also that it is very ironic, as we are talking about the filibuster—I find particularly in Michigan—that when we talk about the filibuster, and so on, as if it has never been done before, colleagues of mine who have been around for a while may remember Abe Fortas who was nominated for Chief Justice back in 1968. I will not tell you where I was in 1968, but it is a little before my time here. But it is interesting to note that one of the Senators who filibustered the Justice at that time, in 1968, was a Michigan Republican Senator, Senator Robert Griffin.

What is particularly noteworthy is that he is the father of one of the nominees to the Sixth Circuit who, in fact, we just tried to move forward right now and were stopped in so doing. But it is important to note that Senator Griffin, on the floor, in his debate, in his speech about why it is appropriate for Senators to be able to stand up and object and to filibuster on judiciary nominations, said:

It is important to realize that it has not been unusual—

This is 1968.

it has not been unusual for the Senate to indicate its lack of approval for a nomination by just making sure that it never came to a vote on the merits. And as I said before, 21 nominations to the court have failed to win Senate approval.

This is Senator Griffin in 1968:

But only nine of that number have been rejected on a direct up-or-down vote.

In other words, Senator Griffin acknowledged, back in 1968, that it was not unusual for this Senate to filibuster judicial nominees. I think there is a lesson here. If the Republicans are currently concerned about filibusters, they should listen to what the father of one of the pending nominees, a Republican, said about filibusters and checks and balances.

Once again, the reality is, I do not believe this is about filibusters in the context of judges because, look: 208 to 10; 208 approved, on a bipartisan basis, to 10. This is about whether we will have free speech in the Senate and, I believe, in our country through its elected Senators. This is about whether there will be checks and balances in our Government that allow those rare occasions—with the 10—for people to say: No. You have gone too far, Mr. President. With all due respect, your nominations have gone too far. And on behalf of the people we represent, we have the responsibility to stand up and say, stop, send us another nominee. Send us someone in the mainstream. Send us someone who will, in fact, represent the interests of a majority of Americans.

That is not what is happening today. We are being told: It is all or nothing. In the Sixth Circuit it is all or nothing. Three out of four judges is not good enough. We are being told here: It is all or nothing. It is about complete and absolute power, no checks and balances. In other countries they call that a dictatorship. We have a democracy. We respect and allow other views to be heard. We do not have to agree with them, but we allow them to be heard in our country's democracy. And we create a way, through the Senate, to force people to come together and listen to each other, and to be able to compromise in the very best sense of the

word so we can create decisions, whether it be nominations for judges, or whether it be other decisions that affect the families we represent, in a way that has balance and common sense.

That is what we are talking about. We are talking about the ability to fight for your State, the ability to stand up for your values and principles, to fight for what you believe is right, the ability to ask others to join you in that, the ability to say to the President of the United States: Ninety-five percent is a great record. Two hundred eight is a great record. But, Mr. President, these 10 go too far. These 10 will turn us back in terms of protecting the rights of Americans, and we are asking you to work with us on these 10.

That is not an unreasonable request. Fundamentally, what we are talking about is whether we are going to continue to value free speech in our country. Doing away with the ability for us to speak and to be able to require a majority vote of 60 votes in order to be able to move forward on controversial issues is the first step of taking away free speech. I am very hopeful when the vote comes that men and women of dignity and respect and good conscience on both sides of the aisle will say, no, this is not about party. It should not be about party. It should be about what is best for the country. It should be about protecting the greatest Constitution in the world, the greatest Bill of Rights in the world.

We have men and women of good conscience on both sides of the aisle who I know want to do what is right. I hope it is going to be a very proud day, if this comes to a vote, and we have the bipartisan support of folks standing together and saying: We can do better than this. We can work together and maintain the ability for the minority view to be heard in the Senate on behalf of the people of this country.

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

The PRESIDING OFFICER. The Senator from Oregon.

Mr. SMITH. Mr. President, I thank the Chair and our side for the time to speak on this issue.

This is an issue and a moment in Senate history which, frankly, I wished there could have been found a way to have avoided. I have been among those who have said to my leader: You have a qualified yes for my support to try and negotiate. Those negotiations have apparently broken down. So then it falls to each of us to study and to take as seriously as we can the weight and moment of this decision and how we should come down on the issue of filibustering judges who have majority support.

I ran for the Senate because I value this body, appreciate its unique role in the history of our Nation, and very much want to see it succeed in doing the people's business. So I have taken as seriously as I can the decision I have made to be an unqualified supporter of what the majority leader is attempting to do here.

When I ran for the Senate, I promised the people of Oregon that when it came to advising and consenting on judges, I would not have a litmus test, that I would respect the results of elections, that I would evaluate nominees for their academic achievement, their judicial temperament, for their personal integrity, and I would then vote on that basis without regard to a cultural litmus test.

I tried to demonstrate that when President Clinton was living at 1600 Pennsylvania Avenue, although I was not on the Judiciary Committee, I followed closely the deliberations of that committee under the leadership of Senator HATCH. There were a number of Democratic nominees that I specifically advocated for and tried very hard to help in their confirmation, and in the most part succeeded, even though their views were different from mine on a range of issues. I remember, in particular, the work of the committee on two controversial judges who were, by every measure, on the left wing of the spectrum politically, Judge Berzon and Judge Paez.

I remember Senator HATCH got them out of the committee, and I remembered my promise to the people of Oregon. One of our colleagues began to filibuster against proceeding in violation of what had been a gentleman's agreement of 200 years and more; that is, you don't filibuster judges when they clear the committee process and they come to a vote. So I voted in both instances to invoke cloture and then to confirm their ascension to the appellate court. I remember hearing a lot of disgruntlement by conservatives in Oregon who felt very strongly that they should be defeated.

But I do think elections have consequences. Presidents have rights and we have a role to play in advising and consenting. But I also feel that when we use the Senate rules to essentially overturn the right of a President and the result of an election, we do more than just violence to the executive branch of Government. We do serious injury to the judicial branch of Government. And we send a chilling effect into judges' chambers that they are going to then, in the future, be held to a standard that is so politicized that the best and brightest of liberal and conservative minds need no longer apply for service in the Federal judiciary.

Reflecting upon what I did under President Clinton, I have tried to be consistent in my advice and consent during the administration of George W. Bush. I also have noted, in history and through my 10 years here, that at the end of every Presidential term it is the common practice in the Senate to slow down the nomination process awaiting the results of an election. This happened to President Carter, it happened to President Reagan, it happened to George Hubert Walker Bush, and to Bill Clinton as well. But we are faced now with a new standard. The agreement of the Senate that has been around for 214 years was changed in the last Congress. The 108th Senate began to filibuster on the floor judges that had cleared committee, judges that had demonstrable majority support. The question that faces us now is a clash of two principles: Do we accede to this new Senate rule that has the standard no longer of 51 votes but the standard of 60 votes or do we go back to that standard by changing a Senate rule making explicit what had before been an understanding among colleagues?

I believe we are in a place now that we have to go back to the standard that this Chamber has operated under for 214 years. I think to do otherwise has a long-term impact that is negative for the third branch of our Government, the judiciary.

As Senator DURBIN, the assistant minority leader, would probably like to know, this is one Republican who does listen to him and I was listening to him last night when he spoke about Priscilla Owen. I heard his comments earlier when she had come up for confirmation in the 108th Congress, and among the many things held against her was her membership in the Federalist Society. The Federalist Society is something I have never belonged to. When I was in law school, I did not know about it. But it is an organization that believes apparently the judicial branch of Government should strictly construe the laws and be reluctant to get into political questions, to leave the democratic processes working, and to strictly interpret their judgments from the black letter of the law. I do, however, remember when I was in law school that one organization was very active in recruiting, and that was the American Civil Liberties Union. That is an organization that believes it stands for the protection of the Bill of Rights and believes that those who should be on the court should expansively interpret those rights. As I understood the assistant Democratic leader, he was saying that Judge Owen's membership in the Federalist Society should disqualify her. Well, if that is now the standard—and, Mr. President, it will be the standard if the new Senate rule is 60 votes—then I promise my friends on the Democratic side that there will probably be more than 40 Senators on this side who in the future will hold ACLU membership against nominees.

I think that is a mistake. I think guilt by association, whatever you think of these organizations, should not be disqualifying of nominees from the Federal bench. If the standard that he erects for Priscilla Owen had been in place when Ruth Bader Ginsburg was nominated to the Court, she would not have been confirmed.

I have also noted with some interest, while it is never held up as a religious test, great concern for nominees who are devout members of their religious faith, fearing that their beliefs and their faith would affect their judgment

on the bench. Mr. President, I believe the Constitution is explicit in making clear that we do not have religious tests for public office. I do not accuse any of my Democratic colleagues of religious bias, but I do hear a fearful undertone, an undercurrent here that I think will bar the door to judicial service to people of faith if we set or keep the standard at 60.

Mr. President, I come to this place believing that the brightest of conservative and liberal thinkers best serve American justice and the evolution of American law rather than having a standard that says if you are unwritten and unrevealed and unaffiliated, you have a chance, but if you are a Member of a political organization, if you are affiliated with the Heritage Institute or the Brookings Institute or you are a member of a religious faith, these standards will begin to erect barriers to service in public office. I think that is a very dangerous thing.

After my own law school experience, I had the privilege of serving as the law clerk to the chief justice of the New Mexico Supreme Court, Vern Payne. It was my observation in those chambers that the judges that made the most difference for good in the administration of equal protection and due process were those on the right and the left that had clear feelings and a compassion that guided their decisions. I do think we make a serious long-term mistake and do very real damage to American law when we say only those in the middle can serve. But that is what the standard of 60 will mean in the future of American law if that is now the rule of the Senate.

If you study the filibuster, you will find that this is a right that Senators have that has evolved out of a mistake in leaving out a Senate rule that originally governed this body. But unlimited debate became the standard, and yet it also became the vehicle by which much of America's business was left undone. Sometimes it was used to odious ends, such as the denial of an African-American's civil rights. Long before I ever arrived here, colleagues of former days began to change, refine, and limit the use of the filibuster. I have heard my colleagues on the other side describe this right in terms which make it secular scripture or that this is in the Constitution. It is not in the Constitution. But it is an important right, I grant.

What the public is not hearing is that there are several calendars of business that we take up. There is the Legislative Calendar. We are the legislative branch. Then there is the Executive Calendar in which we take up advice and consent on executive appointments both to the executive branch and to the judicial branch. When you get to the Executive Calendar, you really do get to the checks and balances. And the question is why was it for more than 200 years the gentleman's agreement was that you do not filibuster these nominees, you give them an up-or-down vote for so long? And the reason was simply because it did have an impact upon other branches of Government.

No one here is proposing a limitation of filibusters on the legislative calendar.

Nevertheless, in former years, our colleagues made many modifications to the filibuster rule. It began in 1917. There was no limit to filibusters until then. The standard was then set at 67 votes to invoke cloture, end debate, and go to a vote. But still, this was not a standard applied to the Executive Calendar.

Further on, many changes have been made to the filibuster rights of a Senator. There are, in fact, 26 laws on our books today abrogating the right of a Senator to filibuster. For example, you cannot filibuster a Federal budget resolution. It was known as the Congressional Budget and Impoundment Control Act of 1974. The Budget Act of 1974 restricts debate on a budget resolution and all amendments thereto and debatable motions and appeals in connection therewith to not more than 50 hours. That is a very significant restriction on the right of a Senator to filibuster.

Another restriction is that you cannot filibuster a reconciliation bill. Like the budget amendment, a reconciliation bill cannot be filibustered on the Senate floor, so it can pass by a majority vote. So you cannot filibuster anything connected with a resolution or reconciliation, such as an amendment or a conference report.

I think the public would be surprised to know that at the end of a session, when the work of the Finance Committee and much of the work of the Appropriations Committee comes to this floor, usually in a big omnibus bill or reconciliation package, it passes by a majority vote because it cannot be filibustered. In fact, I suspect half of the work we end up doing here, because of decisions made in former days, is not the subject of filibuster, even though it is part of the legislative calendar.

Another instance: You cannot filibuster a resolution authorizing the use of force—the War Powers Resolution. You cannot filibuster international trade agreements, and that is called the Bipartisan Trade Promotion Authority. You cannot filibuster legislation under the Nuclear Waste Policy Act of 1982.

Time and again, our colleagues before have recognized that to move the business of the United States, there had to be some kind of limits. When I speak of the filibuster, I speak of it respectfully; I also understand its importance to slow down debate and to give Senators all the opportunity they need for debate. But I also understand that the country's business has to move forward. So colleagues, in former decades, have narrowed the right of the filibuster.

One of the Senators in this Chamber who preceded me here from Oregon is a man much esteemed in Oregon lore. His name was Wayne Morse, known as the ''tiger of the Senate.'' He is the third place recordholder for a filibuster, exceeded only by Strom Thurmond and Al D'Amato. As I recollect, he spoke for 22 hours and 26 minutes on the tidelands oil bill in 1953. I suspect, if you check the record, few Senators used the filibuster more than Wayne Morse. He used to come here late at night and speak well into the night almost on a daily basis when the Senate was in session.

But listen to what Wayne Morse said about the filibuster:

> It is time we got back to the original purpose of the Founding Fathers and of the U.S. Senate. That purpose is to give reflection, continuity, and dispassion to legislation. These certainly do not extend to giving a veto power to a dissident minority. The Constitution is clear about when a two-thirds vote is required to make a decision. Those who want to add to those instances might better be honest about their intentions and come forward with a constitutional amendment, rather than to seek to achieve their purpose by the means of Senate rules.

What Senator Morse was referring to is that the U.S. Constitution makes explicit those instances in which supermajorities are required. Advising and consenting on judges is not among those. It is required for amending the Constitution, it is required to override a President's veto, it is required for the ratification of treaties, and in a couple more instances. But this issue is not among those expressed in the Constitution.

To clarify, Senator Morse states that he supports the use of filibusters. He said:

> I am one liberal who admits that he filibusters.

Yet he draws a distinction between filibusters which control debate and a filibuster designed to prevent a vote from ever occurring, which subjects the Senate to rule by the minority.

He went on to say:

> It is one thing to filibuster to stop what is called a ''steamroller'' in the Senate, to stop a majority from taking advantage of a parliamentary minority. It is quite another thing to filibuster in the Senate under a program which is aimed to defeat the right of the majority to express itself by way of the passage of legislation, which in turn will be subject to the checks which our constitutional system provides.

There are lots of checks and balances, but right now the 109th Senate has a decision to make—whether or not we should reinstate a two-century tradition of voting up or down on the Executive Calendar for judges. Why? Because it is important to the two other branches of Government. The 108th Congress broke this tradition and 60 is now the rule, unless we come to some other agreement.

Well, again, Mr. President, I do fear the impact of this new standard if we don't do something. I believe this new standard, if applied to past distinguished jurists, would make their confirmation impossible. I believe Oliver Wendell Holmes was revolutionary in

his thinking about law. Felix Frankfurter, a Roosevelt appointee, was certainly revolutionary in his thinking. Thurgood Marshall or William Rehnquist or Justice Scalia—these men, I believe, today, under this new 60-vote standard, would likely be unconfirmable.

I believe this dumbs down American law, and the Senate does a disservice to the meaning of elections and to the important authorities given to the executive and the judicial branches when we raise filibusters to this new level, which I believe says to every bright young law student: If you have a point of view that is clear, if you have a membership in the ACLU or in the Federalist Society, if you are a member of a religious faith or part of a labor union, this will be held against you; it will have a chilling effect on people's ability to make a difference in law. It will certainly be a sword that we will wield when we are in the minority. It is, therefore, with regret but conviction that I assert my support for a rule that will restore the tradition of the Senate on the Executive Calendar.

The Senate rules are not Scripture. They have been changed repeatedly throughout the history of this institution. We may now have to do that again. I had hoped that a compromise could be found. One may yet be found. But I have also come to believe that when you take a deal that says give up on the principle, the tradition, and throw half of these nominees overboard, what is admitted in that offer is that all of these people from whom we can select are qualified for the Federal bench, and what is also admitted by that offer is that this is just about politics.

This is a principle too important to get in the way of the efficient management of our business, our responsibility of advising and consenting, and having back in place the 200-year tradition of giving up-or-down votes to those who have majority support.

With that, I urge my colleagues to support the majority leader, and I urge the restoration of a majority vote on judges.

I yield the floor.

The PRESIDING OFFICER (Mr. GRAHAM). The assistant majority leader is recognized.

Mr. MCCONNELL. Mr. President, I want to say this to my good friend from Oregon before he leaves the floor. I listened intently to his extremely well-crafted and reasoned arguments, and I congratulate him for his important contribution to this momentous, significant debate we are having in the Senate, trying to get ourselves back to the way we comfortably operated for 214 years. I thank my colleague for his contribution.

Because of the unprecedented obstruction of our Democratic colleagues, the Republican conference intends to restore the principle that, regardless of party, any President's judicial nominees, after full debate, deserve a simple up-or-down vote.

I know that some of our colleagues wish that restoration of this principle were not required. But it is a measured step that my friends on the other side of the aisle have unfortunately made necessary. For the first time in 214 years, they have changed the Senate's ''advise and consent'' responsibilities to ''advise and obstruct.''

Our Democratic friends did not bring us here by accident. For 4 years, they have steered the Senate toward this unfortunate path. In April of 2001, Senate Democrats held a private weekend retreat in Farmington, PA, to hatch a plan of attack against the President's judicial nominees. According to the New York Times, one participant at the meeting said, quote, ''it was important for the Senate to change the ground rules, and there was no obligation to confirm someone just because they are scholarly or erudite.'' And, thus, we embarked on this uncharted course.

Until the last Congress—the 108th Congress—it had been standard procedure not to filibuster judicial nominees. That changed on February 11, 2003. On that day, Senator HATCH, chairman of the Judiciary Committee, sought consent to consider Miguel Estrada's nomination to the DC Circuit Court. My friend, Senator DODD, refused. Senator HATCH offered to increase the amount of time for debate by 10 hours and was refused again. He offered 20 hours. He offered 40 hours. He offered even 50 hours of debate, an unprecedented amount of time. Senator DODD said as follows:

This is not about the amount of time.

We have heard the repeated argument on the other side that this is about the right to speak. Senator DODD said that this is not about the amount of time.

Remember that, Mr. President. The next time you hear any one of our Democratic colleagues complain that when we restore the norms and traditions of the Senate, we will be limiting their right to speak or cutting off debate, they themselves say it is not about that. Such claims actually don't withstand scrutiny. I could not agree more with my friend from Connecticut when he said this current impasse is not about the amount of time available to debate.

The Democratic leader, my friend, Senator REID from Nevada, also agrees with me. When Senator BENNETT requested an agreement to consider the nomination of Justice Priscilla Owen to the Fifth Circuit, Senator BENNETT also bent over backward to give the minority whatever number of hours for debate it needed.

Senator REID responded:

There is not a number in the universe that would be sufficient.

''There is not a number in the universe that would be sufficient.'' Clearly, it must not have been about getting enough time. Our Democratic friends went on to block several more reasonable requests to consider circuit court nominations.

So it is clear the Democrats do not want more time to debate. The minority leader indicated there was not enough time in the universe for that. Rather, a minority of Senators are rejecting the opportunity to debate because they want to kill qualified judicial nominations with clear majority support.

These nomination have gone for 2, 3, even 4 years—the current justice pending on the calendar has been up for 4 years—without a vote, while vacancies on the Federal bench pile up.

Let's take, for example, Justice Priscilla Owen, who is the pending business of the Senate. She was nominated, as I just indicated, by the President 4 years ago to sit on the Fifth Circuit. Justice Owen has served with honor for 10 years on the Texas Supreme Court. She won reelection with a whopping 84 percent of the vote, far more than most of our colleagues who oppose her. She has the support of both Democrats and Republicans from Texas who know her best. She has endured 4 years of slanderous attacks from partisan groups with grace and poise.

All of that meant nothing once she landed in the crosshairs of the Senate's obstructionist minority. We devoted 17 legislative days to discuss her qualifications—17 days—and we have held four cloture votes on Justice Owen's nomination in order to allow the entire Senate to pronounce its collective judgment on her qualifications. But a minority of Senators is determined to deny the Senate the exercise of its constitutional duty. All four cloture votes have failed.

On May 1, 2003, cloture failed on the Owen nomination by a vote of 52 to 44. One week later, it failed 52 to 45. On July 29 of that year, it failed 53 to 43, and on November 14 of that year, it failed 53 to 42. For every one of those votes, Justice Owen had a clear majority and, in fact, bipartisan support. But some continued to do the unthinkable. They continued to set the precedent that only 41 Senators should have the right to dictate to the President who he or she can and cannot appoint to our Federal courts.

Justice Owen is not the only person they have obstructed. In the 108th Congress, an obstructionist minority blocked the Senate from giving its advice and consent a record 20 times. Twenty votes on judicial nominees were held, and 20 times a minority of Senators refused to let the Senate discharge its constitutional duty to render advice and consent. Twenty times, Mr. President, in the 108th Congress they stopped a judicial nominee who clearly had majority bipartisan support from receiving the courtesy of an up-or-down vote. They filibustered 10 different circuit court nominees within 16 months. This is completely without precedent, and it is also not fair. Any President's judicial nominees should receive careful consideration,

but after that debate, they deserve a simple up-or-down vote.

Despite the Democrats' power grab, we offered them several compromises that allowed for extended debate but still give nominees the courtesy of an up-or-down vote. They rejected every one. For instance, in May 2003, the majority leader, along with Senator Zell Miller of Georgia, a Democrat, proposed S. Res. 138, the Frist-Miller cloture reform proposal.

The Frist-Miller proposal was narrowly tailored after a much broader Democratic proposal from 10 years ago that would have completely eliminated the filibuster in its entirety. The Democratic proposal would have eliminated the filibuster from legislation, to which it has been historically confined, as well as for judicial nominations, where it had not been used until the last Congress.

Interestingly, all Republicans, every single one, voted against the Democratic proposal because it would have eliminated the legislative filibuster. In fact, it was the first vote that Majority Leader FRIST cast in the Senate. The only Senators who voted for that proposal were our friends on the other side of the aisle, nine of whom are still serving in this body today, singing a different tune, I might add.

I have heard several of my friends on the other side of the aisle warn ominously that if the Senate votes to reestablish the norms and traditions of this body with respect to judicial nominations, this could somehow lead to the infringement or even abolishment of a filibuster as applied to legislation. What nonsense. That will not happen because certainly nobody on this side is in favor of this, and I gather now nobody on the other side is in favor of it, even though nine of them were for it 10 years ago.

When the Democrats proposed to do away with the legislative filibuster 10 years ago, nobody on this side of the aisle supported it, and I am confident nobody on this side of the aisle would support it today. What is remarkable about that is back in 1995 when our friends on the other side were proposing eliminating the filibuster, it was right after our party came to the majority. We would have been a big winner of that had it passed, but yet not a single one of us voted for it. What did we do? We exercised restraint.

So back to the Frist-Miller proposal which, as I said, was a narrowly focused version of the Democratic—I stress ''Democratic''—bill to eliminate the filibuster altogether. The Frist-Miller proposal was much more moderate, much more measured. It would have applied only to nominations, not to legislation. It would have allowed Senators after 12 hours of debate to file successive cloture motions with declining requirements to achieve cloture. The final cloture threshold would be a majority of Senators present and voting.

The Frist-Miller proposal would have allowed the minority sufficient time for debate while reestablishing the Senate's 214-year history of allowing nominees with majority support to receive the courtesy of an up-or-down vote. It was a good proposal. Unfortunately, our Democratic colleagues rejected it.

In April 2004, a little over a year ago, the majority again reached out to our Democratic colleagues. We suggested another approach to break this impasse on judicial nominations. This time the chairman of the Judiciary Committee, Senator SPECTER, took the lead by offering S. Res. 327, the Specter protocol. Under the Specter protocol, judicial nominees would receive a committee hearing, a committee vote, and a floor vote within a reasonable amount of time regardless of which party controlled the Senate and the White House.

The chairman of the Judiciary Committee would agree to hold hearings for the nominees within 30 days of the submission of their names by the President. The chairman would set a date for the full committee to vote within 30 days of those hearings. And the majority leader would set an up-or-down vote on the Senate floor within 30 days after the nominee was reported out of committee. It was pretty simple.

As I indicated, these timetables would apply whether Democrats or Republicans were in charge of the Senate, whether the same party controlled the White House and the Senate, or whether the two parties split the control.

I bet to the vast majority of people listening, that sounds like an extremely fair, bipartisan solution. I agree with them. Again, unfortunately, our Democratic friends have not embraced it.

At this point, most people would throw up their hands and give up. We do not have the luxury of doing that, however, because the American people elected all of us to act on these issues that confront the country. Restoring Senate tradition and thereby restoring the proper balance of power between the executive and legislative branches is one of our responsibilities, and we need to do it.

We Republicans redoubled our efforts and patiently tried again. In the interim, though, we had an election. President Bush and several candidates for the Senate, many of whom serve here today, met thousands of mainstream ordinary Americans who were angry at the obstructive attempts to disfigure the filibuster. Thousands of Americans told President Bush and their Republican candidates for the Senate that they do not believe the President's nominees are out of the mainstream, and they do not like a minority of the Senate preventing the Senate from discharging its constitutional duty.

Millions of them turned out to reelect President Bush, giving him more votes than any Presidential candidate in American history. And millions voted to increase the majority's number in this body from 51 to 55.

Given those results, many of us had hoped that the politics of obstruction would have been dumped in the dustbin of history. Regretfully, that did not happen.

Recently, we Republicans tried again to reach an accommodation with our Democratic colleagues. Last month, the majority leader offered a comprehensive, thoughtful, and fair-minded solution. It is called the fairness rule. My Democratic colleagues had repeatedly complained that some of President Clinton's nominees were never reported out of the Judiciary Committee, and that is a valid point. They had a point. So to address the concern, the Frist fairness rule guarantees that every nominee would be reported out of Judiciary—presumably some of them maybe not with majority support—preventing any nominee from getting blocked in committee, which is the principal complaint the Democrats have about how they had been treated when our party controlled the Senate and their party the White House.

The Frist fairness rule guarantees every nominee would be reported out of Judiciary, preventing any nominee from getting blocked in committee. The principal complaint we have heard repeated so often out here is that the Republicans were simply doing in committee under Clinton what the Democrats are doing on the floor under Bush. We will deal with that.

In addition, my Democratic colleagues complain they need to have the right to debate judicial nominees protected.

This complaint is incongruous with Senator REID's comment that there was not enough debate time ''in the universe'' to allow a vote on Justice Priscilla Owen. It must not have been about time because he said there was not enough time in the universe.

Nevertheless, the Frist fairness rule guarantees up to 100 hours of debate on every nominee, allowing every member to have his or her say. This is more time than has been devoted to most Supreme Court nominees.

Finally, the Frist fairness rule guarantees up-or-down votes for every circuit court or Supreme Court nomination, regardless of which party controls the Senate or the White House. So the fairness rule could not have a more appropriate name. It guarantees a full and comprehensive debate. It guarantees every Senator a constitutional right to cast a fair up-or-down vote for every judicial nominee. It guarantees every President that their judicial nominees will get through committee and get a vote on the Senate floor and, of course, it would not apply to legislation at all.

Once again, our Democratic colleagues quickly rejected this proposal.

To recap, the majority in the Senate has had weeks of debate. We have tried multiple and generous time agreements. We have offered the Frist-Miller proposal. We have suggested the Specter protocols. We have offered the Frist

fairness rule. Unfortunately, our Democratic colleagues have rejected all of these efforts at accommodation.

We have reached the point in this debate where not a lot of new things are being said, but not everybody has yet said it. But I want to make a point that I believe has not been made by anyone today. For 70 percent of the 20th century, the same party controlled both the White House and the Senate. For 70 percent of the 20th century, the same people running the White House were running the Senate. Most of the time, the people in the minority in the Senate were people of my party. Yet Republicans did not filibuster, for example, the judicial nominees of Franklin Delano Roosevelt, even though he appointed eight Justices to the Supreme Court and elevated another to Chief Justice.

More recently, the Republican minority did not filibuster the judicial nominees of Presidents Carter and Clinton because we were in the minority for 2 years under President Clinton and all 4 years under President Carter, even though several of these nominees were extremely controversial and did not enjoy supermajority support.

To be fair, when Senator BYRD was the minority leader, he did not lead his Democratic caucus in the Senate to filibuster President Reagan's judicial nominees either, and Senator BYRD should be commended for that. That was an extraordinary act of statesmanship. He could have done at the time he was in the minority when President Reagan was in the White House what has been done in the previous Congress.

When Senator BYRD was minority leader, he did not lead his Democratic Caucus in the Senate to filibuster President Reagan's judicial nominees. Not until 2 years ago has a Senate minority ever decided to filibuster a President's judicial nominations on a repeated partisan and systematic basis when they clearly enjoyed majority support.

To correct this abuse, the majority in the Senate is prepared to restore the Senate's traditions and precedents to ensure that regardless of party, any President's judicial nominees, after full and fair debate, receive a simple up-or-down vote on the Senate floor. It is time to move away from advise and obstruct and get back to advise and consent.

The stakes are high. The Constitution of the United States is at stake. Article 2, section 2 clearly provides the President and the President alone nominates judges.

The Senate is merely empowered to give advice and consent, but our Democratic colleagues want to change the rules. They want to reinterpret the Constitution to require a supermajority for confirmation.

In effect, they would take away the power to nominate from the President and grant it to 41 Members of the Senate. In other words, there would be the distinct possibility and in fact great likelihood, if this continues, that 41 Members of the Senate will dictate to the President of the United States who may be a member of the Supreme Court and other courts.

We have made every effort to reach out and compromise, but our colleagues at least so far have refused. The only choice that remains is to hold a vote to reaffirm the traditions and precedents that have served this body so well for the last 214 years. Let us vote.

I yield the floor.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. LOTT. Mr. President, I thank Senator MCCONNELL for his comments and for his leadership in this area. In many respects, I would like to pick up where he left off in the discussion of how did we reach this point. How did the Senate come to where we are going to have to have hours, days, weeks of debate on highly qualified men, women, and minorities for the Federal judiciary?

Most of my colleagues in the Senate know over the years I have been a believer that we should get things done for the American people; that we should have cooperation; that we should vote on these judges up or down and move on; that we need to be working as we did earlier this week to report a highway bill, to get energy legislation, to deal with the very critical and difficult issue of immigration reform, pass appropriations bills, take up other critical issues for the future in our country, the creation of jobs, to promote the continued development in critical high-tech areas such as telecommunications. We have a lot of work to do and yet here we are, stalled out, in my opinion, unnecessarily.

I believe we should reach across the aisle and try to find accommodation. Whether one likes it, that is how the Senate was set up, that is how we work, quite often by consensus. Over the years, when I served in leadership positions, I was quite often criticized by my own colleagues of being too willing to work with the other side to try to find a way to get a result. Then Senator and Minority Leader Tom Daschle and I worked together a lot. At the same time I was being criticized by some of my colleagues, he was being criticized by his colleagues. It is called leadership. It is called dealing with the rules one has and finding a way to work together and move forward.

I have been working for 4 years to figure out what is going on and find a solution that is acceptable to both sides of the aisle.

I worked with Senator FRIST and Senator Zell Miller to get a bill out of the Rules Committee some 2 years ago that would set up a process that would get us to a final vote on these nominees. The first vote would be the required 60 and then the second vote 57 and so on down until eventually after about a month we would get a direct vote that I think would have been fair. But, no, the Democrats would not accept that.

So then this year I came back and I started to see if maybe I could work across the aisle with Senators such as Senator NELSON, Senator PRYOR, and others to see if we could address some of the legitimate concerns.

This problem did not start 2 years ago or 4 years ago. This has been coming for a long time. I think it began with the nomination of Judge Bork. I think Republicans have retaliated for what they felt was a wrong and then the Democrats retaliated, but always slipping further down this slope of unfairness to these good men and women.

So Senator NELSON and I worked together, and we did come up with a proposal that would guarantee all nominees now and in the future would get reported out of the Judiciary Committee after a specified period of time. In other words, stop the practice, if in fact there was one during the Clinton years, of killing nominations in the Judiciary Committee unless there is clearly justification for it, objection from the in-State Senators, or other reasons, but do not get into the technicalities. Just say we were going to guarantee they would get out of committee, there would be time for full debate up to a week before we could get an up-or-down vote.

Senator FRIST actually expanded that and said how about a full 100 hours of debate; every Senator would have an opportunity to talk an hour about any nominee. By the way, I can tell my colleagues, for the majority leader to make a sacrifice of 100 hours of this body's time is a huge sacrifice. It could not be done very much, maybe two or three times a year at the most. So the seven nominees now being held hostage whom we are going to talk about in the next few days, some of them clearly would not make it under that procedure, but it would have gotten to a final vote.

Again, that was rejected by the Democrats because they said, oh, no, we cannot agree to anything that would appear to or in fact give up our right to filibuster these judges. That did not work.

Then, of course, there was the last effort, one that is now still underway, one I am not involved in any longer because I kept feeling we were not going to get an agreement that did not force us to throw over and not even vote or agree to vote down one of these two women, outstanding nominees, for the Federal appellate courts. I will talk more about them individually in a moment.

So again back to the question of how we got here, the debate we find ourselves currently engaged in is a culmination of 4 years of obstructionism by a minority of Senators who refuse to allow the majority of the Senate to fulfill their constitutional responsibilities.

I know we have a lot of people who come to the Senate floor and talk

about the Constitution, pontificate about the forefathers, and that the language is this. I have read the Constitution, I have read the Federalist Papers, I have looked at the history, and clearly these judges should be getting an up-or-down vote.

The Constitution clearly says when they expect a supermajority, and if they do not, then the presumption is a majority would win.

I believe in protecting minority rights. I have been in the minority more in my legislative career of 33 years than I have been in the majority. But there is another little thing: It is called elections and a majority. At some point, we quit talking and we give these people a fair up-or-down vote.

Some people will come to the floor and say, this is the tradition, we must not mess with it; this is something that has been in existence from the very beginning of the history of our country. That is not so. As a matter of fact, filibusters did not get started until World War I.

Oh, people will be surprised at that. You mean we have not had it since the great days of Clay, Webster, and Calhoun? No. As a matter of fact, after a minority of Senators blocked efforts to have an up-or-down vote on a proposal to arm merchant ships during World War I, the Senate adopted its first cloture rule. The cloture rule was later changed on five separate occasions, most recently in 1986.

So these great and hallowed traditions in this institution, if one checks back on them, do not go back very far. This is a living body. Like the Constitution, it is a living, breathing body. It changes. It evolves. We make changes in the rules. That is why when people say, woe is me, doom and gloom, the Senate cannot get through this, whatever we do, it will be cataclysmic—forget it. We have a job to do here. Let us face it like men and women and let us deal with the issue. Let us move on. Let us deal with the substance. Let us deal with the things that matter to people, such as the price of gasoline and the immigration problem, and handle it in a fair way. But this is not something that has been written into the Constitution. No, it is new.

It began, I am sorry to say, with a personal friend of mine, a great man, a great judge named Charles Pickering who had been approved unanimously by the Senate in the past to be a Federal district judge, but when he was nominated for the Fifth Circuit Court of Appeals, we could not get it out of the committee. At that time, the majority, the Democrats, killed his nomination in committee. I was floored. I could not believe it; one of the finest men, one of the finest Christians, one of the finest judges, one of the best unifiers we have ever had in the history of our country probably since LQC Lamar in the 1880s.

He got defeated in committee. I thought at the time it was a shot at me, part of the politics we get around here, and that it would change with time; it was just a gratuitous backhand at me. I can say for sure Senator Daschle, my friend, was not comfortable with what happened there. The majority came back to the Republican side and Judge Pickering came to the floor and he was filibustered. Then it was Miguel Estrada. Then it was Priscilla Owen. Then a pattern developed. That is one reason some people say, look, if there is this option that it only takes 51 votes, why was it not done last year or 2 years ago or 4 years ago? Frankly, because I thought it was an aberration. I thought it was temporary.

I could not believe this institution would besmirch, denigrate, and harass these nominees, turning the Senate not into an august, hallowed body of great deliberation but into a torture chamber, and yet here we are. I have tried to find a way to get out of this. I have tried to accept some of the blame I deserve, but that has already been done.

We have to find a solution now and we have to do it soon. Can a compromise be worked out? Why, of course. They always can, by sundown. That would probably satisfy nobody totally, but everybody a little bit. If it does not happen, we have to get this over with. We have to vote.

So what I thought was going to be an isolated incident now has become extreme. It has become systematic. It has become highly partisan. We have to deal with it. We probably should have already dealt with it.

As majority leader, I worked closely with Senator Daschle to ensure each nominee who reached the Senate floor received an up-or-down vote. Some people said, all the judges did not get out of committee. The leaders do not dictate to the committees. We do not dictate to one Senator, let alone a committee of Senators. But when it came to the floor, through thick or thin and however difficult it was, we got it done, we got them confirmed.

I will give an example. I filed cloture personally on President Clinton's nominee to the Federal district court in Utah, Brian Theodore Stewart. A cloture vote was in fact held to cut off an unnecessary and unfair filibuster on September 21, 1999. I voted for cloture to cut off the filibuster for this nominee because I believed, as I believe now, that it was important to hold an up-or-down vote on a nomination after it reached the Senate floor.

Additionally, I would like to mention two other controversial nominees to the Ninth Circuit Court of Appeals nominated by President Clinton. Marsha Berzon and Richard Paez both had very serious problems that were raised during their nominations and that concerned Senators. Their nominations were certainly highly contentious, and the process was very slow. However, they did eventually come out of the Judiciary Committee and at the appropriate time I rose to file for cloture on both of these nominees in an effort to move the process forward toward a vote, against the wishes of a number of Members of my own caucus. I stood right there and said we are not going to filibuster Federal judicial nominees; we are not going to do it. If they come out of the committee, they are going to get an up-or-down vote. Now, I may vote against them but not on my watch are Republicans going to filibuster these nominees.

On March 8, 2000, the Senate voted 86 to 13 to 1 to invoke cloture to cut off the filibuster on the nomination of Judge Berzon. Her nomination was confirmed the following day by a vote of 64 to 34 to 2.

Also on March 8, 2000, the Senate voted 85 to 14 to 1 to invoke cloture on the nomination of Richard Paez. The next day, March 9, 2000, a motion to postpone indefinitely a vote on Paez was defeated 67 to 31 to 2. By the way, in the interest of full disclosure, I voted to delay it. I do not remember why, and I am embarrassed. I should not have. An indefinite postponement is the same as a filibuster. That was wrong. We should not have done it. He was later approved that very day 59 to 39 to 2.

These two now serve in the Federal judiciary. They had lots of problems, in my mind, which I will not enumerate. There is no use rehashing that. But this is proof of the evidence when Republicans say we did not do it when we could have during the Clinton years, we did not allow filibusters. The number of President Clinton's judges who were blocked by filibusters, zero. Not under my watch or others'.

I think it is time we bring this to conclusion. I think if we could ever get a time out, if we could ever find a way to stop the filibusters, deal with the magnificent seven that are still pending, this would fade away. That is the way it happens in the Senate.

Oh, the clash is mighty and the roar is deafening. ''There is no way out of this valley of death.'' That is when it always seems to happen, that we find a way to stop the craziness and move forward in a responsible way.

I have to talk a little bit about the nominees. I have met with some of them. I direct your attention to this picture. Why does he have a picture? I want to make a point. These are not numbers. These are not seven things. These seven nominees who have been renominated by the President are men and women and minorities who have had their reputations and their lives dragged through the mud—this one, Priscilla Owen, for up to 4 years.

Maybe you could analyze the seven and say, that one has a little problem or that one has a little problem. I don't say they are perfect. None of us are. But I am telling you, you can't get much closer to perfect than this nominee, Priscilla Owen. That is why I could never agree to any deal that did anything but allow this lady to have an up-or-down vote on her nomination.

She is from Texas. Maybe that is part of the problem, I don't know. She serves on the Texas Supreme Court. It seems like a good training ground before you move to the Federal judiciary. She graduated cum laude from Baylor University and cum laude from Baylor University Law School. She was a member of the Baylor Law Review. She was honored as the Baylor Young Lawyer of the Year, Baylor University Outstanding Young Alumna. After graduating from law school, she scored the highest score in the State when she took the Texas bar exam in 1977.

She practiced law with one of the most prestigious law firms in the State of Texas, mostly commercial litigation, for 17 years. She has been on the Supreme Court of Texas for 10½ years, and the last time she ran she was endorsed by every major newspaper in the State and she received 84 percent of the vote.

She has ruled hundreds of times, not always on the business side, sometimes on the consumer side. She has had to interpret law that has been difficult, but she has done it. She has done it fairly. She has done it most often with the majority of the court.

By the way, even that hallowed American Bar Association—that I used to be a member of, but I dropped my membership for a number of reasons—gave her its highest rating.

When you look at this lady's record, her brilliance, her family—every way she has conducted herself, there is no justification for her not being confirmed or at least getting a vote.

I am not going to go through the charges that are levied against her, partially because some of them are so bizarre and so ridiculous, but also because I have seen around here that if you repeat a misstatement often enough, it becomes fact. Here is an example. Justice Owen has been accused by some of the people here because of the fact that Justice Alberto Gonzales—now the Attorney General, then a supreme court justice in Texas—accused her of being engaged in an ''unconscionable act of judicial activism'' in one particular parental notice case where abortion was involved and she was interpreting a State law. That happened even though Justice Gonzales said that was not the case, that his words were twisted and misconstrued. When he said that, for him, in his concurring opinion, it would be an ''unconscionable act of judicial activism'' for any judge to bend the statute to advance his or her own personal views, even though ''the ramifications of such law and the results of the court's decision may be personally troubling,'' he was talking about himself.

This is not a gratuitous shot at his colleague sitting on the bench, and he has tried to clarify it. It makes no difference. It continues to be repeated as fact among those who oppose this nomination.

Look at this face. This lady has been through 4 years of hell. Why? I just don't get it.

Somebody said she has a pro-business voting record. Is that something sinister? She has ruled, for instance, that patients who are injured should be able to pursue doctors. She has ruled on occasion for consumers. But, my goodness, is it an indictment if you are pro-business? I am the son of a shipyard pipefitter, union member, but I am pro-business because I figured out, like my daddy knew, if business didn't make a profit, if they went out of business, he was out of a job.

So, there, she deserves a vote up or down. She will make a great Federal judge.

This one is even more hard to explain to me. Janice Rogers Brown. I am not going to give her American dream story, but she has lived it: Born in Alabama, family moved to Sacramento when she was still in elementary school. She grew up in California, got an education, and worked hard. She graduated from California State University at Sacramento, with a bachelor in economics and received a law degree from UCLA Law School. She has served as Legal Affairs Secretary to Pete Wilson, the Governor of the State of California, Deputy Attorney General in the office of the California Attorney General, and she served on an intermediate California appellate court. She has been on the bench long enough where she has been appointed and sought reelection and she got 76 percent of the vote in California on reelection.

That is not exactly a center or a center right constituency. They must have thought she was doing a good job; the first African-American woman in history on the Supreme Court of California. A great record.

The American dream has been lived for this lady. Two days ago, when she came by my office, I apologized to her on behalf of the American people for the way the Senate has treated her. I am ashamed of what we did. What is the criticism?

One of them, she is harsh on criminal defendants. Excuse me? The truth is, she is a conservative African-American woman. This is bad. ''How can we allow that to happen? That can't be.'' She has had some things to say in her remarks off the bench, that some of the Federal programs have had a counter-effect, not a positive effect. But she has been described by others as being brilliant and fair. Even a columnist who was being critical of her recently admitted that her opinions are consistently the most concise, engaging, well organized, and well reasoned.

She wrote the majority of the decisions in 2002 for the California Supreme Court. She is writing with the majority. Again, this face is a human being. This is not a number. This lady has been tangled up in partisan politics for 2 years. This is wrong.

That is why when people say to me, Oh, the institution will be damaged, my colleagues, I think we maybe protest too much, and we puff ourselves up a little bit too much. By the way, there are some things more important than the rules of an institution. I still think right and wrong should apply, just as it should in every other phase of our lives.

What has happened to this lady, and this one, is wrong. I cannot be a part of a process that doesn't give them the vote that they deserve, up or down—now. If they are not confirmed, so be it. I have voted on the winning side and on the losing side. I have voted for judges and against judges. Most often they have been confirmed; occasionally not, and I have been berated by Democrats sometimes when I voted against some of the nominees. But the process used to work. It is broken now. Let's fix it. Let's fix it now. Let's do our job. Let's vote.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. COBURN). The Senator from Missouri.

Mr. BOND. Mr. President, I think the facts are clear. You have heard this many times. Almost everything has been said, but not everybody has said it. I want to go over some of the facts I think are very important.

For 214 years judicial nominations have come to the Senate floor and have been considered without filibuster. It is a courtesy extended by my fellow Senators to the President. By resorting to filibustering judicial nominees who have the support of a majority of Senators, which began in 2003 by colleagues on the other side of the aisle, they are throwing overboard 214 years of Senate courtesy and tradition.

The Constitution of the United States does not contain a word about filibusters. The Federalist Papers do not contain the word ''filibuster.'' Rather, the Constitution lays out the standards for confirming judges. It does not require a 60-vote majority for confirmation. It requires a majority vote to confirm members of the Federal judiciary.

The Democrats in this Chamber have taken it upon themselves to rewrite the rules for confirming justices. They now demand 60 votes for confirmation to a circuit court or potentially a Supreme Court position.

For the first time, judicial nominations with clear majority support are denied an up-or-down 51-vote, Senate majority vote on the Senate floor through the unprecedented use of the filibuster.

There is no constitutional authority for their demands, and it is an abandonment of the tradition of this Chamber. We are perfectly within our rights and history is on our side as we prepare to take steps to ensure the confirmation of judges with majority support.

In an attempt to cloud these rather clear facts, the Democrats have put forward a parade of dubious arguments to support their filibusters, obfuscation to justify political obstructionism.

One of the facts they overlook is their obligation to check the President—and our very system of checks and balances gives them authority and

demands action. But the Senate has the ability to check the President, not a minority of the Senate willing to pervert the rules of this body. The majority, therefore the Senate as a body, and representing a separate branch of Government, has spoken on these nominations. These nominees enjoy the support of the majority body's Members. The President has made his nominations and made his case for the nominations. Supporters and opponents of the nominees have made their case before the Senate on these nominations. From the votes we have taken we have seen that a majority of the Senate agrees with the President and supports his nominations. Under the system to check the President, as laid out clearly in the Constitution, the President has carried the issue and won the support of the body that has the authority to register its disapproval.

It has not disapproved. The Constitution says nothing on the subject of a filibuster, and it says nothing of the power of a minority to defeat the President's judicial nominations. It is the product of a rule of the Senate passed many years after the ratification of the Constitution. This rule does not derive from the authority of the Constitution. Furthermore, the rule is being used in a manner never used before. It is a perversion of the intent of the Constitution and, if its use in this manner is not abandoned, then we must take steps to wipe it from the books.

Let me go back to statements made about this process. Democrats are trying to change the constitutional standard for confirmation from a simple majority to a 60-vote standard. That is why we see the claim of the distinguished senior Senator from West Virginia that the nominations were rejected because they did not get 60 votes for cloture in the 108th Congress. Senators from Nevada, New York, Wisconsin, and Massachusetts have said they were rejected. A 60-vote standard is contrary to the Constitution. The Constitution spells out clearly where a supermajority is required: For veto overrides, constitutional amendments, treaty ratification, expelling a Member, convictions for impeachment. Judicial confirmation is not one of them.

It is also a double standard based on past treatment of a Democratic President's nominees. For example, Clinton nominees Richard Paez and Susan Molloway and William Fletcher were all confirmed with fewer than 60 votes, as were Carter nominees Abner Mikva and L.T. Senter.

It is said that justice delayed is justice denied. These filibusters of judicial nominations have slowed the consideration of cases in the Federal appeals court, especially in the Sixth Circuit, where Democrats have blocked four qualified nominees. As my colleague from Mississippi has pointed out, these good people who have devoted their life to law and the judiciary have been subject to interminable delays, personal vilification, without giving them the right to an up-or-down vote which this body has already demonstrated they would give them.

Look at what they have said. Back in 1975 in the CONGRESSIONAL RECORD of February 20:

The filibuster has been the shame of the Senate and the last resort of special interest groups. Too often, it has enabled a small minority of the Senate to prevent a strong majority from working its will and serving the public interest.

So spoke the senior Senator from Massachusetts.

Then, in 1998, June 18, a statement from the CONGRESSIONAL RECORD:

I have stated over and over again on this floor that I would . . . object and fight against any filibuster on a judge, whether it is somebody I opposed or supported.

That was the senior Senator from Vermont.

He also said:

I do not want to get [to] having to invoke cloture on judicial nominations. I think it is a bad precedent.

CONGRESSIONAL RECORD, September 16, 1999.

Another quote:

If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee . . . I have stated over and over again on this floor that I would . . . object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.''

Same Senator from Vermont, June 18, 1998.

Here is another one from the CONGRESSIONAL RECORD March 19, 1997:

But I also respectfully suggest that everyone who is nominated ought to have a shot, to have a hearing and have a shot to be heard on the floor and have a vote on the floor . . . It is totally appropriate for Republicans to reject every single nominee if they want to. That is within their right. But it is not, I will respectfully request, Madam President, appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote . . .

That was the distinguished senior Senator from Delaware, March 19, 1997.

Here is another good quote:

The Chief Justice of the United States Supreme Court said: ''The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.'' Which is exactly what I would like.

The distinguished senior Senator from Massachusetts, CONGRESSIONAL RECORD, March 7, 2000.

Mr. President, the minority had the opportunity to win their argument long before it reached the Senate. They had a chance to win at the ballot box. They argued that the American people could send Members of the Senate who agreed with their legislative agenda and their view of the role of the judiciary. The American people did not agree with the minority and sent an increased majority of Members to the Senate who agree with the President on the role of the judiciary, the type of individuals who should occupy these positions, and the need to give them an up-or-down vote.

On two occasions, my colleagues on the other side of the aisle had the chance to win the argument on judicial nominations and had a chance to win this argument at the ballot box. They did not. They had a chance to convince a majority of the Members of the Senate that the nominees are unsuitable to sit on the Federal bench. They were unable to do so. So they have resorted to turning a Senate rule on its head and insisting on an application never used before to win a debate they could not win by a simple 51-vote majority.

Now our Democratic colleagues come to the floor and say the view of the majority of the Senate and the view of a President, who won the most votes ever by any President, is out of the mainstream. A minority is now demanding their view—which is the minority opinion in this body, and apparently from the opinion polls and our contacts, the minority opinion in the country—should carry the day as to what is and what is not in the mainstream. Once again, this line of thought would seem to turn logic on its head.

To cloud further the unprecedented nature of their attack on the President's nominations, my Democratic colleagues are blowing their own horn about confirming 208 of the President's nominees versus only defeating 10; a stellar record of cooperation they claim, evidenced by confirming 95 percent of the President's nominees. By confirming the President's district court nominees they are attempting to hide a blatant attack on the President's nominees for higher court, appellate courts, courts of appeal.

The circuit courts of appeals are the second most important courts in the land behind only the Supreme Court of the United States. When it comes to confirmation of the President's nominees, their record is not one of cooperation but one of unprecedented assault. Nearly one in three of President Bush's nominees for the Federal court of appeals has been targeted for defeat. This is not by accident. We know two days after the Senator from Vermont switched parties and changed the balance of the Senate in June of 2001, a number of extreme left-leaning groups met to plot the defeat of circuit court nominees. Their analysis showed a Republican President would surely nominate judges with a philosophy consistent with the President, strict construction of the Constitution, rather than the extreme leftwing judicial legislation views of their own. The left-leaning groups saw their balance on the court decreasing, and their plan was to defeat circuit court nominees. Their plan was not to argue for judges in the mainstream or to defeat district court nominees. Their objective was to defeat, by any means, circuit court nominees of President Bush.

Yesterday we saw this outline in the Washington Times. These groups, in

turn, met with Senate Democrats to target certain nominees. Surprisingly, the nominees the groups decided to target seemed to be neatly in line with those ultimately targeted by Senate Democrats. So, actually, the minority has been outsourcing their decision as to who is and who is not in the mainstream to outside liberal groups such as People for the American Way, which a glance at any of their material reveals they are not exactly in the mainstream.

Here are a couple of excerpts from the Washington Times article yesterday:

In a November 7, 2001, internal memo to Sen. Richard J. Durbin, who is now the minority whip, an aide described a meeting that the Illinois Democrats had missed between groups opposed to Mr. Bush's nominations and Sen. Edward M. Kennedy, Massachusetts Democrat and member of the Judiciary Committee.

The memo goes on to State:

Based on input from these groups, I would place the appellate nominees in the categories below . . . listing 19 nominees as ''good,'' ''bad'' or ''ugly.''

Four of the 10 nominees who Democrats have since filibustered were deemed either ''bad'' or ''ugly.'' None of those deemed ''good'' by the outside groups was filibustered.

Among those listed as ''ugly,'' was Texas Supreme Court Justice Priscilla Owen, whose nomination will be brought to the floor today by Majority Leader Bill Frist, Tennessee Republican.

In a June 4, 2002, memo to Mr. Kennedy, staffers advised him that Justice Owen would be ''our next big fight.''

''We agree that she is the right choice—she has had a bad record on labor, personal injury and choice issues, and a broad range of national and local Texas groups are ready to oppose her,'' the aides wrote.

I ask unanimous consent this be printed in the RECORD after my statement.

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

(See exhibit 1)

Mr. BOND. As I believe has been stated many times before, Justice Owen has won overwhelming support, more than three-quarters support of the majority of Texas and the endorsement of major leading newspapers, the Bar Association, but the left-leaning groups did not like her.

Our colleagues in the minority want congratulations for the fact that nearly all of the President's trial court judges have been confirmed. I respect greatly the men and women on the Federal district court. In the eyes of the Senate Democrats, however, clearly, all judgeships are not created equal.

We see the contrast between the way the Democrats are conducting business and the way business has been conducted by tradition. Nearly one of three of the President's nominees to the appellate court, the circuit court are being filibustered. Prior to the Democrats embarking on this path, 2,372 nominees were confirmed without a filibuster; 377 of President Clinton's nominees were confirmed without a filibuster. Judges were confirmed for 214 years without there being a filibuster. So the minority has turned over the determination as to who is and who is out of the mainstream to a number of out-of-the-mainstream groups, and they let these groups lead us down the path of destroying Senate tradition of 200 years. Not a record, in my view, that warrants a hardy pat on the back.

In a thoughtful opinion piece in today's Washington Times, majority leader Bob Dole recalls there were a few nominations made by President Clinton that were clearly objectionable to most Republicans. He said:

I recall two judicial nominations of President Clinton's particularly troubling to me and my fellow Republicans members when I was the Republican Leader in the Senate. Despite our objections, both received an up-or-down vote on the Senate floor. In fact, I voted to end debate on one of these nominees while voting against his confirmation. Republicans chose not to filibuster because it was considered inappropriate for nominations to the federal bench.

Senator Dole goes on to say:

By creating a new 60-vote threshold for confirming judicial nominees, today's Senate Democrats have abandoned more than 200 years of Senate tradition.

For the first time, judicial nominees with clear majority support are denied an up-or-down vote on the Senate floor through an unprecedented use of the filibuster. This is not a misrepresentation of history; it's a fact.

I ask unanimous consent that be printed in the RECORD after my remarks.

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

(See exhibit 2)

Mr. BOND. We have heard a lot of statements and posturing from the other side about the President trying to pack the courts and how this is a nuclear option.

Let me tell you what the nuclear option is. The Democrats say if we go back to the tradition of confirming judges by a 51-vote up-or-down majority in the Senate, they are going to blow up the Senate. They are going to bring everything to a halt. They are going to destroy this body because we insist on what Democrats, prior to 2001, agreed with us; that is, judicial nominations brought to the floor deserve to be confirmed by a 51-vote up-or-down majority.

Already, we have seen the Democrats' stall tactics. ''Stall ball'' is being played. For people not in this body, you may not know that any Senator has a right to object to committee hearings being conducted 2 hours after the Senate goes in session. Even though this is regular order, this is standard procedure, we have had the Democratic side object to holding hearings.

Yesterday, we were scheduled to have a very important meeting in our Intelligence Committee to go over current threats, the intelligence of the dangers that our troops in the field face and the dangers we in the homeland face. That meeting was canceled because the Democrats objected.

The Energy Committee is trying to write a very important bill dealing with energy. We have not had an energy policy in a decade and a half. Gas prices have gone through the roof. We are seeing shortages. We are paying at the pump. We are paying in our home heating bills, paying with jobs going overseas because of the unnatural, artificial restrictions on the development of sources of energy in the United States—natural gas, oil, and even renewable fuel—while demand artificially is being increased for natural gas by the requirement that rules require it be used in electric utilities. And yet by objecting to committee hearings, the Democrats are limiting the Energy Committee to 2 hours a day and a markup.

It is not the President who is distorting rules to forward his nominations. It is not the President who has abandoned tradition and courtesy in forwarding his nomination. It is not the President who is attempting to rewrite the Constitutional standard for confirming judges. The other side of the aisle thinks if they can muster 41 votes, they ought to stop anybody that their leftwing, liberal interest groups target for blocking from confirmation. The President is exercising his constitutional role to appoint members of the Federal judiciary, and he is doing so following his decisive victory last fall after winning more votes than any other president in history, promising to appoint good, well-qualified, highly qualified, highly respected judges and attorneys to the courts of appeal. Who is and who is not in the mainstream of American thought?

I believe it is clear that the President and the majority in the Senate have a right to give these well-qualified nominees an up-or-down 51-vote majority vote on the floor of the Senate.

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

EXHIBIT 1

[From the Washington Times, May 19, 2005]

MEMOS REVEAL STRATEGY BEHIND JUDGE FILIBUSTERS

(By Charles Hurt)

The ''nuclear'' showdown that is expected to begin unfolding in the Senate today has its origins in closed-door discussions more than three years ago between key Senate Democrats and outside interest groups as they huddled to plot strategies for blocking President Bush's judicial nominees.

In a Nov. 7, 2001, internal memo to Sen. Richard J. Durbin, who is now the minority whip, an aide described a meeting that the Illinois Democrat had missed between groups opposed to Mr. Bush's nominees and Sen. Edward M. Kennedy, Massachusetts Democrat and member of the Judiciary Committee.

''Based on input from the groups, I would place the appellate nominees in the categories below,'' the staffer wrote, listing 19 nominees as ''good,'' ''bad'' or ''ugly.''

Four of the 10 nominees who Democrats have since filibustered were deemed either ''bad'' or ''ugly.'' None of those deemed ''good'' by the outside groups was filibustered.

Among those listed as ''ugly'' was Texas Supreme Court Justice Priscilla Owen, whose nomination will be brought to the floor today by Majority Leader Bill Frist, Tennessee Republican.

The internal Democratic memos, downloaded from Democratic computer servers in the Judiciary Committee by Republican staffers, offer a unique look into the early stages of the filibuster campaign, when Democrats were clearly doubtful that they could succeed in blocking any of the nominees.

In the 14 memos obtained in November 2003 by the Wall Street Journal and The Washington Times, Democratic staffers outlined the concerns held by outside groups about Justice Owen's ''hostile'' position toward abortion and her ''pro-business'' attitude.

In a June 4, 2002, memo to Mr. Kennedy, staffers advised him that Justice Owen would be ''our next big fight.''

''We agree that she is the right choice—she has a bad record on labor, personal injury and choice issues, and a broad range of national and local Texas groups are ready to oppose her,'' the aides wrote.

Another nominee discussed often in the memos is Miguel Estrada, a Washington lawyer who became the first filibustered nominee and who withdrew his nomination to the U.S. Court of Appeals for the D.C. Circuit after waiting two years for a final vote.

In the 2001 memo to Mr. Durbin, the staffer explained the concerns that the outside groups had about Mr. Estrada.

''They also identified Miguel Estrada (D.C. Circuit) as especially dangerous because he had a minimal paper trail, he is Latino, and the White House seems to be grooming him for a Supreme Court appointment,'' the aide wrote.

The memos also reveal the close relationship between Democrats and the outside groups.

In a June 21, 2002, memo to Democrats Mr. Kennedy, Mr. Durbin, Sen. Charles E. Schumer of New York and Sen. Maria Cantwell of Washington, a staffer urged delaying a hearing for Mr. Estrada to ''give the groups time to complete their research and the committee time to collect additional information.''

One nominee who wasn't filibustered was Judge Timothy Tymkovich, who now sits on the U.S. Court of Appeals for the 10th Circuit. But Democrats opposed moving him until all the groups had given their approval.

''[I]t appears that the groups are willing to let Tymkovich go through (the core of the coalition made that decision last night, but they are checking with the gay rights groups),'' staffers wrote Mr. Kennedy in a June 12, 2002, memo.

But even as late as early 2003, Democrats appeared concerned that they would not succeed in mounting a full-scale filibuster against their first target.

In a January 2003 meeting between Democrats on the Judiciary Committee and Democratic leaders in the Senate, Democrats agreed to attempt a filibuster against Mr. Estrada.

''All in attendance agreed to attempt to filibuster the nomination of Miguel Estrada, if they have the votes to defeat cloture,'' the judiciary aides wrote. ''They also agreed that, if they do not have the votes to defeat cloture, a contested loss would be worse than no contest.''

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EXHIBIT 2

A UNIQUE CASE OF OBSTRUCTION

In the current debate over judicial nominations, some commentators claim Republicans such as myself are misrepresenting history by suggesting the current filibuster tactics of the Democrats are unprecedented.

These commentators cite the 1968 nomination of Abe Fortas to be chief justice of the United States as an example of how Republicans once attempted to block a judicial nomination on the Senate floor. I welcome the opportunity to respond to this claim, because the more Americans learn about the history of judicial nominations, the more they will realize how terribly off-track our confirmation process has become.

In 1968, President Lyndon Johnson sought to elevate his longtime personal lawyer, then-Associate Supreme Court Justice Abe Fortas, to be chief justice. I would not be elected a senator for a few more months, but followed the news surrounding this nomination closely.

There were problems with the Fortas nomination from the beginning. Not only did he represent the most aggressive judicial activism of the Warren court, but it soon became apparent Justice Fortas had demonstrated lax ethical standards while serving as an associate justice.

For example, it emerged Fortas had taken more than $15,000 in outside income from sources with interests before the federal courts. This was more than 40 percent of his salary at the time, or about $80,000 in today's dollars.

More fundamentally, Fortas never took off his political hat when he became a judge. While serving as a Supreme Court justice, Fortas continued serving as an informal political adviser to the president and even involved himself in Vietnam War policy. It later emerged Fortas had discussed pending cases with the president, an obvious violation of professional ethics.

In fact, less than a year after his nomination as chief justice was withdrawn by President Johnson, Justice Fortas was forced to resign from the Supreme Court due to ethical breaches.

The claim Fortas was not confirmed due to a ''filibuster'' is off-base. A filibuster, commonly understood, occurs when a minority of senators prevents a majority from voting up-or-down on a matter by use or threat of permanent debate.

That simply did not happen with Fortas, where the Senate debated the nomination's merits quite vigorously. Senators exposed the ethical issues involved and the widespread belief the vacancy had been manufactured for political purposes. They sought to use debate to persuade other senators the nomination should be defeated.

After less than a week, the Senate leadership tried to shut down debate. At that time, two-thirds of the senators voting were needed to do so, yet only 45 senators supported the motion. Of the 43 senators who still wished to debate the nomination, 23 were Republicans and 19 were Democrats.

President Johnson saw the writing on the wall—that Fortas did not have 51 senators in support of his nomination—so he withdrew the nomination before debate could be completed.

The events of 37 years ago contrast markedly with those the Senate Faces today:

(1) Fortas lacked majority support when President Johnson withdrew his nomination. Today, Senate Democrats block up-or-down votes on judicial nominees who are supported by a majority of senators.

(2) Justice Fortas was politically associated with President Johnson and eventually resigned from the Supreme Court under an ethical cloud. No such charges have been made against President Bush's nominees.

(3) The Senate debated the Fortas nomination only for several days before Johnson withdrew the nomination, versus the four years some of President Bush's nominees have been pending. It's clear the Democrats today have no desire to persuade, and have even complained further debate is a ''waste of time.''

(4) Fortas' support and opposition were bipartisan, with Republicans and Democrats on both sides of the question. Today, the controversy is purely partisan—with only Democratic senators, led by their leader HARRY REID, opposing an up-or-down vote.

I recall two judicial nominations of President Clinton's particularly troubling to me and my fellow Republican members when I was the Republican Leader in the Senate. Despite our objections, both received an up-or-down vote on the Senate floor. In fact, I voted to end debate on one of these nominees while voting against his confirmation. Republicans chose not to filibuster because it was considered inappropriate for nominations to the federal bench.

By creating a new 60-vote threshold for confirming judicial nominees, today's Senate Democrats have abandoned more than 200 years of Senate tradition.

For the first time, judicial nominees with clear majority support are denied an up-or-down vote on the Senate floor through an unprecedented use of the filibuster. This is not a misrepresentation of history; it's a fact.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, will the Senator yield for a question?

He quoted that wonderful and very important editorial by former majority leader, Bob Dole, saying without any doubt this is an unprecedented act to filibuster. I notice that Senator HATCH, one of our most distinguished Members, the former chairman of the Judiciary Committee, has just joined us on the floor.

I will ask the Senator from Missouri if he remembers, several years ago, after Senator Dole had left the Senate, that a discussion was had in the Republican Conference about the possibility of filibustering judges, and that Chairman HATCH explained to us that it was totally against the traditions of the Senate, and we did not maintain a filibuster against Clinton judges. I wonder if he remembers that.

Mr. BOND. Mr. President, I seem to recall that. I thought it was a very statesmanlike and accurate portrayal of the traditions of this body and the requirements of the Constitution, and I once again commend our colleague from Utah, who at that time was in a position where he obviously could have mustered 41 votes to block the nominee. It was the view of those of us who agreed with the Senator from Utah that we should not do that because the people of America elected a President who has—we know and he knows—the power to nominate judges. And it is necessary to maintain a well-staffed judiciary that we give prompt and up-or-down votes to these nominees.

Mr. SESSIONS. I thank the Senator from Missouri. I will say, I did not hear all of his remarks, but I heard a good portion of them, and if anyone would like an accurate summary of the status of our situation, I suggest they read his remarks. So far as I can tell, everything he said is accurate. So far as I can tell, much of what we have heard from the other side is inaccurate, distorting of the traditions of the Senate,

and not a fair summary of the situation we are in. I feel very strongly about it.

There is a huge issue at stake. And the issue is how the Federal courts will be staffed and operate. What do we want and what do we expect from Federal judges? How do we expect them to behave? President Bush says he believes judges should be faithful to the law and the Constitution, that they are not empowered to use activist tactics to reinterpret and manipulate the meaning of the words in the Constitution or a statute to further a personal agenda they might favor. But they are judges. They are referees, umpires to settle disputes by interpreting the law fairly and objectively. If we get away from that, our judiciary is in great danger.

I believe Senator BOND is correct, also, in saying this memo that was just produced, and other actions I have seen over the years I have been in the Senate, indicate to me that too often our colleagues have outsourced their valuation, outsourced their decision making process on judges to very hard-left groups who are not honest, who deliberately distort the record of fine nominees, who attempt to manipulate the press nationwide, who raise money with an effort to destroy people's reputations in a way that is not legitimate and unfair. I believe that strongly. I have seen it time and time again.

It is time to bring that to a conclusion. One of our great traditions in the Senate is to give a nominee an up-or-down vote. Senator HATCH, who is on the Senate floor, was my chairman of the Judiciary Committee for a number of years. Senator HATCH warned us when I came to the Senate. There were a lot of people who felt strongly about some activist nominees of the Clinton administration. We were very concerned with them.

I see my colleague, the Senator from Oklahoma, who was in the House. The House Members were unhappy with us. They thought we ought to filibuster some of these nominees. And we considered it. People discussed it. Senator HATCH made a very strong, clear presentation in the Republican Conference. He said no, that it was against our traditions. It would be bad public policy. It would alter the balance of power in the separation of powers by creating now a super majority needed for the confirmation of judges. He said we should not do it. And the Republicans were in the majority. We had a majority in the Senate, at one time 55 Members.

So the question was, What about some of these nominees that were objected to? I objected to two from the Ninth Circuit very strongly. The Ninth Circuit was the most activist circuit in America. It had been reversed by the U.S. Supreme Court in 27 out of 28 cases. It was out of step. The New York Times said in an article that a majority of the Supreme Court considered the Ninth Circuit a rogue circuit. Yet President Clinton was appointing two ultra-liberal activists to the court.

But what happened to those two judges? We have heard the democrats complain about on occasion: Judges Paez and Berzon. The Republican majority leader of the Senate, TRENT LOTT, called those nominees up and asked for an up-or-down vote by cloture motion. Those of us who opposed them—I certainly was one of them—voted for cloture, voted to give them an up-or-down vote, even though we intensely opposed them. They were given an up-or-down vote, and they were confirmed. President Clinton's nominees, when the majority was in the hands of the Republicans, were moved, after full debate and an opportunity to make their case. They brought them up, and they were given that up-or-down vote. That is the principle under which the Senate has operated.

Some say, well, we might want to filibuster in the future. Well, we have not filibustered in the past, not for 200 years.

Now, how did this situation that we are facing happen? There is no mystery if you look at the history of it. Senator BOND made a number of the points. But not long after President Bush was elected, in 2000, the Democrats went to a retreat. According to a New York Times article that reported on it, three very liberal, capable law professors—Laurence Tribe, Marcia Greenberger, Cass Sunstein—met with them in retreat. And they returned from that retreat with the conclusion that they were going to change the ground rules of confirmations.

That is what we have seen time and again in a whole lot of ways. The ground rules were changed. For example, not long after that, one Republican Member switched parties and we ceased to be the majority party, and so the Judiciary Committee had a majority of Democrats on it. The first nine nominees who had been submitted—several of these nominees were in that group, including Priscilla Owen and others—were nominated in 2001. They would not bring them up in committee. Then after they moved two nominees—one was a minority and the other was a Democrat. They moved those two, but these other fine nominees never moved out of committee. They were changing the ground rules then.

Then after the Republicans regained the majority, they commenced an unprecedented attempt to filibuster in committee—something we had never seen before. We had to have a fight over that in committee, under Chairman HATCH's leadership, and we reversed that. They were going to filibuster nominees in committee. It is so contrary to what they were saying a few years ago on the floor of the Senate.

On Tuesday of this week, Senator BOXER railed against Janice Rogers Brown, but this is what she said about judicial nominees when President Clinton was in office:

> According to the United States Constitution, the President nominates, and the Senate shall provide advice and consent. It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor.

Now, she has been inconsistent, I would say. But Chairman HATCH has been consistent. When he opposed Clinton nominees, he gave them an up-or-down vote, and so did TRENT LOTT. As soon as the situation flops, some of the Democratic Senators flopped. Senator SCHUMER was one of the most outspoken complainers during the Clinton administration. He said:

> I also plead with my colleagues to move judges with alacrity—vote them up or down.

I agree with that, Senator SCHUMER.—

> But this delay makes a mockery of the Constitution, makes a mockery of the fact that we are here working, and makes a mockery of the lives of the very sincere people who have put themselves forward to be judges and then they hang out here in limbo.

Senator LEAHY, now leading the filibuster, was on the floor talking about that. Back when the Clinton administration was submitting judges, he said:

> I have had judicial nominations by both Democrat and Republican Presidents that I intended to oppose. But I fought like mad to make sure they at least got a chance to be on the floor for a vote. I have stated over and over again on this floor that I would refuse to put an anonymous hold on a judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty. If we don't like somebody the President nominates, vote him or her up or down. But don't hold them in this anonymous unconscionable limbo. . . .

Well, I see Chairman HATCH is here. I know the time is a bit drawn. Chairman HATCH and the Republican leadership have been consistent on this issue, even when it was not to their political benefit to do so. We have opposed the idea of filibusters and have not supported it. The Democrats oppose them when it is convenient and support them when it is convenient. I think their position is untenable as a matter of principle and as a matter of public policy, and our country will not be better off for filibustering judges.

I yield the floor.

The PRESIDING OFFICER (Mr. MARTINEZ). The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I thank my colleague for his kind remarks, and other colleagues as well. I ask unanimous consent that I be given the original half-hour time and that the Democrats be extended an equal amount of time.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. HATCH. Mr. President, I appreciate my colleague from Alabama. He knows about as much as anybody who has ever sat on this side of the aisle. He has the sting of having been rejected by the Judiciary Committee Democrats when he was nominated for a Federal

judgeship years ago. I think that is pretty ironic. They knew he was good and that he could do the job. Now he is a sitting Senator who can no longer be ignored, and he has stood up and triumphed for so many good people through the years. I think it was kind of a God-given thing that he was rejected back then, so he could sit in the Senate and tell people the important aspects of the Federal judiciary we have been discussing. I personally love and appreciate him. He has been a great member of the Judiciary Committee and I have a lot of respect for him.

I have also been told that at the beginning of the session today, one of the leaders offered to discharge a number of judges from the committee, or judgeship nominees. I find that pretty ironic because at the end of the 108th Congress, when I attempted to discharge three nominees to the floor—Tom Griffith, our former counsel, nominated for the DC circuit; J. Michael Seabright, who was from Hawaii and was sponsored very strongly by the two Hawaiian Senators; and Paul Crotty, from New York, who was sponsored strongly by the two New York Senators—the Democrats opposed that and said this was extremely unprecedented, and they prevented me from doing so because they claimed ''proper order'' for all nominees.

Forgive me, Mr. President, if I find the recent Democratic request to discharge people they want to discharge—three Sixth Circuit nominees—more than a little disingenuous. It is only done to try to make it look as though they are trying to cooperate when in fact they knew that could not be permitted. The leadership in the Senate will decide what judges come to the floor and we want all of them, including the three from Michigan.

Last week when the Judiciary Committee considered the asbestos bill, one of our Democratic colleagues referred to proposed amendments to that bill and said something very important: Let's debate them up or down. He said it the way the American people believe it, and that is debating and voting is what legislators do. Let's debate them and then vote them up or down.

The Senator offering that idea was my colleague from Vermont, Senator LEAHY. He was speaking then about legislation, but he and other Democrats once insisted the Senate should follow the same principle as we evaluate the President's judicial nominations.

In October 1997, for example, he said on the Senate floor:

> I hope we might reach a point where we as a Senate will accept our responsibility and vote people up, vote them down. Bring the names here. If we want to vote against them, vote against them.

Of course, at that time, a Democratic President was in power. That may have been the difference between then and now.

It is always refreshing to see our fellow citizens from all over this great country coming here to sit up in the galleries and observe their Senate at work. Some of them with us today might actually be asking, Why is the Senator from Utah making such a big deal about something that is so obvious—votes up or down, that is. Many of our fellow citizens may be surprised to learn that some of the Senators they elected and sent to Congress are refusing to vote on nominations. They might share the sentiment of former Democratic leader Senator Tom Daschle when he said in 1999—of course, Clinton was President:

> I find it simply baffling that a Senator would vote against even voting on a judicial nomination.

That is what they are doing. I guess it makes a difference whether your President is President or whether the opposition President is President. I happen to think there are certain virtues that ought to be maintained, no matter what.

Those Senators on the other side are blocking votes because they know they will lose those votes. If we debate these nominees, America would better understand why we need judges who will interpret, not make, the law. Americans will see how these highly qualified judicial nominees meet that standard, and America will see that these nominees, every one of them, have a bipartisan majority support.

What is wrong with giving them a vote up or down? The political forces promoting an activist political judiciary oppose many of these nominees, and their strategy is simple. The Senate cannot confirm nominees if Senators cannot vote on them. We cannot vote if we cannot end debate. These filibusters use Senate rules to prevent ending debate, prevent taking a vote, and prevent confirmation of these judges. That is not only baffling, it is unprecedented. This is not a tangent, an academic issue, or a question that will 1 day be found in the game ''Trivial Pursuit Senate Edition.'' This issue is central to this debate, and our Democratic colleagues know it.

Some are so desperate to claim even one single solitary precedent for what they are doing that they stretch, twist, and morph the word ''filibuster'' beyond all recognition. They want the word ''filibuster'' to mean so many things that it ultimately means virtually nothing at all.

Unfortunately, these mischaracterizations of Senate history, tradition, and rules cynically exploit the fact that many of our fellow citizens have not mastered the particulars of Senate history, the peculiarities of Senate procedure, or the idiosyncrasies of the confirmation process. Misleading, confusing, patently false claims can easily take on a life of their own, echoed and repeated throughout the media, cyberspace, and even here on the Senate floor.

We all know it can take a long time for what is true to catch up with what is false. Judicial filibuster defenders who claimed that when the Senate voted to end debate on past judicial nominations, we were actually filibustering those nominations; that when we voted down debate and confirmed them, we were actually filibustering—poppycock. They want Americans to believe that ending debate then justifies refusing to end debate now. Poppycock. Or they claim that when the Senate voted to confirm judicial nominations in the past, we were actually filibustering those nominations when we voted to confirm them. That is how far they have gone to try and justify these inappropriate actions.

They want Americans to believe that confirming nominations then, as we did, justifies refusing to confirm them now. Those bizarre claims focus on what happens here on the Senate floor at the end of the judicial confirmation process. Sometimes judicial filibuster defenders on the other side have focused instead on what happens in the Judiciary Committee, an earlier phase in the process. Some appear willing to try anything to create a precedent for their filibusters. Some even claim that any nomination which is not audibly confirmed, no matter what the reason, no matter what the step in the process, has been filibustered. Giving a word any meaning you want may help make any argument you want to make, but it does not make that argument legitimate. This gimmick may have some public relations punch. It leads to cliches such as ''pocket filibuster'' or ''one-man filibuster,'' and creates villains, such as me. What kind of campaign would this be without a bogeyman? After all, I was chairman of the Judiciary Committee for 6 years under President Clinton.

Never mind that the Republican Senate confirmed 377 judges for President Clinton, just 5 short of the all-time confirmation record set by President Reagan. Bill Clinton was the second confirmation champion of judges in the history of this country, and he had 6 years when I was chairman. I wonder how that happened if I was so partisan.

Never mind that President Reagan had his own party controlling the Senate for 6 years while President Clinton had the other party, the Republicans, controlling the Senate for 6 of his years. So Reagan had his own party help him for 6 years. President Clinton only had his own party for 2 years, and yet he still came in just five votes shy of President Reagan. And if my recollection serves me correctly, he would have been three ahead of him had it not been for Democratic holds on their side. One Senator was not getting his; therefore, he would not let anybody else get theirs. It happened. Never mind facts such as that.

The assistant minority leader yesterday claimed every Clinton nomination that was not audibly confirmed was filibustered and that I personally buried them. My hand alone held back a confirmation wave of apparently mythic proportions. Look for a moment what it takes to believe every

unconfirmed nominee is a filibustered nominee. It requires believing dozens of nominees President Clinton himself withdrew were filibustered. Preposterous. President Clinton, for example, withdrew one of his court nominees fewer than 6 months after her nomination because of health concerns. Her nomination did not get out of the Judiciary Committee, did not receive a floor vote, and was not confirmed. But was she filibustered? They seem to think so.

Is her situation the same as Justice Priscilla Owen who has been waiting for more than 4 years and cannot get a floor vote because of a Democratic filibuster, a leader-led partisan filibuster, the first time in history?

This line that all unconfirmed nominees are filibustered nominees requires you to believe ill-founded arguments such as that. It also requires believing that the 28 nominations sent too late to be considered or which President Clinton chose not to resubmit were filibustered.

That is how they add, they double count. It is ridiculous. Preposterous is the word.

It requires believing that nominations not given hearings because of opposition by their home State Senators were filibustered. We have had that go on for years, whoever has been in power. Home State Senators have a lot of swat. The Judiciary Committee system that gives extra weight to the views of Senators from a nominee's home State has been in place in various forms for nearly a century. Democrats, as well as Republicans, use it. I do not hear the Democrats who now want to call these situations filibusters also calling to abolish that system of home State senatorial courtesy. They cannot have it both ways.

The majority leader, Senator FRIST, recently offered a proposal that would not only address our concerns about the floor by ensuring up-or-down votes, but also address Democrats' concerns about the committee by guaranteeing reporting of nominees. The majority leader tried to do that. Democrats rejected that offer. They are not going to give up their rights in committee anymore than Republicans should give up their rights in committee.

But that is not filibustering, I can guarantee that. Either they think treatment of judicial nominees in the Judiciary Committee is a problem needing a remedy or they do not. They cannot have it both ways. Democrats know that many factors determining whether a nomination is approved by the Judiciary Committee are not simply up to the chairman's unilateral discretion. What galls me is some who have made the argument. One in particular this morning begged me to get his judges through, and I have to say there were real questions about his judges, but I put them through because they were nominated by the President. He came to me and asked that I get it done. I did it for countless Democrats in the 6 years I was chairman of the committee during the Clinton years, and they know it. They do not have any other arguments.

So what do they want to do? They want to vilify the chairman of the Judiciary Committee who has had to put up with all kinds of machinations in the Judiciary Committee from both sides, whoever the chairman is. Democrats know there are procedures in the Judiciary Committee and on the floor for forcing a committee chairman to act if Senators believe the chairman is dragging his feet and that those procedures were never used, never even attempted, while I was chairman. Why? Because they knew darn well I was trying to do the best I could.

They do not have any other arguments. They cannot justify their position. Democrats know these things. They also know that many of our fellow citizens do not. So the spin machine cooks up this tail that all unconfirmed nominees are filibustered nominees, attempting to make people believe there is some precedent, even a totally fictional precedent, for their current filibusters. Saying that ending a debate is the same as not ending a debate did not work. Saying that confirming nominations is the same as not confirming nominations did not work. Saying that President Clinton's near record confirmation total is evidence of unfair treatment by Republicans will not work either.

On Tuesday the distinguished Senator from Wisconsin, Mr. FEINGOLD, was making a few other arguments. He pointed out that the text of the Constitution does not require an up-or-down confirmation vote for a judicial nomination.

Well, many of our colleagues on the other side of the aisle attack judicial nominees when they take the Constitution's text this seriously. But I am glad that the Senator from Wisconsin is doing so.

The word ''filibuster'' is not found in the Constitution, either. Nor are phrases such as ''unlimited debate,'' ''minority rights,'' or even ''checks and balances,'' as misused as those terms have been by the other side.

None of the phrases used by some to try to give these judicial filibusters a constitutional anchor are in the chartered text, the constitutional text. What the Constitution does say, however, is that the President has the power to nominate and appoint judges—not the Senate, the President has that power. Our role of advice and consent is a check on the President's power to appoint.

When the filibuster turns our check on the President's power into a weapon that hijacks the President's power, then, yes, it has indeed violated the design that is most certainly in the text of the Constitution, and that is what they are doing.

The Senator from Wisconsin also said the procedure the majority leader may use to prohibit judicial filibusters will mean changing the Senate rules by fiat. That is a variation on the Democratic mantra that this would break the rules to change the rules. That is a catchy little phrase but neither of its catchy little parts is true.

The Senate operates not only by its written rules but also by parliamentary precedence established when the Presiding Officer rules on questions of procedure asked by the Senators. What we call the constitutional option would seek such a ruling from the Presiding Officer. After sufficient debate, the Senate should vote on a judicial nomination. That is what the ruling would be. Senate precedents and procedures would change, but Senate rules would remain unchanged. No breaking of the rules, no changing of the rules.

Senators use the word ''fiat'' because it sounds bad and fits with the abuse of power theme probably born in some liberal focus group somewhere. The word attempts to give people a bad impression, but it should give them an even worse impression to know that it is patently false.

The Constitution gives authority over Senate rules and procedures to the Senate, not to the Parliamentarian or to the Presiding Officer but to the Senate. If the Presiding Officer rules on the question of procedure, it will not actually change Senate procedures until a majority of the Senators vote to do so.

Just as American self-government is radically different from monarchy, Senate self-government is radically different from fiat.

The Senator from Wisconsin said that whenever the Senate merely takes a cloture vote or a vote to end debate, a filibuster is always underway. That, too, is patently false.

Let me refer to this chart. This is what the Congressional Research Service said on April 22, 2005:

It is erroneous to assume that cases in which cloture is sought are always the same as those in which a filibuster occurs.

Let me repeat that.

It is erroneous to assume that cases in which cloture is sought are always the same as those in which a filibuster occurs.

Let me use two examples. Among President Clinton's most controversial nominees were Marsha Berzon and Richard Paez nominated to the U.S. Court of Appeals for the Ninth Circuit. Our colleague from New York, Senator SCHUMER, who has spoken many times on the floor on this issue, in November 2003 called these nominees ''very liberal,'' and, ''quite far to the left.'' Now, that is quite something coming from a Senator who has never been called even a little bit to the right.

On November 10, 1999, the majority leader at the time, Senator LOTT, promised that he would bring these controversial nominations up for a confirmation vote no later than March 15, 2000, and that was at my request. He correctly said that I agreed with using the cloture vote to ensure that a confirmation vote occurred. In other words, it was used to get to a vote.

On March 8, 2000, that is exactly what we did. It was of a procedural floor management device. The first two names on the petition for the cloture vote happened to be Senator LOTT and myself. We took that cloture vote to prevent a filibuster and to ensure an up-or-down vote. We prevented a filibuster. That vote occurred, and the Senate confirmed both nominees. They are today sitting Federal judges. Otherwise we would have kept going on and on on the Senate floor. We decided that is the way to get to a vote, and we did.

The Senator from Vermont, Mr. LEAHY, said on Tuesday that the constitutional option which would use a parliamentary ruling to prohibit judicial filibusters would ''use majority power to override the rights of the minority.'' I have called this parliamentary approach the Byrd option because when Senator BYRD was the majority leader in the late 1970s and early 1980s, Senator BYRD used it to change Senate procedures. He did so regarding legislation and also regarding nomination-related filibusters.

In 1980, for example, then-Majority Leader BYRD wanted to prohibit filibusters with a motion to proceed to nominations, and they could do that back then, just as a confirmation vote cannot happen if debate does not end. Debate cannot start if the Senate cannot vote to proceed to that debate.

Today we hear that any limitation on debate, any restriction of the filibuster, strikes at the very heart of the essence of this institution. Maybe it was a different story back then when they were in control. When the Presiding Officer ruled against what Majority Leader BYRD was trying to do, he then appealed that ruling and the Senate voted to overturn it, effectively terminating those nomination-related filibusters. He knew how the vote was going to turn out in the end.

I remind my colleagues what my good Democratic friend from West Virginia said when he used the procedure to change the filibuster rule, on January 4, 1995, during the Clinton administration. He said:

> I have seen filibusters. I have helped to break them. There are few Senators in this body who were here [in 1977] when I broke the filibuster on the natural gas bill. . . . I asked Mr. Mondale, the vice president, to go please sit in the chair; I wanted to make some points of order and create some new precedents that would break these filibusters.

Then he said this:

> And the filibuster was broken—back, neck, legs, and arms. . . . So I know something about filibusters. I helped to set a great many of the precedents that are on the books here.

Well, the Senator was candid. I personally admire him for it. On at least three other occasions, Majority Leader BYRD used a ruling by the Presiding Officer to change Senate procedures without changing the underlying Senate rules.

The Senator from Vermont says that using this very same mechanism today would be an outrageous trashing of minority rights. Yet he voted every time to support Majority leader BYRD'S use of that mechanism, including to eliminate nomination related filibusters.

Yesterday, the Senator from Illinois, Senator DURBIN, claimed that Senate rules, in his words, from the very beginning, required an extraordinary majority to end debate.

Now that is factual claim, and it is factually false.

The Senate adopted its first rules in 1789. Rule eight allowed a simple majority to proceed to a vote. The men who founded this republic designed this Senate without the minority's ability to filibuster anything.

Over the last few days, many excuses have been offered why some refuse to debate and vote on judicial nominations that reach the Senate floor.

Let me correct that. While these may be their reasons, there are no valid excuses.

When procedural obstructive devices such as the filibuster are kept where they belong, in the legislative process, the debate can properly focus on the merits of these nominees. That is what debating and voting should ultimately be about, the President's nominees.

The debate we have seen here on the Senate floor regarding nominees such as Justices Priscilla Owen and Janice Rogers Brown is typical of what we will see in the future regarding other nominees.

Many of our fellow citizen may know little of the Senate's Byzantine procedures, they may know little about judicial rulings, they may not speak legalese, but I hope they will not be afraid to participate in this process.

Let me offer a few pointers, a few tips, for the road ahead.

Politics is often about results, about winners and losers, and involves politicians asserting their will. Law is about the process of reaching results, about what the law requires, and involves judges using judgment.

Politics and law are two very different things, and our liberty depends on preserving that difference. So if you hear critics of judicial nominees talking only in the language of politics, you know something is wrong.

In the last day or two, for example, critics of the nominees before us have reduced them to sound bites, checklists, and litmus tests.

Senators begin sentences with phrases such as she ruled that . . . or she ruled for. . . .

Mentioning only those results, without exploring how a judge reached those results, amounts to applying political criteria to a judicial nominee, and that is fundamentally wrong. Sometimes the law requires results we may not like, results that may even sound dramatic.

Mentioning the political results without the judicial process leading to those results misleads people about what judges do and how to choose the rights ones.

Or the critics will characterize what a judge said rather than tell us what she actually said.

Or if they do quote the judge, critics will often pluck out only a phrase, or use lots of ellipses.

These are signs that spin may be in the air.

Or the critics will quote other critics. Imagine if the only thing someone knew about you came from what your critics or enemies said about you. That picture would be distorted, incomplete, and just plain false.

So our fellow citizens should not be worried that they do not know the language of lawyers, that they have not read a judicial nominee's writings or rulings, or are not well-versed in the fine points of legal argument.

I hope they will listen critically to the debate here in the Senate about these nominees, their qualifications, and their records.

I hope our fellow citizens will be very skeptical of critics who make a political case against a judicial nominee, skeptical if the case against a nominee is limited to soundbites about results or characterizations by third parties.

Let me conclude my remarks by noting that in September 2000, the Senator from Michigan, Senator LEVIN, said that the Constitution each of us has sworn to protect and defend requires that we debate and vote on judicial nominations reaching the floor.

I agreed with that principle then, and I agree with it today.

For more than two centuries, we kept the filibuster out of the judicial confirmation process.

It is surely not a good sign about our political culture that we must today formalize by parliamentary ruling a standard we once observed by principle and self-restraint.

But that self-restraint has broken down, and maintaining our tradition of up or down votes for judicial nominations is worth defending. Once we take unprecedented obstruction tactics like the filibuster off the table, we can focus where we should, on the merits and qualifications of nominees.

We must have a standard that binds both political parties. That standard must be fair, it must respect the separation of powers, and it must be consistent with our own Senate tradition.

Between 1789 and 2003, we had a strong consistent tradition of voting on judicial nominations once they reach the Senate floor.

We should return to that principle and practice.

Unfortunately, in 2003, the Democratic leadership broke with this longstanding Senate tradition and took an ill-founded turn down a partisan political path and unwisely changed the confirmation process in an unprecedented fashion.

We must turn back from that path. Once a judicial nomination reaches us here, our course should be clear. Let us debate and then let us vote.

I yield the floor.

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

Mr. KENNEDY. Mr. President, I understand that under the previous agreement, I have 15 minutes. Is that correct? Mr. President, I will yield myself 15 minutes. I ask consent to be able to proceed for 15 minutes.

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

Mr. KENNEDY. I ask the Chair if he will be good enough to let me know when there is 3 minutes left.

The PRESIDING OFFICER. The Chair will so notify the Senator.

Mr. KENNEDY. I thank the Chair.

Mr. President, I will take a few moments of the time of the Senate, and for those who are watching this debate, to try to put this whole issue of what I consider to be an arrogant grab for power in some perspective. I urge my colleagues, perhaps over the course of the weekend, take 2 or 3 hours and reread the debates on the Constitutional Convention, about how our Founding Fathers wanted the selection of judges for the courts of this country to be done.

There were three different occasions during the Constitutional Convention when our Founding Fathers considered who should appoint the judges who were going to serve on the courts of this country. The first two times the Founding Fathers debated this and discussed this, they made a unanimous recommendation that it would be solely the Senate of the United States that would be the sole judge for nominating and approving judges who were going to serve on the courts. Then, as the Constitutional Convention came to an end, 8 days before the end of the Constitutional Convention, they came back and they were reviewing the totality of their work and at that time they made a judgment and decision that was virtually unanimous that they would provide a shared responsibility between the executive and the Senate of the United States.

No one can read the debates of the Constitutional Convention and not understand that the Senate of the United States is effectively, in the eyes of the Founding Fathers, a coequal partner in the naming of judges.

I know it has been fashionable around here for many years, particularly for those of the majority party—and I have seen it done even on our side when we were the majority party—for a Democrat to say: Look, if the President of the United States nominates, there has to be a heavy burden on any individual to vote against it. It ought to be automatic. It ought to be effectively a rubberstamp.

That has never been my position. I have always felt and understood that we have an independent judgment and decision as charged by our Founding Fathers to exercise our own good judgment. That has been the history of the Senate.

We have listened—I have—to a lot of debates, saying what we are doing is going back to the original intent of our Founding Fathers. That does not happen to be factually true.

I reviewed yesterday those who have held the seat I hold in the Senate. Going back to John Quincy Adams, going back to Charles Sumner, going back to Daniel Webster—to President Kennedy—the series of Supreme Court nominees they considered, and those they voted for and those they voted against: there never was a single time when any Senator from Massachusetts was effectively muzzled, silenced, gagged when they were expressing their conscience, their view about the members going to the Supreme Court or the circuit courts, not in the history of this body, never.

But under the proposal of the majority leader, that will no longer be the case. That no longer will be the case. It is not only the silencing, the muzzling and gagging of any of the Members in here; it is breaking the rules in the middle of the game.

We have parliamentary rules, like any other legislative body, and we have ways of changing and altering those rules. They are all laid out. I will mention them briefly. There is a way to change the rules if we do not like them and we can follow them and conform them to our views. By the Senate rules we can alter and change them. Is that what is going to be before the Senate in the nuclear option? Absolutely not. Absolutely not.

There is a way to change them, but not the way the Republican leadership and this administration want to do it. They are effectively tearing up the rules. They are basically running roughshod over the Senate rules, the institution that has served this Nation well for 224 years. That is what is being proposed. When all is said and done, we mention all these other past histories of activities, this is effectively what is being done.

I think most Americans may take issue with what happens here in the Senate. They may agree with the activities of the Senate or may differ with them. But one thing in which the American people have some degree of confidence is their basic institutions of Government. With the proposal by the majority leader, we are rending asunder the power and the authority that was described in the Constitutional Convention and described in the Constitution for the Senate. That is why people are feeling so strongly about this, many of us feel so strongly about this—because basically we are undermining what our Founding Fathers wanted.

This is an issue that has been overhanging the Senate now for some weeks, for some months, in spite of the fact that we have approved 208 of the President's judges: 95 percent, a higher percentage than the previous President Bush. What is suddenly the difference? This President has a higher percentage of his nominees approved than the first President Bush, Bush 1. The difference is a different political climate. There is a radical right out there that is loose in the country. They feel they won the Presidency, the House of Representatives, the Senate of the United States and, by God, they are going to take over the independent judiciary.

That is what this is all about. Meantime, while the so-called nuclear option has been hanging out over the Senate, what in the world have we been doing for the last 5 months? January, February, March, April, and now the third week in May?

When I go back to Massachusetts, the people there are talking still about job security and its uncertainty. They are talking about whether they are going to continue to be able to have health insurance. They are talking about escalating prices of prescription drugs. They are talking about the increased costs of tuition, whether their children are going to be able to go to college. They are talking about what is happening in the schools and the school dropout problems and the fact so many classes in our Nation don't have well-trained teachers. They are talking about the needs for special education teachers. They are talking about supplementary services for children going to high schools that were guaranteed in the No Child Left Behind Act and too many of our school districts are not doing; that is what they are talking about.

But what have we been doing? Waiting for the nuclear option. Which means what? Tear up the rules and we pass class action bills benefitting corporate America, we pass bankruptcy bills that will help the credit card industry. We did take 2 weeks, and deservedly so, on the supplemental appropriations, and we included an amendment to add some armor for our troops over there, of which I highly approved. That is it. That is the record. Nothing we really care about. Why? Because we have been absorbed with the nuclear option, changing and altering the rules. Mr. President, 95 percent of approval of this President's nominees has been achieved.

I frankly feel a great deal of this responsibility is right down at the other end of Pennsylvania Avenue. I can remember in January of this year, in the wake of the conclusion of the election and all of us said, This President won. We congratulate him. We have to bring the country back together. I certainly voiced that.

My colleague, Senator KERRY, certainly voiced that. What happened? The ballots are barely cast and the votes are hardly counted, and this President sends up the nominees that have been debated, discussed, had hearings, and voted on in the Senate and said: You have to pass these, Senate, or we will change the rules.

I have taken the time of the Senate in going over the qualifications of these. These are not just ordinary nominees. I have gone over these in some detail. These nominees are radical. I would say, radical, outside the

mainstream. If you have a nominee such as Mr. Pryor, who thinks we ought to repeal the Voting Rights Act, I think he is out of the mainstream.

What he says in his legal papers is in complete conflict with and has been rejected unanimously by the Supreme Court. He does not understand the Americans With Disabilities Act. He does not understand that Republicans and Democrats alike voted for the Americans With Disabilities Act to bring those that are challenged, mentally and physically, into the mainstream of American society. We spent weeks and months and years to pass that legislation. This is not one Senator who will vote for someone that absolutely wants to undermine and eviscerate it, destroy it, and end it. That is what Mr. Pryor's positions lead to.

So these are not people that are in the mainstream. We have expressed that. We ought to be able to express it. But that is not satisfactory to this administration. No, no. They want to change the rules. That is what this will be all about. They are effectively saying: Look we have nominated, and you are going to go ahead and approve.

We have 224 years where they have not been able to silence us, and now they will be able to silence us. But not with this Senator's support.

These are the rules, and I welcome any on the other side to dispute them, and I invite them to put that in the RECORD. First of all, they will have to put the Vice President of the United States in the Presiding Officer's chair. There will not be another Senator in that chair to make the ruling because it is not going by the rules of the Parliamentarian.

Do listeners understand that? It is akin to going to the football game and the referee and the umpire call the penalty or the touchdown and someone else from the crowd says, no, no, that does not count, and for us it recognizes the ''someone else'' in the crowd. That is what they are doing. They will replace a Member of the Senate. We have, as we do now, the distinguished Senator from Tennessee sitting in the chair and presiding over the Senate. But that will not be true that particular day.

Next they will have to break paragraph 1 of rule V which requires 1 day's specific written notice if a Senator intends to try to suspend or change a rule.

And then they break paragraph 2, rule V, which provides that the Senate rules remain in force from Congress to Congress unless they are changed in accordance with existing rules.

Then they have to break paragraph 2, of rule XXII, which requires a motion signed by 16 Senators, a 2-day wait, and a three-fifths vote to close debate on a nomination.

Then they have to break rule XXII requirement of a petition, a 2-day wait, and a two-thirds vote to stop debate on a rules change.

They have to break scores of the rules. It will make a sham of the rules and parliamentary procedures of this Senate. It is wrong.

We are witnessing in this debate an arrogant power grab by the Republican right. This is what happens when the rightwing of the Republican Party calls the tune for the Republican Party as a whole. We are spending days and weeks debating five rightwing judges but not 5 minutes on what counts in most people's lives: Secure jobs, healthy families, educational opportunity. Those are not the values and priorities we see today from the White House and this Republican Congress. To them, history does not matter. Mainstream values do not matter. Our commitment is to working families, and that does not matter.

What the Republican Party cares about today is putting a rightwing agenda ahead of mainstream values, corporate interests ahead of public interests, and the agenda of the privileged few ahead of the American dream for all.

We, as Senators, have a choice as well. We can break the rules and run roughshod over our constitutional system of checks and balances or we can seek accommodation and compromise for the good of our democracy and the strength of our Nation.

The one thing standing between the White House and total control of the Congress and the courts is the Senate's right to full and fair debate. Let's not give it up.

As many of us have said, if Republicans persist in the course they have set, they will destroy the ''compact of comity'' that enables the Senate to fulfill its constitutional responsibilities.

Outside the Capitol, the gravity of that danger may not be self-evident.

''Comity'' may be an unused word today, but for 200 years it has been the lifeblood of daily life in the Senate.

In the Senate, comity is the glue that binds us to one another and to that small but brilliant group of Framers who met, over two centuries ago, and conceived of this institution.

They certainly knew what comity was: they came from totally different views of government.

They labored ceaselessly, in the heat of a Philadelphia summer, in the ultimate American Government Seminar, until they created a government that was reliable, resilient—resistant to attack from within and without.

Comity among the Framers—their overriding ''agreement to agree'' despite their deep differences—informed and nourished their efforts. They worked especially hard to design the Senate.

Their debates were all about great challenges:

What size would be right to enable the Senate to serve as a check on the other House and the President too, and still place personal responsibility for their actions on individual Senators?

How long should each Senate term last, to set the proper balance between the strong, independent Senate they wanted and the potential tyranny of an aristocratic upper House, insulated from popular opinion?

Who would make better judicial choices, the Senate or the Executive?

Fortunately for us today, their debates were not just theoretical. They were very real and very practical. The Framers understood they were creating a new experiment in the history of government as they worked to combine their diverse views into a single concise blueprint.

Despite vigorous and fundamental disagreements at the start, they retained their respect for one another, their capacity for reason, their shared concept of what this Nation could be, and what its government should be. Consensus was not just a goal, but a necessity. Compromise not just an option, but a cornerstone of their creation.

It is not an exaggeration to say that if that ''compact of comity'' is not preserved, the Senate and the Government will suffer mightily. Our vital role in the machinery of checks and balances will fade, and the nation will be left diminished.

What would the Framers have done if faced with the challenge we face?

They would clearly have counseled respect and moderation.

It is not respectful or moderate to suggest, as one of our colleagues did, that judges may have it coming to them if their decisions outrage some people. It is not respectful or moderate to suggest, as the majority leader did yesterday, that Senators are equivalent to the assassins of judges because they strongly criticize the political or ideological views of judicial nominees. As part of its advice and consent function, the Senate has done that since 1795, when it rejected George Washington's nomination of John Rutledge to be Chief Justice.

The majority leader's use of the word ''assassinate'' was especially unfortunate, coming in the very day that Judge Lefkow of Chicago was testifying to our Judiciary Committee about the brutal murders of her family members.

The Founders also would have counseled us about communication. We work with members of the other party every day. We talk to them every day. But I can't think of one of them who has come to me over the past 2 years to say, ''This judicial nomination issue is headed the wrong way—we ought to start talking about how to preserve our institution's strengths and traditions, and solve the problems that these judicial nominations are creating for us all.'' We all know it is very late in this contest of nuclear ''chicken,'' but it is never too late to try.

The Framers would also have told us to minimize the distortions and respect the truth. Again, and again, we are told that there was no Republican-led filibuster of the Fortas nomination to be Chief Justice in 1968. There are still three of us in the Senate today, who were in the Senate then, and who know the truth firsthand. It demeans the Senate and discredits the debater when

someone parrots the bizarrely erroneous White House talking points denying such a filibuster, without having the grace to check the facts.

The Founders would also have told us to take extremely seriously what James Madison in Federalist No. 62, called ''the senatorial trust,' which require[es] a greater extent of information and stability of character.''

As Madison understood, Senators are not the owners of this institution, but we are more than just its occupants. We are, its trustees, with an awesome responsibility to protect that trust—this body—the Senate. That means we must preserve what makes it work well—like extended debate and the super-majority cloture rule.

A central part of that senatorial trust is standing up to the President when he overreaches in the exercise of his power, as he has done with the few, but important, still hotly contested circuit nominees.

Finally, the Framers would say that our endangered senatorial trust needs comity more than ever in our day-to-day activities and relationships. As Madison stated, the comity the Framers had in mind was—''the result, not of theory, but 'of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable.'' That is what we must aspire to. That is what we must accomplish if we are not only to solve our present dilemma but leave this place as least as fine an institution as we found it.

Who are the nominees that the Republicans so want confirmed that Senator FRIST is willing to violate the rules of the Senate?

They include Janice Rogers Brown, who has been nominated to the very important DC Circuit, which is widely regarded as the most important court of all the courts of appeals, and whose decisions affect the rights of all Americans. She has a compelling personal story, which all of us respect. But confirmation to the DC Circuit requires more than a compelling personal story. It requires a record of clear commitment to upholding the rights of all Americans. It requires a record of clear dedication to the rule of law—not remaking the law to fit a particular political view.

Janice Rogers Brown fails this basic test. Her record on the California Supreme Court makes clear that she's a judicial activist who will roll back basic rights. Her record shows a deep hostility to civil rights, to workers' rights, to consumer protection, and to a wide variety of governmental actions in many other areas—the very issues that predominate in the DC Circuit.

She has repeatedly voiced contempt for the very idea of democratic self-government. She has stated that ''where government moves in, community retreats [and] civil society disintegrates.'' She has said that government leads to ''families under siege, war in the streets.'' In her view, ''when government advances . . . freedom is imperiled [and] civilization itself jeopardized.''

She has criticized the New Deal, which gave us Social Security, the minimum wage, and fair labor laws. She has questioned whether age discrimination laws benefit the public interest. She has even said that ''Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system will permit them to extract.''

Yet my colleagues say we're wrong to worry about putting Janice Rogers Brown on the DC Circuit, which is widely regarded as the most important court of appeals, and is just a heartbeat away from the Supreme Court.

No one with these views should be given a lifetime appointment to the Federal court of appeals, and certainly not to the Federal court most responsible for cases affecting government action. It is no wonder that an organization seeking to dismantle Social Security is running ads supporting her nomination to the second most powerful court in the country.

In the area of civil rights, Justice Brown has also written opinions that would roll back basic protections. In a case involving ethnic slurs against Latino workers, Justice Brown wrote that the first amendment prevents courts from stopping ethnic slurs in the workplace, even when those slurs create a hostile work environment in violation of job discrimination laws. She dissented from a holding that victims of discrimination may obtain damages from administrative agencies for their emotional distress. She also wrote an opinion suggesting that Supreme Court decisions upholding affirmative action are inconsistent with laws against discrimination.

On workers' rights, she rejected a binding precedent limiting an employer's ability to require workers to submit to drug tests.

In another case, she wrote a dissent urging the California Supreme Court to strike down a San Francisco law providing housing assistance to low-income, elderly, and disabled people. In case after case, she has sought to undermine the rights of the American people.

It is a travesty that the majority leader is attempting to break the rules of the Senate to confirm such nominees. It takes 67 votes to change Senate rules. Because the majority leader can't win fair and square, he is proposing to break the rules in the middle of the game.

We have heard them make every argument in an attempt to disguise their raw abuse of power. They even claim the Constitution prohibits Senators from filibustering judicial nominees. But as Senator FRIST, the majority leader, admitted on the floor recently, that's nowhere in the Constitution. Certainly the Republicans didn't believe that when they were filibustering President Clinton's nominees—including when Senator FRIST, himself joined in a filibuster of a circuit court nominee in 2000.

This misreading of the Constitution and Senate rules is the same kind of distortion we have seen from the nominees they support.

We have seen it in Priscilla Owen's opinions twisting the law in an attempt to deny the insurance claim of a heart surgery patient, or to exempt campaign contributors from environmental regulations. We have seen it in Janice Rogers Brown's twisting the Constitution to claim job discrimination laws can't protect Latino workers from ethnic slurs in the workplace. We have seen it in William Pryor's opposition to basic protections for the disabled, voting rights, and family and medical leave—views rejected by the Supreme Court. And we've seen it in William Myers' opinion that cleared the way for an open-pit mine on land sacred to Native Americans—an opinion that a Federal court later said ignored ''well-established canons of statutory construction.''

These nominees do not deserve lifetime appointments to the federal courts, where they have enormous power over the American people.

More importantly, the Senate does not deserve the bitter legacy we would leave if we adopt the nuclear option. It is not worth running roughshod over the traditions of this institution for short-term political gain. It is not worth turning our backs on our constitutional role as a check and balance on Presidential appointments to the courts.

Alexander Hamilton said this about the need for the Senate to be an independent check on the President's nominations.

''To what purpose [do we] require the co-operation of the Senate? . . . It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters.''

That's what Alexander Hamilton said the Senate should be—a check against overreaching by the President, not a rubber stamp for the President. I urge my colleagues to remember that as United States Senators, we are the keepers of a constitutional trust that is not ours to give away. That trust belongs to the American people. The system of checks and balances protects them. If we give away that trust, we will never get it back.

What we are witnessing in this debate is an arrogant power grab by the Republican right. This is what happens when the rightwing of the Republican Party calls the tune for the Republican Party as a whole. We are spending days and weeks debating five rightwing judges, but not 5 minutes on what counts most in people's lives—not 5 minutes on secure jobs, or healthy families, or educational opportunity. Those are not the values and priorities we see today from this White House and this Republican Congress.

To them, history doesn't matter. Mainstream values don't matter. Our commitment to working families doesn't matter. What the Republican Party cares about today is putting a rightwing agenda ahead of mainstream values, corporate interests ahead of the public interest, and the agenda of the privileged few ahead of the American dream for all.

We have approved 208 of George Bush's nominees to the federal courts. Two hundred eight. But the five right wing judicial nominees at stake in the nuclear option have no business making life-or-death, make-or-break decisions that affect our lives. They are anti-worker, anti-civil rights, anti-disability, anti-senior, anti-consumer, and anti-environment.

This is President Bush's moment of truth too. Instead of fanning the right wing flames, the President can end this abuse of power. He can pick judges closer to the center, not from the outer edge.

We as Senators have a choice as well. We can break the rules and run roughshod over our constitutional system of checks and balances, or we can seek accommodation and compromise for the good of our democracy and the strength of our Nation. The one thing standing between The White House and total control of Congress and the courts is the Senate's right to full and fair debate.

I urge the President, I urge the Republican leadership in the Senate, to heed the timeless words of the prophet Micah who wrote, ''What is good and what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?''

Here are some of the rules and precedents that the executive will have to ask its allies in the Senate to break or ignore, in order to turn the Senate into a rubber stamp for nominations:

First, they will have to see that the Vice President himself is presiding over the Senate, so that no real Senator needs to endure the embarrassment of publicly violating the Senate's rules and precedents and overriding the Senate Parliamentarian, the way our Presiding Officer will have to do;

Next, they will have to break paragraph 1 of rule V, which requires 1 day's specific written notice if a Senator intends to try to suspend or change any rule;

Then they will have to break paragraph 2 of rule V, which provides that the Senate rules remain in force from Congress to Congress, unless they are changed in accordance with the existing rules;

Then they will have to break paragraph 2 of rule XXII, which requires a motion signed by 16 Senators, a 2-day wait and a ⅗ vote to close debate on the nomination itself;

They will also have to break rule XXII's requirement of a petition, a wait, and a ⅔ vote to stop debate on a rules change;

Then, since they pretend to be proceeding on a constitutional basis, they will have to break the invariable rule of practice that constitutional issues must not be decided by the Presiding Officer but must be referred by the Presiding officer to the entire Senate for full debate and decision;

Throughout the process they will have to ignore, or intentionally give incorrect answers to, proper parliamentary inquiries which, if answered in good faith and in accordance with the expert advice of the Parliamentarian, would make clear that they are breaking the rules;

Eventually, when their repeated rule-breaking is called into question, they will blatantly, and in dire violation of the norms and mutuality of the Senate, try to ignore the minority leader and other Senators who are seeking recognition to make lawful motions or pose legitimate inquiries or make proper objections.

By this time, all pretense of comity, all sense of mutual respect and fairness, all of the normal courtesies that allow the Senate to proceed expeditiously on any business at all will have been destroyed by the pre-emptive Republican nuclear strike on the Senate floor.

To accomplish their goal of using a bare majority vote to escape the rule requiring 60 votes to cut off debate, those participating in this charade will, even before the vote, already have terminated the normal functioning of the Senate. They will have broken the Senate compact of comity, and will have launched a preemptive nuclear war. The battle begins when the perpetrators openly, intentionally and repeatedly, break clear rules and precedents of the Senate, refuse to follow the advice of the Parliamentarian, and commit the unpardonable sin of refusing to recognize the minority leader.

Their hollow defenses to all these points demonstrate the weakness of their case.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. Mr. President, how much time do I have?

The PRESIDING OFFICER. The minority has 1 hour 50 minutes remaining.

Mr. BYRD. I wonder how much time the minority will give to me?

I shall proceed.

Mr. President, today I wish to speak about the history of freedom of speech in the Senate, about the cloture rule which, when invoked, limits debate, a bit about the background here that might help all Senators if they care to read or listen, and the people out there who are listening, help them to understand a little more about what this is all about.

It is a matter of very great interest to the country and to the Republicans and to Democrats and to independents, to people from all walks of life. It is in that spirit that I seek to talk just a little while about this subject which is of great concern. I hope to have more to say on another day, but today I will limit myself to talking about the background, what this is all about, and the history that brings us to where we are today.

In recognition that the duty imposed on the President faithfully to execute the law requires persons sympathetic to his program, the Senate traditionally has given the President great leeway in choosing his policymaking subordinates, especially those in his Cabinet and those in sub-Cabinet positions. The Senate has more or less uniformly followed this practice, as a matter of grace and in the spirit of cooperation, to ensure that the executive branch functions as a team in implementing and enforcing the laws.

What has been the fairly general practice with respect to the appointment of executive branch policymakers, however, has not always applied to judicial nominations, and the arguments to the contrary are at odds with the separation of powers doctrine, common sense and history.

The Constitution establishes a Supreme Court and gives Congress the power, in its discretion, to constitute inferior tribunals; nowhere in the blueprint of our Government is it hinted—is it even hinted; nowhere is it even hinted—that the high Court or any other Federal court is the President's court.

Some may say, well, the President should have his own Cabinet. He should have his Cabinet. He should be able to choose his Cabinet. And there is considerable weight to be given to that point of view. But I do not think that any of us should maintain that the President is entitled to have his own court. That is the point.

So nothing in the Constitution suggests that either the Justices or the judges should be the President's men. Let me say that again. Nothing in the Constitution suggests that either the Justices or judges should be the President's men or women, as it were. In fact, the Constitution refutes this notion by granting Federal judges lifetime tenure and by making their compensation inviolable.

The men who met in Philadelphia in that hot summer of 1787 were practical statesmen. They were experienced in politics, statesmen who viewed the principle of separation of powers as a vital check against tyranny. And so I ask, can a rubber stamp be ''a vital check against tyranny''? If the Framers had intended the Senate simply to endorse the President's selections, the Senate could have been left out of the process altogether. Clearly, the men who met at Philadelphia, nearly 219 years ago, had in mind a more substantive role for the Senate.

The Senate has more than once flexed its political muscles to reject a Presidential nominee, including the rejection or withdrawal of 15 Cabinet nominations and 26 Supreme Court nominations. Confirmation power is one of the major constitutional provisions that separates the Senate from

the other body, the House of Representatives. It has been the subject of numerous articles, books, novels, and even motion pictures.

As early as Henry IV, who reigned from 1399 to 1413, English Parliaments effectively controlled the King's royal council and household. Several officials of Henry IV's household were dismissed at the insistence of the House of Commons. Both the household officials and the members of ''the great and continual council'' were named in Parliament.

So I say to the distinguished Senator from Tennessee, who presently presides over the Senate, with a degree of aplomb and grace and dignity that is so rare as a day in June, that the Senate routinely debated nominations in closed session in the beginning.

John Tyler was the first Vice President to become President on the death of the incumbent. Early in the Tyler administration, President Tyler broke with the Whig majority in the Senate, which thereafter frustrated his efforts to appoint his own supporters to office. Nothing in the Senate's history has ever, ever matched the spectacle that occurred on March 3, 1843, the last day of the Senate's session, when President Tyler came to the Capitol, just down the hall, to sign legislation and to submit last-minute nominations.

Tyler nominated Caleb Cushing to be Secretary of the Treasury, not once, not twice, but three times that night. Are you listening? Three times. And each time, the Senate rejected Cushing by an even larger margin than before, the votes being, as recorded in the Senate Executive Journal, 19 for to 27 against, then 10 for to 27 against, and on the third time, 2 for Caleb Cushing and 29 against.

Three times President Tyler named Henry A. Wise to be Minister to France—that same evening—and Wise, too, was thrice rejected.

Senator Thomas Hart Benton reported that ''nominations and rejections flew backwards and forwards in a game of shuttlecock.'' In all—in all—the Senate turned down four of President Tyler's Cabinet nominees: in addition to Cushing, David Henshaw as Secretary of the Navy, James M. Porter as Secretary of War, and James S. Green as Secretary of the Treasury. And that ain't all. The Senate turned down four of President Tyler's nominees to the Supreme Court: John C. Spencer, Reuben H. Walworth, Edward King, and John M. Read. It is a record of rejection unmatched—unmatched—by any other President. What a spectacle.

''History,'' wrote the poet Byron, ''with all her volumes vast, hath but one page.'' Byron was saying there that history does repeat itself, so it only needs one page.

We should do well, then, Mr. President, to look backward into the past where we shall find that due diligence by the Senate in fulfilling its ''advice and consent'' responsibility in the appointment process has been, in Hamilton's words, ''an efficacious source of stability'' in the Government of the Republic.

Mr. President, in his Manual of Parliamentary Practice, Thomas Jefferson quoted ''Mr. Onslow, the ablest among the Speakers of the House of Commons,'' as follows. Here is what Mr. Onslow had to say:

It was a maxim he had often heard when he was a young man, from old and experienced Members—

like myself—

that nothing tended more to throw power into the hands of administration, and [into the hands of] those who acted with the majority of the House of Commons, than a neglect of, or departure from, the rules—

''the rules''—

of proceeding; that these forms, as instituted by our ancestors—

yours and mine—

operated as a check and control on the actions of the majority, and that they were, in many instances, a shelter and protection to the minority, against the attempts of power.

Now, Thomas Jefferson himself wrote that whether the rules of a legislative body:

. . . be in all cases the most rational or not is really not of so great importance. It is much more material that there should be a rule to go by than what that rule is; that there may be a uniformity of proceeding in business not subject to the caprice of the Speaker or captiousness of the members. It is very material that order, decency and regularity be preserved in a dignified public body.

Therefore, Mr. President, all legislative bodies need rules to follow if they are to transact business in an orderly fashion, and if they are to operate fairly—I have heard that word used a good bit here—efficiently, and expeditiously.

On April 7, 1789, the day after a quorum of Senators had appeared—so you see the Senate just goes back to April 6, 1789—a special committee was created to ''prepare a system of rules for conducting business.'' The committee consisted of Senators Oliver Ellsworth of Connecticut, Richard Henry Lee of Virginia, Caleb Strong of Massachusetts, William Maclay of Pennsylvania, and Richard Bassett of Delaware. All five of these committee members were lawyers. Each had served in his State legislature, the procedures of which were indebted to colonial and English experience. Two had served in the Continental Congress, which was also indebted to colonial and English precedents, and three had participated in the Constitutional Convention, whose members had created the Senate.

Obstructive tactics—we have heard a lot about that lately—in a legislative forum, although not always known as filibusters, are of ancient origin. Plutarch reported that when Caesar returned to Rome after his sojourn in Spain, his arrival happened at the time of the election of consuls. ''He applied to the Senate for permission to stand candidate,'' but Cato—Cato the Younger—strongly opposed his request and ''attempted to prevent his success by gaining time; with which view he spun out the debate till it was too late to conclude anything that day.''

The sun went down. That ended the debate.

Filibusters were also a problem in the British Parliament. In 19th century England, even the members of the Cabinet accepted the tactics of obstruction as an appropriate weapon to defeat House of Commons initiatives that were not acceptable to the government.

Now, in this country, I say to the Presiding Officer and the distinguished Senator from Tennessee and my other colleagues, experience with protracted debate began early. In the first session of the First Congress—that is going back quite a ways. I have only lived one-fourth of all the time that has transpired since that First Congress convened. But in the first session of the First Congress, for example, there was a lengthy discussion regarding the permanent site for the location for the capital. How about that. Fisher Ames, a Member of the House from Massachusetts, complained that ''the minority . . . make every exertion to . . . delay the business.'' That is what we are talking about. That sounds like a filibuster, doesn't it? Senator William Maclay of Pennsylvania complained that ''every endeavor was used to waste time.''

That sounds like a filibuster, doesn't it? Well, long speeches and other obstructionist tactics were more characteristic of the House than of the Senate in the early years. So it started over there. But the House, on February 27, 1811, ''decided . . . that after previous question was decided in the affirmative, the main question should not be debated.'' So there you have it. They moved the previous question. That still is done in the other body. The practice of limiting debate dates back to 1604—my, that is over 400 years; that is 401 years—when Sir Henry Vane first introduced the idea in the British Parliament. Known in parliamentary procedure as the ''previous question,'' it is described in section XXXIV of Jefferson's Manual of Parliamentary Practice, as follows. Here is the way Thomas Jefferson explained the previous question:

When any question is before the House, any Member may move a previous question . . .—

That is the way it is done over in the House, Mr. President: Mr. Speaker, I move the previous question—

whether that question (called the main question) shall now be put.

Mr. Speaker, they say in the House: I move the previous question.

Jefferson went on to say:

If it pass in the affirmative, then the main question to be put immediately, and no man may speak anything further to it, either to add or alter.

That is Thomas Jefferson speaking through his writing. The journals of the Continental Congress record that the previous question was used in 1778. Get that. This is the Continental Congress. When did it first meet? It first

met in 1774, the First Continental Congress. So the journals of the Continental Congress record that the previous question was used in 1778. Section 10 of the rules of the Continental Congress read:

While a question is before the House, no motion shall be received, unless for an amendment, for the previous question, to postpone the consideration of the main question, or to commit to.

The rules adopted by the Senate in April 1789 included a motion for the previous question. According to historian George H. Haynes, when Vice President Aaron Burr delivered his farewell address to the Senate in March 1805—200 years ago—he, Aaron Burr, the Vice President of the United States, ''recommended the discarding of the previous question,'' because in the preceding 4 years during which he had presided over the Senate, it had ''been taken but once, and then upon an amendment.''

So, Mr. President, I say to the Senator from Tennessee, who is presiding, and other Senators, when the rules of the Senate were codified in 1806—that was the first revision of the rules, in 1806—reference to the previous question was omitted. The previous question allowed the Senate to terminate debate: Mr. President, I move the previous question. Or in the House: Mr. Speaker, I move the previous question. If that gained a majority, no further debate. The previous question will be voted on.

In 1806, when the rules of the Senate were first codified, reference to the previous question was omitted. Since then it had only been used 10 times from the years 1789 to 1806, and it has never—it has never, it has never—been restored.

Henry Clay, in 1841, proposed the introduction of the previous question. Here we have Henry Clay proposing that they bring back the previous question. But he abandoned the idea in the face of opposition. Those Senators did not want the previous question. They did not want to terminate debate. They wanted freedom of speech.

When the Oregon bill was being considered in 1846, a unanimous consent agreement was used as a way to limit debate by setting a date for a vote.

When Senator Stephen Douglas proposed permitting the use of the previous question in 1850, the idea encountered substantial opposition and was dropped—dropped, dropped. They did not want the previous question. They did not want to terminate debate. They wanted to be able to speak on and on and on. A filibuster? Well, perhaps.

An effort to reinstitute the previous question on March 19, 1873, failed by a vote of 25 for to 30 against.

The final impetus for a cloture rule came as a result of a 1917 filibuster, one of the most famous in the Senate annals—against an administration measure permitting the arming of American merchant vessels for the duration of the World War. I believe that was 1915.

On February 26, President Wilson—I was born during one of the administrations of Woodrow Wilson—President Wilson appeared before a joint session of Congress to request legislation authorizing the arming of merchant ships. The President announced that the rules of the Senate would have to be revised—now get this—the rules of the Senate would have to be revised before he would call a special session of the entire Congress to deal with the war emergency. And so, Mr. President, the fate of the unlimited debate was sealed.

The principal responsibility for the cloture resolution rested with the new Democratic majority leader, Thomas Martin of Virginia. Under his guidance, a bipartisan committee of the Senate's leaders drew up a proposal providing that a vote—get this—by two-thirds of those present and voting could invoke cloture on a pending measure. Two-thirds of those present and voting.

By a vote of 76 to 3 on March 8, 1917, after only 6 hours of debate, the Senate adopted its first cloture rule. Mr. President, 1917, that was the year in which I was born.

In 1949 now, President Harry S. Truman sought to clear the way for a broad civil rights program, and his first step was to push for liberalization of the cloture rule. His efforts produced a bitter battle at the beginning of the 81st Congress.

The Senate adopted a compromise measure that proved to be less usable than the one it replaced. It required that two-thirds of this entire Senate vote for cloture rather than two-thirds of those present and voting. That was 1949. The new rule differed from the old in that it allowed cloture to operate on any pending business or motion, with the exception of debate on rules change. This meant that future efforts to change the cloture rule would themselves be subject to extended debate without benefit of the cloture provision.

Now we are getting down into my time. At the beginning of the 86th Congress—I came to Congress during the 83rd Congress when Harry Truman was getting close to the end of his tenure—at the beginning of the 86th Congress, Senate majority leader, Lyndon B. Johnson, offered and the Senate adopted by a 72-to-22 rollcall vote, a resolution to amend Senate rule XXII. Approved on January 12, 1959, after 4 days of debate, the resolution permitted two-thirds of the Senators present and voting—going back to the very beginning of the cloture rule—two-thirds of the Senators present and voting to close debate, even on proposals for rules change. It also added to rule XXII:

The rules of the Senate shall continue from one Congress to the next Congress unless they are changed and provided in these rules.

These rules, these rules in this book, the ''Senate Manual.''

On February 28, 1975, I submitted a resolution providing that debate in the Senate be closed by a vote of three-fifths of the Senators duly chosen and sworn, except in the case of a measure or motion to change the rules of the Senate, when a two-thirds vote of Senators present and voting would be required to close debate.

On March 7, 1975, the Senate adopted my substitute providing that three-fifths of all Senators chosen and sworn could invoke cloture. This provision applied to all measures except those amending the rules of the Senate which still required a two-thirds vote of Senators present and voting.

Four years later on February 22, 1979, the Senate agreed to a resolution that I submitted establishing a cap of 100 hours of consideration once cloture had been invoked on a measure.

Under my resolution, each Senator would be entitled to 1 hour of time. Senators could yield their time to the majority or minority floor managers of the bill or to the majority or minority leaders. Except by unanimous consent, none of the designated four Senators could have more than 2 additional hours yielded to him or to her. These Senators in turn could yield their time to other Senators. If all available time expired, a Senator who had not yielded time and who had not yet spoken on the matter on which cloture had been invoked could be recognized for 10 minutes for the sole purpose of debate.

The 1979 resolution made in order only those first-degree amendments submitted by 1 p.m. the day following submission of a cloture motion, with second-degree amendments in order only if submitted in writing 1 hour prior to the beginning of the cloture vote.

The substitute amendment contained the current overall limitation of 30 hours of consideration after cloture has been invoked.

So that brings us up to the present day rules with reference to debate and limitation of debate in the Senate, the current cloture rule. That puts us where we are now, and I thought it would be well just to review briefly the history of unlimited debate in the Senate and then the cloture rule limiting debate—the cloture rule as initially adopted requiring two-thirds of those present and voting; and then in 1949, two-thirds of those elected and sworn; and then again in 1975, two-thirds of those Members present and voting, that is where we are—so that we might have this basis for a better understanding of where we go from here.

I thank you, Mr. President. I thank all Senators, and I yield the floor.

The PRESIDING OFFICER (Mr. COLEMAN). The Senator from Massachusetts.

Mr. KERRY. Mr. President, I thank the Chair, and I thank the distinguished Senator from West Virginia for his extraordinary analysis and understanding of the Constitution which he has constantly been the keeper of in the Senate.

We are in a remarkable moment of confrontation. This is a great institution, or at least it always has been, and it is looked up to by people all over the world. Caught up as we are now in this moment of partisan ideological division of a raw reach for power, the Congress itself is daily dropping in its regard by the American people. Rather than reaching across the aisle to grapple with the real crises that face our Nation, the Republican leadership keeps moving unilaterally to change the way this institution has worked, and not for the better.

Those of us who have had the privilege of being here for some period of time—I have been here for 22 years; Senator BYRD has been here almost 50; Senator KENNEDY, Senator STEVENS, and others have also served for a significant period of time—but brief as my stay has been, I find myself now I think No. 18 in seniority, which means 82 Senators have come and gone during the time I have been here. I have had a chance to know many of them going back to the time of Barry Goldwater, John Stennis, Russell Long, and others. Never in that whole period of time I have served have I ever seen this institution behaving the way it does today.

Colleagues who came to do the same good as colleagues on the other side of the aisle, locked out of conference committees, hearings that do not take place when they ought to; oversight that does not occur as it used to. This institution is being damaged daily by the partisanship, the bitter ideological divide that is preventing good people on both sides of the aisle from doing good business for the American people; from finding real solutions to the real problems of real concern to average families all across our country, who cannot pay their health care bills, who are losing jobs abroad, who worry about the twin deficits of the budget of our country and of our trade; who see extraordinary threats to community as kids do not get the education they ought to. All this time we have been spending weeks, if not months, caught up discussing a nuclear option, discussing a few judges out of the two hundred, 208 or so, who have been nominated and approved by this President.

The Senate is now watching this struggle take place, countless hours consumed by an effort to change the rules by breaking the rules. If my colleagues want to change the rules, use the rules to change the rules. Do not subvert the system. Do not play a cute parliamentary game that has been untouched over 200 years.

This is a stunning moment. The problem is that words spoken in this Chamber do not even fully convey the importance of this moment. This is, in fact, one of those times the Founding Fathers and countless other statesmen of history have warned us against.

Henry Clay said: The arts of power and its minions are the same in all countries and in all ages. It marks its victim, denounces it and excites the public odium and the public hatred to conceal its own abuses and encroachments.

James Madison said: Where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. . . . The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.

What we are going to see if this happens is the judiciary of the United States entirely put into the hands of the Presidency, period. The advice and consent will be wiped out, barring displays of courage that we have not seen recently, because people will come, as they did in our committee most recently, to say, well, we just had an election and the President won and the President has the right to his appointments, that is it, end of issue. Gone, the divisions; gone, the test; gone, the judgment we were supposed to apply as a separate and coequal branch of Government.

That is what the Founding Fathers wrote. They did not give the President the ability to have whoever that President wants. That is what is written into the Constitution, that every single one of us went to the well of this body and raised our hands and swore to uphold.

We did not swear to uphold the majority leader. We did not swear to uphold the President. We did not swear to uphold our party. We swore to uphold the Constitution of the United States, and that is our duty.

Lord Acton said it maybe best: All power corrupts. Absolute power corrupts absolutely.

Thomas Jefferson said: I hope our wisdom will grow with our power and teach us that the less we use our power the greater it will be.

If my colleagues want to use the power of ending a filibuster, just have the filibuster for week after week and let people stand up and make their arguments. If the arguments have no currency, believe me, between the press, public opinion, the bloggers, and C–SPAN, this country will rise up and they will get their 60 votes if they deserve them. That is an up-or-down vote of its own kind.

If it were compelling enough, as it was with the Civil Rights Act, or compelling enough as it has been in other great confrontations in this body, we have always found our way to make it happen. We have always done it without the rules. We are a Nation that has listened to some remarkable men and women in remarkable debates about how we as a Nation are different in balancing power and protecting the people and the institutions that we set up to protect the people. We are not here as an institution to protect an ideology. We are not here as an institution to protect a party. We are here to protect collectively the Government of the United States of America that is made up of those brilliant words that were fought over so diligently and remarkably in Philadelphia and which have served us so well all of these years.

Now all of a sudden in 2005, feeling the flush of victory in an election that was close, controlling two branches of Government, elected officials, people who serve at the grace of that Constitution for a brief period of time, at the sufferance of the people who vote for us, those people are choosing to serve the moment, not to serve history, not to serve precedent, not to serve common sense, not to serve even the real interests of the American people, but to serve a narrowly defined, elected, official, leadership-determined, ideological purpose.

I believe the real interests of Americans are best served by remembering that the greatest strength and the greatest virtue of our democracy is not that it gives power to the majority, which is easy to exercise, easy to understand, easy to abuse; the great virtue of the American system of Government and of our democracy is the protection it provides to the minority. That is what is special about America. That is what makes us different from everybody else. That is what lives are being lost for, to tell people in Iraq and Afghanistan, this is what you ought to embrace—the full measure of democracy, not some limited tricky little measure where, in the flush of victory, you change the rules.

What would we say about this if it was another country that we had helped to be the country they are, embracing our democracy, but they started to play those kinds of games and there was suddenly an abuse of rules that had been set up that everybody understood were there to make the democracy work effectively?

It is precisely the protection of the minority that makes our democracy so respected and so awesome to people all over this planet.

This is a dangerous time for our democracy. What is at stake here is something far greater than the confirmation of a few judges. Let there be no doubt that line was drawn clearly here this morning because the deputy leader offered to have four judges confirmed. We could have confirmed four judges right here, today, this morning.

No, no, no. This is a division. This is a moment of confrontation being sought by the leadership on the other side of the aisle. What is at stake is something far greater than any of the individual judges. It is defined by the refusal to accept the offer to do those judges today. We could have gotten the President's percentage up from 95 to whatever, 98 percent. But, no, we do not want that. That will change the focus.

No matter how much time is spent on the life story of Priscilla Owen, we all

know the choice of this particular judgeship and of just staying on this judgeship and not trying to have other judgeships represents, in fact, a choice. It is a smokescreen for what this fight is really all about. It is not about these few judges. We could have confirmed those judges. But the Republican leadership is fundamentally determined to deny the minority the right to hold the Executive accountable for such judgments as we might make about the lifetime appointment of those judges.

I heard both sides out here. Some Members of our side did call for up-or-down votes when that was the argument that best served them. But, guess what, when they didn't get it, they didn't call for a change in the rules, and they did not try to break the rules to change the rules. They used their best argument, but they respected the institution.

That is not what is happening today. So we can forget about who said what when. The real fight is about the Senate. The real fight is about the Constitution. The real fight is about who we are and what kind of country we are going to be and how we behave and what kind of example we set to young kids in school today who read the history books and dream someday of being a Senator and perhaps joining the world's greatest deliberative body.

This is about George Bush and Karl Rove and the Republican leadership and their quest for absolute control over who goes to the Supreme Court and to the judgeships across this country. This is about carrying, beyond this branch of Government, power into another branch of Government that is supposed to be separate. This is about the gratification of immediate ideological goals and the pursuit of power, regardless of the long-term consequences to the Senate, the Congress, or the Constitution of the country. To get what they want, the leadership has acquiesced to outside forces. Not even the precedents and history and quality of this institution are guiding them. It is an outside hand.

As John Danforth, with whom many of us had the privilege of serving here, a greatly respected former Republican Senator—he was George Bush's choice as a special envoy to Darfur. He was George Bush's choice to go to the United Nations. He is, above all, as all of us know, a man of enormous faith, a respected minister, and a leader in his church. Here is what he wrote a few weeks ago:

> The problem is not with people or churches that are politically active. It is with a party that has gone so far in adopting a sectarian agenda that it has become the political extension of a religious movement.

So spoke Senator John Danforth, Republican.

Yet, despite Senator Danforth's warning, most of my colleagues stay right on script in this fight for history, this fight for principle, and this fight for rights. On script, they allow our cherished principles to be abused and glossed over as the debate sort of develops or drops down into a competition of hollow sound bites. But script and sound bite are not what should dictate what happens here, not in the Senate. Conscience and principle ought to dictate what happens here. There have to be Senators prepared to stand up and do their duty as U.S. Senators, not Senators of their party.

My distinguished colleague, Senator VOINOVICH, recently showed courage in the Foreign Relations Committee when he suddenly stopped the proceedings of the committee and he said: I am not comfortable with what is happening here. My conscience tells me we ought to stop and take a better look.

Guess what happened. He was vilified on talk radio and in certain partisan circles for having gone off script.

Senator CHAFEE of Rhode Island, 4 years here, stands up and says: Wow, that is the first time in 4 years I have ever seen anybody do that.

What? The first time in 4 years a Senator saw another Senator stop and think for himself and exercise conscience and go off script? What kind of statement is that about what has happened here? It is not controversial, my friends. It is a sad statement about the Senate, and it underscores what is happening here now.

Independence and conscience and principle are really what is at stake here, the independence of the Senate, the independence of the judiciary from an administration that is just hell-bent for leather determined to get its way. Heavens knows what leverage will be exerted in these next hours as we see so much on the table, with military bases closing and other issues—who knows? Independence of the Senate, a special institution in our Government, a place where things purposefully slow down, where they find their balance—that is what the Senate was created for.

It is surprising and disturbing that members of the Republican leadership know what is at stake, but they have actually worked with the Republican administration to spreads things that aren't true. I don't know what happened to truth around here. I don't know what happened to truth in the discussion of great issues before this country.

But the truth is, in the end, none of the constitutional issues that have been put forward—and today's Republican leadership—none of them stand up. They do not stand scrutiny. They are hollow, tortured, poll-tested statements. The whole argument about the Constitution and up-or-down votes or ''unprecedented''—the word ''unprecedented'' has been used. They sound good, but they are not true, and we know it. Yet Senators continue to fall in line, turning out the script, turning out the phases that have to be repeated. It is not a true representation of the Constitution, of history, or the rights of Senators.

Personally, I believe there would be a lot more outrage in the Nation and in the media if the value of truth had not been so diminished over the last years. We have a budget that comes trillions of dollars short of counting every dollar we plan to spend, but, oh no, there is no accountability. We have a budget that doesn't even count the interest on the debt. Find me an accountant in a business in America who doesn't put the interest on the debt that they owe in the accounting, and they would be fired. We do not do it. No accountability.

We have had a Medicare actuary who was forced at risk of losing his job to lie about what the costs would be of a prescription drug bill and lie to the Congress. No accountability. We have had falsified numbers in Iraq, on everything from the cost of the war to the number of troops that have been trained to the slam dunk on intelligence—no accountability. We have an administration that continues to want to fund fake newscasts paid for by the American people, without disclaimer, and mislead people across America.

In fact, the administration's willingness to consistently abandon the truth I think has done great damage to the American people's willingness to believe anything any of us say. They are less willing to listen. They are less willing to trust or take anything said seriously.

Now we find ourselves in a struggle between a great political tradition in the United States that seeks to find the common ground, do the common good, and we have a new ethic on any given issue, where any means justifies the ends of victory no matter what. It is a new view that says, if you don't like the facts, just change them. If you can't win by playing by the rules, just rewrite them. Witness what happened with TOM DELAY. The new view says if you can't win a debate on the strength of your arguments, then go ahead and demonize your opponents regardless of whether it is true. The new view says it is okay to ignore the overwhelming public interest as long as you can get away with it.

This time the Republican leadership has gone the farthest to get away with it, hoping to convince Americans that by breaking the Senate rules, they are actually acting to defend the Constitution, honor the words of our Founding Fathers, and avert a judicial crisis.

This debate is not fueled by an effort to protect the Constitution. It is fueled by ideology. It is not fueled by a shortage of judges on the bench because, as the ranking member of the Judiciary Committee has made clear, we have the best record of appointing them and the lowest vacancies in years.

The facts have been repeatedly cleared up, again and again, and repeatedly they are brushed aside with the old adage that if you throw enough mud and you repeat something that is not true enough, enough people may come to believe it. Over 95 percent of all judges already approved. I have been here since 1985 and I have probably voted for a thousand judges. I

have not counted them all. For Ronald Reagan, for George Herbert Walker Bush, for President George Bush. What have we got? Ten who have not been confirmed?

The Bush administration and their allies in Congress hope to get away with this by selling words to the public on a ''team'' the public would never buy if there was a referee who put real facts in front of the American people. Unfortunately, words with great meaning—Constitution, Founding Fathers, history, precedent—all of these are being twisted and cheated of their full meaning and of their full import in the process.

In the end, the American people are being underestimated by this administration. They may work their will here; I don't know yet. We do not know. Certainly they have a lot of cards to play. But in the end, Americans value the Constitution, and over time this will be felt. In the end, Americans understand that the strength of our democracy is best judged by the enduring strength of our minority and its ability to be heard. And Americans cherish the ability of the minority to be heard.

When Americans first heard the term ''nuclear option,'' they kind of recoiled—appropriately. They were confident that dismantling the filibuster and silencing the minority would have as catastrophic an effect on our democracy as a nuclear blast would on our security. But the majority's action was not to back off and to say, okay, we will play by the rules. The majority's reaction was to change the slogan. So in an act of transparent hypocrisy, the minority changed the slogan from ''nuclear option'' to ''constitutional option.'' George Orwell would be pleased. They embarked on a series of hollow arguments based on mythical constitutional provisions confident that if you just say it, somebody will believe it.

You can change the slogan, but you cannot change the fact that diminishing the rights of the minority diminishes the spirit and the substance of our Constitution and the foundation of our Government. Argument after argument put forward by the Bush Republican leadership is just plain false. False. I have heard it argued that our Constitution mandates specific protocol of voting for judges. No. They have used their new catchphrase, up-or-down votes, hundreds of times in recent days. But those words do not appear once in our Constitution. They are not even subliminally in the Constitution in the advice and consent and separateness of power given to the Senate and the right of the Senate to make its own rules.

No one should be fooled. Those phrases do not mean constitutional. They do not mean democratic. They do not mean fair. They are phrases that are code for dissent-proof, minority-proof, and filibuster-proof. There is nothing in our Constitution or our history to suggest that the nominee of any President is so special as to be excused from the scrutiny of the minority or granted immunity from the tools of democracy that protect that minority.

I didn't win, but I can guarantee this: Had I been President, I would not have contemplated supporting or sending a request to change what I have viewed as something of value in the entire time I have been here in the Senate. Never would have occurred to me. It would have occurred to me to send people up here who could win the support of people on both sides. It would have occurred to me to bring the members of the Judiciary Committee together and sit them down and work together to come to a common understanding of what sort of standard we ought to apply and let the American people share that standard.

There is nothing in our Constitution or in history to suggest the President ought to be granted immunity from the tools of democracy. And that is what will happen.

My colleagues are well aware that the power of advice and consent is granted to the Senate and the Constitution says absolutely nothing about how the Senate will proceed to provide advice and consent. And the words advice and consent are there in their duality because advice is one thing and consent is another. You can withhold your consent or you can give your consent. You can say yes, or you can say nothing if you do not vote. And if you do not vote, you have withheld your consent.

It didn't take long before the new Congress exercised its constitutional powers in 1795. Senators who were friends and colleagues of the Founders themselves, who surely knew their intent, turned around and defeated George Washington's nomination of George Rutledge to be the Chief Justice of the Supreme Court. In 1968, Republican Senator Robert Griffin captured the spirit of that event when he said:

> That action in 1795 said to the President then in office and to future presidents, don't expect the Senate to be a rubber stamp. We have an independent and coequal responsibility in the appointing process and we intend to exercise that responsibility as those who drafted the Constitution so clearly intended.

The Constitution did not mandate a rubberstamp for George Washington and the Constitution doesn't mandate a rubberstamp for George Bush today.

In 1795, the rejection of Washington's nominee was heralded as the Constitution working, not failing. There is no doubt that an active, coequal partnership was intended. That resounding rejection of George Washington, our revolutionary leader, helped to seal the death of the monarchy in this country.

The genius of empowering the Senate and the minority was that by limiting the executive, the Senate legitimized the executive. So when I hear my colleagues come to the Senate arguing that the Constitution mandates the will of the majority always trumps the minority, I don't hear the wisdom of our Founding Fathers. I don't see or hear a respect for what happened in 1795. I don't hear the same blind activism that characterizes the judges they intend to enforce on the Federal bench. The actions of some Senators, in fact, today come closer to rewriting the Constitution than defending it.

Another argument we have heard is that the filibuster itself is unconstitutional. That has been made. That argument is deeply flawed. The Constitution in Article I, section 5 granted each house the power to ''determine the rules of its proceedings.'' That is the Constitution of the United States.

Every Senator went down there, raised his or her hand, and swore to defend the Constitution. And the Constitution says we have the power to determine our rules and we have a rule by which we determine the rules, and the current rule says you have to have a supermajority to change the rules. But, no, in the flush of victory, in a moment of ideological excess, people are going to come in and change the rule by breaking the rule of the Senate that the Constitution itself enshrines. Shame. That is a disgrace to the oath and a disgrace to the history and a disgrace to what this institution stands for and to the quality of our democracy that we export at the lives of young Americans abroad. It is wrong, fundamentally wrong.

Over the past 200 years, our predecessors in the Senate have taken the role of ''consent'' very seriously. They have created time-tested rules to assure the rights of the minorities and to balance the power of government. With a hold, a so-called hold, a single Senator can delay a Presidential nominee. A single committee chairman can block a nomination by simply refusing to hold hearings.

I saw Senator Helms do that any number of times. I tried to get a hearing. We tried to get the possibility of a Governor of the United States of America, the Governor of Massachusetts, Bill Weld, nominated to be the Ambassador to go to Mexico. Senator Helms: no hearing. Wouldn't hear of it. It could not happen. Nomination killed.

What is this game that is being played back and forth about who said what, when? We all know how this place has worked all these years. These rules were not created by the Democratic Party when George Bush was elected President. The filibuster was used as early as 1790 by Senators from Virginia and South Carolina who filibustered against a bill to locate the first Congress in Philadelphia. That was a filibuster of one because in 1790, as Senator BYRD has pointed out, you needed unanimous consent to end the debate. They did change that rule, but they changed that rule by using the rules of the Senate, not by breaking them.

Think about it. Those legislators and friends and even the Founders themselves permitted a filibuster of one. Knowing that, today's activist arguments buckle under the weight of history. The unfortunate truth is that some Senators have now fashioned themselves as activist legal scholars using a false reading of the Constitution to paint their opponents as obstructionists while pursuing their political agenda at the expense of our democracy.

I think some of my colleagues forget that the Senate was designed specifically to be the moderating check on a President. And guess what. We have done unbelievably well as a nation these 200 years. We are the envy of people all across this planet. There is not one of us whose heart does not fill with pride, who is not astounded at what we can do and have done, and what we can achieve in America, and the stories of individual Senators in this Chamber who have risen from adverse circumstances, and nothing, to be able to represent people in their States. It is a stunning story. It is a story based on that respect for the law and based on the mutual respect that has always guided this great institution. I think some of my colleagues have lost track of that.

My colleagues also forget, as they demonize the filibuster, it has been a force for the good. Farmers don't forget that. There are a lot of farmers in the Midwest in our country. They don't forget when Senators from rural States used the filibuster to force Congress to respond to a crisis that left thousands of farmers on the brink of bankruptcy in 1985. The big oil companies don't forget it. That don't forget when Senators used the filibuster to defeat massive tax giveaways that they were lobbying for in 1981. And I don't forget it, when, 10 years ago, I came to the floor and filibustered to prevent a bill that would have gutted public health and safety and consumer and environmental protections. That bill never passed, and we know the country is better for it.

Some Senators come to the floor with a practical argument about our courts. They claim that because we have not rubberstamped each and every one of George Bush's nominees, the Nation faces a crisis because of a shortage of judges on the bench. It is not true. How can you keep coming to the floor of the Senate saying things that are just plain not true?

Over 95 percent of the President's nominees have been confirmed. Our courts today have the lowest vacancy rate they have had in years. Enough of that argument.

What is threatened is a delicately balanced system that for 214 years successfully prevented the Executive from usurping power that was granted in good faith by the American people. And that threat manifests itself in this nuclear option that threatens the character, the core of this institution.

The integrity of this Senate is threatened when the majority attempts to change the rules by breaking the rules. The balance of power is threatened when the power of advice and consent is gutted. It will be gone. Whatever nominees they want will be confirmed, unless you happen to find a few people who will stand up to the pressure exerted on their States' need or their reelection need or the other needs that the Founding Fathers wanted to protect Senators against.

Our democracy is threatened when we set the dangerous precedent that minority rights will be silenced at the convenience of the majority. I believe our courts and the justice this rule is meant to deliver are threatened, in the end, by some of these judges who have been nominated.

As I said, that is not what this is fundamentally, in the end, about. It is about getting everything you want when you want it.

I will wrap up in a moment, Mr. President.

Some of my colleagues have argued that Democrats filibuster these judges because we simply dislike them or disagree on ideology or policy. Well, there may be some disagreement on things they have said or the way they have approached their courts. We saw what Attorney General Gonzales has said about Priscilla Owen, that her dissent in In re Jane Doe was an ''unconscionable act of judicial activism.'' But the point is, we have confirmed countless judges with whom we disagree on countless issues. If we have confirmed over 200 judges of the President of the United States, you know we do not agree with them on many of the issues that they brought to the bench, but they brought a fundamental fairness or they brought a record that we did not believe ought to be disputed.

I think we have shown our good faith on the approach to the confirmation of judges. We have confirmed countless judges because we believed they were impartial and responsible arbiters of the law. It is an activist judge, it is a judge with a particular—many of the arguments have been made; I am not going to go through them now—but those arguments have been eloquently made with specificity as to these few judges. It is judges who want to rewrite our laws from the bench whom we believe are unqualified for a lifetime appointment. And we stand against them, Mr. President, not as a threat to the Constitution, but in defense of the Constitution.

We have also been accused of unprecedented acts with respect to these nominations. Well, I am not going to go back into all that history. A lot of my colleagues have talked about it in the last days. But you just cannot come out here with a straight face, on either side—both sides have engaged in delaying some nominees—many of them were not even allowed out of the committee when President Clinton was in. Waited years; never got out. That does not make it all right, but it is the way it works as we fight this process of finding people who meet the consensus of the Senate.

Did you hear the minority then hide behind a mythical constitutional value? No. Did you hear the minority stand up and assert a constitutional violation or the rules of the Senate ought to be changed? No. The majority leader himself has voted to filibuster a nominee. It does not matter whether it is 1, 2, or 10 filibusters, a filibuster is a filibuster.

President Johnson's nominee to be Chief Justice of the Supreme Court, Abe Fortas, was defeated with a filibuster.

Tennessee Republican Howard Baker articulated the minority's position saying:

> The majority is not always right all of the time. And it is clear and predictable that the people of America, in their compassionate wisdom, require the protection of the rights of the minority as well as the implementation of the will of the majority.

Throughout our history, Presidents and majorities have always had to govern a nation where minority rights are protected. Until this day, Presidents of the majority have respected that tradition. They were humbled by it. They were inspired by it, by the lessons of history that colleagues seem to have forgotten today.

In 1937, President Roosevelt attempted to court pack and assert his influence. His own party said no. Thomas Jefferson once attempted to impeach a Supreme Court Justice who disagreed with his political agenda. His own party said no.

When my colleagues complain of lack of precedent, remember those precedents. They were fair, and they were just. They respected the Constitution and they defended the judiciary. Our predecessors stood up to their own party leaders because they valued the real strength of our democracy more than the short-term success of a political agenda of the moment. And the question for all of us here is: Are we going to live up to that test?

Recent predecessors of Senate Republicans have repeatedly urged respect for this—their own party Members, Members of the Republican Party, people of extraordinary respect and even reverence. Former Republican Majority Leader Howard Baker said, destroying the right to the filibuster:

> would topple one of the pillars of American democracy, the protection of minority rights from majority rule.

Former Senator Chuck Mathias said:

> The Senate is not a parliamentary speedway, nor should it be.

Former Republican Senator Bill Armstrong said:

> Having served in the majority and in the minority, I know it's worthwhile to have the minority empowered. As a conservative, I think there is a value to having a constraint on the majority.

My colleagues should defend their judges, but do it without tearing down

the Constitution and our Founding Fathers, or destroying the rules and character of this great institution. Defend your judges without ceding dangerous and corruptive levels of power to the executive branch of Government. Defend your judges without erasing 214 years of wisdom and sacrifice that raised this Nation from tyranny and chaos and spread freedom across the globe. Our Founding Fathers would shudder to see how easily forces from outside of the mainstream now seem to effortlessly push people toward conduct the American people don't want for their elected leaders, abusing power, inserting the Government into our private lives, injecting religion into debates on public policy, jumping through hoops to ingratiate themselves to their party base, while step by step and day by day real problems that keep American families up at night fall by the wayside in Washington.

Congress and our democracy itself are being tested this week and next and will be tested in this vote. We each have to ask ourselves individually, as a matter of conscience, what are we prepared to do? I have attended the Senate prayer breakfast with colleagues here. I know this is a place of great faith and a place of real concern. I ask my colleagues to look into their souls and ask themselves, is this the right thing to be doing for the long-term interests of our Nation?

For those in this Chamber who have reservations about the choices their leadership has made and worry about the possible repercussions on our Constitution and democracy, stop over the weekend and look at history and find the courage to do what is right. History has always remembered and found a place for those who are courageous, and it will remember the courageous few who live up to their responsibility now and speak truth to power when the Senate is tested, so that power doesn't go unchecked.

The Senate and the country need Senators of courage who are prepared to make their mark on history by standing with past profiles in courage and defending not party, not partisanship, but defending principle, defending the Constitution, and defending democracy itself.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Jersey is recognized.

Mr. LAUTENBERG. Mr. President, when I first came to the Senate, our Nation was engaged in the Cold War with the Soviet Union. But now, 22 years later, this Senate is experiencing its own cold war. It is a cold war across the aisle that separates the two parties, and it has escalated with the threat of this nuclear option.

As the name suggests, the result of this threat is nuclear, but in many ways it is also a timebomb. It is a timebomb because, while the action will be visible now, it will do irreparable damage to the future of this country.

Its potential effects on the operations of the United States are well known. But here I want to address my comments to the American people because they are going to pay the price for the change if it takes place here. The majority leader insists on breaking the rules in order to give several people, some of whom deserve far greater review, lifetime appointments as high-ranking Federal judges. They could be on the bench for 30 or 40 years, and they will make decisions about your lives, your families, your rights, and the future of your children. They will make decisions about our lives, such as: Will clean air rules be enforced against polluters. I hope so. I would like to know my grandchildren can breathe the air and not be harmed by it. I have one grandchild who is asthmatic. My daughter, when he goes to play a game or engage in a sport, always checks to see where the nearest emergency clinic is.

So do we want to leave our kids with air that is polluted, with drinking water that is contaminated? Will we have health care? Will we still have strong constitutional rights? That is what this is about. We got lost in how long the filibuster rule has been in effect and how devastating it will be on the process. But it goes much deeper than that. These are critical questions, and these are the judges who will be answering those questions. They might even one day be asked to help elect a President.

When I was a soldier 60 years ago and we dropped the earliest version of the nuclear bomb, called the atom bomb, we celebrated. We knew we could save thousands of Americans from dying in the fight to vanquish our then enemy, Japan.

With this nuclear option, the majority leader is threatening to annihilate over 200 years of American tradition in the Senate by getting rid of the right that challenges decisions made by a slim majority over a minority of over 140 million people's representatives here in the Senate.

Extended debate, or filibuster, is an American tradition that goes back to the earliest days of the Senate. While the written rules establishing the Senate filibuster were not adopted until 1806, the practice existed even in the first Congress. Historical records indicate that in 1790, Senators from Virginia and South Carolina engaged in a filibuster, and it has continued since then.

The first well-documented filibuster was conducted in 1825 by Senator John Randolph of Virginia. For several days, Senator Randolph filibustered President John Quincy Adams' economic agenda. That was in 1825. During the 19th century, there wasn't even an option of a cloture to end the filibuster. It continued as long as people had the breath and stamina to continue. There was no way to stop determined Senators from engaging in an unlimited debate. Then, in 1917, the cloture rule was adopted, which established a procedure to end debate only upon a vote of a supermajority. Through all of these years, through every crisis, the American tradition of the filibuster has endured. It endured through the War of 1812, the Civil War, Reconstruction, two world wars, the Great Depression, the civil rights movement. Yet because of a few of President Bush's judicial nominees, we are being asked to throw out the filibuster safeguards of the huge minority. It makes no sense.

We have heard claims that it is unprecedented to mount a filibuster on a judicial nominee. It can be said, but it is wrong, and the evidence is on the Senate's own Web site.

I quote from a statement made earlier by the senior Senator from Missouri. Mr. BOND said:

> Mr. President, I think the facts are clear. You have heard this many times. Almost everything has been said but not everybody has said it, so I want to go over some of the facts that I think are very, very important. For 214 years, judicial nominations have come to the Senate floor and have been considered without filibuster.

I ask unanimous consent that a table that shows there were 14 judges whose nominations were filibustered since 1968 be printed in the RECORD.

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

TABLE 3.—NOMINATIONS SUBJECTED TO CLOTURE ATTEMPTS, 1968–2002

[Executive branch nominations in roman; Judicial nominations in italic]

| Congress and year | Nominee | Position | Cloture motions filed | Outcome of cloture attempt | Disposition of nomination |
|---|---|---|---|---|---|
| (1) *90th, 1968* | *Abe Fortas* | *Chief Justice* | *1* | *rejected* | *withdrawn* |
| (2) *92nd, 1971* | *William H. Rehnquist* | *Associate Justice* | *2* | *rejected* | *confirmed* |
| 96th, 1980 | William A. Lubbers | General Counsel, National Labor Relations Board. | 3 | invoked | confirmed |
| 96th, 1980 | Don Zimmerman | Member, National Labor Relations Board | 3 | invoked | confirmed |
| (3) *96th 1980* | *Stephen G. Breyer* | *Circuit Judge* | *2* | *invoked* | *confirmed* |
| (4) *98th 1984* | *J. Harvie Wilkinson* | *Circuit Judge* | *2* | *invoked* | *confirmed* |
| (5) *99th, 1986* | *Sidney A. Fitzwater* | *District Judge* | *1* | *invoked* | *confirmed* |
| *99th, 1986* | *Daniel A. Manion* | *Circuit Judge* | *1* | *withdrawn* | *confirmed* |
| (6) *99th, 1986* | *William H. Rehnquist* | *Chief Justice* | *1* | *invoked* | *confirmed* |
| 100th, 1987 | Melissa Wells | Ambassador | 1 | invoked | confirmed |
| 100th, 1987 | C. William Verity | Secretary of Commerce | 1 | invoked | confirmed |

TABLE 3.—NOMINATIONS SUBJECTED TO CLOTURE ATTEMPTS, 1968–2002—Continued

[Executive branch nominations in roman; Judicial nominations in italic]

| Congress and year | Nominee | Position | Cloture motions filed | Outcome of cloture attempt | Disposition of nomination |
|---|---|---|---|---|---|
| (7) *102nd, 1992* | *Edward Earl Carnes, Jr.* | *Circuit Judge* | *1* | *invoked* | *confirmed* |
| 103rd, 1993 | Walter Dellinger | Assistant Attorney General | 2 | rejected | confirmed |
| 103rd, 1993 | five nominations [1] | State Department | 2 | rejected | confirmed |
| 103rd, 1993 | Janet Napolitano | U.S. Attorney | 1 | invoked | confirmed |
| 103rd, 1994 | M. Larry Lawrence | Ambassador | 1 | fell [2] | confirmed |
| *103rd, 1994* | *Rosemary Barkett* | *Circuit Judge* | *1* | *withdrawn* | *confirmed* |
| 103rd, 1994 | Sam Brown | Ambassador | 3 | rejected | returned to president |
| 103rd, 1994 | Derek Shearer | Ambassador | 2 | invoked | confirmed |
| 103rd, 1994 | Ricki Tigert | Board Member and Chair, Federal Deposit Insurance Corporation [3]. | 2 | invoked | confirmed |
| (8) *103rd, 1994* | *H. Lee Sarokin* | *Circuit Judge* | *1* | *invoked* | *confirmed* |
| 103rd, 1994 | Buster Glosson | Air Force Lieutenant General (retired) | 1 | withdrawn | confirmed |
| 103rd, 1994 | Claude Bolton, Jr. | Air Force Brigadier General | 1 | vitiated [3] | confirmed |
| 103rd, 1994 | Edward P. Barry, Jr. | Air Force Lieutenant General (retired) | 1 | vitiated [3] | confirmed |
| 104th, 1995 | Henry Foster | Surgeon General | 2 | rejected | no final vote |
| 105th, 1997 | Joel I. Klein | Assistant Attorney General | 1 | invoked | confirmed |
| 105th, 1998 | David Satcher | Surgeon General | 1 | invoked | confirmed |
| (9) *106th, 1999* | *Brian Theadore Stewart* | District Judge | *1* | *rejected* | *confirmed* |
| (10) *106th, 2000* | *Marsha L. Berzon* | *Circuit Judge* | *1* | *invoked* | *confirmed* |
| (11) *106th, 2000* | *Richard A. Paez* | *Circuit Judge* | *1* | *invoked* | *confirmed* |
| (12) *107th, 2002* | *Lavenski R. Smith* | *Circuit Judge* | *1* | *invoked* | *confirmed* |
| (13) *107th, 2002* | *Richard R. Clifton* | *Circuit Judge* | *1* | *invoked* | *confirmed* |
| 107th, 2002 | Richard H. Carmona | Surgeon General | 1 | invoked | confirmed |
| (14) *107th, 2002* | *Julia Smith Gibbons* | *Circuit Judge* | *1* | *invoked* | *confirmed* |
| *107th, 2002* | *Dennis W. Shedd* | *Circuit Judge* | *1* | *vitiated* [3] | *confirmed* |

[1] These five nominations to various positions in the State Department received consideration and cloture action concurrently, and are counted as one case in the table.
[2] Cloture motion became moot and received no action.
[3] Tigert was nominated simultaneously for these two positions, and cloture action took place on each nomination in turn; the table counts these events as one case.
[4] Senate unanimously consented to treat the cloture motion as having no effect.

Sources: Compilations by CRS and by the Senate Library; Legislative Information System of the U.S. Congress; U.S. Congress, Senate, Committee on Rules and Administration, *Senate Cloture Rule*, committee print 99–95, 99th Cong., 1st sess. (Washington: GPO, 1985), pp. 44–70, 78–85; *Congressional Record* (Daily Digest); and *Congressional Quarterly Almanac* for 1986, 1987, 1992, 1995, 1999.

Mr. LAUTENBERG. Mr. President, the Senate Web site points to one incident from 1964 to the present time. October 1, 1968: ''Filibuster Derails Supreme Court Appointment.'' Why don't our colleagues on the other side take their heads out of the sand, open their eyes, read the record, and tell the public the truth?

In 1968, Abe Fortas, Supreme Court Justice, was filibustered. The Senate failed to invoke cloture on Fortas. There were only 45 votes for cloture. Some say this is proof that a majority of the Senators did not support Fortas. But President Johnson thought otherwise, noting that 12 Senators were absent for the cloture vote. And here from 1968 is a page 1, first-page headline in the Washington Post. It says: ''Filibuster Derails Supreme Court Appointment.''

A full-dress Republican-led filibuster broke out in the Senate yesterday against the motion to call up the nomination of Justice Abe Fortas for Chief Justice.

The public ought to know what is being said. Unfortunately, in the urgency to get this done, they are not being accurate in the things that are said by the Republican majority.

So in 1968—note this, people across the country—on a nomination to be the most influential judge in the country, there was a filibuster. I am not a lawyer, but it seems to me that those who say this has not happened before are guilty of factual negligence. The right to filibuster is fundamental to the Senate because the Senate was created by our Constitution to protect the rights of the minority.

Just this weekend, one of the most distinguished Members of the Senate, our colleague from Arizona, Senator MCCAIN, explained it very well. Senator MCCAIN said:

The Senate was designed to protect the minority. That is why Wyoming has two votes, and that's why California has two votes. That's why Rhode Island—

Another small State—

had two votes among the original 13, and New York and Massachusetts and Virginia had two votes.

The modern Senate reflects the same types of disparities in population as the original Senate. My home State, for instance, New Jersey, has a population that is greater than Alaska, Wyoming, Kansas, North Dakota, South Dakota, and Mississippi combined. But New Jersey only gets two votes in this body, and each one of those States I mentioned also gets two votes. So it is not surprising that when you do the math on the current Senate, you find that the majority is actually in the minority, and the minority is the majority.

Here is what I mean very simply put. The Republican caucus with 55 Senators and with each Senator getting half of the vote in that State represents 144 million people. The Democratic caucus with 45 Senators represents 148 million people. The first one, 144 million; the second one, 148 million—that does not look like much of a minority to me. That is what we are looking at.

Mr. President, what you find is the minority in this body, the Democratic caucus, represents more than the majority, and that is exactly what the Founding Fathers wanted to protect—minority rights in the Senate—because a minority of Senators may actually represent a majority of the people. So it is corrected by a process we have here. The Democratic caucus on this side of the aisle represents many more Americans than the Republican side. That is why we have a filibuster rule. That is why we generally operate by unanimous consent.

The right to filibuster is not just some obscure rule in the Senate. It is part of our American heritage, and it has been celebrated by our culture and our folklore. As many Americans know, the filibuster was immortalized in the film ''Mr. Smith Goes to Washington.'' Here we see a picture of Jimmy Stewart as he played Senator Smith. He used the filibuster to protect the interests of his constituents back home. This image shows Senator Smith in the midst of his filibuster.

From some of the things we have heard from the majority leader, you might think Mr. Smith was the bad guy in that film. No, Mr. Smith, as a filibustering Senator, is not only the good guy, but he is the hero of that film. That film is a celebration of our American democracy. It is a celebration of this Senate, the world's greatest deliberative body. But if the majority leader is successful in ending the filibuster, in ending the representation that the huge minority deserves, we will move from the world's greatest deliberative body to a rubberstamp factory.

The Constitution gives us an active role in the nomination process. The Senate is not a mere formality under the Constitution. The Founding Fathers intended the Senate to be a check on the President's power. We hear our colleagues on the other side pleading for a majority vote; let the Senate act as it should.

The Senate is responsible for the quality of people we put on the courts, and if there is a challenge, so be it. Let the majority party make the case, convince us that these people are not what we think they are in terms of their activist views. Is it an inconvenience to the President to contend with the Senate? Perhaps. But direct your complaints to Thomas Jefferson, James Madison, and our Founding Fathers. You will find they had their hands full, and they knew how to deal with it.

I know our majority leader has said:

We can keep the filibuster for legislation, just not on nominations.

But the American people know you cannot sort of end the filibuster. If this

nuclear option goes into place, citizens across our country understand that their rights will be taken away in large part by those who have expressed themselves before they were nominated in matters dealing with gender, dealing with marriage, dealing with all kinds of issues on which the American people have a right to have a view.

No, this now says we are just going to do it for the judges. Beware, once that barn door opens, we are going to see all kinds of changes. You cannot sort of end the filibuster. You either have to keep the filibuster or you end it.

Would the majority leader like to rename the Jimmy Stewart film, ''Mr. Smith Goes to Washington Except for Judges''?

Speaking of popular culture, the biggest film of the year is opening this week, ''Star Wars: Revenge of the Sith.'' This is one of the characters in that film. He is portrayed here on this chart. He is the leader of the Senate in a far-off universe. In this film, this leader of the Senate breaks rules to give himself and his supporters more power, and after this move from the Senate leader, another Senator states:

This is how liberty dies.

One film critic described this film as a story of ''how a republic dismantles its own Democratic principles.''

As millions of Americans go to see this film this week and in the weeks ahead, I sincerely hope it does not mirror actions being contemplated in the Senate. I say to my colleagues, do not let liberty die. I urge my colleagues, on behalf of the American people—and I ask the American people to express themselves on this—do you want to give up your rights, do you want to give up your rights to protect your children against a foul environment? Do you want to give up your rights to be able to work in a safe environment? Do you want to give up your rights to decide on questions such as war and peace? I urge do not let it happen. I urge my colleagues to oppose any attempt to break the Senate rules and destroy over 200 years of American tradition. We must save the United States and the interests of our country as a whole.

I yield the floor.

The PRESIDING OFFICER (Mr. BURR). The Senator from Delaware.

Mr. CARPER. Mr. President, I have served in the Senate for a bit over 4 years. When I came, I never imagined I would stand on this floor and defend a filibuster. I came to try to make sure we preserve jobs and bring in new ones, to make sure kids got a new education, to make sure we brought down the costs of health care and made it affordable and extended to a whole lot more people, that we ran a fiscally sound ship of state, and that we provided for the security of our Nation. I came for all of those things. I never imagined I would be standing in a food fight on how we are going to approve these judges, how many confirmations are enough and what constitutes a shortfall.

In Delaware, we are proud of being the first State. We were the first State to ratify the Constitution. We did it December 7, 1787. The Constitution that we confirmed at the Golden Fleece Tavern in Dover, DE, had been hammered out about 75 miles north up the road in Philadelphia. The last part of the Constitution that was hammered out, maybe one of the more difficult aspects of the Constitution, was not only who is going to be President, how are we going to pick the President, how long will their terms be. That was worked out. They did not get caught up in how old does one have to be to be a Senator or how old does one have to be to be a Representative, how long are the terms going to be. That was worked out. What was hardest to work out in the Constitutional Convention, almost harder than anything else, was how we are going to pick these judges.

There were some folks at the Constitutional Convention, led by Ben Franklin, who were fearful we would end up in this country with a king. We may not call him a king or we may not call her a queen, but we would end up with a king. They were dead-set determined to make sure we did not do that.

If we read through the Constitution, it is an intricate set of checks and balances that are designed to make sure that we have a President but we do not have a king. With those sets of checks and balances, the Constitution has served us extraordinarily well.

The Constitution also said, in addition to having a House and a Senate and how one gets elected to serve and how long they serve, it also said the House and Senate could each set out their rules. The Constitution does not say what the rules of the Senate are. It says we can write our own, and we have done that.

We heard earlier this afternoon about how the rules have been changed with respect to invoking cloture to end debate. Before 1917, Senators could not invoke cloture. Another Senator could talk literally as long as they could stand. From about 1917 to 1975 or so, the rule was that there had to be roughly a two-thirds supermajority to be able to end debate. Using the rules of the Senate to effect change, the rules were changed to say, no, a three-fifths majority, 60 Senators, is needed to bring debate to a close.

It is interesting how we confirm our judges in Delaware. Governors nominate with the advice and consent of the Senate. We do not nominate people to lifetime terms on the bench. We nominate them to 12-year terms. The remarkable thing in Delaware is for every—and I served 8 years as Governor—Democrat I nominated to the bench I had to nominate a Republican. We are equally balanced Democrat and Republican.

In survey after survey, the Delaware legal environment, including our judiciary, is regarded maybe as the best in the country. We do not have these food fights in Delaware. We have the best judiciary. We have Democrats and we have Republicans who serve on the bench. They are nominated by Republican and by Democratic Governors.

I ran into a friend of mine not long ago who has loosely been following this debate on judicial nominations. He asked: Why do you not confirm more of the President's judicial nominees? And I said: How many do you think we have confirmed, or what percentage do you think we have confirmed?

He said: Maybe half.

And I said: No, no my friend, 95 percent.

He said: Really? Do you not have a lot of vacancies on the Federal judiciary bench?

I said: No. We have one of the lowest vacancy rates we have had in years.

I asked him in return: While we have confirmed over the last 4 years 95 percent of President Bush's nominees to the bench, what percentage of President Clinton's nominees do you think were confirmed during his first 4 years?

Well, I do not have a chart here that says what the answer to that question is, but just to remind us all, from 2001 to the beginning of this year, 95 percent of President Bush's nominees have been confirmed.

If I had a magic marker I would make a big yellow line through this and write in 81 percent because that is the percentage of President Clinton's nominees that were confirmed in his first 4 years.

There is a great irony. I am told we never heard a peep or a squeak from our friends on the other side of the aisle during the first Clinton administration when his nominees were denied a vote on the floor. It was not because of a filibuster. They were denied a vote on the floor because somebody on the other side of the aisle in the Senate Judiciary Committee would not let a hearing be held, not on one or two judges nominated by Bill Clinton but on scores of them. They would not have a hearing. They would not let a nominee out of committee. They did not have to kill them on the floor in a filibuster. They did it in committee, quietly, out of the view of the public.

Now, why just a few years ago was it okay to deny 19 percent of President Clinton's nominees an up-or-down vote on this floor? Why was that okay? And why is it with this President—he received 95 percent of what he wants and actually in the end he will get more than that. There are a couple from Michigan that we are going to confirm. Some of the 10 have basically withdrawn their names or retired from the bench.

The figure of 95 percent actually understates what ultimately this President will realize in confirmation victories.

The other number I want to share, talking about advice and consent, is 2,703. This number is 1. What do they refer to? During the first 4 years of

President Bush's presidency, he nominated over 200 judges. Republicans and Democrats voted on those judges. There were 2,703 aye votes from the Republican side of the aisle on President Bush's judicial nominees. In those 4 years, there was one nay vote from the Republican side of the aisle on a judicial nominee of this President.

We can argue forever what advice and consent really was meant to be when the Constitution was written. But if we are in a situation where 50 percent plus 1, 51 percent, would enable a nominee of this President or any other President to go on to serve for life on the Federal bench, and if you look at the last 4 years and only 1 person out of 2,704 votes was no, does that give you any kind of confidence that we are going to see any sort of checks and balances going forward? It doesn't give me much.

I do not care if you are a Democrat or Republican, it should not matter. It should not matter who is in the White House or the House and Senate. But when you get a situation where you have one party that controls the White House and one party controls the House of Representatives and one party controls the Senate, and you have, out of 2,704 votes for judicial nominees, only 1 Republican Senator who ever voted no, and it was for somebody initially nominated by Bill Clinton, that is something we ought to worry about.

Someday, someday we are going to have a Democratic President. Someday we are going to have a Democratic majority in this body. We have sayings in Delaware. I bet they have in Minnesota, too. Maybe in Vermont. Among those sayings are these: Chickens do come home to roost; the beds that we make are some days the beds that we get to sleep in; what goes around comes around.

I promise you, I promise you, my friends, if a decision is made to pull this trigger, this nuclear option, and we end up with a situation where the rights of the minority really are, in my view, ignored, maybe even trampled on, the Republicans who do this will come to rue the day.

Let me close with this. I came here to get things done. As I look around this floor, the other Senators who are here whom I respect, I know you came here to get things done as well. I mentioned at the outset the kinds of things I wanted to see us accomplish. I describe myself as a recovering Governor. We have a recovering mayor who is presiding here today. We like to work together. We would like to work across the aisle. We are even happy to work with the President, Democrat or Republican.

My fear is here is what is going to happen. If this action succeeds, if we do change the rules of the Senate to lower to 51 the votes that are needed to end a filibuster on judicial nominations, that is a slippery slope. If we can do it on judges, we can do it on other nominees to other posts, we can do it on amendments, we can do it on bills. It is a slippery slope. But there is an even greater concern to me, as a guy who wants to get things done.

I see Senator LEAHY is here. He is working with Senator SPECTER on asbestos litigation reform. We need to pass that litigation. We need to right a wrong. My fear is, if we take this step, trying to work out a very difficult compromise on that legislation will be made more difficult, not easier. We need to address the rising cost of health care and all the folks who do not have it and cannot afford it, and employers are stopping providing it. We need a comprehensive energy policy in this country. It is tough in the best of times to hammer that out.

Mr. LEAHY. Will the Senator from Delaware yield?

Mr. CARPER. I am happy to yield.

Mr. LEAHY. I absolutely agree with the Senator from Delaware. We have a lot of bipartisan legislation that is not even being looked at. The NOPEC bill is one, with Senator DEWINE, Senator KOHL, myself, and others. We looked at the fact that gasoline prices have gone up nearly 50 percent in the last 5 years alone, and yet we have no constraints on artificial prices being set by the NOPEC countries here in the United States. It takes more than holding hands with Saudi princes to bring down prices. We have to ask for real efforts. This is legislation that could pass. This is legislation that could pass. Put some teeth in it. Instead of holding hands, we could hold court actions, and we would be somewhere ahead. That is just one area.

The Senator from Delaware mentioned the asbestos bill. Senator SPECTER and I have worked on it on a totally bipartisan fashion with Senators on both sides of the aisle. We have a bill that could pass. It would take some effort on the floor. It would take a week or so, but it could pass. Victims of asbestosis would be helped. Companies would have some idea what their costs are. The economy would dramatically improve. That bill is going to die if the nuclear option goes through because we will lose the ability to move bipartisan legislation.

We have law enforcement legislation at a time when most of the law enforcement grants, such as the COPS grants and whatnot, are being cut by the administration. A lot of Members on both sides of the aisle are trying to find a way to get that money back to our police officers, the money being cut. We cannot have a debate on it.

This is going to take up—you confirmed 208 judges; blocked, actually, 5. I have been here 31 years. I don't believe anyone has had a record that good. Certainly no baseball team ever had a record that good. The President ought to declare victory on that, having done so much better than all but about three Presidents of recent memory, and let us get on with things. Bring down the price of gasoline, for one; that is affecting the American people.

Mr LEAHY. Mr. President, today we continue to debate the Republican Leader's bid for one-party rule through his insistence to trigger the ''nuclear option.'' I spoke yesterday about this misguided effort to undercut the checks and balances that the Senate provides in our system of Government, and about the need to protect the rights of the American people, the independence and fairness of the Federal courts, and minority rights here in the Senate.

I started my statement yesterday by commending the chairman of the Senate Judiciary Committee. Today I want to add and thank a number of Senators who participated throughout the debate yesterday for their contributions: the Democratic leader; the assistant Democratic leader and senior Senator from Illinois; the senior Senator from Washington; both Senators from California; the senior Senator from New York; the senior Senator from Montana; the senior Senator from Minnesota, the senior Senator from Massachusetts and Senator DORGAN.

I noted yesterday that this is a setting in which Democratic Senators alone will not be able to rescue the Senate and our system of checks and balances from the breaking of the Senate rules that the Republican leader is planning to demand. If the rights of the minority are to be preserved, if the Senate's unique role in our system of Government is to be preserved, it will take at least six Republicans standing up for fairness and for checks and balances. I believe that a number of Republican Senators know in their hearts that this nuclear option is the wrong way to go. I know that Republican Senators with whom I have been privileged to serve know better. I hope that more than six Republican Senators will withstand the political pressures being brought to bear upon them and do the right thing, the honorable thing. I have to believe that enough Republican Senators will put the Senate first, the Constitution first, and the American people first, and withstand those political pressures when they cast their votes.

Today, as we continue this discussion, I note that the Senate remains fixated on a handful of the President's most extreme and divisive judicial nominees. The Democratic leader rightly said recently that the current tally is 208 to 5. The Senate has confirmed 208 of President Bush's judicial nominees, and we are resisting action on five.

I included in the RECORD yesterday my statement laying out my reasons for opposing the nomination of Priscilla Owen. As we continue to debate a nomination that was rejected by the Judiciary Committee in 2002 and on which the Senate engaged in extensive debate in 2004, the Senate is neglecting other matters. That is the choice made by the Republican leadership, in insisting on this confrontation and upcoming conflict.

The Democratic leader is right when he urges the Senate to ''put people over

partisanship'' and to work to reduce gas prices, make health care more affordable, create new and better jobs and give our veterans and their families the support they need and deserve.

Among the matters being neglected in order to engage in this political exercise is consideration and passage of the NOPEC bill, S. 555. This is bipartisan legislation. Our lead sponsors are Senator DEWINE and Senator KOHL. With the increase of gasoline prices by almost 50 percent during the Bush Presidency, with Americans having to pay so much more each week to get to work, drive their kids to school and just to get around, the Republican leadership of the Senate is ignoring a substantial burden on American working families.

This week, the national average price for a gallon of regular gasoline was $2.18. In Vermont, gas is slightly less expensive, but still a hefty $2.15 per gallon. Just a year ago the price was $1.92. When President Bush took office it was $1.46 a gallon.

The artificial pricing scheme enforced by OPEC affects all of us, and it is especially tough on our hard-working Vermont farmers. Rising energy expenses can add thousands of dollars a year to the costs of operating a 100-head dairy operation, a price that could mean the difference between keeping the family business open for another generation or shutting it down.

With summer coming, many families are going to find that OPEC has put an expensive crimp in their vacation plans. Some are likely to stay home; others will pay more to drive or to fly so that they can visit their families or take their well-deserved vacations.

Americans deserve better, and if the White House will not act to abate this crisis, it is time for Congress to act. It is past the time to hold hands and exchange kisses with Saudi princes who artificially inflate the price of gasoline. The President's ''jawboning'' with his Saudi friends has proven unsuccessful. It is now time to act, and the Senate, under the Republican majority leader, is choosing instead to revisit a handful of extreme judicial nominations that have already been considered and rejected by this body.

The production quotas set by OPEC continue to take a debilitating toll on our economy, our families, our businesses, our industry and our farmers. Last year and again last month, the Judiciary Committee voted to report favorably to the full Senate the bipartisan NOPEC bill. Our legislation would apply America's antitrust laws to OPEC's anticompetitive cartel. Why not give the Justice Department the clear authority to use our antitrust laws against the anti-competitive, anti-consumer conduct in which they have engaged? We should take up that bill, debate it and pass it without further delay. The many days of the Senate's time allocated to the provocative ''nuclear option'' comes at the expense of our taking up the NOPEC bill on behalf of the American people.

Another consequence of this fixation on the effort to increase the White House's political power, and to aid this President's attempt to pack the Federal courts, is the loss in focus and sacrifice of progress we have been making on asbestos reform. For more than 3 years I have been working on asbestos reform to provide compensation to asbestos victims in a fair and more expedited fashion.

Chairman SPECTER and I have worked closely on S. 852, the FAIR Act. It is pending before the Judiciary Committee. We are in the midst of our markup sessions. That effort was scheduled for yesterday and today, but the Chairman had to cancel our consideration yesterday in light of this debate and it had to be cut short today. That is most unfortunate. We have been working hard and in good faith to achieve bipartisan legislative progress on this issue. We have done so despite criticism from many quarters. That bipartisan effort is now being retarded by this continuing debate.

There are many, many items that need prompt attention. I understand that the Armed Services Committee last week completed its work on the Department of Defense Authorization bill. Why the Republican leadership is delaying Senate consideration of the Defense Authorization bill I do not understand. At a time when we have young men and women in combat zones and when the home front is being affected by recently recommended base closings, I would have thought the Defense Authorization bill would be a priority.

Let me mention just one other set of legislative issues. Last week was Police Week. On Sunday I was privileged to attend the National Peace Officers' Memorial Service commemorating the service and sacrifice of 154 public safety officers killed in the line of duty over the last year. I worked in a bipartisan way with Senators SPECTER, BIDEN, HATCH, BROWNBACK, CORNYN, DEWINE, DURBIN, FEINGOLD, FEINSTEIN, KENNEDY, KOHL, KYL, SCHUMER, SALAZAR and COLLINS to introduce and pass S. Res. 131, which recognized May 15 as Peace Officers Memorial Day and called upon the entire Nation to join in honoring our law enforcement officers. The President spoke movingly at the ceremony held here on Capitol Hill on that day of remembrance.

This week we should honor our law enforcement officers with supportive legislative action. In the past we have worked in a bipartisan way to improve the Public Safety Officers Benefit Program and to provide educational benefits for the families of State and Federal officers who have been killed in the line of duty. Sadly, the administration has not yet implemented the latest round of improvements to the Public Safety Officers Benefit Program that we enacted last year. I have urged a Judiciary Committee hearing on this delay, as well as on the general state of police officer safety. The Fraternal Order of Police, the International Association of Chiefs of Police, the National Association of Police Organizations, the National Sheriffs' Foundation and other law enforcement organizations are all interested in working with us to ensure that the Justice Department produces comprehensive regulations that effectively create a more user-friendly PSOB Program.

In addition, we should be considering the Social Security Fairness Act, S. 619, the bill that Senators COLLINS, BOXER, FEINSTEIN and a number of us have cosponsored over the years to protect the Social Security and retirement of police officers. Those on the front lines protecting all of us from crime and violence should not see their Social Security benefits reduced because they have historically participated in separate retirement benefit programs. That needs fixing and this week would be an appropriate one to take that Senate action.

These are merely examples of some of the business matters the Republican majority of the Senate has laid aside.

Mr. CARPER. Mr. President, what I was saying, in closing, one of my greatest fears is that we end up with this partisan battle. Those of us who fervently want to accomplish asbestos litigation reform, a comprehensive energy bill, determining what the business model for the Postal Service ought to be in the 21st century or the passenger rail service in the 21st century—what should our next steps be in welfare reform? How are we going to provide health care coverage, reduce the costs, and extend coverage to all kinds of people? There is a ton of stuff, so many issues we need to address.

The postal bill alone—the Presiding Officer serves on the Homeland Security and Governmental Affairs Committee with me. We worked for years, Senator COLLINS, myself, and others, to determine what should the Postal Service look like in the 21st century. What should the business model be? We unanimously passed the bill last year out of committee. Over in the House of Representatives, almost the very same bill was negotiated, debated, and passed unanimously by our counterpart committee. There was not a single ''no'' vote. We could not get either bill to the floor for debate. And that is when we agree.

I remind my friends, if it is that hard to get legislation through the House and Senate to the President for his signature when we agree, God help us on difficult issues such as asbestos or comprehensive energy policy or health care or the like.

Finally, I have a whole lot of quotes here. I was trying to figure who to close my remarks by quoting. I looked for something for the Senator from Minnesota, the Presiding Officer, which might seem appropriate. I couldn't find anything, at least on this subject, so I turned to another source. I think it is

actually pretty good. It is not a Senator, but he probably wouldn't be a bad one, a fellow who has thought a lot and written a lot and I think is generally regarded more favorably on the other side of the aisle than this one, and he makes a lot of sense sometimes. I will close my comments today with a quote from George Will. Here is what he said about the filibuster:

The filibuster is an important defense of minority rights, enabling democratic government to measure and respect not merely numbers but also intensity in public controversies. Filibusters enable intense minorities to slow the governmental juggernaut. Conservatives, who do not think government is sufficiently inhibited, should cherish this blocking mechanism. And someone should puncture Republicans' current triumphalism by reminding them that someday they will again be in the minority.

Will goes on to conclude:

The promiscuous use of filibusters, against policies as well as nominees, has trivialized the tactic. But filibusters do not forever deflect the path of democratic government. Try to name anything significant that an American majority has desired, strongly and protractedly, but has not received because of a filibuster.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from North Carolina.

Mr. BURR. Madam President, I rise to urge my colleagues to support an up-or-down vote on these judicial nominees. I have a great respect for my colleague from Delaware, and I do not stand up with pretty charts with big numbers. I am not a recovering State legislator or recovering city mayor, and I hope I am never a recovering parent or father.

I stand up as a parent today, as a father of two kids, with the full knowledge and understanding that the work we do up here in large measure dictates the America that is going to be there for them. That if we are to follow the strategies on that side, the chart that my colleague showed would never change because we would never vote. That bipartisanship that is needed for legislation—whether it is health care or whether it is energy policy or whether it is asbestos reform—would not be achievable because we would never come here to register a yea or nay on behalf of the people who sent us here.

We are faced with difficult votes, but we take those difficult votes. We do not shy away from the responsibility that people elected us to come here and to make a judgment call and, more importantly, to be held responsible for it. The only thing I can think of relative to not taking a vote is that there are some who believe they will not be held responsible if, in fact, they force this body not to vote, that eventually people will wear down and that if we happen to seat someone that is not the best, the most qualified, that is OK because it saved this institution a fight.

I will tell my colleagues I cannot think of anything more important if there is going to be a fight than that fight be on who we put on the bench.

Now, today's debate, though we have a nominee up, I don't think is about one particular person because clearly we have not heard arguments that this is an unqualified individual. As a matter of fact, in seeking compromise there have been proffers now to this side that suggested: We will vote on five, but not seven, and you pick the two you want to chuck overboard.

What message do we want to send to that law student out there who aspires one day to being on the bench and ultimately seeking a nomination by the President to a Federal court or to the Supreme Court? If you want to do it, understand you will go through personal character assassination; that in some cases you may have to wait 4-plus years to get there.

In 1995, Senator LAUTENBERG stood on this same floor, in this same building, as a Member of the Senate, and he said this then when talking about fairness of the system and how it is equitable for a minority to restrict the majority view:

Why can we not have a straight up-or-down vote on this without threats of filibuster, without threats of filibuster. Whether it was Robert Bork and John Tower or Clarence Thomas, even though there was strong opposition, many Senators opposed them. The fact is, the votes were held up or down.

June 21, 1995. Senator LAUTENBERG.

Today, he denies this Senate a vote on a judicial nominee and threatens a filibuster on all the nominees.

This afternoon, Senator KERRY claimed it is dangerous for the Senate to limit filibusters on judicial nominees. Senator KENNEDY and Senator LAUTENBERG joined Senator KERRY in defending judicial filibusters. But on January 5, 1995, just shortly before, Senator LAUTENBERG was on the Senate floor making the statement I read, all three of those Senators voted to change the Senate rules to eliminate all filibusters on nominations, motions, legislation—everything. If any of those three Senators had had their way in January 1995, we would have an up-or-down vote on these judicial candidates, but we also wouldn't have the ability of the filibuster as a tool in the legislative process.

Some claim this is the start down a road to doom. It is not down the road to doom. Senator KERRY, Senator LAUTENBERG, and Senator KENNEDY voted for it and were joined by Senator FEINGOLD, Senator BOXER, Senator SARBANES, Senator HARKIN, Senator LIEBERMAN, and Senator BINGAMAN. We are not plowing ground that hasn't been plowed.

If anything, we are saying, for 214 years this institution, the Senate, had a gentleman's agreement, and that agreement was that the filibuster would never be used for judicial nominees. For 214 years they showed restraint, even though the rule allowed them to do it because they understood that the process was so important to make sure the best and the brightest found their way to the bench. For 214 years a handshake was all it took.

Something changed in the last Congress. For the first time it was actually used. Now, in an effort to have an up-or-down vote, to have a process like I described in the last election to the people who elected me that I would come here and try to achieve, even if we needed to make sure that the constitutional option of eliminating the filibuster only as it exists for judicial nominees is removed, some suggest that would be disastrous for the Senate.

Some of those same people in 1995 voted to eliminate the filibuster for judicial nominees, for the legislative process, for everything, and they are the same ones who claim this would be disastrous to the Senate today.

So much has been said, so many accusations, so many claims, so many revisionists of history. The reality is in a conversation I had with a high school student just this week, as she looked at me: Can you explain these actions on the floor? I talked about the 214 years that the gentleman's agreement allowed a nominee to get an up-or-down vote with no filibuster and the fear that we were reaching a point where we might have to make a decision, and the concern that existed in this Senate and around the country that it might be disastrous. She looked at me after I explained it to her and she said: Senator, with 214 years of experience, it is not going to be disastrous. Why would you wait so long to do it?

The reality is that sometimes it takes years to understand what we have a hard time understanding up here. For 214 years the filibuster was not used, and we picked the best and brightest and got them on the bench and they guided this country and we have been headed in the right direction.

If the choice is made and we have to choose to eliminate this tool, this is not a dangerous thing for the institution. We have 214 years of experience. We will be just fine. And the challenge will be to protect that filibuster as it relates to the legislative process.

I am here as a new member, as a father, as a citizen, who deeply believes I was sent to the Senate to get work done. That work I do on behalf of North Carolina and for the citizens across this country. There is no doubt in my mind that I was sent here to do what the people of North Carolina heard me say that I would do, and that was to work hard and to accomplish solutions to real problems. There is no doubt in my mind the task includes ensuring that the Senate provides judicial nominees on up-or-down votes.

I am not going to lobby my colleagues which way to vote, but isn't it common courtesy to allow these nominees to have some finality to this process? The judge that is up today, Priscilla Owen, has been in this process for 4 years. I have asked myself, even though I am not a lawyer by profession, would I stick with it 4 years? Would I put myself and my family, my

friends, my career through the types of delays that she has faced? The answer is, I do not know.

The question is, What are future nominees going to say when they get that call, when the President of the United States—whether he is a Republican or Democrat—calls in the future, and says, I need your service to this country, and they look at the precedent of 4 years, of 2 years, of 18 months, of the harassment, of the claims? Are they going to say ''yes, sir'' or ''yes, ma'am'' to the President of the United States? They might. But we might lose the opportunity at the best and the brightest.

One month ago, I joined my freshmen colleagues in urging the Senate leadership to get in a room, to break the current impasse regarding judicial nominees, and to develop a process that was respectful of both parties, where judicial nominees, at the end of the day, receive an up-or-down vote.

I said earlier, the Democrat's offer was: We will vote on five but chuck two of them over the side, and you pick which two. I cannot think of anything worse for the future of this country than for us to treat the best and the brightest with the disregard that proffer would suggest.

I remain hopeful still today that a resolution can be reached. Many of us have worked toward a fair process where all judicial nominees with majority support, regardless of party, receive an up-or-down vote. Let me say that again: regardless of party, receive an up-or-down vote.

What happened for 214 years? This debate is about principle. It is about allowing judicial nominees an up-or-down vote on the Senate floor. And I believe it is an issue of fairness. Let me be perfectly clear, though. I believe if one of my colleagues objects to a particular nominee, it is certainly appropriate and fair for my colleague to vote against that nominee on the floor of the Senate. But denying judicial nominees of both parties, who seek to serve their country, an up-or-down vote, simply is not fair. It was certainly not the intention of our Founding Fathers when they designed and created this very institution.

Together, as Members of the Senate, we are advocates for democracy and for a democratic system of government. It is vital that we have a system that continues to serve as an illustration of effective democracy around the world. The integrity of our judicial system is so very important, and it will certainly suffer as a result of inaction.

Obstructing votes on Presidential nominees threatens the future of our judicial system and the nature of the Supreme Court. You see, I am not sure that many Americans have stopped to think: Well, what happens if this is exercised for Supreme Court Justices? Because I believe in the next several years we will have one or two or possibly more Supreme Court nominees to consider.

Well, the Court still meets. If we are not able to produce a Justice out of this fine Hall, then they will meet with eight Justices. I have to believe there is an odd number of Justices for a very logical reason. It was so there would not be a tie.

On a 4-to-4 tie, what happens? Seldom have we asked the question. On a 4-to-4 tie in the Supreme Court, the lower court's decision stands. That means all of a sudden the Supreme Court, our highest court, the Court we look to to be the best and brightest to interpret law and the Constitution, is insignificant in the process. It means that whatever that court of appeals was—the Fourth Circuit or the Ninth Circuit—whatever decision they came up with that somebody believed was wrong, and they appealed it to the Supreme Court, and the Supreme Court, on the merits of the case, heard it, would become the law of the land.

My colleagues on the other side argue that the reason this is so important is because a Federal judgeship is for life. Let me say to them today, if you exercise this as it relates to the Supreme Court of the United States, and you jeopardize that there may be a 4-to-4 tie, the result is not for the lifetime of the judge you did not seek, it is for the lifetime of this country because that is now the law of the land, that an appellate court, whether it is the Fourth or the Ninth—not the Supreme Court—that will be the ultimate determining factor as to what the law is that our children, our grandchildren, their children, their grandchildren will live by for their entirety.

I urge my colleagues to consider the nomination of Priscilla Owen and all the Federal judges who enjoy the support of a majority of the Members of this Senate. I am reminded, as I stand here, that so much has been said that suggests this process has not been fair. I have looked back at some of my colleagues who have been here for years and who have experience I hope one day to have in this fine institution.

Senator BOXER, in 1997, said:

> According to the U.S. Constitution, the President nominates and the Senate shall provide advice and consent. It is not the role of the Senate to obstruct the process and to prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor.

What has changed since 1997? I read this statement four or five times. There are no exceptions. There is no ''shall be'' or ''case of.'' It is very clear, ''given the opportunity for a vote on the Senate floor.''

And Senator DURBIN, who has been a regular in this debate, in 1998, said:

> I think that responsibility requires us to act in a timely fashion on nominees sent before us.

He went on to say:

> If after 150 days languishing on the Executive Calendar that name has not been called for a vote, it should be. Vote the person up or down. They are either qualified or they are not.

One hundred fifty days should be an automatic trigger that a judicial nominee should come up for a vote up or down—1998—no qualifications, no exceptions. Well, Priscilla Owen has been waiting 4 years. If we had accepted his challenge in 1998, Senator DURBIN's challenge, 150 days after she was first nominated, this body would have voted up or down.

I believe she ought to be voted on up or down today. I believe it is an injustice to the American people that a threat of a filibuster or the application of a filibuster will be applied to the judicial nominees.

Madam President, I know there are a lot of Members who want to speak. I am convinced there will be truths and there will be half-truths that will be spoken as we go through this process. But I am also assured that every Member of the Senate understands the obligation we have when we are sworn in. I would urge my colleagues that obligation is not to a 2-year session of Congress. It is not an obligation to show up every day. It is not an obligation to be involved in committee work, or it is not an obligation necessarily to come up with solutions to problems. But it is an obligation to vote. It is an obligation that when you come in this body it is with the intent to vote up or down. I am convinced that when Priscilla Owen is allowed to have a vote, that her nomination will be confirmed.

I am convinced it is in the interest of this Senate, of this United States, of my family, of your family, of the citizens of this country, that we proceed forward in whatever fashion we must to assure that vote takes place. I am convinced if we don't, the scenario of the inability to accede a Justice to the Supreme Court will cause irreparable harm to the policies, the laws, and to the future of this country.

I thank the Chair and I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SANTORUM. Madam President, I thank the Senator from North Carolina for his excellent statement.

I have been on the floor many times to talk about the issue of judicial nominations, to stand and speak in favor of many nominees to the bench who have been debated over the past couple of years. Last night, I had the opportunity to meet with Justices Janice Rogers Brown and Priscilla Owen. I expressed to them my personal sympathy for them and their families, as I do to all of those who have had their lives, careers, and decisions unjustly dragged and contorted through the streets of debate on the floor of the Senate.

Four years ago now, when Justice Owen was nominated, I am sure that was a very proud day for her. I am sure she looked forward to the challenges of the confirmation process and the challenges of serving in the circuit court. I don't think anyone could possibly have conceived that a person with her judicial standing, having been rated the highest qualified by the American Bar

Association, having served as a supreme court justice in one of the largest States, having been elected in that State with over 80 percent of the vote, having accolades from Democrats and Republicans alike who have served with her on the court, as well as public officials in Texas—I don't think she could have possibly imagined she would be involved as one of the focal points of this maelstrom we see pouring out here over the last few days and, unfortunately, over the last couple years on the floor of the Senate.

These nominees have my respect. They have my respect for their courage and for their perseverance. It has been an act of perseverance on the part of many of them. All of them could have easily walked away—not that they don't have good jobs and great careers, and if not universally respected in the legal community, they are certainly highly respected. They don't get nominated for these positions unless they are highly respected within the community.

So I think it would have been very easy for many to walk away, but they have not. They certainly have earned my respect, no matter what happens here. I think it is a very sad day when we take highly qualified people who are willing to serve, and who have served in the judicial capacity, and treat them this way. We hear so much from the other side about many of us complaining about activist judges, and being critical of judges, and how it is a security threat to judges. Well, I suggest what we have been seeing over the last couple of years in the way these judges and their records have been distorted, they have added to the sense of frustration of the American public as to our judiciary and our system of justice in this country.

We have an opportunity to correct that. We have an opportunity to step away from the mistakes of the past in the next few days and to allow up-or-down votes on the floor of the Senate again. For 214 years, 214 years—in this Chamber and the Chamber just down the hall, and once in a couple other places—in Washington and other places, such as Philadelphia—we had votes by Senators who were elected at very difficult times in our Nation's history, at contentious times, where judges had major roles to play on the issues of the day. Think back to the times of slavery, during the early 1800s, when judges played a huge role in this issue that eventually fractured this country. I am sure there were times when either side, depending on who was the President and who controlled the Senate, felt it would have been unfair to their cause, the Northern cause or the Southern cause, to have a person on the Supreme Court who would vote against their interests. I am confident many felt very much tempted to vote and join a filibuster to block a nomination to require a supermajority vote.

But if you think about it, it is remarkable they withheld from doing that and chose instead something most people would say is much more dramatic, and that is to secede from the Union. But Senators, enduring that very contentious time when there were fights on the floor of the Senate, understood that a very key part, an important part, essential part of the Senate is the process by which we govern ourselves; that the process protects our rights; the process protects the system of Government. They chose to withhold their passions—the passions of the moment for the issue of the day—for the right and controversy to do what was best for the institution of the Senate, the greatest deliberative body in the history of the world, potentially.

And now we have seen this infection that entered into the bloodstream of the Senate. Whether you want to call it a partisan infection or an ideological infection, there certainly is a sickness. I think it is a sickness that, candidly, both sides of the aisle feel. I don't know too many people who feel very good about what we are going through on either side. It is making us all weaker, sicker, and it is so doing to this institution. We need a cure. We had a pretty healthy institution when it came to this issue for 214 years. I think we can look to the prescription that we had for 214 years for a cure to what ails us in this body today.

The Senator from North Carolina accurately said we had an agreement—he used the term ''gentlemen's agreement''—a handshake, that this was the way we were going to proceed. I argue those in the 1850s had the right to filibuster judges. Those in 2003 had the right to filibuster judges. I had the right, during the Clinton administration, to filibuster his appointments. There were those whom I wanted to filibuster and those whom I desperately didn't want to see on the court, and we stood down because in spite of the passions and in spite of what I thought was a mistake to put a particular person on a particular court, there was something lasting, something more important, something certainly not eternal, but certainly eternal for as long as the United States shall survive, and that is this institution. We should not go mucking around in this institution and changing the way we do things, particularly when it comes to the balance of powers and the independence of one of the branches of our Government, the judiciary.

We must tread very carefully before we go radically changing the way we do business here, which has served this country well. We have radically changed the way we do business here.

Some are suggesting we are trying to change the law, we are trying to break the rules. Remarkable hubris. Imagine, the rule that this is the way we confirm judges has been in place for 214 years, broken by the other side 2 years ago, and the audacity of some Members to stand up and say, How dare you break this rule, it is the equivalent of Adolf Hitler in 1942 saying: I'm in Paris, how dare you invade me, how dare you bomb my city. It's mine. This is no more the rule of the Senate than it was the rule of the Senate before not to filibuster. It was an understanding, an agreement, and it has been abused.

In a sense, what we see on the floor of the Senate is a reflection of what we often see in our society. What we often see in our society is a government that increasingly is passing laws. I get this from some of my constituents sometimes. They say: You guys are always passing more and more laws and more and more laws, and ultimately when you are passing laws, in many cases what you are doing is restricting people's freedom.

The more laws we have on the books, the more laws there are to obey, the more laws you have the ability to break. So why do we do this? Because we respond to problems in society that come about certainly, in many cases, because what we once thought we did not need a law in place to keep people from doing, we now have laws in place to punish people who heretofore understood it simply was not a good thing to do.

We did this recently with the corporate scandals. What did we do? We passed a huge law, Sarbanes-Oxley, in response to what? Activities by a group of people who simply forgot about the handshake, forgot about the duty we have to each other, and pushed the law well beyond what we intended. So we had to pass a new law, and we had to constrain 99 percent of the people in America who never even thought about breaking the law or doing the things that were done by Enron and Tyco and all those people. So we had to pass laws on everybody.

Was it a good thing to do? We had to pass the law because there were some who could not live by the law, could not live civilly, could not live with not just the letter of the law but the spirit of the law.

So we had to pass legislation that restricted freedom, that put burdens on people. That is why I have said many times I am not crazy about having to vote to eliminate the possibility of filibusters on judges. I am not anxious to do this anymore than I was anxious to pass some of the corporate responsibility provisions. One would like to think, particularly here, where we are supposed to be a reflection of what is best in our society, that we can understand what we are doing here is wrong and just step back from the ledge and let civility reign, let the tradition of the Senate be upheld.

I do not want to have to pass a law. I want to see a Senate that can agree to act civilly, to respect tradition in the process of running this place that has worked well for 214 years. That is what I want.

So I have encouraged many to sit down and try to negotiate. I encouraged our leaders to do so. I know our leader has tried diligently. I just spoke with him on the phone a few minutes

ago, and he continues to work to avoid what no one—at least I hope no one in this Chamber—wants to see happen. I certainly do not. But we can no longer live—just like we cannot live with the opportunity of those to cheat shareholders and employees—we can no longer live with the minority trying to cheat those nominated by the President of the United States from a fair up-or-down vote in the Senate. We cannot tolerate that. That is behavior beyond the pale. That is behavior that no Senate, prior to the last one, tolerated. None.

I have repeatedly asked and I know other people have asked repeatedly, Name one judge brought to the floor of the Senate who had majority support who was not confirmed. Name one, prior to 2 years ago. Never happened. Never happened in the entire history of the Senate. Never happened. We have 10, potentially 16 who would have that privilege because of this new precedent.

I cannot understand how Members of the Senate can come here and say what we are doing is breaking the rules. Breaking the rules? I do not know how you can possibly contort the facts of this case around to where the Senate Republicans, by returning to the tradition of the Senate of 214 years, is somehow breaking the rules.

This is truly a sad day. It has been a sad week. If you look and listen to my constituents—and I am sure all of our constituents—they are not happy about this debate. They are not happy a group of 100 leaders—100 leaders—cannot negotiate and find some way of acting civilly, of reflecting to our children and our grandchildren that we know how to play nice and we know how to play by the rules.

But the passions of the moment, the passions of the moment have swept over us, and those groups out there that are fomenting this because of their own ideological agenda are the culprits, or at least the motivation, but the votes are here. The votes are here. I am hopeful there are enough on the other side of the aisle who will come to the realization this is not good for them, this is not good for their ideology, it is not good for their partisanship, this is not good for the institution, and this is not good for the country to continue down this path.

When I came to the Senate, I came from the House, like the Senator from Georgia, from the legislature, like the Presiding Officer. I had never dealt with executive nominations before. So one of the things I looked into is how do I determine what a good judge is. We did a little looking around and determined how do you evaluate a judge.

First, are they qualified? Do they have the educational skills, the experience to do the job? Second, are they ethical, not just did they break any laws, but are they ethical individuals and have a reputation for high ethics? And three, do they have an understanding of the role of a judge? Those are the three things.

You did not hear me say, do I agree with them on this issue, this issue, or that issue, because my feeling is whoever is elected President will appoint people who agree with their philosophy. That is how it works, just as when you appoint a Secretary of Veterans Affairs or a Secretary of Energy, you appoint someone who intellectually agrees with your philosophy.

When President Clinton was elected, I came here, and I supported almost every Clinton nominee. Did I agree with them? Absolutely not. Did I think most of them would be damaging to the court? Absolutely. Did I vote for them? Yes. There are a couple of exceptions. One in particular, I have to tell you, who caused me a lot of heartburn was Judge Richard Paez from California who showed a record of activism on the court that was upsetting to me and showed that he was not someone who understood the role of a judge.

So under that he certainly was qualified, and I had no questions about his ethics, but I did have a question as to whether he understood the role of a judge. From his experience it showed me he did not.

There were many who wanted to filibuster Judge Paez because of that very fact. In my mind, certainly from the standpoint of not wanting someone on the court, it would have been a justifiable filibuster, except for the fact that is not the way we do things in the Senate, because you know what. The President won the election, and he can nominate who he wants. And we in the Senate have had a tradition saying if you can get a majority of votes in the Senate, you get confirmed.

It is about majorities. And by the way, I voted for cloture on Judge Paez and voted against him on the floor when an up-or-down vote came. He did not get 60 votes. Had we filibustered, he would not be on the Ninth Circuit today. We did not. I did not because it was not the right thing to do. It was absolutely not the right thing to do.

I suggest that we have changed the qualifications from highly ethical, highly qualified and understanding the role of a judge to someone who is ''in the mainstream.'' That seems to be the idea now. So we are talking about ideology, in the ideological mainstream.

There were probably—well, Richard Paez, certainly from my view, I would argue, is probably not in the ideological mainstream of America but they all supported Judge Paez.

Probably Justice Harlan, who was the lone dissenter in 1896 in Plessy v. Ferguson, was not in the mainstream at the time.

Thurgood Marshall was confirmed in the Senate to the circuit court back in 1961 with 54 votes. As a lawyer for the NAACP in the 1950s, probably a lot of people in America would not have said he was in the mainstream.

There are a lot of judges who are not ''in the mainstream'' depending on what stream one happens to be swimming in.

Elections have consequences. In 1961, John F. Kennedy was the President. He won the election, and he got the benefit of the doubt on the Senate floor. He got an up-or-down vote. Majorities matter. I do not think my colleagues will hear the Senator from Georgia or any other Senator on this side of the aisle complain because for 18 months Priscilla Owen was held in the Senate Judiciary Committee during the chairmanship of Senator LEAHY. I certainly will not complain. It was his right not to report her nomination to the Senate floor. Why? Because they were in the majority. If a majority of that committee did not support her nomination, fine, hold it in committee. Defeat her in committee. That is fine. No problem.

If someone happens to be reported out and a majority defeats, fine, majority rules. This idea that 60, 80 whatever Clinton nominees were held in committee by Republicans during the last few years of the Clinton administration, they were held because the majority opposed them. The majority rules, up-or-down vote on majority vote. That is the 214-year tradition of the Senate.

The idea now is the minority rules. One can lose the presidency, lose four seats in the House and control who is going to be the next circuit and Supreme Court judges in the United States? Very interesting. I guess elections do not matter. I guess who people vote for, for President is of no concern to the minority in the Senate. They are the ones who should dictate who the nominees of this President should be. They are the ones who should dictate who comes to the floor and whether they get a vote or not.

That is not the precedent of 214 years. It has been an up-or-down vote. This is an outrage. This is an abuse of power.

It is interesting we are in the Senate, and we are talking about the minority abusing power. Yes, the minority can abuse power in this case, and in my opinion they certainly have.

One final comment, and I apologize to the Senator from Georgia and I appreciate his patience. I just want to make a comment on one case. Yesterday I heard the Senator from California make a statement with respect to Janice Rogers Brown, one I am particularly concerned about because it deals with the issue of Catholic Charities. I heard the Senator from California in describing Justice Janice Rogers Brown's decision in that case and she used the following words in describing her dissent: She, meaning Justice Brown, was the only member of the court who voted to strike down a State antidiscrimination law that provided a contraceptive drug benefit to women. That is her comment.

Now, she did not go into the fact what this law said. What was this law? Well, it was a law that said that if an employer provided health insurance they must provide contraceptive coverage—must. Now most folks who have

dealt in this area before would say: Is there not an exemption for those religious organizations who do not believe in contraception? The answer is the California legislature did provide such an exception. Let me read the exception. It said that we will exclude from coverage for contraceptive methods that are contrary to their religious tenets. Sounds reasonable. We do that all the time. If it is contrary to religious tenets of a religious organization, they do not have to offer this particular kind of care.

As a Catholic, the tenets of the Catholic Church are that contraceptives are wrong, and therefore they do not want to, according to their religious tenets, offer that service to their employees. Well, this is the California exception for a religious employer: One, the entity whose purpose is the inculcation of religious values. Well, this is Catholic Charities. Is it Catholic Charities' role to inculcate religious values? No. One of the key roles of the Catholic Church is to care for the poor, to care for those who are less fortunate. It is a basic and core value of the church. We hear it repeatedly offered by Members on the other side.

We have discussions about the church and its theology, how core and central helping the poor is. So they do not qualify under that.

Two, that primarily employs persons who share its religious tenets. Well, Catholic Charities does not primarily employ people. They employ people who want to serve the needs of the poor, and they do not ask whether you want to go to church or not at a Catholic Church.

Three, that serves primarily persons who share those religious tenets—in other words, only Catholics. Obviously not. They serve everyone. Mother Teresa is the classic example of a Catholic out on the front lines serving the needs of the poor irrespective of who they are.

Four, and qualifies as a church under a particular section of Federal law. Obviously, Catholic Charities is not a church. Under the religious exception of the California statute, Catholic charities is an arm directly under the control of the bishop, a mission of the church, not a religious organization.

What Justice Brown said was that is an outrage, that is unconstitutional, it is against freedom of religion to suggest that a Catholic organization, Catholic Charities, under that construct, has to offer services in their health care plan. I will agree she was the sole person but that is hardly striking down the rights of women to have contraceptive services. This was an infringement upon the Religious Liberty Protection Act.

I find it very interesting a lot of folks come in here with their scorecards. Well, she voted against consumers this many times, she voted against women this many times, she voted against this, as if judges are supposed to keep a scorecard as to who they vote for and against as opposed to following what the law says.

So if a consumer comes before a judge, they are supposed to be pro-consumer? If a business person comes before a judge, they are supposed to be pro-business? Is that what my colleagues want judges to do, have a scorecard and make sure they are 50–50 on all of these things?

These litmus tests that are being spewed from the other side are a complete undermining of what the rule of law is to be about, about what justice is to be about. They are infusing politics, policy, and partisanship in this process.

We must stop this. We must have up-or-down votes. I hope we do it in a way that does not force us to vote to do that.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. ISAKSON. Madam President, I commend the Senator from Pennsylvania on his remarks. For the moment that he is here, I want him to hear me say something.

I make the remarks I am about to make with a full understanding, were I in the minority party and this another day, I would need to make exactly the same speech and take exactly the same position. You see, I am new here, but I have learned something very quickly. The words you say today will be the words repeated to you tomorrow.

I learned something else. The genie came out of the bottle in the 108th Congress. Whether it was Democrats or Republicans, one day somebody would ultimately have to decide: Was the filibuster intended to be used on advice and consent?

With all due respect to everybody I have heard, it is just incorrect to say that to do away with the filibuster is going to make us a rubberstamp body.

Go ask Clarence Thomas if this place was a rubberstamp body, or Justice Bork. Think about the confirmations, most contentious in the last 20 years. Nobody invoked a filibuster. One of those justices was confirmed. One was not.

There are many responsibilities of the Senate that are designated in the Constitution. Impeachment is one. Whoever heard anybody filibustering an impeachment? Did you? The Constitution says the Senate will conduct that trial, as it says the Senate will advise and consent on treaties—by two-thirds majority. And on justices of the court—simple. It doesn't say maybe. It doesn't say if you feel like it. It is not even confusing. I have it in my pocket. I read it right before I came over here just to make sure I hadn't missed something because I heard twice today people say this document, the Constitution, doesn't say things that it does say.

I rise also, understanding how important the words are, because the second speech I made in the Senate, the first week of February this year, there was nobody in the Chamber. I've got a bigger crowd with the Senator from Pennsylvania than I had. It was early in the morning. It wasn't much of a gallery. I figured nobody was listening. The distinguished Democratic leader quoted me seven times since I made that speech.

I want to address that quote for a second.

You see, I told the story of being in Baghdad and talking to a Sunni, a Shiite, and a Kurd and asking the Kurd: Well, now that you are in the minority, aren't you scared the Shiites are going to run over you? And he said: Oh, no, we will use filibuster.

I thought that was a great remark. Here was a Kurd from the north of Iraq, in a place that had just won its liberty thanks to the blood, sweat, and tears of the United States of America, and he was reading Adams and Jefferson and studying us.

The next thing I know, the distinguished Mr. REID from Nevada says I said that to endorse a debate over whether or not the filibuster should be used on the confirmation of a judge.

I don't blame him. But just so the record is set straight, he is quoting a Kurd who read about America, who is in the process of writing their constitution which, I presume when it is finished, will provide for a filibuster over issues but not a filibuster to be used to obstruct the justice of the new democratic nation of Iraq.

I know my time is short. But I want to make some observations. I want to make my remarks in the context of Justice Brown. I know that Mrs. Owen is the current topic of discussion, about which at some point in time we hope there will be a vote, but Janice Rogers Brown is around the corner, and I felt like, after listening to all these debates, nobody is really talking about anybody's qualifications. Have you noticed that?

Even one of the deals that was offered was: tell you what, we will approve any five, you just give us two we are not going to approve.

Does that tell you they care anything about qualifications? Why, if you thought there was an unqualified judge, would you let the other side pick five and not pick two? I don't think qualifications are the issue. I understand that. That is another reason why I say this is not a superfluous argument, were we in the minority and it was still being decided, and had the roles been on the other side. And it is important that we decide it today.

Janice Rogers Brown was born in 1949 in the Deep South. I was born in 1944 in the Deep South.

When Janice Rogers Brown was born, I don't know that her parents ever envisioned that she would be a supreme court justice in the State of California. When I was born, I doubt my parents envisioned that I would be a Senator. However, in 1944, for a male white child born in the South, it was possible to be a Senator. In 1949, in the South, in Alabama or Georgia, it would not have

been possible for a parent to dream that for a female black child.

In my lifetime of studying this body, the most prevalent use of the filibuster was by southerners in the debates over the civil rights laws in the 1960s. The filibuster was used to protract the ultimate passage of those laws. It finally failed. Our country did what was right and those laws were passed.

I would hope that today the filibuster would not be used to deny an up-or-down vote on Janice Rogers Brown because every parent deserves to dream for every child that they will have the chance—not the guarantee—but the chance. These justices who have been nominated by our President deserve an up-or-down vote. No one in here has challenged anybody's right to vote yes or no. But they have challenged the fact that, yes, every one of them deserves a vote, and that is what this debate is all about.

So, as one who is new to this Chamber but understands how important this debate is, I rise to repeat that I will vote to support a vote, up or down, on every nominee. Understanding that, were I in the minority party and the issues reversed, I would take exactly the same position because this document, our Constitution, does not equivocate. It designates that responsibility to the Senate. I repeat, we are not breaking an old rule, we are addressing an issue that was raised in the last Congress as to where the filibuster would apply. It must be decided, and we must be diligent in our debate, respectful of the differences of opinions but, in the end, understanding of our responsibility as Members of the Senate and those elected to represent those who brought us here.

Madam President, I see my time is about up. If the Chair will inform me, I believe I have 2 minutes.

The PRESIDING OFFICER. The Senator has 2 minutes remaining.

Mr. ISAKSON. I will close by going to a quote I heard earlier today by the distinguished Senator from Massachusetts, who talked about the history of judicial confirmation, and my understanding of history is the same as his. The distinguished Senator said the first two times our Founding Fathers worried about writing the Constitution, they were going to designate the appointment of judges to the Senate. It was only on the third meeting that, at the Constitutional Convention, they determined it be a joint responsibility: Nomination by the President, confirmation by the Senate.

The distinguished Senator is absolutely correct. He described it as a dual responsibility. It would be irresponsible for the Senate to avoid expressing itself in advice and consent on the qualification of any nominee. To do anything other than that which the Constitution designates to us would be to abrogate our responsibility. Our Founding Fathers were right over 200 years ago, and our leader, whom I commend, is right today. I hope when this debate ends, whether through negotiations or a vote, the men and women nominated to the Federal bench of the United States of America will know, not that they are guaranteed a judgeship, but they are guaranteed to know how the Members of the Senate voted on whether or not they would be confirmed.

I yield the floor.

Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

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

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

Mr. SCHUMER. Madam President, I yield myself 7 minutes and then will yield to the Senator from New Mexico 15 minutes immediately after me.

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

Mr. SCHUMER. Madam President, as most have said, we believe we have been more than fair. We have confirmed 95 percent of the President's judges. As I have said before, if my daughter came home with a 95 on her report card, I would say, great. What some on the other side want to say is this: Only got a 95? Break the rules and get 100.

We do not believe in that and would like to exhibit in the most graphic way how we have supported 208 of the 218 judges by doing something very simple—by reading the names of the 208 judges the President has nominated and gotten approved by this Senate.

1. Callie Granade, SD AL
2. Consuelo Callahan, 9th Cir.
3. David Bunning, ED KY
4. Dora Irizarry, USDC ED NY
5. Gary Sharpe, USDC ND NY
6. Henry Hudson, ED VA
7. James Gritzner, SD IA
8. Jeffrey Howard, 1st Circuit
9. John Roberts, DC Circuit
10. Julia S. Gibbons, 6th Cir.
11. Kurt Engelhardt, ED LA
12. Leonard Davis, ED TX
13. Margaret Rodgers, ND FL
14. Michael McConnell, 10th Cir
15. Paul Cassell, UT
16. Ralph Erickson, ND
17. Richard Holwell, SD NY
18. Robert Conrad, WD NC
19. Rosemary M. Collyer, DDC
20. Stanley Chesler, NJ
21. Thomas Phillips, ED TN
22. Walter Kelley, ED VA
23. William Smith, RI
24. C. Ashley Royal, MD GA
25. Clay Land, GA
26. Danny Reeves, ED KY
27. Diane S. Sykes; 7th Circuit
28. Frederick Martone, AZ
29. Henry Floyd, SC
30. James Gardner, ED of PA
31. Jay Zainey, ED LA
32. John Houston, SD CA
33. Judith Herrera USDC D NM
34. Kim Gibson, WD PA
35. Legrome Davis, ED PA
36. Marcia Krieger, CO
37. Michael H. Watson, SD OH
38. Paul A. Crotty, SD NY
39. Ralph Beistline, AK
40. Richard E. Dorr WD MO
41. Robert Clive Jones, NV
42. Ronald White, ED OK
43. Sharon Prost, Federal Circuit
44. Thomas Hardiman, WD PA
45. Virginia H. Covington, MD FLO
46. William Riley, 8th Circuit
47. Amy J. St. Eve, ND IL
48. Christopher Boyko, ND OH
49. D. Michael Fisher, 3rd Circuit
50. David Godbey, ND TX
51. F. Dennis Saylor IV, Mass.
52. Gregory Frost, ND OH
53. J. Ronnie Greer, WD TN
54. James Robart, WD WA
55. Joe Heaton, OK
56. Jose Linares, NJ
57. Kathleen Cardone, WD TX
58. Larry Hicks, NV
59. Louise W. Flanagan, ED NC
60. Micaela Alvarez, SD TX
61. Morrison England, ED CA

Madam President, I am illustrating how many judges—208 to 10—we have approved in this Senate, an outstanding 95-percent record, nothing that any President should complain about.

We will continue the reading later.

I yield the floor to my friend and colleague from New Mexico, Senator BINGAMAN.

Mr. BINGAMAN. Madam President, I thank my friend from New York and congratulate him on his leadership on this very important issue.

I find it very unfortunate that disagreements about judicial appointments have brought us to the point where the majority is ready to take away the longstanding right of each and every Senator to unlimited debate. That is a very major change in the way business has traditionally and historically been done in the Senate.

This is a confrontation that could easily have been avoided by the President and his legal counsel if they had been willing to follow what I understand to be the normal practice that historically has prevailed and should prevail. Someone asked: What is that normal practice? It is simply the practice of consulting with the Senators most involved in the nominating process before making a final decision on which individuals to nominate.

In the case of judicial nominees for Federal court positions in my State of New Mexico, and also positions to be filled on the Tenth Circuit Court of Appeals that are designated for New Mexico attorneys, I have been contacted, and I have been asked if I had objections to perspective nominees in each case before a final decision to nominate has been made. And that is not just in the last year or 2, this is over the 22-plus years I have served in the Senate. As far as I can remember, I have been afforded that courtesy each time. We, the Senate, have confirmed; and Presidents Reagan and Bush, Sr., and Clinton and now George W. Bush have nominated many individuals for the Federal court in my State during that time.

It is also my understanding that more often than not the chair and the

ranking member of the Judiciary Committee have been afforded that same courtesy prior to the nomination of individuals to court of appeals positions or to a Supreme Court position. Much of the current confrontation and rancor could have been sidestepped if that practice had been followed with respect to the nominees who are currently in dispute. Unfortunately, this President has chosen a different course.

Rather than consulting before a nomination is made, the White House has chosen to make nominations that it knows will be highly controversial, in some cases where it knows that the Senators from the nominee's State are strongly opposed to that nominee. Where nominations have been blocked during one Congress, the 108th Congress, last Congress, the President has chosen to renominate those same individuals in the succeeding Congress.

Madam President, this is not a strategy to unite rather than divide the country. This is a strategy to split and to polarize the Senate and the American people, and it is clearly having that exact effect.

Given where we are, I, like most of my colleagues, feel obliged to come to the Senate floor and speak on this so-called nuclear option. In my view, this is a misguided effort that will not only harm the Senate, it will also have a significant impact on the checks and balances that our Founding Fathers envisioned. I am disappointed that the majority leader has decided to pursue this course of action. I regret that he has repeatedly rejected the minority leader's offers to compromise on the issue.

There are two distinct issues I want to discuss briefly today. The first is the manner in which the change is being made, the idea that the majority can simply change longstanding Senate rules whenever it believes it would be expedient to do so. I find that notion deeply troubling. We are a nation of laws, and our institutions need to reflect this.

The second issue I want to discuss is the merits of the proposal and the impact of eliminating the ability to filibuster. The use of the filibuster not only ensures that minority views are respected in the Senate, it also plays an important role in checking the power of the executive branch and in ensuring that the judiciary remains independent.

Let me take a moment to briefly describe what this nuclear option entails. I recognize that discussing rules and procedures is not an exciting topic, but it is important that the American public understand precisely what is being done. This is not about whether every nominee should get an up-or-down vote. It is about whether it is acceptable for the majority party to disregard longstanding Senate rules in order to get its way in each and every case that comes before the Senate.

Senate rule V states that:

The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

In accordance with Senate rule XXII, any such change can only be made with the approval of two-thirds of all Senators elected. That is 67 Senators.

Requiring continuity of the rules from Congress to Congress, and requiring that changes to the rules meet a threshold vote well above a simple majority, has a very straightforward purpose. It ensures that the rules governing the Senate remain constant, that they are not changed whenever one party believes the rules are hampering their ability to get their way in the short term.

Some in the majority party have complained that it is necessary to change the rules with respect to use of the filibuster on judicial nominees because in their view the current 60-vote requirement to end debate is too high. I have no objection to debating that issue and bringing it to a vote. Indeed, throughout the Senate's history there have been a variety of proposals to modify the rules governing the filibuster.

For example, in 1975, the Senate reduced the number of votes required to end debate from 67 to 60. In 1995, I supported a proposal Senator HARKIN offered which did not pass but would have revised the procedure. So why is not the majority leader bringing this proposal, which he is now threatening to make, up for a vote under normal procedure? Simply put, he does not have the votes to pass the measure if we stick by the rules of the Senate, the 67-vote rules of the Senate.

So his proposal is simple: If you do not have the votes to pass the proposal using the rules as they exist, then make up your own rules so you can pass it. Under this procedural maneuver, if the Senate votes to not end debate on one of the disputed nominees, the majority leader intends to make a point of order requesting that the Presiding Chair, who will likely be the Vice President, rule that only 51 votes are needed to confirm appellate and Supreme Court nominees.

Now, all of us know, and it is very clear to everyone who has studied this issue, that is not what the Parliamentarian would rule. The Parliamentarian has said just the opposite. Democrats will object, but the ruling would be upheld by a simple majority vote. It is my understanding this would be the first time that we have changed the rules of the Senate without following the prescribed procedure for doing so in the rules that we have adopted. This would entail overruling the Senate Parliamentarian.

Madam President, I have to ask, what is the meaning of a rule if it is permissible to break it when one disagrees with the outcome that would result if the rule were followed? If the majority leader wants to try to modify the filibuster, he has the right to attempt that, but he should do so within the parameters of the Senate rules. It is dangerous to set a precedent of ignoring those rules that govern how we go about changing rules.

Indeed, if one rule can be changed this way with a simple majority vote, why not others as well?

The majority leader has argued that the Senate's record of processing the President's judicial nominees is so egregious that it justifies breaking the rules and disregarding over 200 years of precedent in order to get more nominees confirmed. Let's examine this record. My colleague from New York has already discussed at length the number of judges, appellate court judges, district court judges, we have approved in this Senate since this President has been in office.

We have the lowest vacancy rate in the Federal judiciary since President Reagan was in office. The Senate has confirmed 95 percent of the President's nominees. In addition, Democrats have offered to bring up several of the disputed nominees for consideration, which would bring the confirmation rate closer to 98 percent. Unfortunately, the majority leader has rejected that proposed compromise.

Some have also asserted that Democrats are charting new ground in filibustering judicial nominees. Frankly, this is just incorrect. It is contrary to the history of the Senate. Republicans did filibuster Abe Fortas in 1968 when he was nominated to be the Chief Justice of the U.S. Supreme Court. The filibuster was successful. He ultimately withdrew his nomination from consideration.

I agree we have an obligation to process the President's judicial nominees in a fair and judicious manner, and, as the record demonstrates, that is exactly what we have been trying to do.

However, I do understand the general frustration surrounding the processing of judicial nominees. During the Clinton administration, the Republican majority, during several of those years, killed over 60 nominees through a variety of delay tactics, mostly by refusing to give hearings in the Judiciary Committee. As a result, many of those nominees never got a chance to have a fair and open debate about their qualifications, much less a vote on the Senate floor.

I believe we should look for ways to improve the confirmation process so that it is conducted in a more bipartisan and constructive manner. But exercising the so-called nuclear option is not a step in the right direction. Let's be clear on what this is about. It is about setting the stage for the debate over the next Supreme Court Justice. It is about putting in place a procedure that would limit the ability of Democrats and moderate Republicans to influence the debate. There would be little need to consult or to compromise if the nominee could be pushed through the Senate with a straight majority vote.

As I have discussed, I strongly disagree with the tactics that have been

chosen here to make these changes. With regard to the merits of the proposal to eliminate the filibuster for judicial nominees, I would like to take a moment to elaborate on the profound implications of moving forward with this effort. I believe such a change would be not only detrimental to the Senate as an institution but will also result in significant deterioration of the checks and balances that ensure the independence of our judiciary.

Having a procedure in place that allows 40 Senators to keep a nominee or legislation from being adopted serves many purposes. Most important, it facilitates compromise by guaranteeing the minority a voice in the legislative process. Unlike in the House of Representatives, where legislation can be easily pushed through with a simple majority vote, the Senate is an institution where deliberation and compromise are absolutely essential.

Forcing Senators to achieve common ground in order to complete the people's work is something that should be encouraged. Bipartisanship has been in short supply in recent years, and we need to be looking for ways to work together to address the challenges we face in America.

I have had the privilege of representing the people of New Mexico for over 22 years now in the Senate. I recognize the importance of working across the aisle to achieve results. Earlier this week, we held the first of several hearings on comprehensive energy legislation to try to mark up legislation in that area. I am extremely encouraged by how members of the committee from both parties have been working together. It is my hope that bipartisanship and sense of compromise can be adopted elsewhere in the Senate. This exemplifies how we should be facilitating more compromise between the majority and minority parties.

The filibuster is not only an important check on the majority power within the Senate, but it is also an essential check on the executive branch. Article II, section 2 of the U.S. Constitution provides the Senate and the President shall share the power to appoint judicial nominees. The President is granted the authority to nominate. The Senate is vested with the authority to provide its advice and consent. This is a serious constitutional duty. I do not believe the Senate should be relegated to the role of a glorified rubberstamp. That is not what the American people want, not what the Founding Fathers envisioned.

The prospect of a filibuster forces the President to submit nominees to the Senate who will be able to garner the support of more than a simple majority of that President's own party. There are plenty of well-qualified, conservative lawyers and judges who would easily be confirmed by this Senate. In fact, the Senate has confirmed over 200 of them since this President has been in office. At the beginning of this Congress, the President chose to resubmit several of the most controversial nominees who lacked widespread support, rather than to heed the concerns that had been raised about their nominations. The Senate has coequal responsibilities in the appointment process. It is important for the administration to recognize this when it decides which nominees to send to the Senate for consideration.

Without the filibuster, the President would essentially be free to appoint whomever he wants to the Federal judiciary with very little restraint. This would threaten the independence of the judiciary, which is charged with checking the actions of the executive and legislative branches, by allowing a President to stack the courts with individuals willing to advance a particular agenda or ideology.

If the same party controls the Senate and the White House, as is the case today, the ability to filibuster is a primary restraint on the majority party of using its power in the nomination and confirmation process. As the Framers recognized, it is reasonable to require that a lifetime appointee have the support of a substantial percentage of Senators who have been elected.

There is a reason why the Framers granted the Senate and not the House of Representatives the constitutional authority to provide advice and consent. The Senate's procedures ensure extended debate and respect for minority views, which in turn facilitate compromise and moderation. I personally believe that having qualified and reasonable judges in the Federal judiciary, regardless of political party, who interpret the law objectively and in accordance with mainstream legal theory is a good thing. These are lifetime appointments, which deserve rigorous debate and substantial scrutiny. This scrutiny would be significantly diminished if the majority party could appoint whoever they want to the judiciary without concern for the views of the minority. And the independence of the judiciary would be threatened if judges approach their work with a particular concern for carrying out the will of the party in power at that moment.

It is not surprising that a President would seek to expand his authority in the appointment process. But it is disappointing to think that the Senate might accede to this and abrogate its own constitutional authority in exercising its obligation to provide advice and consent.

Lastly, the proponents of the nuclear option have said they only want to eliminate the filibuster with regard to nominees, not with regard to legislation. But nothing about their reasoning is unique to nominees. If this can be done with regard to judicial nominees, it can certainly be done with regard to executive branch nominees as well. And there is no logic for arguing it cannot be done with regard to legislation.

As I have stated, I have many concerns about employing this tactic and disregarding Senate tradition. I urge my colleagues across the aisle to seriously consider the ramifications of this so-called nuclear option. It is not good for the Senate, it is not good for the delicate checks and balances that govern our Government, and it is not in the interest of the American people.

I yield the floor.

The PRESIDING OFFICER (Mr. CORNYN). The Senator from Maryland is recognized.

Ms. MIKULSKI. Mr. President, I rise to speak against this so-called nuclear option. This is a sad day for the Senate because I believe we are about to fracture 200 years of precedent and tradition. I think we are about to fracture what I had hoped would be a bipartisan approach to solving the compelling problems we face in the United States of America, and the Republicans are about to change the rules in the middle of the game.

One of the hallmarks of the United States of America is always fair play. And fair play means a belief and respect for the rules because we are a nation that believes in rules and in the rule of law. Whenever we are in competitive situations, we believe in rules. You don't change the rules in the middle of the game. You don't change the rules in a game you are losing. But here especially there is no reason to change because the Bush administration is not losing. They have had more nominees confirmed than almost any other Administration in recent history.

This is a manufactured crisis. There are those who say there is a crisis in terms of confirming judges. There is no crisis. George Bush is not losing. Right now, right this minute, we have confirmed 208 of the President's nominees for the bench. That is a 95-percent confirmation rate. I would think that getting 95% of what you want would make you declare victory. But, oh, no, that is not good enough. There is a desire to change the rules so that the President gets 100% and we cannot exercise our constitutional responsibility of advise and consent.

Now I know that many of my colleagues on both sides of the aisle don't want to change the Senate rules. They know the ebbs and flows of this institution one day you are in the majority and the next in the minority. And they know its not fair to change the rules in the middle of the game because doing so undermines century of tradition and the very essence of the Senate as the world's premier deliberative body.

So I have come to the floor today to urge my colleagues to oppose this so-called nuclear option. I do this because I firmly believe in my heart of hearts that we must always have an independent judiciary and a judiciary that has been confirmed according to the traditional roles of the Senate. I know it is one of my foremost responsibilities as a member of the United States Senate to protect the independence and integrity of our federal courts. Because our courts are charged with safeguarding the very principles on which

our nation was built—justice, equality and individual liberty.

The courthouse door must always stay open. And when someone walks through that door, they must find an independent judiciary. In order to do that, we cannot turn the Senate into a rubberstamp for any administration. We must not compromise our constitutional checks and balances over 7 highly controversial judges. The American people deserve better and, and the Constitution requires it.

When Alexander Hamilton and others were at the Constitutional Convention inventing America, they wanted checks and balances. They wanted no one to have absolute power, they wanted no individual to have absolute power, and they wanted no institution within our Government to have absolute power. That is why we have the system of checks and balances. That is why the greatest check and balance is the advice and consent role given to the Senate. The President nominates and the Senate has an important co-equal role to play in the confirmation process.

So the Senate has a very real and critical role to play here. It can't rubber stamp nominees. It can't give consent without a thorough examination and it should not support nominees who don't respect basic judicial principles.

When we are talking about this, we say, What does it mean? Who has been nominated? Who has been confirmed? Whom have we opposed? I have given the statistics. Since the President has been in office the Senate has confirmed 208 of his nominees and rejected only 10. That's 95 percent approval and those we have rejected have been among the most controversial and extreme nominees. Nominees who did not represent the mainstream of American legal thought. Nominees hostile to civil rights, women's rights, reproductive rights and working families.

Let's talk about the 208. Let's talk about working on a bipartisan basis. Let's talk about Maryland.

There were three openings on the Federal bench in Maryland for the district court. Governor Ehrlich sent forth three names of outstanding people of judicial competency. Senator SARBANES and I moved them straightforward and ahead, even though one had been the chairman of the Republican Party. We did not care about that. Second, he had even run for attorney general. We did not care about that. What we cared about was that the Maryland Bar Association said he was qualified.

No. 2, he had been a U.S. attorney and had done a stunning job, and he had extensive legal background in Maryland. We did not play politics. We moved Judge Bennett, Judge Quarles, and Judge Titus.

Then came the court of appeals. Oh, my gosh, guess what came out of the Bush administration. They wanted to give us a guy who was not even a member of the Maryland bar. SARBANES and MIKULSKI said no. That is one of the ones that did not even come up. Why? We think if you are going to represent Maryland on the court of appeals, you ought to be a member of the Maryland bar and have some significant ties to Maryland. We threatened a filibuster.

This is the Maryland seat on the Fourth Circuit Court of Appeals. They wanted to give us someone from Virginia. We like Virginia, Senator WARNER, Senator ALLEN. We like judges from Virginia, but not for the Maryland seat. And Senator SARBANES and I said we would filibuster. So we stopped, prevent our state from losing its seat on the court of appeals because of the Senate rules.

Though some of them never came forth as nominees, we knew we had the rules of the Senate to prevent this injustice to Maryland. We invited the White House to look at the thousands of lawyers in Maryland who are members of the bar, who have judicial competence and judicial temperament and commitment to basic constitutional principles. Maryland would recognize them.

But we were ready to use these rules in the Senate to protect the Maryland seat and make sure whoever was on the court of appeals for the Maryland seat would at least be a member of the Maryland bar or at least be from Maryland and have significant ties there.

Those are the rules. That is how you exercise advice and consent. We gave advice, they ignored it, so they were not going to get our consent. Hey, those are the rules. We do not want those rules changed, and it would be the same if there was a Democrat in the White House.

We could look at the nominees President Bush has given us. Not only do we get people who are not members of a bar, but we get some who are outside the judicial mainstream.

Judge Priscilla Owen is an example of someone who would turn our courts in the wrong direction. She has a history of being driven by ideology and not law. Her beliefs are far outside the mainstream of judicial thinking. She has an extreme ideological agenda on civil rights, women's rights and the right to privacy that we severely question and make her unsuitable to sit on this federal court.

She is a judicial activist, that means she has a consistent pattern of putting ideology about the law and ignoring statutory language and substituting her own views. Something about which even officials in this White House have raised concern. Alberto Gonzales, now our Attorney General, who once served with her, called her dissent in a case ''unconscionable . . . judicial activism'' and in another case said her dissent would judicially amend the Texas statute. In other words, she was making law rather than interpreting law.

Her opinions show a bias against consumers, victims and individuals. She has consistently ruled against workers, accident victims and victims of discrimination. Her decisions impair the rights of ordinary people to have access to the courts. On the Texas Supreme Court she has restricted a woman's right to choose by ignoring statute and creating additional barriers for women seeking to exercise reproductive choice.

We could go through Owen, and we could go through others. Priscilla Owen stands among a handful of nominees who will turn back the clock on protecting important constitutional rights. We know through our examination of these nominees that they are outside the judicial mainstream, and we want to exercise our priority and our responsibility on advice and consent. And now Republicans want to focus on the jobs of 7 people who already have jobs when we have 7.7 million Americans who don't.

They want the change the subject away from issue that Americans care about to a handful of extreme judicial nominees. They say there is a crisis but there are more federal judges now than at any other point in our nation's history. This is the lowest vacancy rate on the courts in a decade. Republicans have the wrong priorities.

I had to explain what this nuclear option means to a head of state. Did you ever have to explain to someone who is a former head of a government in a European country, who himself fought for freedom and was a dissident and even in prison, what a nuclear option means? He thought we were talking about using nuclear weapons.

I had to explain this to members of my family, the senior citizens in my family. ''Barb, what is this nuclear option? Are we thinking about using nuclear weapons?'' We use language here very glibly, and I think exaggerated. What I said was we are headed for a meltdown. We cannot let the Senate melt down, and we will melt down if we do not stop these proceedings from going forth. We need to have an institution that functions on a bipartisan basis.

Some of the happiest and most distinguished accomplishments of my life have been accomplished because of working on a bipartisan basis. In the 1990s, I worked with the Senator from Colorado, Mr. Hank Brown, and we worked to bring Poland, Hungary, and the Czech Republic into NATO. We had to stand up to a Democrat such as Senator Moynihan and a Republican such as Senator WARNER to get the Senate to consider it, but we worked on a bipartisan basis, and we extended NATO from old Europe to a new Europe. And right now, the people we brought into NATO are fighting with us side by side in Iraq and are part of the coalition of the willing. Bipartisan relationships did that.

Because of our work in the Senate where the women get together at least once a month to have dinner for friendship and fellowship and to talk about

an agenda, we have done a lot on women's health. We have increased mammogram funding research by 700 percent. We have increased funding for domestic violence. We have done all this when we worked together.

My gosh, when we work together we work our best. Let us now stop this dangerous course. We should not continue further on this terrible down this path on which we are embarking. The American people want us to be standing up for jobs. They want us to be able to face straightforward the health care crisis, and they want to make sure we stabilize the pension crisis in the United States of America. Young people want to be able to afford college. They wonder what are we doing here. Republicans are spending all this time on the nuclear option and debating 7 controversial nominees instead of focusing on our national priorities. When all is said and done, is will be that more gets said than gets done?

Let's put the nuclear arsenal option back into the missile silo. We must do so to preserve the constitutional role of the Senate to advise and consent and protect our checks and balances.

Let's get back to doing the business of the people. The American people deserve that and they deserve a Senate that works for them. A Senate that governs best when it works together, and let's start putting the people first rather than politics.

I yield the floor.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, last week on Wednesday, we evacuated the Capitol. At the instruction of the Capitol Police, more than a few Senators and staff actually ran from this building and surrounding offices in the very real fear that a plane was carrying a bomb to attack this building, the center of our democracy.

Sadly, Wednesday was not the first time, and Wednesday will likely not be the last time, that we guard against threats to our democracy by plane or by bomb.

But there are other threats to our democracy and our freedoms just as menacing, equally as dangerous.

Abraham Lincoln said:

America will never be destroyed from the outside. If we falter and lose our freedoms, it will be because we destroyed ourselves.

Former Librarian of Congress Daniel Boorstin said:

It is not slogans or bullets, but only institutions that can make and keep people free.

And Baron Montesquieu wrote in ''The Spirit of the Laws'':

There is no liberty, if the judiciary power be not separated from the legislative and the executive.

The effort to break the rules to allow the President more easily to appoint judges that undermine the independence of the Federal judiciary is no less than a threat to our democracy, a threat to our freedoms, and a threat to our liberties.

For two centuries, Democrats and Republicans alike have used the Senate's rules to protect our democracy, to protect our freedoms, and to protect our liberties. After two centuries, it would be a mistake to change those rules.

Unlimited debate allows Senators to protect minority freedoms. Unlimited debate helps to ensure that no one party has absolute power. Unlimited debate helps to give effect to the Founders' conception of checks and balances.

History will see the actions of this month as what they are: A threat to those checks and balances. History will see the actions of this month as a terrible attempt to diminish the Senate. History will see the actions of this month as an attempt to diminish our democracy.

If those who seek to change the rules succeed, especially by breaking the rules, it will be only a matter of time before the next step comes. It will be only a matter of time before some future Senate leader decides to once again to break the rules to change the rules, and abolish the filibuster altogether.

And what will the Senate look like then?

Then all our votes will be simple majority votes. Then lost will be a centuries-old check and balance. And then what will be left will be a vastly different Senate from the one to which I came in 1978.

The majority leader has proposed that debate on important judges be limited to a fixed number of hours, to 100 hours. That might sound like a lot of time.

But the point is not the number of hours. The point is that at the end of a set amount of time, no Member of the minority party need participate. At the end of a set amount of time, only the majority party will rule. At the end of that set amount of time, there would be no more check and balance.

If one wants to see what the Senate will look like then, look at budget resolutions. Like the majority leader's proposed rule, they allow for a long period of debate. The leader's proposal calls for 100 hours of debate on judges. The Budget Act calls for 50 hours of debate on budgets.

Look at the results.

Rarely do budget resolutions achieve consensus. Since 1992, only one budget resolution has received more than 55 votes on final passage.

This year, the vote on the budget resolution was 52-to-47.

Last year, the disagreements on the budget were so partisan that the majority was not able to bring the conference report on the budget resolution to the floor in the Senate.

In 2003, the vote was as close as it could get: 51-to-50. The Vice President had to break the tie vote.

In 2002, once again, divisions were so partisan that the majority was not able to secure a majority in the Senate.

In 2001, the vote was 53-to-47

In 2000, the vote was 50-to-48.

In 1999, the vote was 54-to-44.

In 1998, the majority was once again unable to adopt a budget resolution.

And 1997 was the exception that proved the rule. That year, the budget resolution achieved a broad consensus, receiving a vote of 76-to-22.

But in 1996, the vote was 53-to-46.

In 1995, the vote was 54-to-46.

In 1994, the vote was 53-to-46.

In 1993, the vote was 55-to-45.

And in 1992, the vote was 52-to-41.

Thus, over 14 years, under Republican Presidents and a Democratic President, over the course of nearly a decade and a half, only one budget resolution has been the product of consensus. Fourteen years, and only one budget with more than 55 votes.

The time limit on debate has not led to working together. The time limit on debate has caused partisanship. And three times in the last decade, the time limit on debate has led to complete failure.

That is what would happen to the Senate if we head down this road. Votes would become more partisan, if that is possible, but it would happen. And the products of those votes would become more extreme.

If we head down this road for the confirmation of judges, then judges will be more partisan. Judges will be more likely to uphold the powers of the President who appointed them. And judges will be less likely to defend individual freedoms and liberties against the powerful executive.

Just think about that for a moment. Under this rule change, judges will be less likely to defend individual freedoms and liberties against the powerful executive. Why? Because of the partisan nature under which a partisan President will have appointed them.

The Senate's role in protecting against extremism is particularly important in the context of nominations for the lifetime jobs of Federal judges. The Founders wanted the courts to be an independent branch of Government, helping to exercise the Constitution's intricate system of checks and balances. The Senate's involvement in the confirmation of judges has helped to ensure that the judiciary can be that more independent branch. And that independence of the judiciary, in turn, has helped to ensure the protection of our democracy, our freedoms, and our liberties.

In ancient Rome, when the Senate lost its power, and the emperor became a tyrant, it was not because the emperor abolished the Senate. In ancient Rome, when the Senate lost its power, it continued to exist, at least in name. But in ancient Rome, when the Senate lost its power, in the words of the Senate's historian, Senator ROBERT BYRD, the Senate became ''little more than a name.''

In ancient Rome, when the Senate lost its power, the Roman Senate was complicit in the transfer. The emperor did not have to seize all the honors and

powers. The Roman Senate, one after another, conferred greater powers on Caesar.

It was not the abolition of the Senate that made the emperor powerful. It was the Senate's complete deference.

Like the Roman Senate before us, we risk bringing our diminution upon ourselves. We risk bringing upon ourselves a hollow Senate, a mere shadow of its past self. And we risk bringing upon ourselves a loss of the checks and balances that ensure our American democracy.

This change, if it succeeds, will leave Senators, as T.S. Eliot described in his 1925 poem, as ''The Hollow Men.'' In that poem, Eliot wrote of a place like what the Senate would become. He wrote:

''Our dried voices, when
We whisper together
Are quiet and meaningless
As wind in dry grass
This is the dead land
This is cactus land
In this hollow valley
This broken jaw of our lost kingdoms
In this last of meeting places
We grope together
And avoid speech
Gathered on this beach of the tumid river
This is the way democracy ends; this is the way democracy ends; this is the way democracy ends; not with a bomb, but a gavel.''

I yield the floor.

The PRESIDING OFFICER. The Senator from Florida.

Mr. NELSON of Florida. Mr. President, before the distinguished Senator from Montana departs, I want to thank him for obviously something that has been well thought out and deeply felt. He is a distinguished Senator who has served decades in the Senate and who has risen to the position as chairman of the Finance Committee. He understands the traditions and the comity of this institution in order for it to function. It clearly cannot function unless Senators can get along and trust each other, where Senators can have respect for one another, and where the minority is not run over all the time by the majority.

That is one of the great checks and balances of this constitutional system that we have. The rights of the minority are protected because of extended debate which, at the end of the day, encourages compromise and consensus building.

As the Good Book says: Come, let us reason together.

So I thank the Senator for his comments. I thank him for being a mentor to me, as I have so enjoyed his company and his leadership as well as the company of all these Senators. There is not a Senator here that I don't like. I like them all. I want to see this body continue to function as it has for 216 years, as the greatest deliberative body in the world. We are about to change that dramatically if this nuclear option is, in fact, employed.

I thank the Senator for his comments.

Mr. President, I want to add in my own little way a plea to the rest of the Senators. I have gotten into some of the discussions that are going on around this Capitol Building right now, to see if we can head off this thing. It doesn't look like we can. It looks like people are hardening into their positions. I wonder why. Is it worth changing over two centuries of history and precedent in the Senate for what, in effect, are five judges? Is it worth giving up the traditions and the protection of the minority, under the rules, for over two centuries for five judges?

I was surprised when I looked over the record and found out what my voting record has been here. I have voted, under President Bush, for 209 of his judicial nominees; I have voted against 7. That is 97 percent of the President's nominees for Federal judgeships that I have voted for. Am I not entitled, as the senior Senator from Florida, to exercise my judgment on seven people for a lifetime appointment as judge, when I don't think they have the judicial temperament in order to be judge for life? That is what the Senate is all about. That is what the Constitution said it is all about. It says that the judicial process is a two-step process. The President nominates and the Senate decides. In the old language of the constitutional forefathers it was ''advise and consent.''

My advice was, on seven, that I didn't think they had the judicial temperament, that they would look dispassionately at an issue, that they would look at the facts and apply the law. Those seven seemed to me to have their minds already made up.

That is not what I want in a judge. I want a judge who is going to be fair-minded, who is going to listen to all the nuances and make a fair and reasoned judgment.

I gave the President the benefit of the doubt on these 209. I can tell you, some of those were in Florida. On those I didn't give him the benefit of the doubt; those were good because in Florida we have a system whereby we have a judicial nominating commission, which is not by law but has been by custom over the years, and that judicial nominating commission receives the applications of people who want to be a Federal district judge, they interview them, and they make a recommendation to the Senators and to the White House. The arrangement that Senator GRAHAM and I had with the White House, with Alberto Gonzales, then the counsel for the White House, was that we would interview all of those recommended to us—sometimes it was three, sometimes it was six—for the vacancy, and we would tell the White House if we had an objection.

That has worked. On the judges from Florida that are within that 209 that I voted for, I can tell you they are good appointments.

But that was the give and take between the Senate and the White House in the filling of a judicial vacancy. That is not the ramming down your throat a judicial nomination just because the White House wants it.

I have agreed with the White House 97 percent of the time. You can calculate it mathematically, that is 97 percent of the time. So now they want to take away the right, under the rule, to filibuster so that no matter who comes in, they are going to be approved if they have 50 votes. It could be 50–50, because the tie would be broken with the Vice President sitting as the Presiding Officer of the Senate.

There is another reason that has just come to my attention why I do not want the filibuster to be eliminated from this particular set of judges. If it is done for this, what is next? What is next? That the majority leader would stand and take away the filibuster and my right to filibuster as a Senator? Is he going to do that on what the administration is bent on doing, and that is drilling for oil and gas off the coast of Florida—drilling for what 18 million Floridians are deathly afraid of; that the $50 billion a year tourism industry is going to be threatened because of oil lapping up onto our beaches?

Are they going to take away my right to stand out here and hold up such legislation, to drill off the coast of Florida, that would despoil our environment? Are they going to take away my right to protect our military assets, an asset that is so valuable it is called restricted airspace? It is out in the Gulf of Mexico and portions of the Atlantic Ocean off Florida, which is why we have so much training in Florida. The pilots can go out there in that restricted airspace. Are they going to take away my right to utilize the filibuster to protect the interests of Florida?

It is obvious that today they have started trying to drill off the coast of Florida. Two weeks ago, I had a meeting with the Secretary of the Interior, and I pleaded with her, as she had agreed back in 2001, that she would not include within the 5-year plan that there would be drilling further, other than what was the agreement back in 2001, to extend an additional 1.5 million acres for oil and gas leasing, and it started to intrude into the eastern Gulf of Mexico. She promised it in the 5-year plan which was from 2002 to 2007. So when I met with her 2 weeks ago I asked her to give me that——

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

Mr. NELSON of Florida. I ask for an additional 5 minutes to proceed.

Mr. REID. It is my understanding the majority leader is on his way. I have no problem with the Senator speaking and the same time would be extended to the majority.

Mr. KYL. Reserving the right to object, I was going to speak at 6 o'clock. My understanding is the minority leader and the majority leader wanted to intercede with a brief colloquy or comments. In order for my scheduling purposes, I would like to know what the

timing then might be. Can the distinguished minority leader give me some idea?

Mr. REID. The Republican leader is going to come to the floor and talk about what the schedule will be the next couple of days. It should not take long. I ask when he shows up that the distinguished Senator from Florida yield to the majority leader.

Mr. NELSON of Florida. Of course.

Mr. REID. We get 5 minutes, they get 5 minutes.

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

The Senator from Florida is recognized for an additional 5 minutes.

Mr. NELSON of Florida. This filibuster issue is so important to me as I project how it can be taken away from me as I try to protect the interests of Florida.

I was about to point out that although the Secretary of the Interior 2 weeks ago, when I requested in the next 5-year plan that she extend the same protections of no additional drilling in the Gulf of Mexico off of Florida, would not give me that assurance.

I now see, as the result of a vote today in the House of Representatives, an amendment offered for oil and gas drilling off of the State of Florida. It may have been this amendment, may have been just for gas drilling. That is the proverbial camel's nose under the tent.

All drilling, happily, in that amendment failed in the House of Representatives, but the Bush administration's intent is now clear since the Secretary of Interior would not give me that assurance that she gave me back in 2001. It is their intent to start drilling off the coast of Florida in the Gulf of Mexico, which brings me back to the filibuster.

I don't want to lose this precedent of 216 years in the Senate, to lose this right of a filibuster. If we do it with regard to these judges, then what is coming next, they will take away our right to stand up here for the interests of our States?

This is a matter of tremendous gravity. It affects all of us.

I yield the floor.

Mr. REID. I suggest the absence of a quorum.

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

The assistant legislative clerk proceeded to call the roll.

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

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

Under the previous order, the Senator from Arizona is recognized.

Mr. KYL. Might I inquire of the distinguished minority leader, the majority leader will be here shortly?

Mr. REID. A few minutes ago he said he was on his way.

Let me say, one of the distinguished clerks, without divulging a person's name, said that when Senator FRIST and I talk about coming to the floor, it is dog time, meaning every minute is 7 minutes, so you never know.

Mr. KYL. Mr. President, I will go ahead and in between the sandwich we will have the meat which will be the conversation between the two leaders, but I will proceed with my remarks.

Now I am told the leader is indeed on his way, so I will suspend and yield to the distinguished majority leader.

The PRESIDING OFFICER (Mr. CHAMBLISS). The majority leader is recognized.

Mr. FRIST. Mr. President, many Members have been inquiring about the schedule, but I do want to thank all Senators for their statements today, as well as yesterday. The debate time has been evenly divided. We have heard from a number of people. This is our second day of debate on the nomination of Priscilla Owen for the Fifth Circuit Court. We have not had very much in the way of pauses in the debate. We have used floor time well. And from both leaders, we thank everybody for their participation and cooperation. It has been a constructive debate.

Tomorrow, we will resume debate. We will be continuing debate tonight, but for people's planning purposes, tomorrow we will resume debate on Priscilla Owen, and it would be my intent to ask consent for some limitation of time before we vote on the Owen nomination. If we are unable to reach an agreement, I would then file a cloture motion tomorrow, on Friday.

On Monday, we would return to session and continue the debate on Priscilla Owen, much in the same vein it has been yesterday, today, and will be tomorrow. I encourage, once again, our colleagues to take advantage of the opportunity to speak. The reason we are spending the time is to make sure all ideas and thoughts and concerns are expressed.

The Democratic leader and I have discussed this, and we will have a vote on Monday at approximately 5:30. It will be a procedural vote. I anticipate it will be—we will say 5:30 now. Senators should return for debate on this vote. On Monday, Senators will have as much time as they need to debate the pending nomination. We will file cloture tomorrow, and then we would have the cloture vote on Tuesday. And the timing of that vote is something the Democratic leader and I have not talked about but will do so and make our colleagues aware.

With that understanding—and that is the plan—we will have no further votes this evening. And we would have no votes tomorrow as well but continue debate.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, very briefly, before I address the primary subject of my presentation, I would like to do two things. First, I ask unanimous consent to have printed in the RECORD, after my remarks, the Washington Times oped piece by a former majority leader of the Senate, Bob Dole, dated Thursday, May 19, 2005.

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

(See exhibit 1.)

Mr. KYL. Secondly, I would like to very briefly remind my colleagues of the fact that when we talk about the numbers of judges President Bush has nominated who have been confirmed, it is important for us to remember that there has never been any controversy with respect to district court judges. Almost all Presidents' district court judges are confirmed. Those are recommended for nomination usually by Members of the Senate, and it is rare, indeed, that we would object to each other's recommendations. Instead, for all Presidents there is a very high number of district court judges confirmed. And indeed, that was the case with President Clinton and has been the case so far with President Bush.

So when talking about the numbers of judges confirmed, and wondering what the fuss is all about, our constituents might want to focus on the fact that what the other side usually does not talk about is the fact that the judges that are not being confirmed are circuit court judges. These are the judges directly below the U.S. Supreme Court. There are not very many of them. They are very important. And these are the judges who are being filibustered by the minority.

How many? Well, in the case of President Bush, in his first term—and none have been confirmed now at the beginning of his second term, so this is the full story—35 of the President's 52 nominees have been confirmed. That is only a confirmation rate of two-thirds or 67 percent. And that puts that at the lowest percentage of any President in our modern history. This chart says ''ever.'' And that is what we are talking about here, the 10 filibusters and 6 other threatened filibusters last year of the President's circuit court judges who have been filibustered and, as a result, have never received an up-or-down vote. That is what is troubling us.

So I want folks to understand that instead of talking about almost 200 judges confirmed, and only a very few rejected, what we are talking about is the circuit court judges. And of those, only 35 of 52 have been confirmed. That is what this is all about. And these are the judges directly below the position of the U.S. Supreme Court.

What I want to talk about today is a very simple and yet a very momentous question. Does the Senate have the power to govern itself? Does the Senate have the power to govern itself? Specifically, can a majority of the Senate establish how we are governed? I have heard a lot of careless talk over the last few months and days. Some have charged the Senate will soon break the rules to change the rules and destroy the Senate as we know it. Some Senators claim the Senate is about to abdicate all constitutional responsibility, is becoming a rubberstamp. Others

raise the specter of lawlessness and banana republics. Worst of all, Senators speak figuratively of detonating nuclear bombs and shutting down the Senate's business.

This kind of hysteria does a tremendous disservice not only to the Senate but to our Nation as a whole. Not only are the claims blatantly false, but they add to the already unacceptable level of incivility in our political affairs. It is often said we should disagree without being disagreeable. That is a sentiment with which I wholeheartedly concur. A good first step would be for my colleagues to stop making outrageous claims that Republicans want to destroy this institution.

The reality is the Senate is now engaged in a historic debate and, I believe, a historic effort to protect constitutional prerogatives and the proper checks and balances between the branches of our Government.

Republicans seek to right a wrong that has undermined 214 years of tradition—wise, carefully thought out tradition. The fact that the Senate rules theoretically allowed the filibuster of judicial nominations, but were never used to that end, is an important indicator of what is right and why the precedent of allowing up-or-down votes is so well established. It is that precedent that has been attacked and which we seek to restore.

Fortunately, the Senate is not powerless to prevent a minority from running roughshod over its traditions. It has the power—indeed, I would say the obligation—to govern itself. As I will demonstrate today, that power to govern itself easily extends to the device that has come to be known as the constitutional option.

The Constitution is clear about the scope of the Senate's power to govern itself. Article I, section 5, clause 2 of the Constitution states that each House may determine the rules of its proceedings.

The Supreme Court of the United States has rarely interpreted this clause, but one case is important for our purposes, the case of the United States v. Ballin, a case decided in 1892. That case dealt with the power of the majority of the House of Representatives to make rules, and it contains two holdings that bear on our situation today.

First, the Supreme Court held that the powers delegated to the House or the Senate through article I, section 5, clause 2 are powers held by a simple majority of the quorum. The Constitution states that a majority of Members constitutes a quorum, and the Supreme Court, therefore, held that ''when a majority are present the house is in a position to do business.''

The Supreme Court continued:

All that the Constitution requires is the presence of a majority.

Thus, a majority is all the Constitution requires for us to make rules, to set precedents, and to operate on a day-to-day basis. The Supreme Court made this clear.

Second, the Supreme Court held that the power to make rules is not one which, once exercised, is exhausted. It is a continuous power, always subject to being exercised by the House. By ''House,'' the court means the House of Representatives or the Senate. The import of this statement is crucial for present purposes. The power of the majority of Senators to define Senate procedures is one that exists at all times, whether at the beginning, the middle, or the end of Congress.

The constitutional background is simple and uncomplicated. We can govern ourselves. We can do it by majority vote, and we can do it at any time. Let me repeat: The Supreme Court has held that we have the right to govern ourselves, that we can do it by majority vote, and we can do it any time.

Let's look at how the Senate employs its constitutional power to govern itself. There are four basic ways that the Senate does so: In standing rules, precedents, standing orders, and in rulemaking statutes. I will discuss each briefly in turn.

First, the Senate has adopted standing rules to govern some but not all Senate practices and procedures. I have seen much confusion in the press and even, sadly, in this body about those standing rules. Some argue that the standing rules are the be-all and end-all of Senate practice and procedure. The confusion might be understandable outside the Senate, but Senators know that these rules are but one aspect of the overall set of tools, the broader rules that the Senate uses to govern itself.

That brings us to the second way the Senate exercises its constitutional power: the creation of precedents. Precedents are created whenever the Presiding Officer rules on a point of order, when the Senate sustains and/or rejects an appeal of the Presiding Officer's ruling on a point of order, or when the Senate itself rules on a question that has been submitted to it by the Presiding Officer.

As former Parliamentarian and Senate procedural expert Floyd Riddick has said:

The precedents of the Senate are just as significant as the rules of the Senate.

Let me repeat what Mr. Riddick said:

The precedents of the Senate are just as significant as the rules of the Senate.

Indeed, as we will see, precedents have sometimes been created that directly contradict the Standing Rules of the Senate. I will return to that point later, but I want everyone to remember what Mr. Riddick said.

A third way that the Senate exercises its constitutional power is through standing orders which can be adopted by legislation, Senate resolutions, or run-of-the-mill unanimous consent agreements. It is worth pausing to note that the Senate regularly overrides the standing rules and precedents of the Senate through unanimous consent agreements. You saw that a few minutes ago. Our leaders get together and decide, for example, to change the time to hold a cloture vote, even though rule XXII mandates that the vote shall occur 1 hour after the Senate comes into session on the second day after the cloture petition is filed. Yet the leaders move the votes in direct contradiction of the rules.

Of course, a unanimous consent agreement is formalistically unanimous. But that temporary rule change, if you want to call it that, is done completely outside the standing rules.

How can we do this? How can the Senate ignore the Standing Rules of the Senate? The answer is simple. It goes to the essence of the situation before us today. As the Supreme Court held, the Constitution gives the Senate the power to make rules and govern itself on a continuous basis. We are not held hostage to the standing rules, nor are we required to go through the cumbersome process of amending the standing rules when it is necessary to get something done. This has always been true.

A fourth way that the Senate exercises its constitutional power is through rulemaking statutes. For example, for 30 years the Budget Act has been placing severe restrictions on the rights of Senators to debate. Indeed, the Congressional Research Service has identified 26 rulemaking statutes that somehow limit the ability of individual Senators to debate and/or amend legislation. Think about that for a moment. We hear much pontificating on this floor about the supposedly sacred and untouchable right of Senators to debate on an unlimited basis. Yet, arguably, our most important function, that of ensuring that government services are budgeted and receive funding, is subject to carefully crafted restrictions of that right of debate. We have 50 hours of debate, followed by a majority vote, period. For generations, Senators have judged some limits on debate are necessary just as a matter of common sense. This is one of them.

Parenthetically, no matter how many times a few Senators say otherwise, this controversy before us now has nothing whatsoever to do with free speech, as the minority leader himself has acknowledged. This dispute has never been about the length of debate. It is about blocking judicial nominees. We will have plenty of debate on all of the nominees, as much as anyone wants.

I would like to move to another important aspect of this discussion: The role of tradition and norms of conduct in the day-to-day functioning of the Senate. This is crucial. Although it is frequently said that the unique features of the Senate are individual Senator's rights to demand and amend, there is another even more central aspect to Senate procedure. As I see it, the overriding feature of the Senate is the mutual self-restraint and respect for the settled norms of this body. I would like to consider a few examples.

Senators limit their speech on an informal basis every day. We cut short

remarks so that others can speak. We did that a few moments ago. We acquiesce in unanimous consent agreements that will have the effect of denying ourselves any chance to speak on a subject. We decline to object to procedural unanimous consent requests even though we might have good reason to want to slow down Senate business. We acquiesce in our leader's floor schedule. We work with bill managers to limit amendments so that the Senate can function, so that each individual Senator's rights do not become an impediment to the task of governing. Senators have rights, but we also have obligations to each other and to the Nation.

So we limit our rights on the basis of mutual respect and a belief in good government but, candidly, also out of fear of retaliation. If I assert my rights too forcefully, I not only disrespect my colleagues, but I threaten my own public policy goals. The result is a complicated mutual truce of sorts that allows us to do the people's business in an orderly way. In a word, we gain institutional stability.

In short, the Senate is institutionally stable, not just because of rules, precedents, or the standing order, or the rulemaking statutes I discussed. The body is stable because we respect each other's prerogatives. We understand that any breach of the truce will produce a reaction. And it is that basic understanding of physics, action, and reaction, coupled with a genuine goodwill that allows us to function even with the many individual rights that we possess. The rights only work because we so often choose not to exercise them. So it is not just rights that define the Senate but also restraint.

Which brings us back to the filibuster of judicial nominations. It is certainly the case that the Standing Rules of the Senate do countenance the filibuster of judicial nominations, but it is equally the case that the longstanding norms of the Senate do not. Until 2003, no judicial nominee with demonstrable support of a majority of Senators had ever been denied an up-or-down vote on the Senate floor through a filibuster. Even on the rare occasions where there were attempts, they failed on a bipartisan basis. And why? Because the filibuster of judicial nominations used as a minority veto was not part of our tradition and never had been. Again, out of respect for fellow Members, for the President, and for the judiciary, and out of a recognition of the long-term impact of such tactics, the Senate had always declined to march down this path.

When I entered the Senate in 1995, I had grave concerns about some of more activist nominees that President Clinton sent to us.

But I listened to Chairman ORRIN HATCH, Majority Leader TRENT LOTT, and many others. They taught that we had a longstanding Senate tradition against blocking Senate nominations by filibuster. So I joined Democrats and Republicans alike in making sure there were no filibusters.

Ironically, some point to those successful cloture votes for confirmed judges and claim those nominees were filibustered. Well, all that establishes is that both parties ensured a supermajority to end debate, precisely to adhere to historical norms. We took the steps to ensure those judicial nominees who reach the Senate floor received the fair up-or-down votes to which they were entitled. Again, the standing rules might have permitted such obstruction, but the Senate norms and traditions did not.

To the extent the rules technically permitted such obstruction, the traditions had rendered the power obsolete and inert. In common law, there is a doctrine called desuetude, which means that obsolete or unenforced laws shall not have effect in the future even if not formally repealed. In other words, a law that is de facto unenforced may be treated as ineffective de jure as well.

We faced a similar situation in the Senate. In fact, our tradition was our rule. To minimize the traditions of this body is to display a naive and legalistic misunderstanding of the institution. To say we are a body of traditions is meaningless if we do not acknowledge that our traditions have content and meaning. There can be no question that the filibusters of the last Congress broke that Senate tradition and, therefore, the set way this body had governed itself. By breaking traditions of the Senate, members of the minority should have known they would force the Senate to react. Tradition should never change without consensus, and a consensus requires, at a minimum, a majority. The question is, what are we to do when norms and traditions are changed by the minority? What do we do when there is no consensus, just a minority with a determination to exploit dormant rules to further partisan end? The Senate can do one of two things: Let our traditions be transformed and permit rule by minority or we can insist that the Senate maintain traditional norms and take action to protect them.

That brings us to the constitutional option itself. The constitutional option is nothing more than the Senate governing itself, as the Constitution provides, by acts of majorities of Senators. The Senate has been in this situation before 4 times over a 10-year period, when the Senate majority reacted to a minority using rules that had not traditionally been used to obstruct Senate business. My colleague Senator MCCONNELL will discuss each instance in depth. I address one in particular by way of illustration.

In 1977, two Senators attempted to block a natural gas deregulation bill after cloture had already been invoked. They were succeeding through a strategy of ''filibuster by amendment.'' Post-cloture debate time had lapsed, but the obstructing Senators could still call up amendments, force quorum calls, and force rollcall votes on the amendments. Rule XXII prohibited dilatory or nongermane amendments, but Senate procedure did not rule these amendments out of order. True, a Senator could raise a point of order against one of these dilatory amendments, but any favorable ruling could be appealed. A rollcall vote could then be demanded on that appeal. And once that rollcall vote began, the obstructing Senators could accomplish their slowdown in a different way—filibuster by rollcall vote. To make matters worse, in 1977, before any point of order could even be made against an amendment, the amendment in question had to be read by the clerk. By objecting to the routine courtesy of waiving the reading of the amendment, the obstructing Senators delayed the business of the Senate even further.

That all may seem complicated, but there is one undeniable truth about what these obstructing Senators were doing. It was all completely permitted under the standing rules and the precedents of the Senate. At the same time, however, these tactics were in violation of settled Senate norms and practices. So what was the Senate to do?

The answer came when the then-Democratic majority leader made the decision these new tactics were dilatory, in violation of the traditional norms, and could no longer prevail. He asked then-Vice President Walter Mondale to sit in the chair in his capacity as President of the Senate. The Democratic majority leader made a point of order that ''when the Senate is operating under cloture, the chair is required to take the initiative under Rule XXII to rule out of order all amendments that are dilatory or which on their face are out of order.'' Mondale sustained the point of order, even though it had no foundation in the rules or precedents of the Senate. Another Senator appealed the Mondale ruling, and the Democratic majority leader moved to table. The Senate then voted to table the appeal. In doing so, the Senate created a new precedent. But that precedent ran directly contrary to the Senate's longstanding procedures which had required Senators to raise points of order to enforce Senate rules. Under the new precedent established by the Senate, no such point of order would be necessary.

Again, this may seem complicated, but these small changes had dramatic effects. The Democratic majority leader began to call up each of the dilatory amendments so the Chair could rule them out of order. One by one, the Chair obliged. Under normal circumstances, an appeal would have been in order, but the majority leader exercised his right of preferential recognition to block any appeal. He quickly called up every remaining amendment, Vice President Mondale ruled them out of order, and all of the amendments were disposed of.

Nearly 20 years later, the Senator who orchestrated those events in 1977

explained to the Senate what he had done. He explained:

I asked Mr. Mondale, the Vice President, to go please sit in the chair; I wanted to make some points of order and create new precedents that would break these filibusters. And the filibuster was broken—back, neck, legs, and arms. So there should be no confusion about what happened on that day.

That was the constitutional option in action. The Senate faced a situation where a minority of Senators was frustrating Senate business in an untraditional way. The majority wished to proceed. The majority did not propose any formal rules change, refer the proposal to the Rules Committee, wait for its action, and then bring it to the floor under rule XXII's cloture provisions for such rule change proposals. That procedure was not followed. Instead, the majority leader recognized that the Senate had the constitutional power to bypass that route, which is exactly what the Senate did.

As I mentioned earlier, that same Democratic leader would create several other precedents while serving as majority leader, in each case because he concluded the existing standing rules and precedents of the Senate were inadequate, and that a majority of Senators had the power to alter the way the Senate governs itself. In 1979, for example, a new precedent was created to prevent legislation on appropriations bills, in direct contravention of the text of the standing rules at that time. In 1980, the Senate used the constitutional option to eliminate the ability to debate and filibuster the motion to proceed to a particular item on the Executive Calendar. That situation is remarkably similar to the one we face today. In 1987, in a complicated set of maneuvers, the Senate created new precedents to limit minority rights and declare that certain dilatory tactics during the morning hour were out of order.

I will not examine each of these historical events in detail today. Instead, I ask unanimous consent to have printed in the RECORD a copy of the policy paper prepared by the Republican Policy Committee, which I chair, which examined each of these events in great detail.

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

THE SENATE'S POWER TO MAKE PROCEDURAL RULES BY MAJORITY VOTE

INTRODUCTION

In recent months, there has been growing public interest in the Senate's ability to change its internal procedures by majority vote. The impetus for this discussion is a Senate minority's use of the filibuster to block votes on 10 judicial nominations during the 108th Congress. Until then, a bipartisan majority of Senators had worked together to guarantee that filibusters were not to be used to permanently block up-or-down votes on judicial nominations. For example, as recently as March 2000, Majority Leader Trent Lott and Minority Leader Tom Daschle worked together to ensure that judicial nominees Richard Paez and Marsha Berzon received up-or-down votes, even though Majority Leader Lott and most of the Republican caucus ultimately voted against those nominations. But that shared understanding of Senate norms and practices—that judicial nominations shall not be blocked by filibuster—broke down in the 108th Congress.

This breakdown in Senate norms is profound. There is now a risk that the Senate is creating a new, 60-vote confirmation standard. The Constitution plainly requires no more than a majority vote to confirm any executive nomination, but some Senators have shown that they are determined to override this constitutional standard. Thus, if the Senate does not act during the 109th Congress to restore the Constitution's simple-majority standard, it could be plausibly argued that a precedent has been set by the Senate's acquiescence in a 60-vote threshold for nominations.

One way that Senators can restore the Senate's traditional understanding of its advice and consent responsibility is to employ the ''constitutional option''—an exercise of a Senate majority's power under the Constitution to define Senate practices and procedures. The constitutional option can be exercised in different ways, such as amending Senate Standing Rules or by creating precedents, but regardless of the variant, the purpose would be the same—to restore previous Senate practices in the face of unforeseen abuses. Exercising the constitutional option in response to judicial nomination filibusters would restore the Senate to its longstanding norms and practices governing judicial nominations, and guarantee that a minority does not transform the fundamental nature of the Senate's advice and consent responsibility. The approach, therefore, would be both reactive and restorative.

This constitutional option is well grounded in the U.S. Constitution and in Senate history. The Senate has always had, and repeatedly has exercised, the constitutional power to change the Senate's procedures through a majority vote. Majority Leader Robert C. Byrd used the constitutional option in 1977, 1979, 1980, and 1987 to establish precedents changing Senate procedures during the middle of a Congress. And the Senate several times has changed its Standing Rules after the constitutional option had been threatened, beginning with the adoption of the first cloture rule in 1917. Simply put, the constitutional option itself is a longstanding feature of Senate practice.

This paper proceeds in four parts: (1) a discussion of the constitutional basis of the Senate's right to set rules for its proceedings; (2) an examination of past instances when Senate majorities acted to define Senate practices—even where the written rules and binding precedents of the Senate dictated otherwise; (3) an evaluation of how this history relates to the present impasse regarding judicial nomination filibusters; and (4) a clarification of common misunderstandings of the constitutional option. The purpose of this paper is not to resolve the political question of whether the Senate should exercise the constitutional option, but merely to demonstrate the constitutional and historical legitimacy of such an approach.

THE CONSTITUTION: THE SENATE'S RIGHT TO SET PROCEDURAL RULES

The Senate's constitutional power to make rules is straightforward, but two issues do warrant brief elaboration—the number of Senators that are constitutionally necessary to establish procedures and whether there are any time limitations as to when the rulemaking power can be exercised.

The Supreme Court addressed both of these questions in United States v. Ballin, an 1892 case interpreting Congress's rulemaking powers. [144 U.S. 1 (1892).] First, the Court held that the powers delegated to each body are held by a simple majority of the quorum, unless the Constitution expressly creates a supermajority requirement. [Ballin, 144 U.S. at 6. There is no serious disagreement with the Supreme Court's conclusion in Ballin. Indeed, Senator Edward Kennedy has said that only a majority is necessary to change Senate procedures. Congressional Record, Feb. 20, 1975, S3848. Senator Charles Schumer conceded during a Judiciary subcommittee hearing on the constitutionality of the filibuster that Senate rules ''could be changed by a majority vote.'' S. Hrg. 108–227 (May 6, 2003), at 60.] The Constitution itself sets the quorum for doing business—a majority of the Senate. [U.S. Const., art. I, 5, cl. 1.] Second, the Supreme Court held that the ''power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house.'' [Ballin, 144 U.S. at 5.] Thus, the Supreme Court has held that the power of a majority of Senators to define the Senate's procedures exists at all times whether at the beginning, middle, or end of a Congress.

The Senate majority exercises this constitutional rulemaking power in several ways:

First, it has adopted Standing Rules to govern some Senate practices and procedures. Those rules formally can be changed by a majority vote. Any motion to formally amend the Standing Rules is subject to debate, and Senate Rule XXII creates a special two-thirds cloture threshold to end that debate.

Second, the Senate operates according to Senate precedents, i.e., rulings by the Chair or the Senate itself regarding questions of Senate procedure. A precedent is created whenever the Chair rules on a point of order, when the Senate sustains or rejects an appeal of the Chair's ruling on a point of order, or when the Senate itself rules on a question that has been submitted to it by the Chair. [Floyd M. Riddick, Senate Parliamentarian, Oral History Interviews (November 21, 1978), Senate Historical Office, Washington, D.C., at 429.] As former parliamentarian and Senate procedural expert Floyd M. Riddick has said, ''The precedents of the Senate are just as significant as the rules of the Senate.'' [Riddick interview at 426.]

Third, the Senate binds itself through rulemaking statutes that constrain and channel the consideration of particular matters and guarantee that the Senate can take action on certain matters by majority vote. At least 26 such rule-making statutes govern Senate procedure and limit the right to debate, dating back to the 1939 Reorganization Act and including, most prominently, the 1974 Budget Act. [Martin B. Gold, Senate Procedure and Practice (2004), at 5. For a complete list of the 26 statutes that limit Senate debate, see John Cornyn, Our Broken Judicial Confirmation Process and the Need for Filibuster Reform, 27 Harv. J. L. Pub. Pol'y 181,213–214 (2003).]

Finally, the Senate can modify the above procedures through Standing Orders, which can be entered via formal legislation, Senate resolutions, and unanimous consent agreements.

It is important to emphasize, however, that these rules are the mere background for day-today Senate procedure. As any Senate observer knows, the institution functions primarily through cooperation and tacit or express agreements about appropriate behavior. Most business is conducted by unanimous consent, and collective norms have emerged that assist in the protection of minority rights without unduly hindering the Senate's business.

Consider, for example, the Senate's contrasting norms regarding the exercise of individual Senators' procedural rights. Under the rules and precedents of the Senate, each Senator has the right to object to consent requests and, with a sufficient second, to demand roll call votes on customarily routine motions. If Senators routinely exercised those rights, however, the Senate would come to a standstill. Such wholesale obstruction is rare, but not because the Senate's standing rules, precedents, and rulemaking statutes prohibit a Senator from engaging in that kind of delay. Rather, Senators rarely employ such dilatory tactics because of the potential reaction of other Senators or the possibility of retaliation. As a result, informed self enforcement of reasonable behavior is the norm.

At the same time, some ''obstructionist'' tactics have long been accepted by the Senate as features of a body that respects minority rights. Most prominent is the broadly accepted right of a single Senator to speak for as long as he or she wants on pending legislation, subject only to the right of the majority to invoke cloture and shut off debate. Indeed, an overwhelming and bipartisan consensus in support of the current legislative filibuster system has existed for 30 years. [Standing Rule XXII's standard for cloture—three-fifths of Senators ''duly chosen and sworn''—has been in effect since 1975.] Thus, the norms of the Senate tolerate some, but not all, kinds or degrees of obstruction.

Thus, while written rules, precedents, and orders are important, common understandings of self-restraint, discretion, and institutional propriety have primarily governed acceptable Senatorial conduct. It is the departures from these norms of conduct that have precipitated institutional crises that require the Senate to respond.

THE HISTORY: THE SENATE'S REPEATED USE OF THE CONSTITUTIONAL OPTION

The Senate is a relatively stable institution, but its norms of conduct have sometimes been violated. In some instances, a minority of Senators has rejected past practices and bipartisan understandings and exploited heretofore ''off limits'' opportunities to obstruct the Senate's business. At other times, a minority of Senators has abused the rules and precedents in a manner that violates Senators' reasonable expectations of proper procedural parameters. These are efforts to change Senate norms and practices, but they do not necessarily have the support of a majority.

Such situations create institutional conundrums: what should be done when a mere minority of Senators changes accepted institutional norms? One option is to acquiesce and allow ''rule by the minority'' so that the minority's norm becomes the Senate's new norm. But another option has been for the majority of Senators to deny the legitimacy of the minority Senators' effort to shift the norms of the entire body. And to do that, it has been necessary for the majority to act independently to restore the previous Senate norms of conduct.

This section examines those illustrative instances—examples of when the Senate refused to permit a minority of Senators to change norms of conduct or to otherwise exploit the rules in ways destructive to the Senate, and, instead, exercised the constitutional option.

When Senator Robert C. Byrd was Majority Leader, he faced several circumstances in which a minority of Senators (from both parties) began to exploit Senate rules and precedents in generally unprecedented ways. The result was obstruction of Senate business that was wholly unrelated to the institution's great respect for the right to debate and amend. Majority Leader Byrd's response was to implement procedural changes through majoritarian votes in order to restore Senate practices to the previously accepted norms of the body.

In 1977, two Senators attempted to block a natural gas deregulation bill after cloture had already been invoked. [See Martin B. Gold & Dimple Gupta, The Constitutional Option to Change Senate Rules and Procedures: a Majoritarian Means to Overcome the Filibuster, 28 Harv. J. L. Pub. Pol'y 206,262–264 (2004).] A ''post-cloture filibuster'' should seem counterintuitive for anyone with a casual acquaintance with Senate rules, but these obstructing Senators had found a loophole. Although further debate was foreclosed by Rule XXII once post-cloture debate was exhausted, the Senators were able to delay a final vote by offering a series of amendments and then forcing quorum calls and roll call votes for each one. Even if the amendments were ''dilatory'' or ''not germane'' (which Rule XXII expressly prohibits), Senate procedure provided no mechanism to get an automatic ruling from the Chair that the amendments were defective. A Senator could raise a point of order, but any favorable ruling could be appealed, and a roll call vote could be demanded on the appeal. Moreover, in 1975, before a point of order could even be made, an amendment first must have been read by the clerk. While the reading of amendments is commonly waived by unanimous consent, anyone could object and require a reading that could further tie up Senate business. Thus, the finality that cloture is supposed to produce could be frustrated.

These practices were proper under Senate rules and precedents, but Majority Leader Byrd concluded in this context that these tactics were an abuse of Senate Rule XXII. His response was to make a point of order that ''when the Senate is operating under cloture the Chair is required to take the initiative under rule XXII to rule out of order all amendments which are dilatory or which on their face are out of order.'' [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 263.] The Presiding Officer, Vice President Walter Mondale, sustained the point of order, another Senator appealed, and Majority Leader Byrd immediately moved to table. The Senate then voted to sustain the motion to table the appeal. In so doing, the Senate set a new precedent that ran directly contrary to the Senate's longstanding procedures which required Senators to raise points of order to enforce Senate rules. Now, under this precedent, the Chair would be empowered to take the initiative to rule on questions of order in a post-cloture environment.

The reason for Majority Leader Byrd's tactic immediately became clear. He began to call up each of the dilatory amendments that had been filed post-cloture, and the Chair instantly ruled them out of order. There was no reading of the amendments (which would have been dilatory in itself) and there were no roll call votes. The Majority Leader then exercised his right of preferential recognition to call up numerous remaining amendments, and similarly disposed of them. No appeals could be taken because any appeal was mooted when Majority Leader Byrd secured his preferential recognition to call up additional amendments. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 263–264.]

This was the constitutional option in action. Majority Leader Byrd did not follow the regular order and attempt to amend the Senate Rules in order to block these tactics. Instead, he used a simple point of order that cut off the ability of a minority of Senators to add a new layer of obstruction to the legislative process. His method was consistent with the Senate's constitutional authority to establish procedure.

Majority Leader Byrd used the constitutional option again in 1979 in order to block legislation on appropriations bills. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 264–265.] Standing Rule XVI barred Senate legislative amendments to appropriations bills. By precedent, however, such amendments were permissible when offered as germane modifications of House legislative provisions. Thus, when the House acted first and added legislative language to an appropriations measure, Senators could respond by offering legislative amendments to the House's legislative language. While another Senator might make a point of order, the Senator offering the authorizing language could respond with a defense of germaneness. And, by the express language of Rule XVI, that question of germaneness must be submitted to the Senate and decided without debate. By enabling the full Senate to vote on the germaneness defense without getting a ruling from the Presiding Officer first, the legislative amendment's sponsor avoided having to overturn the ruling of the Chair and create any formal precedents in doing so. The result was a breakdown in the appropriations process due to legislative amendments, and it was happening pursuant to Senate rules that plainly permitted these tactics.

Majority Leader Byrd resolved to override the plain text of Rule XVI and strip the Senate of its ability to decide questions of germaneness in this context. Senator Byrd's mechanism was similar to the motion he employed in 1977: he made a point of order that ''this is a misuse of precedents of the Senate, since there is no House language to which this amendment could be germane, and that, therefore, the Chair is required to rule on the point of order as to its being legislation on an appropriation bill and cannot submit the question of germaneness to the Senate.'' [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 265 (emphasis added).] The Chair sustained the point of order, and the Senate rejected the ensuing appeal, 44–40.

The result of Majority Leader Byrd's exercise of the constitutional option was a binding precedent that caused the Senate to operate in a manner directly contrary to the plain language of Rule XVI. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 265.] Moreover, the method was contrary to past Senate practices regarding germaneness. But the process employed, as in 1977, was nonetheless constitutional because nothing in the Senate's rules, precedents, or practices can deny the Senate the constitutional power to set its procedural rules.

The Senate's Executive Calendar has two sections—treaties and nominations. Prior to March 1980, a motion to enter Executive Session, if carried, would move the Senate automatically to the first item on the Calendar, often a treaty. Rule XXII provides (then and now) that such a motion to enter Executive Session is not debatable. However, unlike the non-debatable motion to enter Executive Session, any motion to proceed to a particular item on the Executive Calendar was then subject to debate. In practice, then, the Senate could not proceed to consider any business other than the first Executive Calendar item without a Senator offering a debatable motion, which then would be subject to a possible filibuster. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 265–267.]

Majority Leader Byrd announced his objection to this potential ''double filibuster'' (once on the motion to proceed to a particular Executive Calendar item, and again on the Executive Calendar item itself), and exercised another version of the constitutional option. This time he moved to proceed directly to a particular nomination on the Executive Calendar and sought to do so without debate. Senator Jesse Helms made the

point of order that Majority Leader Byrd could only move by a non-debatable motion into Executive Session, not to a particular treaty or nomination. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 266.] The Presiding Officer upheld the point of order given that it was grounded in Rule XXII and long-standing understandings of Senate practices and procedures. But Majority Leader Byrd simply appealed the ruling of the Chair and prevailed, 38–54. Thus, even though there was no basis in the Senate Rules, and even though Senate practices had long preserved the right to debate any motion to proceed to a particular Executive Calendar item, the Senate exercised its constitutional power to ''make rules for its proceedings'' and created the procedure that the Senate continues to use today.

As an historical sidenote, Majority Leader Byrd used this new precedent to great effect in December 1980 when he bypassed several items (including several nominations) on the Executive Calendar to take up a single judicial nomination—that of Stephen Breyer, then Chief Counsel to the Senate Judiciary Committee, to be a judge on the U.S. Court of Appeals for the First Circuit. Judge Breyer was later nominated and confirmed to the U.S. Supreme Court in 1994. Without Majority Leader Byrd's exercise of the constitutional option earlier that year, it is almost certain that Justice Breyer would not be on the Supreme Court today.

A fourth exercise of the constitutional option came in 1987 when Senator Byrd was once again Majority Leader. The controversy in question involved an effort by Majority Leader Byrd to proceed to consider a particular bill, an effort that had been frustrated because a minority of Senators objected each time he moved to proceed. To thwart his opponents, Majority Leader Byrd sought to use a special feature of the Senate Rules—the Morning Hour (the first two hours of the Legislative Day).

Under Rule VIII, a motion to proceed to an item on the Legislative Calendar that is made during the Morning Hour is non-debatable. This feature of the rules gives the Majority Leader significant power to set the Senate agenda due to his right to preferential recognition (which is, itself, a creature of mere custom and precedent). Such a motion cannot be made, however, until the Senate Journal is approved and Morning Business is thereafter concluded (or the first of the two hours has passed). Meanwhile, the clock runs on the Morning Hour while that preliminary business takes place. When the Morning Hour expires, a motion to proceed once again becomes debatable and subject to filibuster. [Gold, Senate Procedure and Practice, at 68–69.] It was this feature of the Morning Hour that Senator Byrd believed would enable him to proceed to the bill in question.

Majority Leader Byrd's plan was complicated, however, when objecting Senators forced a roll call vote on the approval of the Journal, as was their right under the procedures and practices of the Senate. Rule XII provides that during a roll call vote, if a Senator declines to vote, he or she must state a reason for being excused. The Presiding Officer then must put a non-debatable question to the Senate as to whether the Senator should be excused from voting. When Majority Leader Byrd moved to approve the Journal, one Senator declined to vote and sought to be excused. Following Rule XII, the Presiding Officer put the question directly to the Senate—should the Senator be excused?—but during the roll call on whether the first Senator should be excused, another Senator announced that he wished to be excused from voting on whether the first Senator should be excused. The Chair was likewise obliged to put the question to the Senate. At that point, yet another Senator announced he wished to be excused from that vote. There were four roll call votes then underway—the original motion to approve the Journal and three votes on whether Senators could be excused. If Senators persisted in this tactic, the time it took for roll call votes would cause the Morning Hour to expire, and the Majority Leader would lose his ability to move to proceed to his bill without debate. All this maneuvering was wholly consistent with the Standing Rules of the Senate.

Majority Leader Byrd countered with a point of order, arguing that the requests to be excused were, in fact, little more than efforts to delay the actual vote on the approval of the Journal. His solution was to exercise the constitutional option: to use majority-supported Senate precedents to change Senate procedures, outside the operation of the Senate rules. In three subsequent partyline votes, three new precedents were established: first, that a point of order could be made declaring repeated requests to be excused from voting on a motion to approve the Journal (or a vote subsumed by it) to be ''dilatory;'' second, that repeated requests to be excused from voting on a motion to approve the Journal (or a vote subsumed by it) ''when they are obviously done for the purpose of delaying the announcement of the vote on the motion to approve the Journal, are out of order;'' and third, that a Senator has a ''limited time'' to explain his reason for not voting, i.e., he cannot filibuster by speaking indefinitely when recognized to state his reason for not voting. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 267–269.] Majority Leader Byrd had crafted these new procedures completely independently of the Senate Rules, and they were adopted by a partisan majority without following the procedures for rule changes provided in Rule XXII. Yet the tactics were wholly within the Senate's constitutional power to devise its own procedures.

This 1987 circumstance offers a very important precedent for the present difficulties. Majority Leader Byrd established that a majority could restrict the rights of individual Senators outside the cloture process if the majority concluded that the Senators were acting in a purely ''dilatory'' fashion. Previous to that day, dilatory tactics were only out of order after cloture had been invoked.

The Senate also has endorsed (or acted in response to) some version of the constitutional option several other times over the past 90 years—in 1917, 1959, 1975, and 1979.

The original cloture rule, adopted in 1917, itself appears to be the result of a threat to exercise the constitutional option. Until 1917, the Senate had no cloture rule at all, although one had been discussed since the days of Henry Clay and Daniel Webster. The ability of Senators to filibuster any effort to create a cloture rule put the body in a quandary: debate on a possible cloture rule could not be foreclosed without some form of cloture device.

The logjam was broken when first term Senator Thomas Walsh announced his intention to exercise a version of the constitutional option so that the Senate could create a cloture rule. His method was to propose a cloture rule and forestall a filibuster by asserting that the Senate could operate under general parliamentary law while considering the proposed rule. Doing so would permit the Senate to avail itself of a motion for the previous question to terminate debate—a standard feature of general parliamentary law. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 220–226.] In this climate, Senate leaders quickly entered into negotiations to craft a cloture rule. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 226.] Negotiators produced a rule that was adopted, 76–3, with the opposing Senators choosing not to filibuster. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 226.] But it was only after Senator Walsh made clear that he intended to press the constitutional option that those negotiations bore fruit. As Senator Clinton Anderson would remark in 1953, ''Senator Walsh won without firing a shot.'' [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 227.]

The same pattern repeated in 1959, 1975, and 1979. In each case, the Senate faced a concerted effort by an apparent majority of Senators to exercise the constitutional option to make changes to Senate rules. In 1959, some Senators threatened to exercise the constitutional option in order to change the cloture requirements of Rule XXII. Then-Majority Leader Lyndon Johnson preempted its use by offering a modification to Rule XXII that was adopted through the regular order. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 240–247.] In 1975, the Senate three times formally endorsed the constitutional option by creating precedents aimed at facilitating rule changes by majority vote, although the ultimate rule change (also to Rule XXII) was implemented through the regular order after off-the-Floor negotiations. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 252–260.] And in 1979, Majority Leader Byrd threatened to use the constitutional option unless the Senate consented to a time frame for consideration of changes to post-cloture procedures. The Senate acquiesced, and the Majority Leader did not need to use the constitutional option as he had in the other cases discussed above. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 260; Congressional Record, Jan. 15, 1979.]

The Senate, therefore, has long accepted the legitimacy of the constitutional option. Through precedent, the option has been exercised and Senate procedures have been changed. At other times it has been merely threatened, and Senators negotiated textual rules changes through the regular order. But regardless of the outcome, the constitutional option has played an ongoing and important role.

### THE JUDICIAL FILIBUSTER AND THE CONSTITUTIONAL OPTION

The filibusters of judicial nominations during the 108th Congress were unprecedented in Senate history. [This historical observation has been conceded by leading Senate Democrats. For example, the Democratic Senatorial Campaign Committee solicited campaign contributions in November 2003 with the claim that the filibusters were an ''unprecedented'' effort to ''save our courts.'' See Senator John Cornyn, Congressional Record, Nov. 12, 2003, S14601, S14605. No Senator has disputed that until Miguel Estrada asked the President to withdraw his nomination in September 2003, no circuit court nominee had ever been withdrawn or defeated for confirmation due to the refusal of a minority to permit an up-or-down vote on the Senate floor.] While cloture votes had been necessary for a few nominees in previous years, leaders from both parties consistently worked together to ensure that nominees who reached the Senate floor received up-or-down votes. The result of this bipartisan cooperation was that, until 2003, no judicial nominee with clear majority support had ever been defeated due to a refusal by a Senate minority to permit an up-or-down floor vote, i.e., a filibuster. [For a review of all past cloture votes on judicial nominations prior to the 108th Congress, see Senate Republican Policy Committee, ''Denying Mr. Estrada an Up-or-Down Vote Would Set a Dangerous Precedent'' (Feb. 10, 2003). See also Cornyn, 27 Harv. J. L. Pub. Pol'y at 218–227.]

The best illustration of this traditional norm is the March 2000 treatment of President Bill Clinton's nominations of Richard Paez and Marsha Berzon to the U.S. Court of Appeals for the Ninth Circuit. When those nominations reached the Senate floor, Majority Leader Trent Lott, working with Democrat Leader Tom Daschle, filed cloture before any filibuster could materialize. Republican Judiciary Chairman Orrin Hatch likewise fought to preserve Senate norms and traditions, arguing that it would be ''a travesty if we establish a routine of filibustering judges.'' [Congressional Record, Mar. 8, 2000, S1297.] Moreover, as a further testament to the bipartisan opposition to filibusters for judicial nominations, more than 20 Republicans who opposed the nominations and who would vote against them nonetheless supported cloture for Mr. Paez and Ms. Berzon, and cloture was easily reached. [For Berzon, compare Record Vote #36 (cloture invoked, 86–13) with #38 (confirmed, 64–34); for Paez, compare Record Vote #37 (cloture invoked, 85–14) with #40 (confirmed, 59–39). All votes on Mar. 8–9, 2000.] Had every Senator who voted against Mr. Paez's nomination likewise voted against cloture, cloture would not have been invoked. Thus, as recently as March 2000, more than 80 Senators were on record opposing the filibuster of judicial nominations. [For a more detailed list of Senators' historic opposition to filibusters for judicial nominations, see Senate Republican Policy Committee, ''Denying Mr. Estrada an Up-or-Down Vote Would Set a Dangerous Precedent'' (Feb. 10, 2003). For an extended examination of filibustering Senators' previous opposition to judicial filibusters, see Cornyn, 27 Harv. J. L. Pub. Pol'y at 207–211.] If the new judicial nomination filibusters are accepted as a norm, then the Senate will be rejecting this history and charting a new course.

It is not only the Senate norm regarding not filibustering judicial nominations that risks being transformed, but the effective constitutional standard for the confirmation of judicial nominations. There can be no serious dispute that the Constitution requires only a Senate majority for confirmation. Indeed, many judicial nominees have been confirmed by fewer than 60 votes in the past—including three Clinton nominees and two Carter nominees. [Examples of judicial nominations made prior to the 108th Congress that were confirmed with fewer than 60 votes include Abner Mikva (D.C. Cir., 1979); L.T. Senter (N.D. Miss., 1979); J. Harvie Wilkinson III (4th Cir., 1984); Alex Kozinski (9th Cir., 1985); Sidney Fitzwater (N.D. Tex., 1986); Daniel Manion (7th Cir., 1986); Clarence Thomas (Supreme Court, 1991); Susan Mollway (D. Haw., 1998); William Fletcher (9th Cir., 1998); Richard Paez (9th Cir., 2000); and Dennis Shedd (4th Cir., 2002).] Never has the Senate claimed that a supermajority is necessary for confirmation.

Recently, however, some filibustering Senators have suggested that a failed cloture vote is tantamount to an up-or-down vote on a judicial nomination. The new Senate Minority Leader, Harry Reid, has stated that the 10 filibustered judges have been ''turned down.'' [William C. Mann, Senate leaders draw line on filibuster of judicial nominees, Boston Globe, Jan. 17, 2005.] Senator Charles Schumer has repeatedly stated that a failed cloture vote is evidence that the Senate has ''rejected'' a nomination. [Senator Charles Schumer, Congressional Record, July 22, 2004, S8585 (''I remind the American people that now 200 judges have been approved and 6 have been rejected''); see also Jeffrey McMurray, Pryor Supporters Debate Timing of Vote, Tuscaloosa News, Jan. 10, 2005 (''To nominate judges previously rejected by the Senate is wrong''); Anne Kornblut, Bush Set to Try Again on Blocked Judicial Nominees, Boston Globe, Dec. 24, 2004 (quoting official statement by Sen. Schumer).] Senator Russell Feingold described the filibustered nominees from the 108th Congress as having ''been duly considered by the Senate and rejected.'' [Keith Perine, Fiercest Fight in Partisan War May Be Over Supreme Court, CQ Weekly, Jan. 10, 2005, at 59.] Judiciary Committee Ranking Member Patrick Leahy has referred to the filibustered nominees as having been ''effectively rejected.'' [Congressional Record, Feb. 27, 2004, S1887.] And in April 2005, Senator Joseph Lieberman claimed that 60 votes should be the ''minimum'' for confirmation. [Senator Joseph Lieberman, Transcript of Press Conference, Apr. 21, 2005.] These characterizations illustrate the extent to which the Senate has lost its moorings.

Without restoration of the majority-vote standard, judicial nominations will require an extra-constitutional supermajority to be confirmed, without any constitutional amendment—or even a Senate consensus—supporting that change. Any exercise of the constitutional option would, therefore, be aimed at restoring the Senate's procedures to conform to its traditional norms and practices in dealing with judicial nominations. It would return the Senate to the Constitution's majority-vote confirmation standard. And it would prevent the Senate from abusing procedural rules to create supermajority requirements. Instead, it would be restorative, and Democrats and Republicans alike would operate in the system that served the nation until the 108th Congress.

COMMON MISUNDERSTANDINGS OF THE CONSTITUTIONAL OPTION

Senate procedures are sacrosanct and cannot be changed by the constitutional option.

This misunderstanding does not square with history. As discussed, the constitutional option has been used multiple times to change the Senate's practices through the creation of new precedents. Also, the Senate has changed its Standing Rules several times under the threat of the constitutional option.

Exercising the constitutional option will destroy the filibuster for legislation. The history of the use of the constitutional option suggests that this concern is grossly overstated. Senators will only exercise the constitutional option when they are willing to live with the rule that is created, regardless of which party controls the body. For the very few Senators (if any) who today want to eliminate the legislative filibuster by majority vote, the roadmap has existed since as early as 1917. Moreover, an exercise of the constitutional option to restore the norms for judicial confirmations would be just that—an act of restoration. To eliminate the legislative filibuster would not be restorative of Senate norms and traditions; it would destroy the Senate's longstanding respect for the legislative filibuster as a vehicle to protect Senators' rights to amend and debate. It is also worth noting that the Senate is now entering its 30th year of bipartisan consensus as to the cloture threshold (three-fifths of those duly chosen and sworn) for legislative filibusters. [In 1995, Senators Tom Harkin and Joe Lieberman proposed a major revision to the Senate filibuster rules for legislation, but the proposal failed 76–19, attracting the support of no Republicans and but a fraction of Democrats (who were in the minority). The only current Senators who sought to change the Senate's consensus position on legislative filibusters were Senators Jeff Bingaman, Barbara Boxer, Russell Feingold, Tom Harkin, Edward Kennedy, John Kerry, Frank Lautenberg, Joe Lieberman, and Paul Sarbanes. See Record Vote #1 (Jan. 5, 1995).]

All procedural changes must be made at the beginning of a Congress. Again, this claim does not square with history. In fact, there is nothing special about the beginning of a Congress vis-a-vis the Senate's right to establish its own practices and procedures, or even its formal Standing Rules. As discussed above, Majority Leader Byrd used the constitutional option to create a precedent that overrode Rule XVI's plain text—and not at the beginning of a Congress. Moreover, as the Supreme Court held in Ballin, each House of Congress's constitutional power to make procedural rules is of equal value at all times. [Ballin, 144 U.S. at 5.]

The essential character of the Senate will be destroyed if the constitutional option is exercised. When Majority Leader Byrd repeatedly exercised the constitutional option to correct abuses of Senate rules and precedents, those illustrative exercises of the option did little to upset the basic character of the Senate. Indeed, many observers argue that the Senate minority is stronger today in a body that still allows for extensive debate, full consideration, and careful deliberation of all matters with which it is presented.

Exercising the constitutional option would turn the Senate into a ''rubber stamp.'' Again, history proves otherwise. The Senate has repeatedly exercised its constitutional power to reject judicial nominations through straightforward denials of ''consent'' by up-or-down votes. For example, the Senate defeated the Supreme Court nominations of Robert Bork (1987), G. Harold Carswell (1970), and Clement Haynsworth (1969) on up-or-down votes. [See Record Vote #348 (Oct. 23, 1987) (defeated 42–58); Record Vote #112 (Apr. 8, 1970) (defeated 45–51); Record Vote #135 (Nov. 21, 1969) (defeated 45–55).] Even in the 10Sth Congress, when the Senate voted on the nomination of J. Leon Holmes to a federal district court in Arkansas, five Republicans voted against President Bush's nominee. Had several Democrats not voted for Mr. Holmes, he would not have been confirmed. [Record Vote #153 (July 6,2004) (confirmed 51–46).] In other words, the Senate still has the ability to work its will in a nonpartisan fashion as long as the minority permits the body to come to up-or-down votes. Members from both parties will ensure that the Senate does its constitutional duty by carefully evaluating all nominees.

CONCLUSION

Can the Senate restore order when a minority of its members chooses to upset tradition? Does the Constitution empower the Senate to act so that it need not acquiesce whenever a minority decides that the practices, procedures, and rules should be changed? Can the Senate majority—not necessarily a partisan majority, but simply a majority of Senators—act to return the Senate to its previously agreed-upon norms and practices? The answer to all these questions is a clear yes. The Senate would be acting well within its traditions if it were to restore the longstanding procedural norms so that the majority standard for confirmation is preserved and nominees who reach the Senate floor do not fall victim to filibusters.

Mr. KYL. These precedents—in 1977, 1979, 1980, and in 1987—bear directly on the situation the Senate faces today. In those instances, Senate business was being obstructed by dilatory tactics that had not traditionally been employed but which were permitted under the rules. The Senate faced the same conundrum as it does today: Must the Senate permit rule by the minority, or can it exercise its constitutional power to restore traditional practices? In

each case, the Senate did the latter. It created precedents that altered the practices and procedures and, in some cases, operation of the standing rules themselves in order to ensure that tradition was upheld.

What did not happen as a result of these earlier exercises of the constitutional option?

Well, first, the Senate did not collapse or become ''like the House of Representatives,'' which is the fear of many Senators today.

Second, Senators' speech rights are just as strong as ever. Nor were Americans' free speech rights injured, as some Senators say will happen.

Third, minority rights were not destroyed. The Senate minority is as vibrant as ever and has been remarkably successful in obstructing the business of the Senate, whether we are talking about the Energy bill, medical liability lawsuit reform, asbestos reform, tax relief, or other issues.

Before I close, I would like to address concerns that some of my conservative friends have recently expressed. Some are fretting that Republicans are taking a dangerous step by restoring the traditional up-or-down vote standard for judicial nominees. My friends argue that Republicans may want to filibuster a future Democratic President's nominees. To that I say, I do not think so. And even if true, I am willing to give up that tool. It was never a power we thought we had in the past, and it is not one likely to be used in the future, unless that longstanding tradition is abdicated.

I know some insist we will someday want to block judges by filibuster, but I know my colleagues. I have heard them speak passionately, publicly and privately, about the injustice done to filibustered nominees. I think it highly unlikely that they will shift their views simply because the political worm has turned, again, if we sustain the tradition of the Senate. So I say to my friends what you say that we Republicans are losing is in fact no loss at all.

My friends also argue that the legislative filibuster will be next. I have even seen some media outlets insist that this exercise of the constitutional option for judicial filibusters will automatically apply to the legislative filibuster. This is completely false. Moreover, no Republican Senator wants to eliminate the legislative filibuster and few, if any, Democrats do. Some once did, but they recently recanted. In fact, the junior Senator from California said she was ''wrong . . . totally wrong'' ever to have thought otherwise.

Everyone here knows that political fortunes change. It is one thing to give this supposed ''right'' that had never been used, such as this filibuster of judicial nominees. It is quite another to be so shortsighted as to eliminate such a powerful legislative tool. In fact, the first vote I ever cast as a Senator was to preserve the legislative filibuster, and I was in the majority.

But I think it is important to acknowledge, in the interest of intellectual honesty, that if the majority wanted to eliminate the filibuster for all matters, including legislation, it would have certainly had that power. It would be wildly imprudent, contrary to tradition, generally destructive of the institution, but that is what the Constitution provides—the power of the Senate to govern itself.

In closing, I say to my colleagues what we are contemplating doing is in the best traditions of the Senate. We are restoring our consensus practices for managing the judicial confirmation process using a tool that has been repeatedly used and has always been available. I look forward to completing this debate so that we can start voting on individual judicial nominees and turn to the pressing legislative matters of the Senate.

EXHIBIT 1

[From the Washington Times, May 19, 2005.]

A UNIQUE CASE OF OBSTRUCTION

(By Senator Bob Dole)

In the current debate over judicial nominations, some commentators claim Republicans such as myself are misrepresenting history by suggesting the current filibuster tactics of the Democrats are unprecedented.

These commentators cite the 1968 nomination of Abe Fortas to be chief justice of the United States as an example of how Republicans once attempted to block a judicial nomination on the Senate floor. I welcome the opportunity to respond to this claim, because the more Americans learn about the history of judicial nominations, the more they will realize how terribly off-track our confirmation process has become.

In 1968, President Lyndon Johnson sought to elevate his longtime personal lawyer, then-Associate Supreme Court Justice Abe Fortas, to be chief justice. I would not be elected a senator for a few more months, but followed the news surrounding this nomination closely.

There were problems with the Fortas nomination from the beginning. Not only did he represent the most aggressive judicial activism of the Warren court, but it soon became apparent Justice Fortas had demonstrated lax ethical standards while serving as an associate justice.

For example, it emerged Fortas had taken more than $15,000 in outside income from sources with interests before the federal courts. This was more than 40 percent of his salary at the time, or about $80,000 in today's dollars.

More fundamentally, Fortas never took off his political hat when he became a judge. While serving as a Supreme Court justice, Fortas continued serving as an informal political adviser to the president and even involved himself in Vietnam War policy. It later emerged Fortas had discussed pending cases with the president, an obvious violation of professional ethics.

In fact, less than a year after his nomination as chief justice was withdrawn by President Johnson, Justice Fortas was forced to resign from the Supreme Court due to ethical breaches.

The claim Fortas was not confirmed due to a ''filibuster'' is off-base. A filibuster, commonly understood, occurs when a minority of senators prevents a majority from voting up-or-down on a matter by use or threat of permanent debate.

That simply did not happen with Fortas, where the Senate debated the nomination's merits quite vigorously. Senators exposed the ethical issues involved and the widespread belief the vacancy had been manufactured for political purposes. They sought to use debate to persuade other senators the nomination should be defeated.

After less than a week, the Senate leadership tried to shut down debate. At that time, two-thirds of the senators voting were needed to do so, yet only 45 senators supported the motion. Of the 43 senators who still wished to debate the nomination, 24 were Republicans and 19 were Democrats.

President Johnson saw the writing on the wall—that Fortas did not have 51 senators in support of his nomination—so he withdrew the nomination before debate could be completed.

The events of 37 years ago contrast markedly with those the Senate faces today:

(1) Fortas lacked majority support when President Johnson withdrew his nomination. Today, Senate Democrats block up-or-down votes on judicial nominees who are supported by a majority of senators.

(2) Justice Fortas was politically associated with President Johnson and eventually resigned from the Supreme Court under an ethical cloud. No such charges have been made against President Bush's nominees.

(3) The Senate debated the Fortas nomination only for several days before Johnson withdrew the nomination, versus the four years some of President Bush's nominees have been pending. It's clear the Democrats today have no desire to persuade, and have even complained further debate is a ''waste of time.''

(4) Fortas' support and opposition were bipartisan, with Republicans and Democrats on both sides of the question. Today, the controversy is purely partisan—with only Democratic senators, led by their leader Harry Reid, opposing an up-or-down vote.

I recall two judicial nominations of President Clinton's particularly troubling to me and my fellow Republican members when I was the Republican Leader in the Senate. Despite our objections, both received an up-or-down vote on the Senate floor. In fact, I voted to end debate on one of these nominees while voting against his confirmation. Republicans chose not to filibuster because it was considered inappropriate for nominations to the federal bench.

By creating a new 60-vote threshold for confirming judicial nominees, today's Senate Democrats have abandoned more than 200 years of Senate tradition.

For the first time, judicial nominees with clear majority support are denied an up-or-down vote on the Senate floor through an unprecedented use of the filibuster. This is not a misrepresentation of history; it's a fact.

The PRESIDING OFFICER (Mr. ALLEN). The Senator from Texas.

Mr. CORNYN. Mr. President, at a time when it seems like too often debate on the President's nominees have shed more heat than light, it has been a delight for me to sit here, as the Chair has, and listen to the Senator from Arizona present in comprehensive detail the legal and constitutional framework for the Senate's authority to set its own rules by establishing precedents, passing standing rules, adopting standing orders by unanimous consent, and otherwise. It was an excellent presentation and, indeed, a strong case, and that is exactly why leading Senators on the other side of the aisle, including the former Democratic majority leader, the Senator

from West Virginia, the Senator from Massachusetts, and the junior Senator from New York, have all stated, as recently as 2 years ago, that, of course, a majority of Senators has the power to set rules, precedents, and procedures. Indeed, that is why the power of the Senate majority to set rules, precedents, and procedures is known as the Byrd option or, as some have called it, the constitutional option.

Let me begin my remarks by making one simple point. I would prefer the bipartisan option to the Byrd option every time. America works better, indeed the Senate works better, when we work together in a bipartisan way to try to solve the problems that come before the Congress. I would much prefer to stand up here, after waking each day, and conduct business in a bipartisan manner.

I have done my best to make the most of every opportunity that I have seen to do so since I have been in the Senate. For example, I have enjoyed working with the senior Senator from Vermont on legislation to strengthen the accessibility, accountability, and openness of the Federal Government.

I have worked with the junior Senator from Wisconsin and the senior Senator from Connecticut on the important issue of continuity of Government in the wake of a future terrorist attack.

I have worked with the senior Senator from New York on ways that we together can combat modern day slavery and human trafficking.

And I have worked with the senior Senator from Massachusetts on military citizenship and immigration issues.

I would choose collaboration in this kind of bipartisan cooperation any day of the week. But bipartisanship is a two-way street. Both sides must agree on certain fundamental principles and a fair process that applies no matter who is in power, whether we have a Republican President or a Democratic President, whether we have a Republican majority or a Democratic majority.

The most fundamental principle of all is fairness. Fairness means that the same rules apply regardless of who is President.

Bipartisanship is difficult, however, when long-held understandings and the willingness to abide by basic agreements and principles has unraveled so badly. Where fairness falters, bipartisanship will fail.

So I ask my colleagues, what are we supposed to do when these basic principles, commitments, and understandings have unraveled? What are we to do when nominees are attacked, including being called names, simply for doing their jobs, when they are attacked for following judicial precedents adopted and agreed to by appointees of Presidents Clinton and Carter, when they are singled out for their decision on a particular case even though it was held by a unanimous or near unanimous court?

What are we to do when these nominees are demonized and caricatured beyond recognition to those of us who actually know them; when Senators on the other side of the aisle call them kooks, despicable, Neanderthal, and scary; when nominees are condemned as unqualified or perhaps lacking in judicial temperament, while at the same time they are deemed unanimously well qualified by the American Bar Association, an institution that the Democrats have always revered and held up as the gold standard when it came to qualifications to serve on the Federal judiciary?

What are we to do when Senate and constitutional traditions are abandoned for the first time in more than two centuries, when both sides once agreed that nominees would never be filibustered, and then one side simply denies the existence of that very agreement when it suits them, when their interpretation of Senate tradition changes based on who happens to occupy the Oval Office and who happens to be in the majority in the Senate?

What are we to do when our colleagues boast to their campaign contributors of this ''unprecedented'' obstruction, and then come to the Senate floor and claim that it is someone else who has changed the rules; when our colleagues justify their obstruction by pointing to Clinton nominees, such as their most prominent example, Judge Richard Paez, who was confirmed by standards they now reject for this President's nominees?

What are we to do when our colleagues on the other side of the aisle claim that Justice Owen must cross the threshold of 60 votes, whereas Judge Paez only required 51 votes to be confirmed?

What are we to do when the Democrats' former majority leader, the Senator from West Virginia, claims on 1 day that the filibuster is sacrosanct and sacred to the Founders when in January of 1995 he said:

> I have seen filibusters. I have helped to break them . . . the filibuster was broken—back, neck, legs, arms.

Finally, what are we to do when they claim on 1 day that all they seek is more time to debate a nomination and then claim on another day that there are not enough hours in the universe to debate the nomination?

The new requirement this partisan minority is now imposing, that nominees will not be confirmed without the support of at least 60 Senators, is, by their own admission, wholly unprecedented in Senate history. The reason for this is simple. The case for opposing this fine nominee, Justice Priscilla Owen, is so weak the only way they can attempt to successfully oppose her is by changing the rules, imposing a double standard in an attempt to defeat her nomination.

Different Senators during the course of this debate have come to the floor and criticized judicial decisions that Justice Owen has participated in as a member of the Texas Supreme Court. As Members of this body know, I formerly served on that same court and for 3 years had the distinct pleasure of serving alongside of this able judge and fine and decent human being. I can tell you from the sharp attacks that have been made against her and the mischaracterizations that have been made of the opinions she has written and joined, I doubt that many Senators have actually read those opinions. If they had, they would not be able, with a straight face, to make some of the claims that have been made on this floor.

Rather than reading the opinions of this able jurist and fine and decent human being, it appears the talking points they have been using are written, not based on what these cases actually say, but they are talking points prepared by political consultants who are more concerned with winning a partisan political battle at any cost.

A number of Senators, for example, have mentioned a case called Montgomery Independent School District v. Davis. That is supposed to be an example of Justice Owen being ''out of the mainstream.''

But I ask my colleagues, just read the opinion. The case involved the authority of a local school board to dismiss a poorly performing and abusive teacher. This teacher admitted that she had referred to her students as little blank blank blanks, a four-letter expletive that I will not mention on the floor of the Senate. But when confronted with this, the teacher justified the use of this expletive—to schoolchildren mind you—on the bizarre ground that she used exactly the same language when talking to her own children—clearly unacceptable conduct on the part of any teacher, or any adult who is given the authority to deal so closely with impressionable children.

The Senator from New York says this teacher was wrongly dismissed. Numerous other Senators have likewise characterized Justice Owen's decision in the case the same way.

I have children. Many Senators have children. Are Justice Owen's opponents really arguing that this teacher acted appropriately? That she was wrongly dismissed and that somehow this decision, or this ruling by Justice Owen—I should say in her dissenting opinion—somehow renders her out of the mainstream? Justice Owen simply said the local school board was justified in dismissing this teacher, hardly a decision out of the mainstream. I daresay the vast majority of America would agree with her.

However, in that case the majority of the Texas Supreme Court disagreed and held that the school board could not dismiss the teacher, notwithstanding the fact that she conceded the language that she used. Justice Owen's dissenting opinion simply concluded that the majority ''allows a state hearing examiner to make policy decisions that the Legislature intended local

school boards to make.'' She also noted that the majority ''misinterpreted the Education Code.''

Another case that Senators, particularly the Senator from Massachusetts, attacked Justice Owen for was Texas Farmers Insurance Company v. Murphy. In this case, Justice Owen ruled that neither an arsonist nor his spouse should benefit from his crime by recovering insurance proceeds.

The senior Senator from Massachusetts says this position puts Justice Owen out of the mainstream. I disagree. Do Justice Owen's opponents really believe that it is extreme and out of the mainstream to say that arsonists and their spouses should not benefit from their crime?

I also point out that Justice Owen's ruling in this case followed two unanimous decisions of the Fifth Circuit Court of Appeals, the very court to which she has been nominated. Again, hardly out of the mainstream.

How about the case of FM Properties Operating Company v. the City of Austin, relied upon also by the senior Senator from Massachusetts and other Senators? Justice Owen is criticized for dissenting in this case because she did not want to use a doctrine known as the nondelegation doctrine in order to strike down a Texas law as unconstitutional. Yet just last month, another Senator, this time the senior Senator from Delaware, criticized another judicial nominee, Bill Pryor, for wanting to use the nondelegation doctrine in another situation. So Justice Owen's critics seem to be saying if you support the use of this particular legal doctrine, the nondelegation doctrine, you are out of the mainstream. And if you oppose the nondelegation doctrine, you are somehow out of the mainstream.

I ask them, which one is it? The truth is, this legal doctrine known as nondelegation is a controversial theory that is often harshly criticized by liberals who accuse conservatives of wanting to use it to strike down laws enacted by the legislature. That is fine. Fair enough. But that is exactly what Justice Owen's dissent criticized the majority of the court for doing. She stated the court has seized upon this rarely used nondelegation doctrine to claim the constitutional authority for an unprecedented restriction of the legislature's power, and that the court today exercises raw power to override the will of the legislature and of the people of Texas.

It reminds me of the lyrics of a country and western song: ''Darned If I Do, Danged If I Don't.''

Justice Owen cannot win. She is being whipsawed by Senators who on one hand criticize her for doing one thing, when other Senators criticize some other nominee for doing something else. They really are arguing both sides against the middle and these nominees cannot win, according to that inconsistent, and some might even claim hypocritical test.

The Senator from Illinois has attacked Justice Owen for a ruling in the City of Garland v. Dallas Morning News. In that case Justice Owen followed precedents adopted by three appointees of President Carter to the Federal bench. So Justice Owen is now too conservative and out of the mainstream because she happens to agree with presidential appointees of President Jimmy Carter?

The majority opinion in that case said we should not blindly follow the Federal courts. Justice Owen simply said that the courts should follow Federal precedence because Texas open government laws had originally been modeled after the Federal Freedom of Information Act.

One last example. The Senator from Washington mentioned a case that was discussed in a recent op-ed in Roll Call. She claimed that in Read v. Scott Fetzer Company, Judge Owen would not allow a woman who was raped by a vacuum cleaner salesman to sue the company that had hired him without a background check.

The Senator should check her facts because it is simply not true. The Senator must not have seen my letter published in Roll Call a few days later because I pointed ought there, as I point out here, that the dissenting opinion made clear no one questions that the company that had hired the rapist is, in fact, liable. The justices simply disagreed on whether another company, one that had not hired the rapist and had no relationship with the rapist, should also have been held liable.

Of course, a number of Senators have spoken about the parental notification cases. That is the attempt by the Texas Supreme Court to interpret a new statute which stands for the proposition which I think most Americans would agree with, that when minor girls seek to get an abortion, they should notify their parents or, failing that, seek a bypass of that requirement from a judge. That is what the legislature said they should do, and that is precisely the statute that Justice Owen sought to interpret.

I ask the people across America who may be listening to the debates we are having in the Senate, whom would you trust to judge Justice Own and whether she did a good job in that case? Who was more credible to talk about the quality of Justice Owen's legal analysis in the parental notification cases? Would it be, perhaps, say, the author of the law she was interpreting who supports Justice Owen? Would it be, perhaps, her former colleagues on the court, including former Justices Alberto Gonzales and Greg Abbott, who support Justice Owen's nomination. How about now—Attorney General Alberto Gonzales, who swore under oath that the accusations we are hearing are untrue and that he never accused her of being a judicial activist.

I have seen some of the advertising that has been done by some of the interest groups attacking Justice Owen unfairly who are claiming that Alberto Gonzales accused her of being a judicial activist. As I pointed out, he swore under oath that is not true. It is clear by any reasonable reading of the opinions that he never referred to her by name or was even, in fact, referring to her by implication.

It reminds me of what Mark Twain said: A lie can travel around the world while the truth is still putting on its shoes.

How about the pro-choice Democratic law professor appointed by the Texas Supreme Court to help set up procedures under which parental notification statute. Would critics tend to think she might be a credible person when it comes to whether Justice Owen did a good job if this same Democratic pro-choice law professor supports Justice Owen too? She said in a letter that has been made part of the CONGRESSIONAL RECORD Justice Owen simply did what good appellate judges do every day. If this is activism, then any judicial interpretation of a statute's terms is judicial activism.

I ask, should we trust the critics who have misconstrued and mischaracterized and painted a picture of this fine person beyond any recognition by those who know her and have worked alongside her or do you trust the people who actually know her, the people who have worked most closely with her? In fact, it is the very same liberal special interest groups who criticize her today who never wanted the legislature to pass this parental notification law in the first place.

It is these same liberal interest groups who literally make their living trashing nominees of this President who are criticizing Justice Owen today.

As a former justice of the Texas Supreme Court myself, I find these cases moderately interesting reading. Most Senators and most Americans probably do not, and that is fine. But we can surely agree on this. If these cases are accurately characterized and understood, they definitively demonstrate that Justice Owen is a capable and well-qualified judge, and that of course is why she enjoys such impressive and wide-ranging endorsements from across the aisle.

We should keep our eye on the ball. Let's remember what judicial activism really means because the American people know a controversial judicial ruling when they see one. Whether it is the radical redefinition of our society's most basic institutions like marriage, or the expulsion of the Pledge of Allegiance from our classrooms, or from the public square, whether it is the elimination of the three strikes and you are out law and other penalties against hardened criminals, or the forced removal of military recruiters from college campuses, Justice Owen's ruling, of course, falls nowhere near this category of cases.

There is a world of difference between struggling to try to interpret the ambiguous expressions of a legislative body and refusing to obey a legislature's directives altogether.

If the Senate today were simply to follow more than 200 years of consistent Senate and Constitutional tradition dating back to our Founding Fathers, there would be no question that Justice Owen would be confirmed today. President after president after president had their judicial nominees confirmed by a majority vote, not a supermajority vote.

By their own admission, at least at one time, Justice Owen's opponents in this body are using unprecedented tactics to block her nomination and prevent a bipartisan majority from casting their vote in favor of her confirmation.

Again, the reason is simple: The case for opposing this fine nominee is simply so weak that only by using a double standard and changing the rules can they hope to defeat her. Legal scholars across the spectrum have long concluded what we in the Senate know instinctively, and that is to change the rules of confirmation, as a partisan minority has done these last 4 years, badly politicizes the confirmation, as a partisan minority has done, and badly politicizes the Judiciary and hands over control of the judicial confirmation process to special interest groups.

I ask unanimous consent a summary of supporting quotes from legal scholars be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1)

Mr. CORNYN. Mr. President, the record is clear, notwithstanding what some opponents have said today and in the last 4 years. The Senate tradition has always been a majority vote, and the desire by some to alter that Senate tradition has been roundly condemned by legal experts across the political spectrum.

I will close by simply reinforcing what the Senator from Arizona stated so well in his earlier remarks. To employ the Byrd option is not a radical move at all. It would merely be an act of restoration. In fact, as we have heard time and time again, there is ample precedent to support the use of this point of order.

The senior Senator from West Virginia was then majority leader of this body and used this on four separate occasions—in 1977, in 1979, in 1980 and again in 1987—to establish precedence to change Senate procedure during a session of Congress. Other leading Senators from the other side of the aisle have recognized, time and again, the legitimacy of the Byrd option, including the Senator from Massachusetts, as well as the junior Senator from New York as recently as 2 years ago.

In the end, I believe this debate demonstrates, without a doubt, that it is time to fix our broken judicial confirmation process. It is time to end the blame game, to fix the problem, and to move on and do the American people's business. It is time to end the wasteful and unnecessary delay in the process of selecting judges that hurts our justice system and harms all Americans.

It is simply intolerable for a partisan minority to block a bipartisan majority from conducting the Nation's business. It is intolerable that the standards now change depending on who is in the White House and which party is the majority party in the Senate. And it is simply intolerable that this nominee—this fine and decent human being—an outstanding judge has wasted 4 long years for a simple up-or-down vote.

Yes, we need a fair process for selecting fair judges, after full investigation, full questioning, full debate, and then a vote. Throughout our Nation's more than 200-year history, constitutional rule and Senate tradition for confirming judges has always been a majority vote. And that tradition—broken 4 years ago after this nominee and others were proposed by the President—must be restored. After 4 years of delay, affording Justice Owen a simple up-or-down vote would be an excellent start.

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

EXHIBIT 1

Professor Michael Gerhardt, who advises Senate Democrats about judicial confirmations, has written that a supermajority requirement for confirming judges would be ''problematic, because it creates a presumption against confirmation, shifts the balance of power to the Senate, and enhances the power of the special interests.''

D.C. Circuit Judge Harry Edwards, a respected Carter appointee, has written that the Constitution forbids the Senate from imposing a supermajority rule for confirmations. After all, otherwise, ''[t]he Senate, acting unilaterally, could thereby increase its own power at the expense of the President'' and ''essentially take over the appointment process from the President.'' Edwards thus concluded that ''the Framers never intended for Congress to have such unchecked authority to impose supermajority voting requirements that fundamentally change the nature of our democratic processes.''

Georgetown law professor Mark Tushnet has written that ''[t]he Democrats'' filibuster is . . . a repudiation of a settled, preconstitutional understanding.'' He has also written: ''There's a difference between the use of the filibuster to derail a nomination and the use of other Senate rules—on scheduling, on not having a floor vote without prior committee action, etc.—to do so. All those other rules . . . can be overridden by a majority vote of the Senate . . . whereas the filibuster can't be overridden in that way. A majority of the Senate could ride herd on a rogue Judiciary Committee chair who refused to hold a hearing on some nominee; it can't do so with respect to a filibuster.''

And Georgetown law professor Susan Low Bloch has condemned supermajority voting requirements for confirmation, arguing that they would allow the Senate to ''upset the I carefully crafted rules concerning appointment of both executive officials and judges and to unilaterally limit the power the Constitution gives to the President in the appointment process. This, I believe, would allow the Senate to aggrandize its own role and would unconstitutionally distort the balance of powers established by the Constitution.'' She even wrote on March 14, 2005: ''Everyone agrees: Senate confirmation requires simply a majority. No one in the Senate or elsewhere disputes that.''

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. CORZINE. Mr. President, I rise today to address the nomination of Priscilla Owen to the Fifth Circuit Court of Appeals and to oppose the majority's challenge to our Nation's constitutional framework of checks and balances. I also rise to protect the rights of the minority in our political system.

This debate is historic in the context of American constitutional practice, and it deals with the core of necessary consensus building that has united and strengthened America throughout our political life.

Though I have come to the floor on a number of occasions this year to speak on vital domestic and national security concerns affecting New Jersey's and America's citizens, today, with disappointment, I rise to speak—not about issues such as the safety of our troops in Iraq; protecting our citizens at home from terrorist threats, whether it be at chemical plants or ports or airports; ending genocide in Darfur; strengthening Social Security; providing access or cost control to health care; lowering gas prices, combating global warming; or building affordable housing—all vital issues to the American people—instead, I am here because some in this body think it is their responsibility and right to eliminate minority rights when it comes to approving lifetime appointments to the U.S. Court of Appeals and to the U.S. State supreme court.

I rise to protest this attack on our constitutional system and our Senate traditions. In short, it is an attack that I think supports the view that breaking the rules is the way to change the rules. We are here today because a number of my colleagues, many in good faith, wish to ignore the principles embedded in the U.S. Constitution and allow the will of the majority to reign supreme. Absolute power is often said to corrupt, and limiting the checks and balances of the right to debate on the Senate floor can most certainly facilitate that abuse.

There was a reason our Founders gave two votes to each State. That fundamental principle was debated as the Founders wrote our Constitution. Today, there are two Senators from California, a State with 36 million citizens. Similarly, there are two Senators from the State of Wyoming, which has slightly more than 500,000 citizens. Our Founders believed strongly in the right of minorities to have a voice on the floor of the Senate and embedded this principle in our Constitution. It is absolutely one of the most essential compromises that was a part of creating our Constitution. In fact, it has been the framework that has allowed the Constitution to work so effectively for some 217-odd years.

At a practical level, this overreach—some might call abuse—by the majority is unfortunate for those of us who have been pleased to work well with the White House in building a consensus on judicial nominations. It has happened in our State. For example, New Jersey Senators have met and agreed to a set of five judges, including, by the way, a circuit court judge who reflects the best of our legal community and who travels well within the mainstream of legal thought.

Over my 4½ years in the Senate, the White House and I have agreed on an outstanding package of jurists of whom we can all be proud. And we are currently working with the White House on another package—for district court judges and one additional circuit court judge.

Let me be clear, while many of these judges would not have been my first political or philosophical choice, I have worked, together with Senator LAUTENBERG, and before him with Senator Torricelli, with the White House to come to an agreement on smart, fair, and hard-working judges for the Federal bench in New Jersey—people clearly in the mainstream, people of whom we will all be proud to have as lifetime judicial appointments. All of these are judges committed to the rule of law and not to promoting their own political views or trying to rewrite law through judicial activism.

I have voted many times for judges with whom I disagree on important issues—issues as fundamental to me as choice or worker protections. But I have voted for them because they respect the law and precedent. What I cannot and will not agree to are nominees who are political ideologues people who let us know that they will challenge precedent in order to promote their political beliefs and what I believe is an extremist agenda. They want to change the law. The job of writing laws is the job we have right here on the Senate floor.

This debate is particularly important in a practical sense to me because there is a vacancy currently on the Third Circuit Court of Appeals due to the retirement of Michael Chertoff, now the head of our Nation's Department of Homeland Security. I fear this Third Circuit vacancy is in jeopardy of going the way of what we have seen with the nomination of these activist judges—jurists with views outside the mainstream, with extremist views, who believe that it is their right to make the law as opposed to interpret it or apply it.

If these activist individuals want to make law—and they may have remarkable resumes—they should run for Congress or the Senate rather than accept a nomination to the Federal bench.

That is why my support for the filibuster in the judicial nominating process is not about anything but the fundamental constitutional principles established by our Founders.

It is not about getting even. It is not tit for tat. I am not suggesting Democrats should block nominations because Republicans have used process and procedure to stop Democratic nominees, which, in fact, has been the case. The hard facts show that the Senate has approved 208 of President Bush's 218 judicial nominations. That is a 95-percent rate of approval—not too bad; as a matter of fact, I think most people would think if you were hitting at that level in baseball, you would be doing pretty good.

President Clinton's nominees were often held up before they even had a chance for debate in committee, a different procedural process that led to about over 60 of the Clinton nominations being blocked. But again, I don't think this issue is about tit for tat or getting even.

It is misplaced for others to argue that Democrats are being obstructionist because we refuse to serve as rubberstamps. I was not elected by the people of New Jersey to be a rubberstamp. Actually, they don't like that kind of thing in New Jersey.

Republicans may one day see a change in their majority status, and many of my Republican colleagues may not like this change at another point in time. I don't think they would seek to be a rubberstamp in the judicial nomination process at that time.

This is not about an up-or-down vote, as Republicans suggest. That argument is intended to divert the attention of the American people from the real issue—the rights of the minority in the Senate, as developed by our constitutional Founders, the U.S. system of checks and balances, and, frankly, the principle of fundamental fairness, that you don't change the rules in the middle of the game.

Here is the argument that this is not about an up-or-down vote. The majority blocked over 60 of President Clinton's nominees. They never allowed them to have an up-or-down vote on the Senate floor and, frankly, they never allowed them to have an up-or-down vote in committee. They just used different rules and different procedures, at different time, but they accomplished the same thing.

Additional evidence that this is not about giving nominees an up-or-down vote is the simple fact that historically the filibuster has been used as a Senate procedural tool, often to prevent Democratic judicial nominees from receiving an up-or-down vote in the Senate.

Since 1968, at least according to the legal scholars I have talked to, we have seen Republicans use the filibuster six times to block judicial nominees, perhaps the most visible being the nomination of Abe Fortas to be Chief Justice of the Supreme Court. The Fortas nomination was successfully filibustered and was never given an up-or-down vote.

But just to put it in a broader historical perspective, 20 percent of the nominations to the Supreme Court from our birth as a nation have never gotten an up-or-down vote in the Senate.

One has to put this into a historical perspective. This is something that should be debated on a more fundamental level of what it is that one can draw from the reading of our Constitution. I go back to the fact that there are two Senators for every State, regardless of its size. The intent was to make sure minorities were fully represented.

Looking at this from another perspective, a more political perspective, I accept that Republicans hold 55 seats in the Senate and that President Bush won reelection. However, neither of those facts goes against the constitutional history of the right to speak your mind as a minority. And neither of those facts give the majority the right to break the rules to gain more power. The rules are the rules adopted. A ruling from the Chair without consultation with the Parliamentarian would be an extraordinary action, certainly contrary to anything I have seen in the 4½ years I have been here, certainly contrary to what I hear among my colleagues.

A rule change under extraordinary procedures is why it has been labeled the nuclear option. I would argue if the majority were to adopt this procedure they would be breaking the rules to make the rules. We all know we are setting an extraordinary precedent—and frankly, this could become a slippery slope for this legislative body, particularly when it sets a precedent that may be expanded upon to include legislative filibusters, which I hear almost everyone argue is not something they would embrace. It could be a slippery slope and a dangerous precedent for a thriving democracy and an August body that has served America well by providing for checks and balances through the fullness of our political life.

Our U.S. system is based on the competition of ideas between the two main political parties. Clearly, each side seeks to prevail. What the majority is doing now goes beyond a simple desire to prevail. What is going on here is an attempt by the majority to break the rules to change the rules. That violates the principle of fundamental fairness and actually attacks in a fundamental sense the rule of law under which our Nation operates. You don't break the rules to win in America. That is not the American way.

The American way is to play fairly and consistently by the rules. That is all that I believe we on this side of the aisle are asking for. We are asking for the right to play by the established rules that have been historically in place, consistent with precedent, ones that have existed for decades, to challenge people who we believe are fundamentally unqualified or judicially outside the mainstream to be Federal judges either because of their views, which are inconsistent with precedent, or because of their activist judicial records.

Let me be specific as to the judicial nominees before the Senate: Justice Priscilla Owen and Justice Janice Rogers Brown. Both may be remarkable people in their own right, but that is not my concern. Good people may not be fit to serve as federal judges because of their interpretation of the Constitution, how they apply it or don't apply law, and the activist approach they take.

Let's start with Justice Owen. This is a judge who has consistently inserted her political views into judicial opinions. That is how I read the record. She has had a record distinguished by conservative judicial activism. Justice Owen has consistently voted to throw out jury verdicts favoring workers and consumers against businesses and she has dismissed cases brought by workers for job-related injuries, discrimination, and unfair employment practices, making decisions that are inconsistent with established precedent.

Justice Owen has participated in cases involving companies that have been involved in her own political activities, including Enron and Halliburton decisions. But the real issue, the Houston Chronicle concluded, was that ''Owen's judicial record shows less interest in impartially interpreting law than in pushing an agenda.'' I believe this is a record that is outside the mainstream. That justifies my position and, I believe, that of my Democratic colleagues.

As for Justice Janice Rogers Brown, a California Supreme Court justice nominated to the DC Circuit, she has spent the better part of her time as a judge attacking America's social safety net. The California Bar Commission found Justice Brown unqualified in part because of her tendency to interject her political and philosophical views into her opinions. I don't have a problem with people having political and philosophical views. Most of the folks who speak here on this floor have political views. But when you go to the bench, you are asked to bring an impartiality, an independence as to how you deal with a case and how you apply the law and interpret the law. Justice Brown, through her opinions as a judge has made it clear that she has a disregard for legal precedent. Justice Brown has called Supreme Court decisions upholding the New Deal ''the triumph of our socialist revolution.'' I believe that is outside the mainstream. Let us not forget, by the way, that one of the main components of the New Deal was the creation of Social Security, which is now having a debate in this Nation. It is hardly a socialist initiative.

Justice Brown has also—always in dissent—used constitutional provisions or defied the legislature's intent to attempt to restrict or invalidate laws that she doesn't like—as, most notably, she did with California's anti-discrimination statute. And so I believe that this is a case where there is reason to believe that Justice Brown would operate outside of the mainstream if confirmed as a federal judge.

I simply cannot support placing such an immoderate judge on the Federal appeals court for a lifetime tenure.

In closing, let me return to where I began. Yes, this is an important debate—maybe one of the two or three most important in the last few years. I think it goes at the core of our constitutional system. It is unfortunate we are not here debating the real problems that face our Nation and the citizens of my State, which include health care costs, gas prices, education, energy costs, and the safety of servicemen. Those are the issues that people talk to me about when I am out and about in my home State. But the people of my home State—and I suspect it is true of people of every State in the Nation—expect us to defend our constitutional liberties. They expect us to stand for checks and balances and for the rights of those in the minority so that we can build a consensus to unite, not divide. They expect us to speak strongly to preserve those rights on the floor of this Senate. I think that is what this debate is about. This debate is a fundamental one and, therefore, truly one of the most important we can have.

I want us to move on to the real issues of the day, and they are challenging for our Nation, for all of us. Men and women are losing their lives. But there is an absolute responsibility for all of us to make sure that our system works with the kind of care and thoughtfulness and the kind of checks and balances that have served our Nation so well.

It is our responsibility to stay tuned to the historical traditions of the Senate and to the principles our Founders put together that said minorities in this Nation have a right to be heard. The Founders established that principle clearly with the Philadelphia Compromise. We must sustain this principle in the days ahead in our debate.

I yield the floor.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. DURBIN. Mr. President, this morning, Senator GORDON SMITH came to the floor. He is a close friend. He made a statement relative to something I said on the floor yesterday about the nomination of Priscilla Owen. I am flattered he was listening, or that someone was listening.

I am afraid what he said about my remarks was not completely accurate. Senator SMITH made the following statement:

As I understood the assistant Democratic leader, he was saying that Judge Owen's membership in the Federalist Society should disqualify her.

Well, this is about the nomination of Priscilla Owen from Texas. I made the point of how interesting it was that while very few lawyers in America belong to the Federalist Society—maybe 1 percent—it turns out that about a third of President Bush's nominees belong to this Federalist Society. I referred to it as the ''secret handshake'' at the White House and that, if you belong, you have a much better chance to become a judge.

I also made a point of the fact that when we ask nominees what the Federalist Society is and why do you belong, we get the craziest answers you can imagine. There was a law professor from Georgetown, Viet Dinh, a nice man who worked for the Department of Justice, and I said to him, ''What is the Federalist Society? Why is it so many Bush nominees belong to it?'' ''Oh,'' he said, ''it is an excuse to have lunch in Chinatown once a month. We go there and somebody talks to us and we eat and come back to school.'' And I would ask others, ''What is it all about?''

With the exception of Senator ORRIN HATCH, who I believe was on the board, or may still be on the board of the Federalist Society, almost nobody will talk publicly about who they are and what they believe.

That was the point I was making. This curious, semisecret society is so quickly disavowed by its members whenever you ask a public question about it. Yet it appears to be one of the most important things you can add to your resume if you want to be a judge from the Bush administration.

And Priscilla Owen of Texas—surprise, surprise—is a member and officer of the Federalist Society. I do not think she should be disqualified because of that. There is nothing illegal about it. I do not know what the philosophy is other than what they state on their Web site. It is very conservative. It thinks that liberals are ruining the world. It goes on and on.

I am not saying that if you belong to that you should not be qualified to serve on the bench. That is not the point. But when I asked someone such as Priscilla Owen, a supreme court justice from Texas whose time must be very precious, why she took the time to join this organization and she cannot or will not answer it, I think it is important.

I voted to confirm the vast majority of President Bush's nominees and a lot of Federalist Society members, so I am not blackballing or disqualifying them. I know it is an ultraconservative society, whatever it is, and I know that so many people are afraid to even acknowledge they are members when it is brought to public attention.

I think their views are extreme and off base, from my point of view. I think their views are extreme and off base when we look at mainstream America. How can you say, as they do, that the legal profession is strongly dominated

by a form of orthodox liberal ideology? Look at the 13 Federal courts of appeal and you find 10 of those Federal courts of appeal in America dominated by Republican-appointed judges. Liberal ideology? How can you say the legal profession is strongly dominated by a form of orthodox liberal ideology when seven out of the nine members of the U.S. Supreme Court were appointed by Republican Presidents?

So what I said about Justice Owen is that her conservative ideology is demonstrated by her membership in the Federalist Society. However, the best documentation on her ideology is her own track record as a judge. So I say to Senator SMITH, no, it does not disqualify Priscilla Owen, but it is curious to me why this supreme court justice had the time to pay the dues and join an organization which she just cannot remember what they believe in. I think there is more to it.

Senator KYL of Arizona also came to the Senate floor. He said something I would like to address. He charged that President Bush has only had 67 percent of his circuit court nominees confirmed, and that this is an alltime low, according to Senator KYL. I do not know if it is true or not. I do not have the data going back all the way in time. But I know this: If the Republican leadership had taken me up on my offer this morning and they had confirmed the four circuit court nominees I asked unanimous consent to bring up for a vote, President Bush's circuit court success rate would be 75 percent. But I was reminded by the Republican leader—in this case the Republican whip, Senator MCCONNELL—that there is just no time in the schedule to bring up more of President Bush's circuit court nominees.

Curious, isn't it? This whole debate, this constitutional confrontation is all about whether President Bush is getting enough nominees. I came to the floor this morning and said: Here are four we can take right now, confirm on a bipartisan basis, and get it done before lunchtime. Senator MCCONNELL of Kentucky said we are much too busy to deal with approving judges on a bipartisan basis. Instead, we are focused on one judge, already rejected by the Senate, who may precipitate a constitutional confrontation here on the floor of the Senate.

Incidentally, President Clinton's circuit court success rate when the Republicans were in control of the Senate: 71 percent. So if President Bush had these four nominees and hit 75 percent, he has already passed the success rate of President Clinton during his tenure in office.

So there is no vacancy crisis here, and they are trying to manufacture it, they are trying to suggest that President Bush is being mistreated, and yet the same Republican leadership that talks about mistreatment could not take the time—namely, an hour or two—to pick up four circuit court nominees who are standing waiting for approval. Democrats are prepared to approve. Of course, that would destroy the argument that somehow we are obstructionist.

I was involved in the debate yesterday when Senate majority leader BILL FRIST came to the floor and said:

> I rise today as leader of the majority party of the Senate, but I do not rise for party, I rise for principle. I rise for the principle that judicial nominees with the support of a majority of Senators deserve an up-or-down vote on this floor.

Moments later, Senator SCHUMER of New York asked Senator FRIST a simple, pointed question: Is it correct that on March 8, 2000, Senator FRIST, the Republican majority leader, voted to uphold the filibuster on a Democratic nominee, Richard Paez? Here is Senator FRIST's reply:

> The issue is we have leadership-led partisan filibusters that have obstructed not 1 nominee but 2, 3, 4, 5, 6, 7, 8, 9, 10 in a routine way. The issue is not cloture votes per say, it's the partisan leadership led use of cloture votes to kill, to defeat, to assassinate these nominees. That's the difference.

I spoke yesterday on the floor afterwards about Senator FRIST's poor choice of words. I said then, and I will say now, he is a man with a good heart. He cares for people. He is a doctor who has saved lives. He is a transplant surgeon, well recognized in his profession as a very accomplished doctor. In his spare time he goes to help the poorest people of the world. So I do not question that he is a man with a good heart. That was never part of it.

I was concerned with his choice of words. It was a very bad day to use the words ''to assassinate nominees.'' Just minutes before, Joan Lefkow of Chicago had been to the Senate Judiciary Committee testifying in very emotional testimony about her own family being attacked in their home and her husband and mother losing their lives.

I do not want to belabor this point. Let me just say, let's be careful with the language we use on the floor when it relates to judges. I do wish to talk about the rest of Senator FRIST's statement, not that particular section.

He admitted in the course of what he said that ''the issue is not cloture votes per se,'' it is not filibusters, per se. And we know from his own actions that the majority leader does not believe that every judicial nominee with majority support deserves an up-or-down vote because he, in fact, on March 8, 2000, voted to support a filibuster. In other words, the thing that he is condemning when it comes to Priscilla Owen is exactly what he did on March 8, 2000—supporting a filibuster against a nominee, Richard Paez. I do not understand that. I cannot understand how he can condemn that today, having done it himself a short time ago.

It turns out that it is a very specific type of filibuster to which Senator FRIST objects—in his words, a leadership-led use of cloture votes. I can see why the majority leader was such a good surgeon. He has taken the scalpel to the filibusters and decided which filibusters are OK and which are not. That really destroys the whole argument that this is all about an up-or-down-majority vote.

Senator FRIST voted to deny Richard Paez an up-or-down-majority vote. Now he says we need to change a 200-year tradition in the Senate so that no one can ever do the same thing he did to Richard Paez. This is an unusual principle to try to follow. It is, in fact, creating a constitutional confrontation over something that is very contradictory on its face.

I believe filibusters are constitutional. They are certainly allowed under the Senate rules. And when we get to the question of motives behind them, I really think that the Republicans, the majority has to dig very deep in order to find an argument to make against the practice we have used and others have used throughout the history of the Senate.

In addition, yesterday morning, before Senator FRIST moved to bring up the nomination of Priscilla Owen, Senator REID asked the majority leader whether it would not make more sense for the Senate to move instead to consider four other nominees about whom there is little controversy. Senator FRIST refused yesterday, as Senator MCCONNELL refused today. So for 2 straight days, the Republicans have had a chance to pick up four circuit court nominees to fill vacancies, to give the President a higher success rate in filling vacancies on these courts than President Clinton, and they have refused; they said we are much too busy. We have to spend time here destroying a precedent in the Senate. We have to reach the point when we can count on Vice President CHENEY to come to the Senate, to sit in that chair and, when asked, give the right answer so they can wipe away with one ruling by Vice President CHENEY a rule that has been in place for over 200 years.

Senator LEAHY asked if we could consider a nominee from Utah, who would have likely won confirmation easily yesterday. Senator FRIST refused. He insisted on bringing up this nomination of Priscilla Owen, one of the most controversial judicial nominees in recent memory, someone who has already been rejected by the Senate.

Why would the majority leader flatly refuse every effort to find a way out of this crisis? I don't know. It is possible he is still taking advice from people who should not be trusted for advice. I don't know if the name Manny Miranda rings a bell, but it should. From the spring of 2002 until April 2003, Mr. Miranda was working for the chairman of the Senate Judiciary Committee, ORRIN HATCH, and then for majority leader BILL FRIST.

Mr. Miranda and other Republican staff hacked into the committee's computers and systematically stole thousands of documents, including confidential memos between Democratic Senators and their staff. I know. I was the biggest target of Mr. Miranda.

I discovered it when the Wall Street Journal published an editorial and quoted extensively from a staff memo in my office. And I said as soon as I read it: Somebody stole this memo. There is no way the newspaper would have a copy of an obscure memo and build an editorial around it.

After some investigation, we learned that in fact Mr. Miranda was behind it.

Let me tell you what then-chairman of the Senate Judiciary Committee, ORRIN HATCH, said. I quote him directly:

I am mortified that this improper, unethical and simply unacceptable breach of confidential files may have occurred on my watch.

At which point Senator HATCH asked the Senate Sergeant at Arms to conduct an investigation. Mr. Miranda was forced to resign from the Senate staff in disgrace. The findings of the Sergeant at Arms investigation were referred to the Justice Department, which then assigned a special prosecutor to the case.

Two years later, with the case still unresolved and finished, it appears Mr. Miranda is back. According to news reports, he is now helping to lead the nuclear option fight from outside the Senate. Yesterday, Mr. Miranda sent an e-mail to allies of Senator FRIST, demanding, ''a straightforward rallying cry: NO DEALS, VOTE PRINCIPLE'' and ''NO UNPRINCIPLED COMPROMISES.''

So here we have a former aide to Senator FRIST, a person who, according to the investigation, broke into Senate computers. He is now in charge of rallying the troops on the conservative side. He is the cheerleader for the nuclear option. And he is demanding that Senator FRIST and other Republicans break the Senate rules to give extremist judges lifetime appointments.

I do not quite understand this. I commend Senator HATCH for the investigation. I commend Senator FRIST for the investigation. They knew as we knew that something wrong, probably criminal, had occurred, and they went forward with an honest investigation. When this man resigned in disgrace you would think that would be the end of his role on Capitol Hill, but now he has returned as a cheerleader for the cause of the nuclear option.

It is hard to keep track of some of these players without a scorecard. But keep track of Mr. Miranda. He will undoubtedly pop up again.

There is another thing that should be addressed. Senator FRIST has given his word in writing that he will not seek to eliminate the filibuster when it comes to legislation—just judicial nominees, Senator FRIST said. But he also said he is leaving the Senate at the end of next year. He has voluntarily, on his own, decided to limit the terms that he would serve.

So the next majority leader, Republican or Democrat is not obliged to take any promise Senator FRIST might make. The truth is, if this Senate, for the first time in history, rejects the principle of extended debate, there is no guarantee that the damage of the nuclear option will not spread. In his opening remarks yesterday Senator FRIST said if Republicans would vote the nuclear option, Democrats ''will retaliate.''

They will obstruct the Senate's other business. They will obstruct the people's business. They will hold back our agenda to move America forward. An energy strategy to reduce our dependence on foreign oil, held back; an end to the medical lawsuit abuse to reduce the cost of health care, held back; a simpler, fair Tax Code to create jobs and to encourage economic growth, held back.

Supporters of the nuclear option say they only want to eliminate the filibuster for judicial nominees. It doesn't take much imagination to consider the possibility of a majority leader in the future saying, with gas prices at an all-time high, America just cannot afford an extended debate on an energy bill.

If we eliminate extended debate for judges who serve for life, why would we preserve unlimited debate on the nominations of Cabinet Secretaries who leave office with the President who appoints them? Or on laws that can be reversed by the next Congress?

The truth is, this line in the sand will disappear with the next wave. This is not about principle. It is about politics.

Many special interest groups have made it clear they are going to fight anyone who tries to eliminate the filibuster over legislation. To quote the conservative columnist, George Will:

It is a short slide down a slippery slope from the postulated illegitimacy of filibustering judicial nominees to the illegitimacy of filibustering any sort of nominee to the illegitimacy of filibusters generally. That is not a position conservatives should promote.

Quote from George Will, the grand guru of the conservative cause.

Former Republic Senators Jim McClure and Malcolm Wallop, both also conservative, agree. In a recent op-ed in the Wall Street Journal, these two former Republican Senators wrote:

It is naive to think what is done to the judicial filibuster will not later be done to its legislative counterpart.

They add:

It is disheartening that those entrusted with the Senate's history and future would consider damaging it in this manner.

I think that is what it gets down to. I think it is a question of this institution and its future and what it is going to look like. Today I am in the minority. You are in the majority. That could change. Every election, the people of this country have the final word on who will be the majority party in the Senate. What has endured throughout all the changes in history from one party to the next is a basic concept and that is, no matter how large your majority, you must respect the minority in the Senate. It is not democracy if you do not respect the minority—it is tyranny. We know that. The Greeks knew that when they invented the term.

Yet when it comes to the rules of the Senate to protect the minority, what we are hearing is that many are ready to cast them aside. Senator FRIST, for reasons I cannot explain, wants to have the distinction, the singular distinction, to go down in history as the only Republican majority leader to destroy a 200-year-plus tradition in the Senate, a tradition of extended debate and filibusters. I do not think that would be a proud moment for this body. I do not think it would be a proud part of any Senator's legacy. That is why many of us are appealing to the other side of the aisle.

Time and again in our Nation's history when we really faced some very difficult situations with judges who were controversial and courts that didn't agree with the President, Presidents have said: Give us more power. We will control those courts.

And when those Presidents came to Congress, as they had to, they found that even their own party would not go along with them. The Senators in those eras of Thomas Jefferson and Franklin Roosevelt took enough pride in this institution to say: We will make our own rules, Mr. President. We will stand by the Constitution. We will not give you more power.

But look what is going on now with this nuclear option. It is being orchestrated by the President. And we have too many Senate Republicans who are playing the role of lapdog to the Commander in Chief. They are sitting there like a group of cocker spaniels in a room full of pit bulls, afraid to speak up. They want to give this President whatever power he asks for, whatever nominee he asks for. What a departure from the tradition of this Senate, when it was truly independent, when we respected the President but also respected—maybe more—our constitutional responsibilities.

Our constitutional responsibility is not to agree with everything the President says; not to agree with everything that he wants; not to give him every shred of power that he seeks. Throughout history, Senators have said: We respect you, Mr. President. We respect the Constitution more.

In the midst of this debate, that has been completely thrown away by so many Republican Senators. They are so loyal, to the point of blind loyalty, that they cannot see what is happening to this institution. That they would walk away from the institutional authority of the Senate, the constitutional authority of the Senate, over what?

Take a look at these numbers—208 to 10. How much more graphic could it be? The full Senate has considered 218 judges, since President Bush was elected, and 208 have been approved. Over 95 percent.

When it comes to the 10, it is arguable who dropped out and who retired, but I will use the larger number of 10 just to demonstrate to those who are following this debate that there is hardly a crisis. This President has been more successful appointing judges than

any President in 25 years. There are fewer vacancies on the Federal courts of America than at any time in recent memory. And it was not that long ago when the Republicans, during the Clinton administration, held a series of hearings, which I attended, arguing that we just have too many Federal judges. Senator GRASSLEY of Iowa, a good friend, chairman of a Subcommittee on Judiciary, used to hold regular hearings calling Republican judges from different circuits who would say: Keep those vacancies. Don't fill them. We have plenty of judges. The caseload is not that heavy.

Now the argument is being made, with even fewer vacancies, that we are in a judicial crisis. We are not. It has been 9 years since we had so few judicial emergencies in the courts. We have been through times of larger vacancies and, unfortunately, the Republican majority would not give President Clinton the judges he needed to fill them.

These are the things which clearly we find are the realities of the debate. A President extraordinarily successful in creating and filling more judgeships, a president who has been extraordinarily successful when it comes to convincing his presidential party to support him, and now a move afoot to change the traditions and rules of the Senate in a way that can create constitutional confrontation, if not constitutional crisis.

There are 55 Republican Senators. We need six—six who will stand up and say: History is our guide. We cannot let this institution change or diminish. We will stand with those on the Democratic side of the aisle, understanding that each of us has to use our own discretion when it comes to those nominees we will vote for, understanding that each of us is aware of the fact that the next election could change the balance in this Senate so quickly.

One of the nominees who will be considered next is Janice Rogers Brown. She may be the nuclear trigger—either she or Priscilla Owen. There was an article in a recent New York Times magazine about a far-right legal movement in America called the Constitution in Exile. This movement consists of judges and scholars who believe that the right to private property and economic liberty is almost absolute. Its adherents believe that nearly all Government infringement on property rights is repressive. They encourage judges to strike down laws on behalf of rights that do not appear explicitly in the Constitution.

If this philosophy sounds familiar, it should. The article lists Janice Rogers Brown as a poster child for the Constitution in Exile movement.

I served as the ranking Democrat at Justice Brown's hearing in October of 2003. I asked her a lot of questions. Her answers offered little assurance that she will be anything other than a judicial activist with a very extreme agenda. Her views on Government, courts, and the Constitution are troubling. She called the year 1937 ''the triumph of our socialist revolution.''

She has said:

> Where government moves in, community retreats, civil society disintegrates and our ability to control our own destiny atrophies.

She has said that politicians are ''handing out new rights like lollipops in the dentist's office.''

She claimed that our Federal courts ''seem ever more ad hoc and expedient, perilously adrift on the roiling seas of feckless, photo-op compassion and political correctness.''

She has even complained in the last 30 years, the Constitution has ''been demoted to the status of a bad chain novel.''

Her rhetoric makes it clear she is inspired and guided by Fountainhead, Atlas Shrugged, and the Road to Serfdom, more than the Constitution and the Bill of Rights.

At her hearing, Justice Brown said her speeches were just an attempt to ''stir the pot.'' Justice Brown's speech did more than stir the pot. Those speeches knocked it off the stove.

I have concerns about her record on the bench, even beyond these speeches where she has opened up her heart.

In her own words, she said:

> I have been making a career out of being the lone dissenter.

In case after case, she has come out on the side of denying rights and remedies to the disadvantaged. Oftentimes she was, indeed, a lone dissenter and oftentimes she ignored even established court precedent and rulings. I have a lot of concerns about her tendency to push her philosophical views into opinions.

The California State Bar Commission in 1996 said as much when it rated Justice Brown as not qualified for the California Supreme Court. Yet the Bush White House wants to appoint her to the second highest court at the Federal level in America.

Justice Brown suggested at her hearing the views in her speech do not reflect the view and her decisions. The facts tell a different story. There is a seamless web between Justice Brown's speeches and her decisions. It is the same person. It is the same philosophy. It is the same conclusion. I have concern about nominating to the DC Circuit someone with her hostility to the forces of Government.

The DC Circuit is the No. 1 adjudicator of Federal agency disputes. I don't think someone who considers the New Deal a ''socialist revolution'' is the right person for the job. Think of all the socialism in the New Deal. I can think of one element that she might call socialism. Franklin Delano Roosevelt called it Social Security.

I want to discuss her evasiveness too. She is a wise lawyer. And good lawyers knows how to duck a question better than a politician. We can't properly perform the advice and consent function of the Senate if nominees will not level with us. Take the Lochner case. This is a famous case that most students study in law school, certainly those who study constitutional law. In her speeches, Justice Brown has praised it. Now, at her hearing we asked her, and she attempted to distance herself from what she said before, saying that the case has been ''appropriately criticized'' and ''discredited.'' Yet she evaded a simple question about whether she agreed with it.

It is an important case. It is a case that spells out the responsibility of the Federal Government when it comes to questions of commerce and liberty of contract. It was a decision by the court many thought moved clearly in the wrong direction and did not even allow Federal jurisdiction in questions regulating health and safety.

Here is another example of her evasiveness. I asked her in writing to explain what rights she was referring to when she said that politicians are handing out new rights like lollipops in a dentist's office. Her full answer to that question was as follows:

> I was merely commenting in general terms and was not specifically criticizing a particular legislative action.

Now, in all fairness, that is a duck and a dodge. She did not answer the question. I asked her whether she agreed with the Federalist Society mission statement, the one I said earlier, about orthodox liberal ideology dominating the legal profession and so forth. She gave me the most evasive answer of any nominee, once again mystified as to what the Federalist Society really means, although she has attended their events.

She said:

> As a judge, I have not had occasion to determine whether the law schools and legal professors are by and large liberal or conservative, and thus do not find myself qualified to offer an opinion on that subject.

She did not answer half the question. My question was about law schools and legal profession and she did not address the legal profession. I can go on, but I tell you this: She was not going to answer questions. We have seen nominees like her before who come before us and defy us to ask questions and to have answers come forward.

There is a legitimate area of inquiry. I can recall when a Republican Member of the Senate Judiciary Committee asked one of President Clinton's nominees to disclose every vote she had cast for a California referendum for or against it in her lifetime. I thought that crossed the line. There is some secrecy in the ballot box and privacy involved, but that was considered a fair range of questions when it came to asking Clinton nominees if they are qualified. When we ask Justice Janice Rogers Brown the most fundamental questions about things she has said publicly, she ducks and dodges.

According to the Washington Post, which has defended many of President Bush's judicial nominees:

> Justice Brown is one of the most unapologetically ideological nominees of either party in many years.

A Los Angeles Times editorial entitled ''A Bad Fit for a Key Court,'' stated:

In opinions and speeches, Brown has articulated disdainful views of the Constitution and government that are so strong and so far from the mainstream as to raise questions about whether they would control her decisions.

That is from her home-State newspaper.

The New York Times echoed that sentiment and said Brown ''has declared war on mainstream legal values that most Americans hold dear.''

The Atlantic Journal-Constitution wrote that Brown's views ''are far out of the mainstream of accepted legal principles.''

The list goes on and on of over 100 organizations, including the Congressional Black Caucus, that oppose Justice Brown.

Dorothy Height recently received the Congressional Gold Medal. She said this about a vote on Justice Brown:

I cannot stand by and be silent when a jurist with the record of performance of California Supreme Court Justice Janice Rogers Brown is nominated to a federal court, even though she is an African-American woman.

Ms. Height, an African-American women herself, goes on to say:

In her speeches and decisions, Justice Janice Rogers Brown has articulated positions that weaken the civil rights legislation and progress that I and others have fought so long and hard to achieve.

Stephen Barnett, a University of California-Berkeley constitutional law professor who had endorsed Brown before her hearing and whose support Chairman HATCH specifically mentioned in his opening statement at Justice Brown's hearing, sent a letter to Senator HATCH after the hearing and withdrew his support for Janice Rogers Brown. This is what Professor Barnett, who was once supposed to be a strong advocate for her, wrote to Senator HATCH after her hearing:

Having read the speeches of Justice Brown that have now been disclosed, and having watched her testimony before the Committee on October 22, I no longer support the nomination.

So you would hear from the Republican side that she is just another routine nominee who is being beaten up on by the Democratic side of the aisle. But when you read through all these comments of people who have observed her in her professional life, those who have followed her, not only fellow judges but those in the legal profession, it is very clear: This is a controversial nominee. She is a person who will bring to the bench something less than the moderation that we look for.

I come from the Democratic side of the aisle. I understand if you are going to put a person on the bench, 9 times out of 10 you should look for a person who is going to try to be moderate and mainstream. What I found is that 10 times out of 10, with very few exceptions, that is exactly what we have ended up with. That is not the case here.

The White House strategy is unfair to Justice Brown and her family, unfair to the Senate, and unfair to those who want to move beyond the environment of political confrontation which has become the hallmark of our efforts. We should not have to go through this knock-down, drag-out over filling these court vacancies. I have said to Chairman HATCH, and I will say again to those listening, there are plenty of good, conservative Republican attorneys and judges who are not so ideologically extreme who could fill these positions. You can find them in Ohio. You can find them in Virginia. You can even find them in Illinois. Why this White House continues to go after some of the most inflammatory, some of the most extreme judges to fill the benches in the highest courts in the land is beyond me.

So when we find, among 218 nominees, 10 who fall into this extreme category, when we say they have gone too far, when we say to the President: You may have 95 percent, but for this other 4 or 5 percent the answer is no—I think we are doing what the Constitution asks us to do: advise and consent.

But the President, of course, says no. I want them all. No dissent, no disagreement—I want every single judge. Strike ''advise and consent'' and put ''consent'' in there. That is what this President wants. Maybe that is what every President wanted. But the Congress and Senate in particular in the past have told those Presidents: No. We have the right to ask these questions and to demand the answers. And if we find a nominee wanting, we have the right to reject them, either by extended debate and filibuster or by the majority vote that ultimately that candidate would face if a motion for cloture prevailed.

So in this case, they have decided that rather than hold these nominees to the same standard, they will change the rules of the Senate. That is what the nuclear option is about, changing the rules in the middle of the game, diminishing the constitutional principle of checks and balances, reducing the power of the Senate against the power of the White House and the Presidency, and saying to this President: You may make lifetime appointments of judges without holding them to the same standards that every President's nominees have been held to.

Some time next week—and I pray to God it does not happen—Vice President CHENEY may take that chair, preside over the Senate, and with just a few words sweep away 200 years of tradition. It is an act of arrogance to think that any person would do that without reflecting on the history of this body and its traditions.

It is an abuse of power that this White House has to have more and more power, that 208 judges out of 218 is not enough, that they are going further. They want them all. And they have found too many compliant Republican Senators who have said: Whatever you want, Mr. President. Sign us up.

I sincerely hope the Senate rises to the occasion. I sincerely hope that six Republican Senators will show the courage to speak out for the value of our Constitution and the tradition of the Senate.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. THUNE). The Senator from Ohio.

Mr. VOINOVICH. Mr. President, I rise to support the nomination of Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit.

I believe it is important that the Senate take its responsibility to advise and consent with respect to nominations very seriously. The people who are appointed to the judiciary, as well as to the executive branch of Government, can have an enormous impact on how our Government operates. In many cases, an appointee can make the difference on whether a particular policy or program is effective.

I also believe the Senate should seek to work in a bipartisan manner, particularly with respect to judges. Since I came to the Senate 6 years ago, I have always been open to listen to any concerns that my colleagues across the aisle may have about a nominee.

There has been a great deal said about Priscilla Owen and her nomination to the Fifth Circuit. I have heard the concerns about Justice Owen, but, frankly, I do not see any basis for them. If Justice Owen is not acceptable as a nominee to the U.S. Court of Appeals, we are going to have a hard time filling the vacancies in the court of appeals.

Let's review Justice Owen's record. Justice Owen has a very distinguished and impressive record as a lawyer, community leader, and most recently as a justice on the Texas Supreme Court.

Justice Owen graduated cum laude from Baylor University and cum laude from Baylor Law School in 1977. She was on the Baylor Law Review and earned the highest score on the Texas bar exam in December of 1977.

Justice Owen joined the well-regarded firm of Andrews & Kurth and rose to be a partner by the remarkably young age of 30. Any lawyer in this body has to be impressed with the fact that someone such as Justice Owen could become a partner at the age of 30. She practiced commercial litigation for 17 years.

In 1994, Justice Owen was elected to the Texas Supreme Court, and, in 2000, as has already been noted, she won a second term to the Texas Supreme Court with a vote of 84 percent.

This is a very impressive record.

I am not surprised that the American Bar Association unanimously rated Justice Owen as ''well qualified.'' That is the highest rating the American Bar Association can give to someone seeking a judgeship.

But Justice Owen's legal credentials are not the only reasons I support her

nomination. In an age where I believe too many people do not take the time to become active members of their communities, Justice Owen has been a real leader in her community.

She is a member of the board of the Texas Hearing & Service Dogs, and a member of the St. Barnabas Episcopal Mission, where she teaches Sunday school. She helped organize Family Law 2000, which seeks to lessen the adversarial nature of divorce proceedings in her State.

She has been honored as Baylor Young Lawyer of the Year and as a Baylor University Outstanding Young Alumna. She also has been active in helping the poor obtain legal services, as well as other pro bono legal activities.

I think her involvement in her community is important. We need judges who not only have exceptional legal skills, which Justice Owen certainly has, but also who have a perspective about how the law impacts upon individuals and communities.

I have reviewed the letters of support she has received, and I am pleased that she has such broad support from the people who know her best and have worked with her.

I also would like to note that even her opponents in the Senate have said they believe her to be a very good person. Accordingly, I do not see any issues that could raise any questions about whether she should be confirmed. Rather, she is exactly the type of serious, hard-working, and well-respected person who should be nominated to the court of appeals.

Some have said that Justice Owen is an extremist who will be a judicial activist. Again, I see no reason for such conclusions. Reviewing her record, I see a judge who vigorously but carefully sets forth her reasoning in her decisions and is willing to stand up for what she thinks is the correct decision. She is not an activist. She is an excellent judge.

Any good nominee who has been active in thinking and writing about issues is going to have statements in their writings that, if taken out of context, can be made to appear extreme. This is what has happened to Justice Owen. Her opponents—mainly partisan interest groups—have scrutinized her writings, looking for anything that they could make into a sound bite to distort her record. But an examination of her record as a whole reveals that claims that she is extremist are baseless. Justice Owen is a good judge and would and will make a great circuit court judge.

There is no need to filibuster this nominee. Justice Owen deserves an up-or-down vote. The filibustering of Justice Owen reveals just why the constitutional option may be necessary. The filibuster is being abused. If the minority is going to abuse its power to filibuster nominees such as Justice Owen, then the nomination process will break down completely. It is already too long and demanding on nominees and their families and deters excellent candidates from choosing to serve. We have no idea of what a chill this is sending throughout the country to people who we would like to serve on the bench but who say: I don't want to go through that process. It is a shame that such an exceptionally qualified nominee such as Miguel Estrada finally asked that his nomination be withdrawn after being filibustered for 2 years. As I look at what a clearly qualified nominee such as Miguel Estrada and Justice Owen must go through to serve our country, I wonder that the judiciary is not going to be able to attract the talent it needs.

If every nominee must get 60 votes, it is clear that many posts simply will not be filled. In addition, if we require 60 votes to confirm nominees, we are only going to see nominees who have no paper trails or records of achievement, who have done little, if any, scholarly work, and who avoid public or judicial controversies. I don't want extremists on the bench, but I also don't want bland nominees who have never had to make difficult decisions.

Comparing the Senate now to the Senate prior to the 108th Congress when filibustering of judicial nominations first occurred, I have to say that I think the old system was a lot better than what we saw in the 108th Congress. Under that system, a nominee who had the support of a majority of Senators, who was reported out of the Judiciary Committee, would get an up-or-down vote after review of the nominee's record and a robust debate. That was the fair way to proceed. It has been that way many times. It has been that way, as a matter of fact, for 214 years. No judicial nominee sent to the Senate floor who had the support of a majority of Senators was denied an up-or-down vote. There were no judicial filibusters. Thus, I do not consider the constitutional option as a change in the rules but a restoration of a Senate tradition, the tradition that filibusters do not apply to judicial nominees.

My colleagues on this side of the aisle, including myself, had many opportunities to filibuster judicial nominees during the Clinton years as well as during the decades it spent in the minority. Just think about how long the Republican Party was in the minority—from 1954 to 1980. All during that time, they never used a filibuster to stop a judge who was nominated. They insisted that there be an up-or-down vote. This was the courtesy that was extended to the other party. It helped make sure that the judicial nomination process worked smoothly and fairly. I wish the present minority would extend the same courtesy now.

I also believe the ongoing abuse of the filibuster is preventing the Senate from addressing other, often more pressing business, such as passing an energy bill, addressing asbestos litigation, and other issues. I can recall in the 108th Congress hour after hour after hour after hour, staying here late at night, working on these judicial nominees when, in my opinion, we should have been doing the other work of the Senate that was important to the people of our country.

The minority has repeatedly claimed that President Bush has had 95 percent or so of his nominees confirmed. Yet we all know this statistic is a smokescreen. The real issue here is the appointment of circuit court judges, and the minority has successfully prevented the confirmation of about a third of President Bush's nominations. President Bush has the lowest confirmation rate of circuit court judges of any President going back as far as President Roosevelt. I think the statistics show that the real issue here is not that any of these judges is extreme but that there is an active campaign to use the filibuster to prevent President Bush from appointing circuit court judges.

It is the President's job to nominate judges, and it is the Senate's job to advise and consent. It is time the Senate started doing its job and voted on these nominees. If a Senator doesn't like the nominee, that Senator should vote against the nominee. If someone doesn't like Justice Owen, vote against her, don't filibuster her and deny your colleagues an up-or-down vote. I want to vote on these nominees.

There have been nominees in the past and some currently and some from my own party who I did not support. But I never filibustered them, even during the Clinton years. I can remember in our conference meetings talking about judges and some of my colleagues getting up and saying at those meetings: Let's filibuster this judge. We can't allow that judge to go forward. That judge is going to be bad for the district court to which they are being nominated. I can remember ORRIN HATCH saying: We can't do that because if we start to do this, God only knows where we are going.

Last time around, my colleagues on the other side of the aisle started a new tradition. It is not a good tradition for the Senate. It is not a good tradition for the people of the United States of America. I believe both the President and my fellow Senators, as well as this country, deserve the courtesy of an up-or-down vote on nominees.

I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. ALLEN. Mr. President, I rise to speak on this matter of judges. I was presiding the last hour and a half or so listening to some of my colleagues speak. I associate myself with the remarks of the Senator from Ohio. But I was listening to my colleagues from New Jersey and Illinois, Senator CORZINE and Senator DURBIN.

I heard the Senator from New Jersey talking about the rights of minorities. The Senate does care about the rights of the minority. When one talks about the rights of the minority, one normally talks about ways to enhance

civil rights, to make sure there is equal opportunity—that there is due process of law.

Sadly, the Democrats have changed the rules. They changed 214 years of practice, which was that when a President nominated a particular person for a judicial vacancy, the Judiciary Committee would examine that individual very closely, as to their scholarship, their temperament, their judicial philosophy, and ultimately if they passed muster, that person would come to the Senate floor. Senators, for 214 years, would vote to confirm or deny confirmation to that particular nominee. That changed just 3 years ago.

What is being suggested by Senator CORZINE and others on the other side is that a minority of only 41 Senators should be able to deny a well-qualified nominee the fairness and the due process of an up-or-down vote on the Senate floor.

These individuals are well qualified, but they are denied the opportunity of an up-or-down vote. These individuals, as Senator VOINOVICH said, go through a gauntlet. And when one of these nominees goes through the gauntlet, that doesn't last just months. It has been lasting for 1, 2, 3, and, in the case of Priscilla Owen, 4 years. Once you get through that gauntlet, you may be bruised and you may have some aspersions made about you and statements taken out of the record and opinions criticized and scrutinized and all the rest.

At the end of the day, when a majority of the Senators are in favor of that individual and they have come out of the Judiciary Committee, they ought to be accorded the fairness, the decency, the due process of an up-or-down vote.

Another statement that was made is that the Senate is to protect minority interests. Well, if one would actually read the Constitution and read the documents and the debates on the Senate, why the Senate was created the way it is and compare that to the way the House of Representatives is, one would find that the Senate is to protect the interests of the people in the States. The Senate is not representative of the population of the country, as is the House.

In fact, the Senate was to serve, in many respects, as a safeguard of State prerogatives. So when the Senator from New Jersey says the Senate is created to protect minority rights, it is to protect the right of the States. Let's recall that it was the people in the States who created the Federal Government. Note the name of our country: The United States of America. In fact, the rights of the States were so closely guarded that State legislators actually selected Senators for most of the history of this country rather than the people. Let's get those facts straight.

All of this sort of talk and background noise is trying to avoid the point that the Democrats' partisan obstruction of the President's nominees is unprecedented. We are trying to get back to the precedent we had for 214 years before they changed it. It is an issue of fairness. It is an issue for me as a Senator from the Commonwealth of Virginia, the State of James Madison, one of the key authors of our Constitution. It is my constitutional duty to advise and consent. What 41 Senators are trying to do is take away my responsibility to the citizens of the Commonwealth of Virginia. I see nothing wrong with voting yes or no.

Now, also in the midst of this flailing and background noise, from time to time, we have heard from the senior Senator from Illinois, casting aspersions on an organization called the Federalist Society, saying because Justice Owen of Texas was a member of the Federalist Society, and that many of President Bush's nominees for the Federal courts were in the Federalist Society, he wondered what this society was all about.

Well, after listening, I had my crack staff get on the Internet and get me the background on the Federalist Society. Let me share this with my colleagues regarding what is called the Federalist Society for Law and Public Policy Studies. Here is their background:

Founded in 1982, the Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians dedicated to reforming the current legal order. We are committed to the principles that the State exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks to promote awareness of these principles and to further their application through its activities.

It goes through its mission and says the purpose of the society is unique. They have legal experts of opposing views to interact with members of the legal profession, the judiciary, law students, academics, and the architects of public policy. They talk about appreciation of the role of separation of powers; federalism; limited constitutional Government; and the rule of law protecting individual freedom and traditional values. Overall, the Society's efforts are improving our present and future leaders' understanding of the principles underlying American law. They have a student division, and the student division has more than 5,000 law students at approximately 180 ABA-accredited law schools, including all of the top twenty law schools.

They have a lawyers' division comprised of over 20,000 legal professionals and others interested in current intellectual and practical development in the law.

I urge my colleague from Illinois to recognize that they have chapters in 60 cities, including Washington, DC; New York; Boston; Chicago; Los Angeles; Milwaukee; San Francisco; Denver; Atlanta; Houston; Pittsburgh; Seattle; Indianapolis, and others. They have a faculty division and more.

I ask unanimous consent that this statement of the background of the Federalist Society be printed in the RECORD before anybody else mischaracterizes the purpose and salutary goals and mission of the Federalist Society.

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

[FROM THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES]

OUR BACKGROUND

Founded in 1982, the Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians dedicated to reforming the current legal order. We are committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks to promote awareness of these principles and to further their application through its activities.

In its mission and purpose, the Federalist Society is unique. By providing a forum for legal experts of opposing views to interact with members of the legal profession, the judiciary, law students, academics, and the architects of public policy, the Society has redefined the terms of legal debate. Our expansion in membership, chapters, and program activity has been matched by the rapid growth of the Society's reputation and the quality and influence of our events. We have fostered a greater appreciation for the role of separation of powers; federalism; limited, constitutional government; and the rule of law in protecting individual freedom and traditional values. Overall, the Society's efforts are improving our present and future leaders' understanding of the principles underlying American law.

The Society is a membership organization that features a Student Division, a Lawyers Division, and a newly-established Faculty Division. The Student Division includes more than 5,000 law students at approximately 180 ABA-accredited law schools, including all of the top twenty law schools. The national office provides speakers and other assistance to the chapters in organizing their lectures, debates, and educational activities.

The Lawyers Division is comprised of over 20,000 legal professionals and others interested in current intellectual and practical developments in the law. It has active chapters in sixty cities, including Washington, D.C., New York, Boston, Chicago, Los Angeles, Milwaukee, San Francisco, Denver, Atlanta, Houston, Pittsburgh, Seattle, and Indianapolis. Activities include the annual National Lawyers Convention, a Speakers Bureau for organizing lectures and debates, and 15 Practice Groups.

The Federalist Society established its Faculty Division in early 1999 with a conference that was attended by many of the rising stars in the legal academy. The objective of the Faculty Division is to provide events and other tools to help encourage constructive academic discourse. This encouragement will help foster the growth and development of rigorous traditional legal scholarship.

Finally, the Federalist Society provides opportunities for effective participation in the public policy process. The Society's ongoing programs encourage our members to involve themselves more actively in local, state-wide, and national affairs and to contribute more productively to their communities.

Mr. ALLEN. Mr. President, the Senator from Illinois went on further to

chastise and criticize the statements that he said were contradictory statements of Senator FRIST in a filibuster, as he characterized it, in the year 2000.

Now, if the senior Senator from Illinois, Senator DURBIN, wants to point to prior inconsistent statements, let me refresh his memory. This is what Senator DURBIN said on September 28, 1998:

I think that responsibility requires us to act in a timely fashion on nominees sent before us. The reason I oppose cloture is I would like to see that the Senate shall also be held to the responsibility of acting in a timely fashion. If, after 150 days languishing in a committee there is no report on an individual, the name should come to the floor. If, after 150 days languishing on the Executive Calendar that name has not been called for a vote, it should be. Vote the person up or down. They are qualified or they are not.

Those are good words from the senior Senator from Illinois in 1998. Those are the principles we are advocating now. These nominees have not been held up for just 150 days. These nominees—Priscilla Owen, Janice Rogers Brown, and others have been held up for months and years, and in Justice Owen's case, four years.

Then we heard from the senior Senator from Illinois, after saying that we ought to watch our words, he called the Republicans dogs, more specifically, cocker spaniels. This was all because we vote for President Bush's nominees for judges. So we are like dogs, cocker spaniels. Let me be like an Australian shepherd and herd in the Democrats for the last few days who have been popping up like prairie dogs. We have heard this charge from others, including Senator KENNEDY, Senator MURRAY, Senator SCHUMER, Senator DORGAN, and Senator DURBIN, who just recently made this unsubstantiated accusation that, we just vote for all these nominations and nobody votes against any of President Bush's judicial nominees.

The truth is, all of these Senators—Senators KENNEDY, MURRAY, SCHUMER, DORGAN, and DURBIN when it came to a straight up-or-down vote on all of President Clinton's judicial nominees, whether they were for district court, circuit court of appeals, or Supreme Court, never cast a dissenting vote—not even once. That is a lot of affirmative votes, if you ask me, for 8 years of President Clinton's nominees.

Then I scoured around like a German shorthair, and let me point out what I found out from Senator KENNEDY on straight up-or-down votes, not only on President Clinton's nominees, but on President Carter's judicial nominees. Senator KENNEDY didn't even cast a dissenting vote on any of those nominees. To be calling Republicans ''lap dogs,'' ''rubberstamps,'' and so forth—I don't think so.

Unlike Senator DURBIN, we are not going to call the Democrats dogs or cocker spaniels. I think we are lucky dogs that President Bush has examined some outstanding nominees from coast to coast, outstanding men and women who are willing to serve at the circuit court level, which is a very important level of appeals in this country. He has nominated well-qualified nominees for the circuit court, such as Miguel Estrada.

When you talk about qualifications, Miguel Estrada received the highest possible rating unanimously from the American Bar Association and although we had, on five or six occasions, 55, 56 votes, he was denied the opportunity of a fair up-or-down vote. Finally, his life could not continue in such limbo and he withdrew his nomination.

Priscilla Owen, a justice of the Supreme Court of Texas, another outstanding nomination from President Bush, the person we are actually debating right now, received the highest level of endorsement from the American Bar Association, a unanimous, well-qualified. Justice Owen was elected to the Supreme Court of Texas in 1994 and was reelected with 84 percent of the vote in Texas in the year 2000. This is a person well qualified, well respected in her State.

Janice Rogers Brown, another great American life story of someone who is the daughter of a sharecropper in segregated Alabama, moved to California, ended up being the first African American on the Supreme Court of California, the largest State in our Nation. She is one who has been characterized as a brilliant and fair jurist who is committed to the rule of law. The Chief Justice of the California Supreme Court called on her to write the majority opinion more times in 2001 and 2002 than any other justice of the supreme court.

In California, judges are elected rather than appointed and in the most recent election, Justice Brown received 76 percent of the vote, which was the largest margin of any of the four justices up for retention that year in California, which is not a strong red State. In fact, it is kind of a pale-blue State. Nonetheless, she received 76 percent of the vote in California.

This individual, Janice Rogers Brown, is having to go through these sort of accusations against her. She is well respected, and she is certainly within the mainstream.

I hope these rebuttals will shed some light on the reality of what is going on here. What we are simply trying to do is accord these nominees the fairness of an up-or-down vote. People in the real world probably do not understand this process. They do not understand why a nominee who has majority support cannot be accorded the fairness of a vote. The people of America understand courtesy, and they understand due process. They understand the bump and run and activity that one will have and statements that might be made, and you can have some fun talking about dogs, and so forth.

But ultimately, once you go through all the histrionics, aspersions, characterizations, rebuttals, and setting the record straight, ultimately what we ought to do as Senators is our job and our duty. This is what the people of America in our respective States have asked us to do. I really do not think it is too much for us to get off our haunches, show some spine, show some backbone, vote yes, vote no on these nominees, and then you can explain to your constituents back in New Jersey or Illinois or South Dakota or Virginia why you voted the way you did.

What we need to do is truly take the politics out of this process. It is harmful that this has become so politicized in the last several years. It is an issue I know is very important to the American people. They recognize President Bush has a philosophy—and it is one that I share—that judges ought to apply the law, not invent the law, and that he has found and sought out men and women of diverse background to bring their experiences, but also their fundamental belief of what the proper role of a judge should be, and that is to listen to the evidence, apply the facts to the law as written by the legislative branch in our representative democracy, and make that ruling.

These nominees are well qualified. They have gone through a lot. They are individuals. These are not just pieces of paper that you just crumble up and throw aside. These are human beings, and they should not be treated this way.

If we are going to be able to attract quality men and women in the future to our Federal judgeships and Federal appointments, many giving up lives where they can make more money, certainly have less controversy, they ought not to be treated like a sheet of paper. They are human beings. Let's have our debates, have the arguments, make a judgment, and ultimately vote ''yes'' or vote ''no.''

That is what I think the American people expect out of the Senate, and it is a shame we are having to spend as much time as we are on this, but it is an important principle. It is due process, it is fairness, and it is the rule of law.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

## MORNING BUSINESS

Mr. ALLEN. Mr. President, I ask unanimous consent that there now be a period for morning business, with Senators permitted to speak for up to 10 minutes each.

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

NATIONAL POLICE WEEK 2005

Ms. MURKOWSKI. Shortly after noon on Wednesday May 11, I was presiding over the Senate when the entire Capitol complex was evacuated in response to the threat of an airplane in restricted airspace. The officers of the United States Capitol Police reacted quickly and evacuated the Capitol in record time, moving my colleagues, our staffs, the press corps and our visitors to safe locations.

I cannot say enough about the men and women of our United States Capitol Police. One of their slogans, ''You elect them . . . we protect them,'' accurately describes the mission of this highly professional force which was formed in 1828. That mission, simply stated, is to protect democracy's greatest symbol, the United States Capitol, the people who work here, and its owners, the American people, who visit our offices.

When the Senate returned to its work, our leaders took the floor to express our collective appreciation to the U.S. Capitol Police. Senator REID closed his statement with these touching words, ''Every day, we see them standing around doors, and they don't appear to be working real hard, but it is on days such as this that they earn their pay over and over again.'' Senator REID would know something about this because of all of the things on his rather impressive resume, I understand that he is proudest of his service as a member of the U.S. Capitol Police.

It is no small irony that the skills of our U.S. Capitol Police Officers would be put to the test at the very moment that surviving family members of fallen police officers from around the Nation were arriving in Washington, DC, for the annual candlelight vigil at the National Law Enforcement Officers Memorial and then for Peace Officers Memorial Day services at the west front of the Capitol.

At this time of year, it is appropriate not only to reflect on the professionalism of today's U.S. Capitol Police Officers, but also on three who have fallen in the line of duty. I am referring to Jacob John Chestnut, who was fatally shot while tending one of those checkpoints that Senator REID referred to, by an armed assailant intent upon entering the Capitol. I am also referring to John M. Gibson who was fatally shot by the same individual while protecting the life of one of our colleagues from that assailant.

And let us also not forget Christopher Eney, a U.S. Capitol Police Officer who gave his life while participating in a training exercise in 1984. I understand that he was participating in the type of intense training that would have proven very helpful on Wednesday, May 11. Their names are all inscribed on the National Law Enforcement Officers' Memorial on Judiciary Square. The headquarters of the U.S. Capitol Police is named in the honor of each of them.

This is the third consecutive year that I have spoken in honor of the men and women in law enforcement who have lost their lives in the line of duty. This year, the names of 415 law enforcement officers have been inscribed on the memorial; 153 of these brave men and women lost their lives in 2004. The remainder lost their lives in other years—some generations before the memorial was created.

In 2004 Alaska did not lose a law enforcement officer in the line of duty. This year, no Alaskans have been added to the National Law Enforcement Officers Memorial and for this we are grateful.

During National Police Week we are reminded that the 17,000 people whose names are engraved on the Law Enforcement Officers Memorial were heroes not for the way they died but for the way they lived. It was Vivian Eney, the surviving spouse of U.S. Capitol Police Officer Christopher Eney, who coined that phrase.

For 51 weeks a year the stories behind those 17,000 names are known to family members and law enforcement colleagues. But during National Police Week the memorial comes alive as surviving family members and department colleagues decorate the memorial with shoulder patches, photographs, stories and poems. Ultimately this material will be available to the public 365 days a year at a museum that the Congress authorized to be constructed on Federal land in 2000.

The museum will be developed, constructed, owned and operated by the National Law Enforcement Officers Memorial Fund—the same nonprofit organization that built and now oversees the National Law Enforcement Officers Memorial. Construction is expected to commence in 2007 and the opening is slated for 2009.

The museum will replace a one room memorial visitor center in the storefront of a downtown office building and will educate millions of visitors about the tremendous contributions our law enforcement officers have made throughout our Nation's history. It is a worthy addition to the memorial and a project worthy of support by our colleagues and the Nation.

During the annual Police Week observance thousands of survivors of fallen law enforcement officers return to Washington, D.C., for the annual conference of the support group Concerns of Police Survivors. I was proud to welcome to my office the surviving family members of Kenai Police Department Officer John Patrick Watson whose name was inscribed on the National Law Enforcement Officers Memorial in 2004.

Laurie Heck Huckeba, the widow of fallen Alaska State Trooper Bruce Heck, who gave his life on January 10, 1997, has returned to our Nation's Capital in her role as Pacific Region Trustee of Concerns of Police Survivors. She could not come to Capitol Hill to visit with me because she was busy conducting orientation sessions for the survivors of fallen law enforcement officers who are attending the Concerns of Police Survivors meetings in Alexandria, VA for the first time. It was not so long ago that Laurie was attending her first survivors' conference and now she is helping other survivors rebuild their lives. Laurie was raised in Glennallen, AK. Although Laurie has relocated from Alaska to the Bakersfield, CA area, it is clear to me that the Alaskan spirit of giving and sharing still burns strong within her. Thank you, Laurie.

Mayor Steve Thompson of the City of Fairbanks has sent a wreath to be displayed at the National Law Enforcement Officers Memorial in memory of Patrol Officer John Kevin Lamm who gave his life on January 1, 1998. Thank you, Mayor Thompson.

The names of 42 Alaskans appear on the National Law Enforcement Officers Memorial. During National Police Week, which officially begins on May 15 and concludes on May 21 we will reflect on the contributions of each of these heroes here in Washington and in ceremonies in my State of Alaska.

To their colleagues in law enforcement and to the surviving members of these 41 Alaskans and to the family, friends and colleagues of the 17,000 men and women whose names appear on the National Law Enforcement Officers Memorial, let us remember during this National Police Week that ''Heroes Live Forever.''

In valor there is hope.

I ask unanimous consent that the names of these 42 individuals, their agencies and the date upon which each of their watches ended be printed in the RECORD.

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

ALASKANS INSCRIBED ON THE NATIONAL LAW ENFORCEMENT OFFICERS MEMORIAL

Richard J. Adair, Juneau Police Department, August 17, 1979

Doris Wayne Barber, Sitka Police Department, July 28, 1960

Gordon Brewster Bartell, Kodiak Police Department, January 15, 1983

Robert Lee Bittick, Alaska State Troopers, October 11, 1994

Leroy Garvin Bohuslov, Alaska Dept. of Fish and Game, March 5, 1964

Larry Robert Carr, Alaska State Troopers, December 11, 1974

Ignatius John Charlie, Alakanuk Police Department, May 10, 1985

Roland Edgar Chevalier, Jr., Alaska State Troopers, April 3, 1982

Dennis Finbar Cronin, Alaska State Troopers, February 18, 1974

Thomas Clifford Dillon, Bethel Police Department, November 19, 1972

Donald Thomas Dull, Juneau Police Department, October 19, 1964

Troy Lynn Duncan, Alaska State Troopers, May 19, 1984

Johnathan Paul Flora, Anchorage Police Department, September 8, 1975

Harry Biddington Hanson, Jr., Anchorage Police Department, July 17, 1986

Bruce A. Heck, Alaska State Troopers, January 10, 1997

James C. Hesterberg, Alaska Department of Corrections, November 19, 2002

Earl Ray Hoggard, Ketchikan Police Department, March 30, 1974

Anthony Crawford Jones, Dillingham Police Department, February 12, 1992
Harry C. Kavanaugh, Anchorage Police Department, January 3, 1924
Jimmy Earl Kennedy, Juneau Police Department, April 17, 1979
Harry Edward Kier, Anchorage Police Department, October 28, 1980
John Kevin Lamm, Fairbanks Police Department, January 1, 1998
Richard I. Luht, Jr. Internal Revenue Service, January 31, 1999
Alvin G. Miller, Fairbanks Police Department, November 2, 1908
Louie Gordon Mizelle, Anchorage Police Department, June 6, 1989
James A. Moen, Alaska Fish and Wildlife Protection, June 25, 2001
Kenneth G. Nauska, Craig Police Department, January 30, 1966
Thomas P. O'Hara, National Park Service, December 20, 2002
Karl William Reishus, Juneau Police Department, May 4, 1992
Frank Stuart Rodman, Alaska State Troopers, December 11, 1974
Hans-Peter L. Roelle, Alaska State Troopers, November 24, 2001
James Arland Rowland, Jr., Palmer Police Department, May 15, 1999
Dan Richard Seely, Anchorage Police Department, October 26, 1996
John David Stimson, Alaska Fish and Wildlife Protection, January 14, 1983
Benjamin Franklin Strong, Anchorage Police Department, January 4, 1968
John J. Sturgus, Anchorage Police Department, February 20, 1921
Claude Everett Swackhammer, Alaska Department of Public Safety, October 11, 1994
John Patrick Watson, Kenai Police Department, December 25, 2003
Charles H. Wiley, Seward Police Department, October 4, 1917
Gary George Wohfeil, Alaska Dept. of Fish and Game, March 5, 1964
Justin Todd Wollam, Anchorage Police Department, July 9, 2001
Ronald Eugene Zimin, South Nannek Village Public Safety Officer, October 21, 1986

Ms. CANTWELL. Mr. President, I rise today to say a few words in honor of our country's many dedicated law enforcement officers, and to thank them for their ongoing efforts to keep our families and communities safe. As my colleagues know, May 15 is National Peace Officers Memorial Day, and the week that follows marks National Police Week. Throughout this week, the United States honors the courage, devotion, and sacrifice of law enforcement officers from across the Nation, and recognizes their invaluable contributions to the well-being of our country.

First observed in 1962, National Police Week also provides us with an important opportunity to remember those we have lost in the line of duty. One hundred and fifty-three law enforcement officers lost their lives while serving in 2004, including three from my home State. Last month, their names were added to the National Law Enforcement Officers Memorial, offering a stark reminder of the sacrifice all law enforcement personnel stand prepared to make to protect the citizens they serve.

Sadly, Senior Boarder Patrol Agent Jeremy Wilson of Ferndale, Officer James G. Lewis of the Tacoma Police Department, and Sergeant Brad Crawford of the Clark County Sheriff's Department all lost their lives in the line of duty during 2004. The outpouring of community support that accompanied each loss underscores the immense appreciation and compassion felt by Americans for those ready to help in a time of need. I would like to join with my fellow Washingtonians and take a moment to pay tribute to Agent Wilson, Officer Lewis, and Sergeant Crawford for their generous spirit and tireless devotion to duty. By sharing a little bit about each of these officers with you, I hope to help honor their sacrifice.

Currently, there are over 10,000 Federal law enforcement officers deployed along our country's borders. The deserts, wilderness, and rivers that line many of our Nation's edges often present these agents with extreme and trying conditions that can sometimes lead to tragedy. On Sunday, September 19, 2004, Senior Border Patrol Agent Jeremy Wilson fell overboard during a patrol on the Rio Grande near Los Indios, TX. Soon after, the patrol boat capsized, sending the boat's captain and another officer, Agent Travis Attaway, into the turbulent, storm-fed river. A second border patrol boat was able to rescue the boat's captain, but Agents Wilson and Attaway were lost. Agent Wilson, a third generation Border Patrol Agent from Ferndale, WA, was 29 years old. His passing leaves a reminder of the dangers faced by officers who spend each day navigating extreme conditions on our Nation's frontiers.

Often, the randomness and chance surrounding a loss of life makes the event difficult to understand. Routine actions, preformed hundreds of times, can, without warning, end tragically. On Tuesday, April 27, 2004, Officer James G. Lewis, a 19-year veteran of Tacoma Police Department, lost his life when his motorcycle collided with a car that pulled in front of him as he rushed to help a fellow officer who had requested back-up. Officer Lewis was 45 years old. He was a member of Tacoma Pierce County Search & Rescue, and had served as a police officer in the Marine Corps. He is survived by his wife and son. He will be remembered for his willingness to help others and his readiness to put their needs before his own.

While our Nation's police officers spend each day working to limit violence, a call for help can sometimes lead to an outbreak of what law enforcement works so hard to prevent. On Friday, July 30, 2004, Sergeant Brad Crawford of the Clark County Sheriff's Department was killed when his patrol car was intentionally rammed by a truck fleeing the scene of a standoff. Sergeant Crawford was 49 years old. He had served as a law enforcement officer for over two decades and had been with the Clark County Sheriff's Department for 8 years. He is survived by his wife, five children, and three grandchildren.

The untimely and unnecessary loss of Agent Wilson, Officer Lewis, and Sergeant Crawford reminds us of the immense challenges that law enforcement officers face on a daily basis. They will each be remembered for their dedication and their desire to serve and help others. Our thoughts and prayers are with their families during this difficult time.

National Police week is a time to remember those we have lost and thank those who continue to serve. However, our gratitude extends far beyond this one week. Local, State, and Federal law enforcement stand ready at every hour, and their unending courage and sense of duty represents the very best of America. On behalf of the citizens of Washington State, I offer my thanks to the men and women who wake up every day, put on a uniform, and set out to make our country an even better place.

## ADDITIONAL STATEMENTS

### HONORING THE CAREER OF ARLO LEVISEN

• Mr. JOHNSON. Mr. President, I rise today to publicly honor the career of Mr. Arlo Levisen, superintendent of the Grant-Duel School District. After 15 years of dedicated service as Grant-Duel's top administrator, Arlo is retiring.

A native of Milbank, SD and son of a farmer and 40-year Grant County educator, Arlo graduated in 1962 from South Shore High School. He then went on to receive his Bachelor of Science degree from Aberdeen's Northern State College in 1967, graduating with a degree in elementary education and history.

Throughout the latter portion of the 1960s, Arlo taught at and was principal of various schools throughout South Dakota, including Yankton, Pine Ridge, Kyle, Lyman, and Deubrook School District. These diverse educational experiences allowed Arlo to understand and appreciate the various learning environments South Dakota has to offer.

In 1979, in addition to his position as principal of Lyman School District's elementary and junior high schools, Arlo took on the responsibility of serving as commodity supervisor of the South Dakota Department of Education's Child and Adult Nutrition Services. There he was responsible for annually purchasing 22 million pounds of USDA commodities and distributing them to 600 South Dakota institutions and reservations.

In 1984, Arlo became principal of the Pierre Indian Learning Center, a boarding school created solely for the purpose of educating Indian children with a history of behavioral disorders. As head of the learning center, Arlo oversaw 185 students ranging from first through eighth grades, as well as 40 staff members.

Following his time at the Pierre Indian Learning Center, Arlo accepted the position as superintendent of the

Grant-Duel School District, where he has remained for the last decade and a half. Throughout his tenure at Grant-Duel, Arlo has enhanced the lives of countless students by broadening their educational opportunities. For instance, he was instrumental in opening Watertown High School's classes to Grant-Duel students, thus enabling his students to experience all that a larger school district has to offer. As a result of this initiative, Grand-Duel students are often better prepared and able to adjust quickly to the enormous campus life that many encounter in college.

Additionally, Arlo played a vital role in establishing the Minnesota Border Schools Coalition, an association created to discuss and implement South Dakota and Minnesota's open enrollment policy. Not only is Arlo the current president of the organization, but under his leadership and direction, Grant-Duel School was the first school to accept a Minnesota student.

Throughout the years, thousands of students have benefited from Arlo's commitment to educational excellence, as have his colleagues. In 1991, Arlo helped establish and chair The South Dakota School Group Insurance Pool, a health insurance pool created to make affordable health insurance available to Grant-Duel faculty.

In addition to the hours he puts in as superintendent of the Grant-Duel School District, Arlo is vice-chairman of the board of directors for Pierre Odyssey World, Inc., he is a member of Capital City Bass Bandits, a volunteer advisor to the U.S. Forest Service, a member of the High Plains Wildlife Federation, and county chairman of the Hughes County Democratic Party.

The lives of countless people have been enormously enhanced by Arlo's talent and leadership as superintendent of the Grant-Duel School District. The State of South Dakota is a better place because of his commitment to and passion for academic excellence; his achievement will serve as a model for other talented educators and administrators throughout our State to emulate. On the occasion of his retirement, I congratulate Arlo for his tireless commitment to quality education in South Dakota, and I wish him and his family the very best.●

## CONGRATULATING THE TEAM INDIANA OUTLAWS

● Mr. LUGAR. Mr. President, I wish to inform my colleagues of the remarkable feat reached by a dedicated group of young women from my home State of Indiana, qualification for the 2005 USA Junior Olympic Girl's Volleyball Championships.

The Team Indiana Outlaws, consisting of nine young women well coached by Larry Leonhardt and Erika Dobrota, will represent the State of Indiana and their Team Indiana Volleyball Club in the 13 and Under Division of the 26th Annual USA Junior Olympic Girl's Volleyball Championships held this year in Salt Lake City, Utah. From June 29, 2005 through July 3, 2005, the Team Indiana Outlaws will compete against a number of other national teams who have likewise qualified for this tournament.

I commend these nine young women for their hard work and discipline that culminated in their qualification for competition against equally dedicated national opponents. I am additionally pleased that their tutelage came at the hands of two fine Hoosiers, Coaches Leonhardt and Dobrota, who have been mainstays in the Indiana volleyball community for a number of years. I am confident that the Team Indiana Outlaws will not only play with distinguished efforts, but also demonstrate the good sportsmanship that is prevalent in Indiana athletics.

The names of the Team Indiana Outlaws are as follows: Coaches: Larry Leonhardt, Erika Dobrota; players: Sammi Deer, Shelby Hiltunen, Megan Neher, Alli Norris, Lauren Rafdal, Emily Reber, Lucy Reser, Kasey Ruppe, and Allison Snyder.●

## HONORING GEORGE REDMAN

● Mr. CHAFEE. Mr. President, today I wish to pay tribute to George Redman of East Providence, RI. The Greenways Alliance of Rhode Island, the Ocean State Bike Path Association, and the Narragansett Bay Wheelman are honoring George tonight for his ''Spirit, Dedication and Commitment to Rhode Island Greenways.''

George is an active neighborhood volunteer, an avid bicyclist, an amateur genealogist, historian, and sailor. His extraordinary service during World War II aboard the USS Mississippi began a career of service to his community and country.

He has dedicated much of his life to the revitalization of the East Providence waterfront, beginning with a shoreline cleanup that he organized as an Assistant Master of a Boy Scout troop. His efforts continued with his work as chairman of the Fort Hill Waterfront Park Committee, the East Providence Beautification Committee, the East Providence Shoreline Committee, and the Narragansett Bay Commission Advisory Council.

I would especially like to commend George for his vital role advocating for the East Bay Bike Path. This 14-mile trail, built on an abandoned railway connecting East Providence to the coastal towns of Barrington, Warren, and Bristol, has been hailed as a national example of the benefits of recreational trails. In the early 1980s, George headed a petition effort that received more than 4,200 signatures and spurred the Rhode Island Department of Transportation to complete the path in 1992. His bike path advocacy has earned him recognition in the Christian Science Monitor, the Providence Journal, Rails to Trails Magazine, and other local media outlets covering bike path and waterfront-related issues.

Active for many years in local politics, George was elected a delegate to the 1986 Rhode Island Constitutional Convention. He has received numerous letters of appreciation and recognition from past Governors and Federal, State, and local officials. It was my privilege to take a bike ride with George last August on the newly constructed Washington Secondary Bike Path that runs from Cranston to Coventry, RI. As I said at the time, if the East Bay Bike Path had not been built, there would not have been the momentum to go forward with other trails.

George has been married for 53 years to his wife, Adeline, and they have two children, Paul and Mary, and three grandchildren.

George Redman's success in pushing for the East Bay Bike Path affirms the notion that members of grassroots organizations can partner with state and federal agencies to improve the quality of life in their communities. I am delighted to join in recognizing his achievements, and his passion for the environment and public recreation.●

## ALICE YARISH: IN MEMORIAM

● Mrs. BOXER. Mr. President, I rise to honor and share with my colleagues the memory of a very special woman, Alice Yarish of Marin County, who died May 9, 2005. She was 96 years old.

Alice Yarish was an award-winning reporter and the Grande Dame of Marin journalism. I knew her during the 11 years she worked for the Pacific Sun, exposing political scandals and pushing for prison reform.

During her years as a journalist in Marin, Alice demonstrated personal courage and a strong commitment to social justice. Alice is most well known for her relentless coverage of prison reform and she continued to fight for prisoner rights and prison reform until her retirement from the Pacific Sun in 1981.

She went on to write her autobiography, ''Growing Old Disgracefully: Adventures of a Maverick Reporter.''

Alice was born in Goldfield, NV, where her father was a judge and her mother was one of the first women lawyers in the State. Her family moved to Redondo Beach, CA when she was still young. After graduating from high school, Redondo Beach is where Alice began her long and passionate career as a journalist.

Alice worked for the Los Angeles Express when she interviewed First Lady Eleanor Roosevelt. Out enjoying a bicycle ride wearing shorts and a sweatshirt, Alice spotted Mrs. Roosevelt entering a beachfront hotel and ran after her to request an interview. She was granted the interview, which shocked and amazed her editors.

After her stint at the Los Angeles Express, Alice left journalism to attend college and law school at the University of Southern California. Financial problems during the Depression led her to leave law school early, and she took

a job as a social worker with the Emergency Relief Administration. She left this job when she married career military man, Peter Yarish, and moved with him to Hamilton Air Force Base in Novato.

Alice raised four children and returned to journalism when she was 42 years old. She wrote for the Marin Independent Journal, the Novato Advance, the Santa Rosa Press Democrat and the San Francisco Examiner. But it was at the Pacific Sun where she really made a name for herself as a unique, outspoken woman journalist.

Those who knew Alice viewed her as a sharp and witty reporter with a tremendous sense of curiosity. She took pride in uncovering injustice at every level of government. She stood out as a passionate watchdog with an incredible capacity for building friendships throughout the local community. Alice was deeply-respected by fellow journalists, editors and elected officials. She will be deeply missed.

Alice is survived by her four children, Tim Yarish of Sausalito, Thomas Yarish of Mill Valley, Anthony Yarish of Cotati, and Robin Ell of Portland, OR. She is also survived by seven grandchildren and three great grandchildren.●

## TRIBUTE TO GREGORY PRINCE

● Mr. KENNEDY. Mr. President, this month Hampshire College in Amherst, MA says goodbye to Greg Prince, who has served so impressively as its President since 1989. Dr. Prince came to Hampshire after a distinguished academic career as a professor of history and administrator at Dartmouth College, and he has spent the past 16 years building a strong record for Hampshire.

Hampshire is a young college founded in 1970 as a model of interdisciplinary education without conventional grades. Its unique college setting promotes independent thought and activism on public policy, while at the same time participating in a five college consortium with traditional colleges Smith, Mount Holyoke, Amherst and the University of Massachusetts.

Greg Prince is a president who believes in wide-ranging discussion, and so Hampshire students are encouraged to be active participants in the dialogue and activities of the college. He believes strongly that the institution must have a vision, and the president must support and encourage that vision. In Hampshire's case, the vision is firmly grounded in the value of social justice.

Prior to his presidency, Hampshire had become the first college in the country to divest its stock in corporations doing business in South Africa. Greg Prince continued to set an example in everything he did. He has had an indelible impact on the campus by his strong commitment to the college's mission of self-expression and action. He has inspired all of us through his leadership on issues that affect college education—particularly on student aid and academic freedom. Through his speaking, his writing and most importantly his actions—he has demonstrated his commitment to the quality and diversity of higher education.

Greg Prince has served Hampshire College, the Commonwealth of Massachusetts, and the Nation well, and I know I join his many friends and admirers in extending our gratitude for his extraordinary service and our best wishes for the next phase of his outstanding career.●

## TRIBUTE TO CENTRAL ACADEMY HIGH SCHOOL

● Mr. HARKIN. Mr. President, I come to the floor today, to congratulate students from Central Academy High School in Des Moines, IA, who competed in national finals of the ''We the People: The Citizen and the Constitution'' program in Washington, DC, earlier this month. The students won the Unit Three Award at the competition. This was the second year in a row that students from Michael Schaffer's government classes have won this prestigious recognition. These outstanding young Iowans competed against classes from every State in the country, and earned the highest score by demonstrating a remarkable understanding of the fundamental ideals and values of American constitutional government. Clearly, the future of democracy is in good hands, as demonstrated by the skill, knowledge and poise shown by these students.

I recognize and salute the students from Des Moines and surrounding suburbs who were involved in the competition: Emily Burney, Julia Busiek, Kate Conlow, Tim Di Iulio, Jon Hill, Lisa Jefferson, Alix Lifka-Reselman, Phillip R. Miller, Ben Miller-Todd, David Nolan, Caroline Rendon, Andrew Tatge, Erin Turner, Emily Yarn.

The ''We the People'' program is administered by the Center for Civic Education. It is the most extensive program of its kind, reaching more than 26 million students in elementary, middle, and high schools. In Iowa, ''We the People'' is coordinated by Linda Martin and Ivette Bender is the district coordinator for the area that serves Des Moines. I salute them also for their hard work and dedication to this excellent program.●

## MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Ms. Evans, one of his secretaries.

## EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

## MESSAGE FROM THE HOUSE

At 4:38 p.m., a message from the House of Representatives, delivered by Ms. Niland, one of its reading clerks, announced that the House has passed the following bill, in which it requests the concurrence of the Senate:

H.R. 1817. An act to authorize appropriations for fiscal year 2006 for the Department of Homeland Security, and for other purposes.

## MEASURES REFERRED

The following bill was read the first and the second times by unanimous consent, and referred as indicated:

H.R. 1817. An act to authorize appropriations for fiscal year 2006 for the Department of Homeland Security, and for other purposes; to the Committee on Homeland Security and Governmental Affairs.

## MEASURES PLACED ON THE CALENDAR

The following bills were read the second time, and placed on the calendar:

S. 1061. A bill to provide for secondary school reform, and for other purposes.

S. 1062. A bill to amend the Fair Labor Standards Act of 1938 to provide for an increase in the Federal minimum wage.

## MEASURES READ THE FIRST TIME

The following bills were read the first time:

S. 1084. A bill to eliminate child poverty, and for other purposes.

S. 1085. A bill to provide for paid sick leave to ensure that Americans can address their own health needs and the health needs of their families.

## EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, and were referred as indicated:

EC–2251. A communication from the Chief, Regulations and Administrative Law, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Anchorage Ground; Pacific Ocean at Santa Catalina Island, CA [CGD11–04–006]'' (RIN1625–AA01) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2252. A communication from the Chief, Regulations and Administrative Law, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulations: Annual Fort Myers Beach Air Show, Fort Myers Beach, FL [CGD07–05–012]'' (RIN1625–AA08) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2253. A communication from the Chief, Regulations and Administrative Law, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulations (including 2 regulations): [CGD11–05–

004] [CGD05–05–047]'' (RIN1625–AA08) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2254. A communication from the Chief, Regulations and Administrative Law, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Drawbridge Operation Regulations; Chelsea River, MA [CGD01–05–022]'' (RIN1625–AA09) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2255. A communication from the Chief, Regulations and Administrative Law, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Drawbridge Operation Regulations (including 4 regulations): [CGD08–05–027], [CGD07–05–041], [CGD01–05–039], [CGD08–05–028]'' (RIN1625–AA09) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2256. A communication from the Chief, Regulations and Administrative Law, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Bering Sea, Aleutian Islands, Unalaska Island, AK [COPT Western Alaska-04–003]'' (RIN1625–AA00) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2257. A communication from the Chief, Regulations and Administrative Law, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Gulf Gateway Deepwater Port, Gulf of Mexico [USCG–2005–21111]'' (RIN1625–AA00) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2258. A communication from the Chief, Regulations and Administrative Law, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Fireworks Displays within the Fifth Coast Guard District [CGD05–05–013]'' (RIN1625–AA00) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2259. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''Airworthiness Directives: McDonnell Douglas Model MD–11 and -11F Airplanes'' ((RIN2120–AA64) (2005–0240)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2260. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''Airworthiness Directives: General Electric Company CF6–80E1A2 Turbofan Engines'' ((RIN2120–AA64) (2005–0241)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2261. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''Airworthiness Directives: McDonnell Douglas Model DC 9 31 and DC 9 32 Airplanes'' ((RIN2120–AA64) (2005–0242)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2262. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''Bird Ingestion Standards; CORRECTION'' ((RIN2120–AF84) (2005–0001)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2263. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''Modification of Class E Airspace; Sidney, NE'' ((RIN2120–AA66) (2005–0112)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2264. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''Standard Instrument Approach Procedures; Miscellaneous Amendments (61); Amdt. No. 3078'' ((RIN2120–AA65) (2005–0016)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2265. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''Amendment of Class E Airspace; Pennsylvania, New Jersey, Delaware'' ((RIN2120–AA66) (2005–0113)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2266. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''Aging Aircraft Safety; CORRECTING AMENDMENT'' ((RIN2120–AE42) (2005–0002)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2267. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''Reduced Vertical Separation Minimum in Domestic United States Airspace; TECHNICAL AMENDMENT'' ((RIN2120–AH68) (2005–0001)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2268. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''Security Considerations for the Flightdeck on Foreign Operated Transport Category Airplanes; DISPOSITION OF COMMENTS'' ((RIN2120–AH70) (2005–0001)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2269. A communication from the Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled ''1–G Stalling Speed as a Basis for Compliance with Part 25 of the Federal Aviation Regulations; CORRECTION'' ((RIN2120–AD40) (2005–0001)) received on May 18, 2005; to the Committee on Commerce, Science, and Transportation.

EC–2270. A communication from the Chairman of the Board of Governors of the Federal Reserve System, transmitting, pursuant to law, the Federal Reserve Board's ninety-first annual report; to the Committee on Banking, Housing, and Urban Affairs.

EC–2271. A communication from the Secretary of Commerce, transmitting, pursuant to law, a six-month report prepared by the Department of Commerce's Bureau of Industry and Security on the national emergency declared by Executive Order 13222; to the Committee on Banking, Housing, and Urban Affairs.

EC–2272. A communication from the Chief Counsel, Bureau of the Public Debt, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled ''31 CFR Part 356, Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds—Bidder'' received on May 17, 2005; to the Committee on Banking, Housing, and Urban Affairs.

EC–2273. A communication from the Chief Counsel, Bureau of the Public Debt, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled ''17 CFR Part 450, Government Securities Act Regulations: Custodial Holdings of Government Securities'' (RIN1505–AB06) received on May 17, 2005; to the Committee on Banking, Housing, and Urban Affairs.

EC–2274. A communication from the Secretary of Health and Human Services, transmitting, pursuant to law, a report entitled ''HHS Designation of Additional Members of the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act''; to the Committee on Health, Education, Labor, and Pensions.

EC–2275. A communication from the Director, Regulations Policy and Management Staff, Food and Drug Administration, Department of Health and Human Services, transmitting, pursuant to law, the report of a rule entitled ''Use of Ozone-Depleting Substances; Removal of Essential-Use Designations'' ((RIN0910–AF18) (Docket No. 2003P–0029)) received on May 17, 2005; to the Committee on Health, Education, Labor, and Pensions.

EC–2276. A communication from the Acting Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to the Arms Export Control Act, a certification regarding the proposed transfer of major defense equipment valued (in terms of its original acquisition cost) at $25,000,000 or more from the Government of the Netherlands to the Government of Portugal; to the Committee on Foreign Relations.

EC–2277. A communication from the Acting Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to law, a report relative to the Participation of Taiwan in the World Health Organization Act, 2004; to the Committee on Foreign Relations.

EC–2278. A communication from the Assistant Legal Adviser for Treaty Affairs, Department of State, transmitting, pursuant to the Case-Zablocki Act, 1 U.S.C. 112b, the report of the texts and background statements of international agreements, other than treaties; to the Committee on Foreign Relations.

EC–2279. A communication from the Biomass and Forest Health Program Manager, Wildland Fire Coordination, Office of the Secretary, Department of the Interior, transmitting, pursuant to law, the report of a rule entitled ''Woody Biomass Utilization'' (RIN1084–AA00) received on May 17, 2005; to the Committee on Environment and Public Works.

EC–2280. A communication from the Director, Pentagon Renovation and Construction Program Office, Department of Defense, transmitting, pursuant to law, the annual report on the Pentagon Renovation Program; to the Committee on Armed Services.

EC–2281. A communication from the Acting Under Secretary of Defense for Acquisition, Technology, and Logistics, transmitting, pursuant to law, a report relative to defense Federally Funded Research and Development Centers (FFRDC); to the Committee on Armed Services.

EC–2282. A communication from the Assistant Under Secretary of Defense (Transportation Policy), Acquisition, Technology, and Logistics, Department of Defense, transmitting, pursuant to law, a corrected report relative to the Department's implementation of postal system improvements; to the Committee on Armed Services.

EC–2283. A communication from the Chairman, Parole Commission, Department of Justice, transmitting, pursuant to law, the Commission's annual report for the year 2004; to the Committee on Homeland Security and Governmental Affairs.

EC–2284. A communication from the Acting Director, Office of General Counsel and Legal Policy, Office of Government Ethics,

transmitting, pursuant to law, the report of a rule entitled ''Technical Updating Amendments to Executive Branch Financial Disclosure and Standards of Ethical Conduct Regulations'' ((RIN3209–AA00) and (RIN3209–AA04)) received on May 17, 2005; to the Committee on Homeland Security and Governmental Affairs.

EC–2285. A communication from the Acting Director, Strategic Human Resources Policy Division, Office of Personnel Management, transmitting, pursuant to law, the report of a rule entitled ''Absence and Leave'' (RIN3206–AK80) received on May 17, 2005; to the Committee on Homeland Security and Governmental Affairs.

EC–2286. A communication from the Acting Director, Strategic Human Resources Policy Division, Office of Personnel Management, transmitting, pursuant to law, the report of a rule entitled ''Employment of Relatives'' (RIN3206–AK03) received on May 17, 2005; to the Committee on Homeland Security and Governmental Affairs.

EC–2287. A communication from the Acting Director, Strategic Human Resources Policy Division, Office of Personnel Management, transmitting, pursuant to law, the report of a rule entitled ''Final Regulations on Computation of Pay for Biweekly Pay Periods'' (RIN3206–AK62) received on May 17, 2005; to the Committee on Homeland Security and Governmental Affairs.

EC–2288. A communication from the Acting Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to law, a Certification to Congress Regarding the Incidental Capture of Sea Turtles in Commercial Shrimping Operations; to the Committee on Finance.

EC–2289. A communication from the Acting Chief, Publications and Regulations Branch, Internal Revenue Service, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled ''Bureau of Labor Statistics Price Indexes for Department Stores—March 2005'' (Rev. Rul. 2005–34) received on May 18, 2005; to the Committee on Finance.

EC–2290. A communication from the Acting Chief, Publications and Regulations Branch, Internal Revenue Service, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled ''Time for Performing Certain Acts Postponed by Reason of Service in a Combat Zone or a Presidentially Declared Disaster'' (Rev. Proc. 2005–27) received on May 18, 2005; to the Committee on Finance.

## REPORT OF THE CONTINUATION OF THE NATIONAL EMERGENCY PROTECTING THE DEVELOPMENT FUND FOR IRAQ AND CERTAIN OTHER PROPERTY IN WHICH IRAQ HAS AN INTEREST, AND THE CENTRAL BANK OF IRAQ, AND TO MAINTAIN IN FORCE THE SANCTIONS TO RESPOND TO THIS THREAT—PM 11

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Banking, Housing, and Urban Affairs.

*To the Congress of the United States:*

Section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)) provides for the automatic termination of a national emergency unless, prior to the anniversary date of its declaration, the President publishes in the *Federal Register* and transmits to the Congress a notice stating that the emergency is to continue in effect beyond the anniversary date. In accordance with this provision, I have sent the enclosed notice to the *Federal Register* for publication. This notice states that the national emergency declared in Executive Order 13303 of May 22, 2003, as expanded in scope by Executive Order 13315 of August 28, 2003, modified in Executive Order 13350 of July 29, 2004, and further modified in Executive Order 13364 of November 29, 2004, is to continue in effect beyond May 22, 2005. The most recent notice continuing this emergency was published in the *Federal Register* on May 21, 2004 (69 FR 29409).

The threats of attachment or other judicial process against (i) the Development Fund for Iraq, (ii) Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, or (iii) any accounts, assets, investments, or any other property of any kind owned by, belonging to, or held by, on behalf of, or otherwise for the Central Bank of Iraq create obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq. Accordingly, these obstacles continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States. For these reasons, I have determined that it is necessary to continue the national emergency protecting the Development Fund for Iraq, certain other property in which Iraq has an interest, and the Central Bank of Iraq, and to maintain in force the sanctions to respond to this threat.

GEORGE W. BUSH.

THE WHITE HOUSE, *May 19, 2005.*

## 2005 COMPREHENSIVE REPORT ON U.S. TRADE AND INVESTMENT POLICY FOR SUB-SAHARAN AFRICA AND IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT—PM 12

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Finance.

*To the Congress of the United States:*

Consistent with title I of the Trade and Development Act of 2000, I am providing a report prepared by my Administration, the ''2005 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act.''

GEORGE W. BUSH.

THE WHITE HOUSE, *May 19, 2005.*

## EXECUTIVE REPORT OF COMMITTEE

The following executive report of committee was submitted on Wednesday, May 18, 2005:

By Mr. ENZI for the Committee on Health, Education, Labor, and Pensions.

*Raymond Simon, of Arkansas, to be Deputy Secretary of Education.

*Nomination was reported with recommendation that it be confirmed subject to the nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.

## INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second times by unanimous consent, and referred as indicated:

By Mrs. LINCOLN (for herself and Mr. TALENT):

S. 1076. A bill to amend the Internal Revenue Code of 1986 to extend the excise tax and income tax credits for the production of biodiesel; to the Committee on Finance.

By Mrs. LINCOLN:

S. 1077. A bill to amend the Internal Revenue Code of 1986 to provide a renewable liquid fuels tax credit, and for other purposes; to the Committee on Finance.

By Mrs. LINCOLN:

S. 1078. A bill to amend the Internal Revenue Code of 1986 to expand and extend the renewable resource credit and nonconventional source credit for landfill gas facilities; to the Committee on Finance.

By Mrs. LINCOLN:

S. 1079. A bill to amend the Internal Revenue Code of 1986 to expand and extend the renewable resource credit for trash combustion facilities; to the Committee on Finance.

By Mr. JEFFORDS (for himself, Mr. LAUTENBERG, Mrs. BOXER, and Mr. LIEBERMAN):

S. 1080. A bill to amend the Safe Drinking Water Act to require the use of nontoxic products in the case of hydraulic fracturing that occurs during oil or natural gas production activities; to the Committee on Environment and Public Works.

By Mr. KYL (for himself, Ms. STABENOW, Mr. CORZINE, and Mr. TALENT):

S. 1081. A bill to amend title XVIII of the Social Security Act to provide for a minimum update for physicians' services for 2006 and 2007; to the Committee on Finance.

By Mrs. HUTCHISON (for herself, Mr. ALLARD, Mr. ALLEN, Mr. BAUCUS, Mr. BOND, Mr. BUNNING, Mr. BURNS, Mr. BURR, Mr. CHAMBLISS, Mr. COBURN, Mr. CORNYN, Mr. CRAIG, Mr. CRAPO, Mr. ENSIGN, Mr. ENZI, Mr. HAGEL, Mr. HATCH , Mr. INHOFE, Mr. ISAKSON, Mr. KYL, Mr. LOTT, Ms. MURKOWSKI, Mr. NELSON of Nebraska, Mr. SESSIONS, Mr. SUNUNU, Mr. TALENT, Mr. THUNE, Mr. VITTER, Mr. SHELBY, Mr. DEMINT, and Mr. THOMAS):

S. 1082. A bill to restore Second Amendment rights in the District of Columbia; to the Committee on Homeland Security and Governmental Affairs.

By Mr. HARKIN:

S. 1083. A bill to provide coverage under the Railway Labor Act to employees of certain air and surface transportation entities; to the Committee on Health, Education, Labor, and Pensions.

By Mr. KENNEDY:

S. 1084. A bill to eliminate child poverty, and for other purposes; read the first time.

By Mr. KENNEDY (for himself, Mr. DURBIN, Ms. MIKULSKI, Mrs. MURRAY, Mr. HARKIN, Mr. DODD, Mr. LAUTENBERG, Mr. CORZINE, Mr. AKAKA, Mrs. BOXER, Mr. FEINGOLD, Mr. SCHUMER, and Mr. DAYTON):

S. 1085. A bill to provide for paid sick leave to ensure that Americans can address their own health needs and the health needs of their families; read the first time.

By Mr. HATCH:

S. 1086. A bill to improve the national program to register and monitor individuals who commit crimes against children or sex offenses; to the Committee on the Judiciary.

By Mr. ALEXANDER (for himself and Mr. SCHUMER):

S. 1087. A bill to amend section 337 of the Immigration and Nationality Act to prescribe the oath or affirmation of renunciation and allegiance required to be naturalized as a citizen of the United States; to the Committee on the Judiciary.

By Mr. KYL:

S. 1088. A bill to establish streamlined procedures for collateral review of mixed petitions, amendments, and defaulted claims, and for other purposes; to the Committee on the Judiciary.

By Mr. AKAKA (for himself, Mr. COCHRAN, and Mr. DODD):

S. 1089. A bill to establish the National Foreign Language Coordination Council to develop and implement a foreign language strategy, and for other purposes; to the Committee on Health, Education, Labor, and Pensions.

## SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Ms. SNOWE (for herself and Mr. SARBANES):

S. Res. 149. A resolution honoring the life and contributions of His Eminence, Archbishop Iakovos, former archbishop of the Greek Orthodox Archdiocese of North and South America; to the Committee on the Judiciary.

By Mr. DURBIN (for himself, Mr. SMITH, and Mr. MARTINEZ):

S. Res. 150. A resolution expressing continued support for the construction of the Victims of Communism Memorial; considered and agreed to.

By Mr. FRIST (for himself, Mr. REID, Mr. MARTINEZ, Mr. LAUTENBERG, Mr. INHOFE, Mr. LIEBERMAN, and Mrs. DOLE):

S. Res. 151. A resolution recognizing the 57th Anniversary of the Independence of the State of Israel; considered and agreed to.

By Mr. SMITH (for himself, Mrs. FEINSTEIN, and Mr. DURBIN):

S. Con. Res. 35. A concurrent resolution expressing the sense of Congress that the Government of the Russian Federation should issue a clear and unambiguous statement of admission and condemnation of the illegal occupation and annexation by the Soviet Union from 1940 to 1991 of the Baltic countries of Estonia, Latvia, and Lithuania; considered and agreed to.

## ADDITIONAL COSPONSORS

S. 185

At the request of Mr. NELSON of Florida, the name of the Senator from Florida (Mr. MARTINEZ) was added as a cosponsor of S. 185, a bill to amend title 10, United States Code, to repeal the requirement for the reduction of certain Survivor Benefit Plan annuities by the amount of dependency and indemnity compensation and to modify the effective date for paid-up coverage under the Survivor Benefit Plan.

S. 327

At the request of Mr. SANTORUM, the name of the Senator from Kentucky (Mr. BUNNING) was added as a cosponsor of S. 327, a bill to amend the Internal Revenue Code of 1986 to expand the tip credit to certain employers and to promote tax compliance.

S. 392

At the request of Mr. LEVIN, the name of the Senator from Colorado (Mr. SALAZAR) was added as a cosponsor of S. 392, a bill to authorize the President to award a gold medal on behalf of Congress, collectively, to the Tuskegee Airmen in recognition of their unique military record, which inspired revolutionary reform in the Armed Forces.

S. 473

At the request of Ms. CANTWELL, the name of the Senator from California (Mrs. BOXER) was added as a cosponsor of S. 473, a bill to amend the Public Health Service Act to promote and improve the allied health professions.

S. 502

At the request of Mr. NELSON of Florida, his name was added as a cosponsor of S. 502, a bill to revitalize rural America and rebuild main street, and for other purposes.

S. 665

At the request of Mr. DORGAN, the name of the Senator from New York (Mrs. CLINTON) was added as a cosponsor of S. 665, a bill to reauthorize and improve the Spark M. Matsunaga Hydrogen Research, Development, and Demonstration Act of 1990 to establish a program to commercialize hydrogen and fuel cell technology, and for other purposes.

S. 671

At the request of Mr. LIEBERMAN, the name of the Senator from New York (Mrs. CLINTON) was added as a cosponsor of S. 671, a bill to amend the Internal Revenue Code of 1986 to allow a credit against income tax for certain fuel cell property.

S. 914

At the request of Mr. ALLARD, the name of the Senator from South Dakota (Mr. JOHNSON) was added as a cosponsor of S. 914, a bill to amend the Public Health Service Act to establish a competitive grant program to build capacity in veterinary medical education and expand the workforce of veterinarians engaged in public health practice and biomedical research.

S. 988

At the request of Mr. SESSIONS, the names of the Senator from North Carolina (Mr. BURR) and the Senator from South Carolina (Mr. DEMINT) were added as cosponsors of S. 988, a bill to permanently repeal the estate and generation-skipping transfer taxes.

S. 1010

At the request of Mr. SANTORUM, the names of the Senator from New Jersey (Mr. CORZINE) and the Senator from Colorado (Mr. SALAZAR) were added as cosponsors of S. 1010, a bill to amend title XVIII of the Social Security Act to improve patient access to, and utilization of, the colorectal cancer screening benefit under the Medicare Program.

S. 1022

At the request of Mrs. LINCOLN, the names of the Senator from Arkansas (Mr. PRYOR) and the Senator from Michigan (Ms. STABENOW) were added as cosponsors of S. 1022, a bill to amend the Internal Revenue Code of 1986 to allow for an energy efficient appliance credit.

S. 1064

At the request of Mr. COCHRAN, the name of the Senator from Louisiana (Ms. LANDRIEU) was added as a cosponsor of S. 1064, a bill to amend the Public Health Service Act to improve stroke prevention, diagnosis, treatment, and rehabilitation.

S. 1068

At the request of Mrs. DOLE, the name of the Senator from Montana (Mr. BURNS) was added as a cosponsor of S. 1068, a bill to provide for higher education affordability, access, and opportunity.

S.J. RES. 12

At the request of Mr. HATCH, the name of the Senator from New Hampshire (Mr. SUNUNU) was added as a cosponsor of S.J. Res. 12, a joint resolution proposing an amendment to the Constitution of the United States authorizing Congress to prohibit the physical desecration of the flag of the United States.

S.J. RES. 18

At the request of Mrs. FEINSTEIN, the names of the Senator from New Mexico (Mr. BINGAMAN) and the Senator from Massachusetts (Mr. KERRY) were added as cosponsors of S.J. Res. 18, a joint resolution approving the renewal of import restrictions contained in the Burmese Freedom and Democracy Act of 2003.

S. CON. RES. 11

At the request of Mr. SESSIONS, the name of the Senator from New York (Mrs. CLINTON) was added as a cosponsor of S. Con. Res. 11, a concurrent resolution honoring the Tuskegee Airmen for their bravery in fighting for our freedom in World War II, and for their contribution in creating an integrated United States Air Force.

AMENDMENT NO. 762

At the request of Mr. NELSON of Florida, the name of the Senator from Florida (Mr. MARTINEZ) was added as a cosponsor of amendment No. 762 intended to be proposed to S. 1042, an original bill to authorize appropriations for fiscal year 2006 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy,

to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes.

## STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mrs. LINCOLN (for herself and Mr. TALENT):

S. 1076. A bill to amend the Internal Revenue Code of 1986 to extend the excise tax and income tax credits for the production of biodiesel; to the Committee on Finance.

Mr. TALENT. Mr. President, today Senator LINCOLN and I introduce legislation to extend the current excise tax credit for biodiesel through 2010. This tax credit brings great benefits to our nation's economy and environment while at the same time reducing our dependence on foreign oil.

Biodiesel is a cleaner burning alternative to petroleum-based diesel, and it is made from renewable resources like soybeans and other natural fats and oils, grown here in the United States. It works in any diesel engine with few or no modifications. It can be used in its pure form (B100), or blended with petroleum diesel at a level—most commonly 20 percent (B20). Soybean farmers in Missouri and across the Nation have invested millions of dollars to build a strong and viable biodiesel industry.

In last years JOBS bill, we created an excise tax credit for biodiesel; a $1/gallon credit for biodiesel produced from virgin oils, and a $0.50/gallon credit for biodiesel produced from yellow grease or recycled cooking oil. This important tax credit is set to expire in less than 2 years. It is imperative that we extend this incentive that is expected to increase domestic energy security, reduce pollution and stimulate the economy.

I certainly would prefer to fill up my tank with a clean burning fuel grown by farmers in our Nation's heartland instead of petroleum imported from the Saudis. Our farmers pose no security risks. I'm not alone in this preference. More than 400 major fleets use biodiesel commercially nationwide. About 300 retail filling stations make biodiesel available to the public, and more than 1,000 petroleum distributors carry it nationwide.

I am pleased that we will soon have a biodiesel plant in Missouri. Missouri Soybean Association and Mid-America Biofuels LLC recently announced plans to build a biodiesel plant in Mexico, MO. The plant is expected to produce 30 million gallons of biodiesel annually. There is strong support for this endeavor and they have exhibited exceptional leadership by bringing this plant to Missouri. I look forward to working with them.

As I've said before, biodiesel is a fuel of the future that we can use today. It is nontoxic, biodegradable and essentially free of sulfur and aromatics. Biodiesel offers similar fuel economy, horsepower and torque to petroleum diesel while providing superior lubricity. It significantly reduces emissions of carbon monoxide, particulate matter, unburned hydrocarbons and sulfates. On a lifecycle basis, biodiesel reduces carbon dioxide emissions by 78 percent compared to petroleum diesel. In other words, biodiesel is good for your car and the environment.

Additionally, this new value added market for soybeans brings jobs to our economy and benefits to farmers. Based on the USDA baseline estimates for future soybean production, over a five year time period the biodiesel tax incentive could add almost $1 billion directly to the bottom line of U.S. farm income. In addition, the provisions will significantly benefit the U.S. economy and could increase U.S. gross output by almost $7 billion.

I want to thank Senator LINCOLN and Senator GRASSLEY for their leadership on this important issue. We need to prevent this tax credit from expiring. It is expected to increase biodiesel demand from an estimated 30 million gallons in fiscal year 2004 to at least 124 million gallons per year, based on a U.S. Department of Agriculture study.

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By Mr. JEFFORDS (for himself, Mr. LAUTENBERG, Mrs. BOXER, and Mr. LIEBERMAN):

S. 1080. A bill to amend the Safe Drinking Water Act to require the use of nontoxic products in the case of hydraulic fracturing that occurs during oil or natural gas production activities; to the Committee on Environment and Public Works.

Mr. JEFFORDS. Mr. President, I would like to thank Senators LAUTENBERG, BOXER, and LIEBERMAN for working with me to introduce this important legislation, the Hydraulic Fracturing Safety Act of 2005.

Over half of our Nation's fresh drinking water comes from underground sources. The process of hydraulic fracturing threatens our drinking water supplies. Hydraulic fracturing occurs when fluids are injected at high rates of speed into rock beds to fracture them and allow easier harvesting of natural oils and gases. It is these injection fluids that are of high concern.

In a recent report, the EPA acknowledged that these fluids, many of them toxic and harmful to people, are pumped directly into or near underground sources of drinking water. This same report cited earlier studies that indicated that only 61 percent of these fluids are recovered after the process is complete. This leaves 39 percent of these fluids in the ground, risking contamination of our drinking water.

Let me share with you the story of Laura Amos, a resident of Colorado who suffers from ill health effects today. In May of 2001, while an oil and gas well was being hydraulically fractured near her home, the metal top of her drinking well exploded into the air. At the same time, her water became bubbly and developed a horrible odor.

For three months, she was provided alternate drinking water by Ballard, later know as Encana, the company that owned the well near her home. It took this long until her water appeared normal again. Laura and her family drank from this well over the next couple of years. It was then that Laura developed a rare adrenal-gland tumor. During this time, Laura began actively investigating the chemicals used during the hydraulic fracturing of a well near her home. She learned about a chemical called 2–BE, which was later linked to adrenal-gland tumors in rodents.

Litigation over the last several years has resulted in findings that hydraulic fracturing should be regulated as part of the underground injection control program in the Safe Drinking Water Act. Yet, EPA indicates in writing that they have no intention of publishing regulations to that effect or ensuring that state programs adequately regulate hydraulic fracturing.

I ask unanimous consent that a series of letters to EPA and their responses dated October 14, 2004 and December 7, 2004, be inserted in the RECORD.

In June of 2004, an EPA study on hydraulic fracturing identified diesel as a ''constituent of potential concern.'' Prior to this, EPA had entered into a Memorandum of Agreement with three of the major hydraulic fracturing corporations, whom all voluntarily agreed to ban the use of diesel, and if necessary select replacements that will not cause hydraulic fracturing fluids to endanger underground sources of drinking water. However, all parties acknowledged that only technically feasible and cost-effective actions to provide alternatives will be sought.

Hydraulic fracturing needs to be regulated under the Safe Drinking Water Act and it has got to start now. It is unconscionable to allow the oil and gas industry to pump toxic fluids into the ground.

My bill, the Hydraulic Fracturing Safety Act of 2005, clarifies once and for all that hydraulic fracturing is part of the Underground Injection Control Program regulated under the Safe Drinking Water Act.

This legislation also bans the use of diesel and other toxic pollutants for oil and natural gas exploration.

Lastly, this legislation requires EPA to ensure that States adequately regulate hydraulic fracturing activities in all States to ensure that companies area adhering to our Nation's laws and conducting business in a manner safe for all Americans.

We need to do the right thing, and take action now to protect our Nation's drinking water supply. According to the oil and gas industry, 90 percent our oil and gas wells will be accessed through hydraulic fracturing. Congress and the EPA have to work together to provide a consistent and safe supply of drinking water for all Americans.

I ask unanimous consent that the text of the bill be printed in the RECORD.

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

U.S. SENATE, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
*Washington, DC, October 14, 2004.*

Administrator MICHAEL O. LEAVITT,
*Environmental Protection Agency, Ariel Rios Building, Washington, DC.*

DEAR ADMINISTRATOR LEAVITT: We are writing to you regarding the Environmental Protection Agency's (EPA's) administration of the Safe Drinking Water Act (SDWA) as it pertains to hydraulic fracturing. In recent months, the Agency has taken several key actions on this issue:

On December 12, 2003, the EPA signed a Memorandum of Understanding with three of the largest service companies representing 95 percent of all hydraulic fracturing performed in the U.S. These three companies, Halliburton Energy Services, Inc., Schlumberger Technology Corporation, and BJ Services Company, voluntarily agreed not to use diesel fuel in their hydraulic fracturing fluids while injecting into underground sources of water for coalbed methane production.

In June of 2004, EPA completed its study on hydraulic fracturing impacts and released its findings in a report entitled, ''Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs. The report concluded that hydraulic fracturing poses little chance of contaminating underground sources of drinking water and that no further study was needed.

On July 15, 2004, the EPA published in the Federal Register its final response to the court remand *(Legal Environmental Assistance Foundation (LEAF), Inc.*, v. *United States Environmental Protection Agency*, 276 F. 3d 1253). The Agency determined that the Alabama underground injection control (UIC) program for hydraulic fracturing, approved by EPA under section 1425 of the SDWA, complies with Class II well requirements.

We are concerned that the Agency's execution of the SDWA, as it applies to hydraulic fracturing, may not be providing adequate public health protection, consistent with the goals of the statute.

First, we have questions regarding the information presented in the June 2004 EPA Study and the conclusion to forego national regulations on hydraulic fracturing in favor of an MOU limited to diesel fuel. In the June 2004 EPA Study, EPA identifies the characteristics of the chemicals found in hydraulic fracturing fluids, according to their Material Safety Data Sheets (MSDSs), identifies harmful effects ranging from eye, skin, and respiratory irritation to carcinogenic effects. EPA determines that the presence of these chemicals does not warrant EPA regulation for several reasons. First, EPA states that none of these chemicals, other than BTEX compounds, are already regulated under the SDWA or are on the Agency's draft Contaminant Candidate List (CCL). Second, the Agency states that it does not believe that these chemicals are present in hydraulic fracturing fluids used for coalbed methane, and third, that if they are used, they are not introduced in sufficient concentrations to cause harm. These conclusions raise several questions:

1. The data presented in the June 2004 EPA study identifies potential harmful effects from the chemicals listed by the Agency in this report. Has the Agency or does the Agency plan to incorporate the results of this study and the fact that these chemicals are present in hydraulic fracturing agents into the CCL development process, and if not, why not?

2. In the June 2004 EPA study, the Agency concludes that hydraulic fracturing fluids do not contain most of the chemicals identified. This conclusion is based on two items—''conversations with field engineers'' and ''witnessing three separate fracturing events'' (June 2004 EPA Study, p. 4–17.)

a. How did the Agency select particular field engineers with whom to converse on this subject?

b. Please provide a transcript of the conversations with field engineers, including the companies or consulting firms with which they were affiliated.

c. How did the Agency select the three separate fracturing events to witness?

d. Were those events representative of the different site-specific characteristics referenced in the June 2004 study (June 2004 EPA Study, p. 4–19) as determining factors in the types of hydraulic fracturing fluids that will be used?

e. Which companies were observed?

f. Was prior notice given of the planned witnessing of these events?

g. What percentage of the annual number of hydraulic fracturing events that occur in the United States does ''3'' represent?

h. Finally, please explain why the Material Safety Data Sheets for the fluids identified as potentially being used in hydraulic fracturing list component chemicals that the EPA does not believe are present.

The Agency concludes in the June 2004 study that even if these chemicals are present, they are not present in sufficient concentrations to cause harm. The Agency bases this conclusion on assumed flowback, dilution and dispersion, adsorption and entrapment, and biodegradation. The June 2004 study repeatedly cites the 1991 Palmer study, ''Comparison between gel-fracture and water-fracture stimulations in the Black Warrior basin; Proceedings 1991 Coalbed Methane Symposium,'' which found that only 61 percent of the fluid injected during hydraulic fracturing is recovered. Please explain what data EPA collected and what observations the Agency made in the field that would support the conclusion that the 39 percent of fluids remaining in the ground are not present in sufficient concentrations to adversely affect underground sources of drinking water.

After identifying BTEX compounds as the major constituent of concern (June 2004 EPA study, page 4–15), the Agency entered into the MOU described above as its mechanism to eliminate diesel fuel from hydraulic fracturing fluids.

3. a. How does the Agency plan to enforce the provisions in the MOU and ensure that its terms are met?

b. For example, will the Agency conduct independent monitoring of hydraulic fracturing processes in the field to ensure that diesel fuel is not used?

c. Will the Agency require states to monitor for diesel use as part of their Class II UIC Programs?

4. a. Should the Agency become aware of an unreported return to the use of diesel fuel in hydraulic fracturing by one of the parties to the MOU, what recourse is available to EPA under the terms of the MOU?

b. What action does the Agency plan to take should such a situation occur?

c. Why did EPA choose to use an MOU as opposed to a regulatory approach to achieve the goal of eliminating diesel fuel in hydraulic fracturing?

d. What revisions were made to the June 2004 EPA study between the December 2003 adoption of the MOU and the 2004 release of the study? Which of those changes dealt specifically with the use and effects of diesel fuel in hydraulic fracturing?

e. The Agency also states that it expects that even if diesel were used, a number of factors would decrease the concentration and availability of BTEX. Please elaborate on the data EPA collected and the observations the Agency made in the field that would support the conclusion that the 39 percent of fluids remaining in the ground (1991 Palmer), should they contain BTEX compounds, would not be present in sufficient concentrations to adversely affect underground sources of drinking water.

We are also concerned that the EPA response to the court remand leaves several unanswered questions. The Court decision found that hydraulic fracturing wells ''fit squarely within the definition of Class II wells.'' (LEAF II, 276 F.3d at 1263), and remanded back to EPA to determine if the Alabama underground injection control program under section 1425 complies with Class II well requirements. On July 15, 2004, EPA published its finding in the Federal Register that the Alabama program complies with the requirements of the 1425 Class II well requirements. (69 FR No. 135, pp 42341.) According to EPA, Alabama is the only state that has a program specifically for hydraulic fracturing approved under section 1425. Based on this analysis, it seems that in order to comply with the Court's finding that hydraulic fracturing is a part of the Class II well definition, the remaining states should be using their existing Class II, EPA-approved programs, under 1422 or 1425, to regulate hydraulic fracturing.

To date, EPA has approved Underground Injection Control programs in 34 states. Approval dates range from 1981–1996.

5. Do you plan to conduct a national survey or review to determine whether state Class II programs adequately regulate hydraulic fracturing?

At the time that these programs were approved, the standards against which state Class II programs were evaluated did not include any minimum requirements for hydraulic fracturing. In its January 19, 2000 notice of EPA's approval of Alabama's 1425 program, the Agency stated, ''When the regulations in 40 CFR parts 144 and 146, including the well classifications, were promulgated, it was not EPA's intent to regulate hydraulic fracturing of coal beds. Accordingly, the well classification systems found in 40 CFR 144.6 and 146.5 do not expressly include hydraulic fracturing injection activities. Also, the various permitting, construction and other requirements found in Parts 144 and 146 do not specifically address hydraulic fracturing.'' (65 FR No. 12, p. 2892.)

Further, EPA acknowledges that there can be significant differences between hydraulic fracturing and standard activities addressed by state Class II programs. In the January 19, 2000 Federal Register notice, the Agency states: . . . since the injection of fracture fluids through these wells is often a one-time exercise of extremely limited duration (fracture injections generally last no more than two hours) ancillary to the well's principal function of producing methane, it did not seem entirely appropriate to ascribe Class II status to such wells, for all regulatory purposes, merely due to the fact that, prior to commencing production, they had been fractured.'' (65 FR No. 12, p. 2892.)

Although hydraulic fracturing falls under the Class II definition, the Agency has acknowledged that hydraulic fracturing is different than most of the activities that occur under Class II and that there are no national regulations or standards on how to regulate hydraulic fracturing.

6. In light of the Court decision and the Agency's July 2004 response to the Court remand, did the Agency consider establishing national regulations or standards for hydraulic fracturing or minimum requirements for hydraulic fracturing regulations under state Class II programs?

7. a. If so, please provide a detailed description of your consideration of establishing these regulations or standards and the rationale for not pursuing them.

b. Do you plan to establish such regulations or standards in the future?

c. If not, what standards will be used as the standard of measurement for compliance for hydraulic fracturing under state Class II programs?

We appreciate your timely response to these questions in reaction to the three recent actions taken by the EPA in relation to hydraulic fracturing—the adoption of the MOU, the release of the final study, and the response to the Court remand. Clean and safe drinking water is one of our nation's greatest assets, and we believe we must do all we can to continue to protect public health. Thank you again for your response.

Sincerely,

JIM JEFFORDS.
BARBARA BOXER.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
*Washington, DC, December 7, 2004.*

Hon. JIM JEFFORDS,
*U.S. Senate,*
*Washington, DC.*

DEAR SENATOR JEFFORDS: Thank you for your letter to Administrator Michael Leavitt, dated October 14, 2004, concerning the recent actions that the Environmental Protection Agency (EPA) has taken in implementing the Underground Injection Control (UIC) program with respect to hydraulic fracturing associated with coalbed methane wells.

The Office of Ground Water and Drinking Water (OGWDW) has prepared specific responses to your technical and policy questions regarding how we conducted the hydraulic fracturing study, the reasons behind our decisions pertaining to the recommendations contained in the study, and any plans or thoughts we may have on the likelihood for future investigation, regulation, or guidance concerning such hydraulic fracturing.

Since the inception of the UIC program, EPA has implemented the program to ensure that public health is protected by preventing endangerment of underground sources of drinking water (USDWs). The Agency has placed a priority on understanding the risks posed by different types of UIC wells, and worked to ensure that appropriate regulatory actions are taken where specific types of wells may pose a significant risk to drinking water sources. In 1999, in response to concerns raised by Congress and other stakeholders about issues associated with the practice of hydraulic fracturing of coalbed methane wells in the State of Alabama, EPA initiated a study to better understand the impacts of the practice.

EPA worked to ensure that its study, which was focused on evaluating the potential threat posed to USDWs by fluids used to hydraulically fracture coalbed methane wells, was carried out in a transparent fashion. The Agency provided many opportunities to all stakeholders and the general public to review and comment on the Agency study design and the draft study. The study design was made available for public comment in July 2000, a public meeting was held in August 2000, public notice of the final study design was provided in the Federal Register in September 2000, and the draft study was noticed in the Federal Register in August 2002. The draft report was also distributed to all interested parties and posted on the internet. The Agency received more than 100 comments from individuals and other entities.

EPA's final June 2004 study, Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs, is the most comprehensive review of the subject matter to date. The Agency did not recommend additional study at this time due to the study's conclusion that the potential threat to USDWs posed by hydraulic fracturing of coalbed methane wells is low. However, the Administrator retains the authority under the Safe Drinking Water Act (SDWA) section 1431 to take appropriate action to address any imminent and substantial endangerment to public health caused by hydraulic fracturing.

During the course of the study, EPA could not identify any confirmed cases where drinking water was contaminated by hydraulic fracturing fluids associated with coalbed methane production. We did uncover a potential threat to USDWs through the use of diesel fuel as a constituent of fracturing fluids where coalbeds are co-located with a USDW. We reduced that risk by signing and implementing the December 2003 Memorandum of Agreement (MOA) with three major service companies that carry out the bulk of coalbed methane hydraulic fracturing activities throughout the country. This past summer we confirmed that the companies are carrying out the MOA and view the completion of this agreement as a success story in protecting USDWs.

In your letter, you asked about the Agency's actions with respect to hydraulic fracturing in light of LEAF v. EPA. In this case, the Eleventh Circuit held that the hydraulic fracturing of coalbed seams in Alabama to produce methane gas was ''underground injection'' for purposes of the SDWA and EPA's UIC program. Following that decision, Alabama developed—and EPA approved—a revised UIC program to protect USDWs during the hydraulic fracturing of coalbeds. The Eleventh Circuit ultimately affirmed EPA's approval of Alabama's revised UIC program.

In administering the UIC program, the Agency believes it is sound policy to focus its attention on addressing those wells that pose the greatest risk to USDWs. Since 1999, our focus has been on reducing risk from shallow Class V injection wells. EPA estimates that there are more than 500,000 of these wells throughout the country. The wastes injected into them include, in part, storm water runoff, agricultural effluent, and untreated sanitary wastes. The Agency and States are increasing actions to address these wells in order to make the best use of existing resources.

EPA remains committed to ensuring that drinking water is protected. I look forward to working with Congress to respond to any additional questions, or the concerns that Members of Congress or their constituents may have. If you have further comments or questions, please contact me, or your staff may contact Steven Kinberg of the Office of Congressional and Intergovernmental Relations at (202) 564–5037.

Sincerely,

BENJAMIN H. GRUMBLES,
*Acting Assistant Administrator.*

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EPA RESPONSE TO SPECIFIC QUESTIONS REGARDING HYDRAULIC FRACTURING

1. The data presented in the June 2004 EPA study identifies potential harmful effects from the chemicals listed by the Agency in this report. Has the Agency or does the Agency plan to incorporate the results of this study and the fact that these chemicals are present in hydraulic fracturing agents into the Contaminant Candidate List (CCL) development process, and if not, why not?

Although the EPA CBM study found that certain chemical constituents could be found in some hydraulic fracturing fluids, EPA cannot state categorically that they are contained in all such fluids. Each fracturing procedure may be site specific or basin specific and fluids used may depend on the site geology, the stratigraphy, (i.e., type of coal formation), depth of the formation, and the number of coal beds for each fracture operation. The Agency's study did not develop new information related to potential health effects from these chemicals; it merely reported those potential health effects indicated on the Material Safety Data Sheet (MSDS) or other information we obtained from the service companies.

As noted in the final report, ''Contaminants on the CCL are known or anticipated to occur in public water systems . . .'' The extent to which the contaminants identified in fracturing fluids are part of the next CCL process will depend upon whether they meet this test.

2. In the June 2004 EPA study, the Agency concludes that hydraulic fracturing fluids do not contain most of the chemicals identified. This conclusion is based on two items—''conversations with field engineers'' and ''witnessing three separate fracturing events''.

a. How did the agency select particular field engineers with whom to converse on this subject?

The Agency did not ''select'' any of the engineers; we talked with the engineers who happened to be present at the field operations. In general those were engineers from the coalbed methane companies and the service companies who conducted the actual hydraulic fracturing. When we scheduled to witness the events, we usually conversed with the production company engineer to arrange the logistics and only spoke with the field engineers from the service companies at the well site.

b. Please provide a transcript of the conversations with field engineers, including the companies or consulting firms with which they were affiliated.

EPA did not prepare a word-for-word transcript of conversations with engineers.

c. How did the Agency select the three separate fracturing events to witness?

The events selected were dependent on the location of the fracturing events, the schedules of both EPA OGWDW staff and EPA Regional staff to witness the event, and the preparation time to procure funding and authorization for travel EPA witnessed the 3 events because the planning and scheduling of these happened to work for all parties. In one event, only EPA HQ staff witnessed the procedure, in another event only EPA Regional staff witnessed it, and in one event, both EPA HQ and Regional staff attended with DOE staff.

d. Were those events representative of the different site-specific characteristics referenced in the June 2004 study (p. 4–19)'' as determining factors in the types of hydraulic fracturing fluids that will be used?

Budget limitations precluded visits to each of the 11 different major coal basins in the U.S. It would have proven to be an expensive and time-consuming process to witness operations in each of these regions. Additionally, even within the same coal basin there are potentially many different types of well configurations, each of which could affect the fracturing plan. EPA believed that witnessing events in 3 very different coal basin settings—Colorado, Kansas, and south western Virginia—would give us an understanding of the practice as conducted in different regions of the country.

e. Which companies were observed?

EPA observed a Schlumberger hydraulic fracturing operation in the San Juan basin of Colorado, and Halliburton hydraulic fracturing operations in southwest Virginia and Kansas.

f. Was prior notice given of the planned witnessing of these events?

Yes, because it would have been very difficult to witness the events had they not been planned. To plan the visit, EPA needed to have prior knowledge of the drilling operation, the schedule of the drilling, and the scheduling of the services provided by the hydraulic fracturing service company. Wells, in general, take days to drill (in some cases weeks and months depending on depth of the well) and the fracturing may take place at a later date depending on the availability of the service company and other factors beyond anyone's control.

g. What percentage of the annual number of hydraulic fracturing events that occur in the United States does ''3'' represent?

Because of a limited project budget, EPA did not attempt to attend a representative number of hydraulic fracturing events; that would have been beyond the scope of this Phase I investigation. The primary purpose of the site visits was to provide EPA personnel familiarity with the hydraulic fracturing process as applied to coalbed methane wells. The visits served to give EPA staff a working-level, field experience on exactly how well-site operations are conducted, how the process takes place, the logistics in setting up the operation, and the monitoring and verification conducted by the service companies to assure that the fracturing job was accomplished effectively and safely. EPA understands that thousands of fracturing events take place annually, for both conventional oil and gas operations and coalbed methane production, and that three events represent an extremely small fraction of that total.

h. Finally, please explain why the Material Safety Data Sheets for the fluids identified as potentially being used in hydraulic fracturing list component chemicals that the EPA does not believe are present.

In Table 4–1 of the final study, EPA identified the range of fluids and fluid additives commonly used in hydraulic fracturing. Some of the fluids and fluid additives may contain constituents of potential concern, however, it is important to note that the information presented in the MSDS is for the pure product. Each of the products listed in Table 4–1 is significantly diluted prior to injection. The MSDS information we obtained is not site specific. We reviewed a number of data sheets and we noted that many of them are different, contain different lists of fluids and additives, and thus we concluded in the final report that we cannot say whether one specific chemical, or chemicals, is/are present at every hydraulic fracturing operation.

3. a. How does the Agency plan to enforce the provisions in the MOU and ensure that its terms are met?

There is no mechanism to ''enforce'' a voluntary agreement such as the MOA signed by EPA and the three major service companies. The MOA was signed in good faith by senior managers from the three service companies and the Assistant Administrator for Water, and EPA expects it will be carried out. EPA has written all signers of the MOA and asked if they have implemented the agreement and how will they ensure that diesel fuel is not being used in USDWs. All three have written back to EPA, stating that they have removed diesel from their CBM fracturing fluids when a USDW is involved and intend to implement a plan to ensure that such procedures are met. EPA intends to follow up with the service companies on progress in implementing such plans.

b. For example, will the Agency conduct independent monitoring of hydraulic fracturing processes in the field to ensure that diesel fuel is not used?

It is unlikely that EPA will conduct such field monitoring. First, in most oil and gas producing states, and coalbed methane producing states, the State Oil and Gas Agency generally has UIC primary enforcement responsibility, and the state inspectors are the primary field presence for such operations. Second, EPA has a very limited field staff and in most cases they are engaged in carrying out responsibilities related to Class I, III and V wells in states in which they directly implement the UIC program. EPA plans to work with several organizations, including the Ground Water Protection Council and the Independent Petroleum Association of America to determine if there are other smaller companies conducting CBM hydraulic fracturing with diesel fuel as a constituent and will explore the possibility of including them in the MOA.

c. Will the Agency require states to monitor for diesel use as part of their Class II programs?

Given limited funds for basic national and state UIC program requirements, EPA does not have plans to include the states as parties to the MOA or require them to monitor for diesel fuel in hydraulic fracturing fields. The State of Alabama's EPA-approved UIC program prohibits the hydraulic fracturing of coalbeds in a manner that allows the movement of contaminants into USDWs at levels exceeding the drinking water MCLs or that may adversely affect the health of persons. Current federal regulations do not expressly address or prohibit the use of diesel fuel in fracturing fluids, but the SDWA and UIC regulations allow States to be more stringent than the federal UIC program.

4. a. Should the Agency become aware of an unreported return to the use of diesel fuel in hydraulic fracturing by one of the parties to the MOD, what recourse is available to EPA under the terms of the MOD?

There are no terms in the MOA that would provide EPA a mechanism to take any enforcement action should the Agency become aware of an unreported return to the use of diesel fuel in hydraulic fracturing by one of the parties to the MOA. However, EPA would work closely with the companies to determine why such action occurred and discuss possible termination procedures. The agreement defines how either party can terminate the agreement. EPA would make every effort to work with such a company to maintain their participation in the agreement. EPA entered the agreement with an assumption that the companies would honor the commitments they have made about diesel use in hydraulic fracturing fluids.

b. What action does the Agency plan to take should such a situation occur?

If such a situation does happen, and EPA learns that diesel fuel used in hydraulic fracturing fluid may enter a USDW and may present an imminent and substantial threat to public health, EPA may issue orders or initiate litigation as necessary pursuant to SDWA section 1431 to protect public health. Otherwise, EPA would take the actions described under the previous question.

c. Why did EPA choose to use an MOU as opposed to a regulatory approach to achieve the goal of eliminating diesel fuel in hydraulic fracturing?

While the report's findings did not point to a significant threat from diesel fuel in hydraulic fracturing fluids, the Agency believed that a precautionary approach was appropriate. EPA chose to work collaboratively with the oil service companies because we thought that such an approach would work quicker, and be more effective than other approaches the Agency might employ (i.e. rulemaking, enforcement orders, etc.). We believed that once the service companies became familiar with the issue, they would willingly address EPA's concerns. After several months of meetings and negotiations between representatives of the service companies and high level management in EPA's Office of Water, a Memorandum of Agreement (MOA) was drafted and signed by all parties effective December 24, 2003.

We believe that the MOA mechanism accomplished the intended goal of removing diesel from hydraulic fracturing fluids in a matter of months, whereas proposing a rule to require removal would have taken at least a year or more.

d. What revisions were made to the June 2004 EPA study between the December 2003 adoption of the MOD and the 2004 release of the study? Which of those changes dealt specifically with the use and effects of diesel fuel in hydraulic fracturing?

During the specified time-frame, EPA focused on making editorial changes to the report and clarifying information relative to its qualitative discussion of the mitigating effects of dilution, dispersion, adsorption, and biodegradation of residual fluids. With respect to the use and effects of diesel fuel, changes in the study primarily focused on including language in the text of the report which acknowledged that we had successfully negotiated an MOA with the service companies. Specifically. EPA referenced this agreement in the text of the report in the Executive Summary at page ES–2 and on page BS–17 and further discussed the MOA in Chapter 7 in the Conclusions Section of the study.

e. The Agency also states that it expects that even if diesel were used a number of factors would decrease the concentration and availability of BTEX. Please elaborate on the data EPA collected and the observations the Agency made in the field that would support the conclusion that 39% of fluids remaining in the ground (1991 Palmer), should they contain BTEX compounds would not be present in sufficient concentrations to adversely affect underground sources of drinking water.

EPA reiterates that the 39% figure from the 1991 Palmer paper is only one instance where it has been documented what quantity of the hydraulic fracturing fluids injected into wells will remain behind. Dr. Palmer, who conducted the original research, estimated that coalbed methane production wells flow back a greater percentage of fracturing fluids injected during the process. Where formations are dewatered or produced for a substantial period of time, greater quantities of formation and fracturing fluids would presumably be removed. We used 39% remaining fluids as a ''worst case'' scenario while doing our qualitative assessment, since it was the only figure we had from research conducted on coalbed methane wells.

With respect to the BTEX compounds, we no longer believe that they are a concern owing to the MOA negotiated between EPA and the three major service companies.

5. Do you plan to conduct a national surveyor survey or review to determine whether state Class II programs adequately regulate hydraulic fracturing?

At this time, EPA has no plans to conduct such a survey or review regarding the adequacy of Class II programs in regulating hydraulic fracturing. In its final study design, EPA indicated that it would not begin to evaluate existing state regulations concerning hydraulic fracturing until it decided to do a Phase III investigation. The Agency, however, reserves the right to change its position on this if news information warrants such a change.

6. In light of the Court decision and the Agency's July 2004 response to the Court remand, did the Agency consider establishing national regulations or standards for hydraulic fracturing or minimum requirements for hydraulic fracturing regulations under Class II programs?

When State UIC programs were approved by the Agency—primarily during the early 1980s—there was no Eleventh Circuit Court decision indicating that hydraulic fracturing was within the definition of ''underground injection.'' Prior to LEAF v. EPA, EPA had never interpreted the SDWA to cover production practices, such as hydraulic fracturing. After the Court decision in 1997, the Agency began discussions with the State of Alabama on revising their UIC program to include hydraulic fracturing. The net result of that process was the EPA approval of Alabama's revised section 1425 SDWA UIC program to include specific regulations addressing CBM hydraulic fracturing. This approval was signed by the Administrator in December 1999, and published in the Federal Register in January 2000.

In light of the Phase I HF study and our conclusion that hydraulic fracturing did not present a significant public health risk, we see no reason at this time to pursue a national hydraulic fracturing regulation to protect USDWs or the public health. It is also relevant that the three major service companies have entered into an agreement with EPA to voluntarily remove diesel fuel from their fracturing fluids.

7. a. If so, please provide a detailed description of your consideration of establishing these regulations or standards and the rationale for not pursuing them. b. Do you plan to establish such regulations or standards in the future? c. If not, what standards will be used as the standard of measurement for compliance for hydraulic fracturing under state Class II programs?

EPA has not explored in any detailed fashion minimum national or state requirements for hydraulic fracturing of CBM wells, except when it evaluated the revised UIC program in Alabama.

Considering and developing national regulations for hydraulic fracturing would involve discussions with numerous stakeholders, the states, and the public and it would require an intensive effort to arrive at regulatory language that could be applied nationwide. As EPA's study indicates, coalbeds are located in very distinct geologic settings and the manner in which they are produced for methane gas may be very different in each locale. The proximity of USDWs to the coal formations, and the regional geology and hydrology all play roles in how hydraulic fracturing operations are conducted.

If EPA receives information of drinking water contamination incidents and follow-up investigations point to a problem, EPA would then re-evaluate its decision to not continue with additional study relating to CBM hydraulic fracturing.

Should additional states submit revised UIA programs for EPA's review and approval which include hydraulic fracturing regulations, we would evaluate these programs under the effectiveness standards of the SDWA section 1425 as we did for the State of Alabama.

S. 1080

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the ''Hydraulic Fracturing Safety Act of 2005''.

**SEC. 2. HYDRAULIC FRACTURING.**

Section 1421(d)(1) of the Safe Drinking Water Act (42 U.S.C. 300h(d)(1)) is amended—

(1) by adding at the end the following: ''The term 'underground injection' includes hydraulic fracturing, which means the process of creating a fracture in a reservoir rock, through the injection of fluids and propping agents, for the purpose of reservoir stimulation relating to oil and gas production activities.''; and

(2) by adding at the end the following:

''(3) HYDRAULIC FRACTURING.—

''(A) IN GENERAL.—In the case of hydraulic fracturing that occurs during the exploration for, or the production of, oil or natural gas, a producer of oil or natural gas shall not use diesel fuel or any other material that the Administrator has listed as a priority pollutant under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

''(B) REGULATIONS.—The Administrator shall promulgate such regulations as are necessary—

''(i) to regulate hydraulic fracturing in accordance with this subsection; and

''(ii) to ensure that State programs under section 1422 or 1425 regulate hydraulic fracturing in accordance with this subsection.''.

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By Mr. KYL (for himself, Ms. STABENOW, Mr. CORZINE, and Mr. TALENT):

S. 1081. A bill to amend title XVIII of the Social Security Act to provide for a minimum update for physicians' services for 2006 and 2007; to the Committee on Finance.

Mr. KYL. Mr. President, I rise today to introduce the Preserving Patient Access to Physicians Act of 2005. This bill updates Medicare physician reimbursement for 2006 and 2007 according to the recommendations of the Medicare Payment Advisory Committee (MedPAC). There would be a 2.7 percent increase to the physician payment schedule for 2006 and using the Medicare Economic Index update for the price of inputs, a 2.6 percent increase in 2007.

If the schedule is left alone, the consequences for physicians will be a negative. Instead of the 1.5 percent payment increase for 2004 and 2005 which I helped author in the Medicare Modernization Act, there would be a 4.3 percent decrease.

The sustainable growth rate (SGR) formula used to calculate physician payment depends on a number of factors: the number of Medicare fee-for-service beneficiaries, the volume and type of services provided, the price of services rendered, changes in regulations and laws. The formula also incorporates other factors such as prescription-drug prices and the gross domestic product. The SGR was intended to control expenditures by basing a given year's physician payment rate on the previous year's performance. Instead, it creates an arbitrary deficiency that continues to force Congress to intervene.

There is a debate going on, her CMS has the authority to alter the SGR formula by removing drugs. Setting that aside, though, the fact of the matter is that without Congress stepping in to provide for a physician payment update, it probably will not occur. My Senate colleagues and I have talked for many years about ensuring adequate physician payment because current and past administrations have failed to modify the formula. This formula is not doing what it was intended to do. Therefore, I believe we need to scrap it and start again. My bill is a starting point and proposes amounts for an update, but I would really like to see us go all the way back to the drawing board and answer the fundamental question of how to pay physicians appropriately for their services.

I want doctors to be able to continue to assist our nation's seniors, but it is unfair to expect them to practice and to have their reimbursement decrease. Practice expenses, the costs of medical technology, wages for administrative and clinical staff, and medical liability premiums are all increasing while physicians are on track to receive a payment decrease. They cannot afford to continue practicing medicine while receiving reimbursements that do not allow them to even break even. Many are retiring early or threatening to limit the number of Medicare patients they treat.

The service of physicians all across the country is vital to our seniors. Almost half a million doctors provide treatment to the 42 million people under the Medicare program. Physicians are often the gateway for access to other medical services and treatments. Not being able to consult a physician results in delayed referrals, delayed treatment and delayed care. In sum, the quality of health care continues to erode and our system does not operate efficiently.

Should the scheduled physician reimbursement cuts take effect, the result will be a $710 million decrease in payments to doctors in Arizona over 2006 through 2010. I have heard from virtually every physician with whom I have spoken about the constraints that inadequate payments are placing on their practice of medicine. While many work for hospitals and health systems, in the rural areas, a large number are solo practitioners or in small practices. For these physicians, poor payment hits their practice especially hard.

If Medicare rates for doctors are inadequate, many other health care payors will also lack for adequate reimbursement. Other payors such as Medicaid and private insurers often base their payments on Medicare rates. While this bill only addresses Medicare physician payment, the problem of access to services will be compounded if physicians receive reimbursement from other payors that is below the appropriate levels.

The cost of addressing the physician payment update is not cheap. Estimates on the cost of this bill are between $25 billion to $35 billion over five years. I await an official score from the Congressional Budget Office. But I point out, that doing nothing to solve this problem may cost us more: more money, more health and access problems, and more physicians leaving the profession. Although this legislation provides for a two year update, we must develop a long range mechanism to pay physicians appropriately.

I am grateful for the support of this legislation by my colleague, Senator

STABENOW of Michigan, and encourage my other colleagues to support the Preserving Patient Access to Physicians Act of 2005.

I ask unanimous consent that a letter of support be printed in the RECORD.

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

AMERICAN MEDICAL ASSOCIATION,
*Chicago, IL, May 19, 2005.*

Hon. JOHN KYL,
*U.S. Senate, Hart Senate Office Building, Washington, DC.*

DEAR SENATOR KYL: On behalf of the American Medical Association (AMA), we offer our strong support of your legislation, entitled the Preserving Patient Access to Physicians Act of 2005. We thank you for your leadership in introducing this legislation and providing a remedy to the steep Medicare physician payment cuts that are expected, beginning January 1, 2006.

The Medicare Trustees have recently predicted that Medicare payments for physicians' services will be cut by about 26 percent from 2006 through 2011. These cuts will critically impact access to medical services for our Nation's senior and disabled patients. A recent AMA survey concerning physician responses to significant Medicare physician pay cuts beginning January 1, 2006 indicates that if these cuts begin in 2006: 38 percent of physicians plan to decrease the number of new Medicare patients they accept; more than half of physicians plan to defer the purchase of information technology; and a majority of physicians will be less likely to participate in Medicare Advantage.

The expected cuts result from the inherently flawed payment update formula, the sustainable growth rate (SGR) spending target. The SGR is linked to the gross domestic product and penalizes physicians and other practitioners for volume increases that they cannot control and that the government actively promotes through new coverage decisions and other initiatives that, while beneficial to patients, are not reflected in the SGR.

The AMA applauds your leadership in addressing these cuts and introducing legislation that protects access to needed medical care. Your bill would provide a positive physician payment update of not less than 2.7 percent in 2006 and an update in 2007 that reflects physician practice cost inflation, which, at this time, is expected to be about 2.6 percent.

Your bill is critical for ensuring continued and long-term access to health care services for Medicare beneficiaries. We look forward to continuing to work with you to achieve enactment of your legislation, as well as long-term reform of the update formula.

Sincerely,

MICHAEL D. MAVES,
*Executive Vice President, CEO.*

Ms. STABENOW. Mr. President, I am very pleased to introduce the ''Preserving Patient Access to Physicians Act'' with my friend and colleague from Arizona, Senator KYL. This legislation is critical to ensuring that our Nation's 42 million Medicare beneficiaries continue to have access to high quality physician care.

The Medicare program is one of the most successful Federal programs of all time. It has lifted countless seniors out of poverty, and it has ensured access to necessary, affordable, quality medical care for our most vulnerable citizens for the last 40 years.

However, that success is threatened because the Medicare physician payment formula is fundamentally flawed. At a time when the doctors who treat our seniors are facing increasing practice costs, they are looking at a payment cut of 4.3 percent in 2006 for the Medicare services they provide that simply doesn't make sense.

And the cuts don't stop in 2006: if Congress doesn't act, physicians will be hit with devastating cuts totaling 22 percent over the next 5 years. Those cuts represent over $44 billion dollars nationwide, and a staggering $126 billion over the next 10 years.

Currently, over 20,000 MDs and DOs in Michigan treat over 1.4 million Medicare-eligible Michiganians with very high quality care. But if the doctors in my State receive their scheduled cut of $109 million next year, and over $5 billion over the next ten years, it's not hard to imagine that they may be forced to limit the number of Medicare patients they serve.

Numbers in the billions are indeed staggering—but the critical need for this legislation is even better demonstrated by getting down to the specifics: a Detroit physician currently is reimbursed $56.88 for an office visit. But while we all know medical inflation will continue to increase, under current law, that same physician will receive only $41.86 in 2011 for that same visit. And while an orthopedic surgeon in Detroit is now reimbursed $1,813.10 for performing a knee arthroplasty—a knee repair necessary to ensure full mobility—she is scheduled to receive $478.66 less for performing that same procedure in 2011! The examples go on and on: a cardiologist inserting a stent in a Medicare patient to prevent heart problems receives $873.85 today. The same surgeon inserting a stent in 2011 will be reimbursed only $643.15.

The ''Preserving Patient Access to Physicians Act of 2005'' provides physicians with a minimum update in 2006 and 2007. Specifically, the legislation overrides the Sustainable Growth Rate (SGR) formula in these years: the update to the single conversion factor in 2006 would be 2.7 percent, and a formula based on input prices and a productivity adjustment is used for 2007—the likely update for 2007 will be 2.6 percent.

Kevin Kelly, Executive Director of the Michigan State Medical Society, tells me that the minimum updates provided in this legislation are essential to both physicians and patients in Michigan in terms of assuring access to Medicare services.

And Robert Stomel, D.O., President of the Michigan Osteopathic Association, said that introduction of this legislation ''is an important step in efforts to protect the availability and access to physician services for millions of Medicare beneficiaries.'' Dr. Stomel went on to say, ''This bipartisan legislation represents a continued recognition that physician payment under Medicare must keep pace with the increasing cost of providing care.''

Yet I know that this is just the beginning. We cannot continue to use stop-gap measures but must replace the SGR with a payment system that actually makes sense and reflects the costs of providing physician care to Medicare beneficiaries.

Through the bipartisan partnership Senator KYL and I have begun today, we can—and must—fix the physician payment formula and continue to provide access to high-quality Medicare services for all of our seniors and people with disabilities.

I ask unanimous consent to have printed in the record letters of support from the American Medical Association and the American Osteopathic Association.

I urge my Colleagues to join us in this effort, and I thank the Chair.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

AMERICAN MEDICAL ASSOCIATION,
*Chicago, IL, May 19, 2005.*

Hon. DEBBIE A. STABENOW,
*U.S. Senate, Washington, DC.*

DEAR SENATOR STABENOW: On behalf of the American Medical Association (AMA), we offer our strong support of your legislation, entitled the Preserving Patient Access to Physicians Act of 2005. We thank you for your leadership in introducing this legislation and providing a remedy to the steep Medicare physician payment cuts that are expected, beginning January 1, 2006.

The Medicare Trustees have recently predicted that Medicare payments for physicians' services will be cut by about 26% from 2006 through 2011. These cuts will critically impact access to medical services for our nation's senior and disabled patients. A recent AMA survey concerning physician responses to significant Medicare physician pay cuts beginning January 1, 2006 indicates that if these cuts begin in 2006: 38% of physicians plan to decrease the number of new Medicare patients they accept; more than half of physicians plan to defer the purchase of information technology; and a majority of physicians will be less likely to participate in Medicare Advantage.

The expected cuts result from the inherently flawed payment update formula, the sustainable growth rate (SGR) spending target. The SGR is linked to the gross domestic product and penalizes physicians and other practitioners for volume increases that they cannot control and that the government actively promotes through new coverage decisions and other initiatives that, while beneficial to patients, are not reflected in the SGR.

The AMA applauds your leadership in addressing these cuts and introducing legislation that protects access to needed medical care. Your bill would provide a positive physician payment update of not less than 2.7% in 2006 and an update in 2007 that reflects physician practice cost inflation, which, at this time, is expected to be about 2.6%.

Your bill is critical for ensuring continued and long-term access to health care services for Medicare beneficiaries. We look forward to continuing to work with you to achieve enactment of your legislation, as well as long-term reform of the update formula.

Sincerely,

MICHAEL D. MAVES.

AMERICAN OSTEOPATHIC ASSOCIATION,
*Washington, DC, May 19, 2005.*

Hon. DEBBIE STABENOW,
*U.S. Senate, Washington, DC.*

DEAR SENATOR STABENOW: As President of the American Osteopathic Association (AOA), I am pleased to inform you of our strong support for the ''Preserving Patient Access to Physicians Act of 2005''. The AOA, which represents the nation's 54,000 osteopathic physicians practicing in 23 specialties and subspecialties, extends its sincere gratitude to you for introducing this bill.

The current sustainable growth rate (SGR) formula for physician services under the Medicare program is broken. The continued use of the flawed and unstable methodology will result in a loss of physician services for millions of Medicare beneficiaries. Physicians annually face reductions in payment while their practice costs continue to rise. Congress recognized this with the approval of the ''Medicare Prescription Drug, Improvement, and Modernization Act of 2003'' (MMA) (P.L. 108–173) which replaced scheduled physician payment reductions with modest increases of 1.5 percent per year for 2004 and 2005. Unfortunately, physicians now face a projected reduction of 4.3 percent for 2006, with additional reductions for the foreseeable future that could amount to over 30 percent.

Your legislation takes an important step to address the projected 2006 and 2007 reductions in physician payment under Medicare. Specifically, the bill would establish a minimum physician payment update of 2.7 percent per year for 2006 and 2007. A minimum update of 2.7 percent will help ensure a physician's continued ability to provide quality health care services to Medicare beneficiaries.

On behalf of my fellow osteopathic physicians, I pledge our support for your effort to address the flawed Medicare physician payment formula. We look forward to working with you to advance this important legislation. Please do not hesitate to call upon the AOA or our members for assistance on health care issues. Contact the AOA's Department of Government Relations at (202) 414–0140 for additional information.

Sincerely,

GEORGE THOMAS, D.O.,
*President.*

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By Mr. KENNEDY:

S. 1084. A bill to eliminate child poverty, and for other purposes; read the first time.

Mr. KENNEDY. Mr. President, it is shameful that in the richest and most powerful Nation on earth, nearly a fifth of all children—nearly 13 million—live in poverty. That is why I am introducing the End Child Poverty Act to address this fundamental moral issue. It will set a national goal to reduce child poverty by half within a decade, and to eliminate it entirely as soon as possible after that.

The effect of child poverty is far reaching. Children in poverty are often malnourished. They have weaker immune systems and are more vulnerable to infections and illness. Poor children also suffer in school. They lack vital nutrition necessary for healthy brain development. They have trouble concentrating in class. They often attend schools that have the least resources. Their families move frequently, so their school attendance is low. Overcrowding, utility shutoffs, and poor heating interfere with homework.

The End Child Poverty Act would commit the U.S. to ending these horrors of children growing up in such dire conditions. The bill would establish a Child Poverty Elimination Board to make recommendations to the President on how best to meet this commitment to children. It would offset the cost with a one percent surtax on income over $1 million to be invested in a Child Poverty Elimination Fund.

We must begin with this moral vision, just as we did with America's seniors. The elderly were once the poorest in society. But in 1935, we made a commitment that growing old shouldn't mean growing poor. We enacted Social Security and later Medicare, and now the elderly in America are significantly better off. The End Child Poverty Act is a vital step to give comparable security to America's children.

It's time for America to make a real commitment, and give real hope, real opportunity and real fairness to children and families mired in poverty in communities in all parts of our country.

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By Mr. HATCH:

S. 1086. A bill to improve the national program to register and monitor individuals who commit crimes against children or sex offenses; to the Committee on the Judiciary.

Mr. HATCH. Mr. President, we are here today in a battle to save our children, their families, and the victims, of repeat sex offenders.

I am so proud of the real warriors in this battle: the victims and their family members. One of those warriors is Ed Smart, from my home State of Utah, whose daughter Elizabeth was kidnapped from her own bedroom by a sexual predator. Ed is joined by Patti Wetterling, Linda Walker, and other outstanding advocates of our children, including John Walsh of America's Most Wanted, Ernie Allen of the National Center for Missing and Exploited Children, and Robbie Calloway of the Boys & Girls Club of America in support of this bipartisan legislation we are introducing today along with cosponsor Senator BIDEN. We need legislation that will close the gaps in many laws already on the books; integrate and revive the existing laws; and expand covered offenses against children.

The Sex Offender Registration and Notification Act will bring all of the States up to date and enable citizens in every State to inform themselves about predators in their communities. This law will enable States to take public information about sex offenders and make it easy for citizens to access at one, open, web-site.

This legislation will put the responsibility on the sex offenders themselves to register with the local authorities. They will be required to notify those authorities when they move or change jobs. And if they don't want to comply with the rules—then they will go to jail!

This is common sense—those who break such a sacred trust and intend to harm our children, no matter who they are, where they are from, or where they commit their crime, should have some obligations under this law to voluntarily make their whereabouts known or subject themselves to additional jail time. That's what this bill is about. It's that simple.

The victims and victims' families have dealt with the pain and anguish imposed on them by these sexual offenders and predators. But instead of lying down, they are standing up for imposing common-sense rules on those who have taken the life and liberty of the most innocent and defenseless among us. They are standing up for tough sentences against those who won't abide by these very simple rules. They are standing up to say that together we are stronger.

Prior to 1994 just five states required convicted sex offenders to register their address with local law enforcement. Today there are over 549,000 registered sex offenders in the United States. Unfortunately, most of these receive and serve limited sentences and roam unchecked and unknown in our communities. Their crimes are heinous and they have a high risk of repeating their crimes on innocent children.

Under this Act, sex offenders and predators will be required to register in person, versus mailing in a letter. They will be required to wear a tracking device while they are on probation for a first-time offense—and wear it for life if they choose to repeat their crimes.

This Act enables states to offer citizens a searchable, statewide sex offender registry that interacts with all other states to provide seamless registration and notification across the country.

The Sex Offender Notification and Registration Act will strengthen and unite cities, communities and states in the effort to stop the assault on American children. This bill has a companion bill in the House, sponsored by Congressman MARK FOLEY and Congressman BUD CRAMER. I invite you to join Senator BIDEN and me as we close the gaping holes that keep our children at risk.

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By Mr. ALEXANDER (for himself and Mr. SCHUMER):

S. 1087. A bill to amend section 337 of the Immigration and Nationality Act to prescribe the oath or affirmation of renunciation and allegiance required to be naturalized as a citizen of the United States; to the Committee on the Judiciary.

Mr. ALEXANDER. Today I am introducing legislation to address an important statement on what it means to be a citizen of the United States: the Oath of Allegiance, to which all new citizens swear in court when they are naturalized.

In the last session of Congress, I introduced legislation to enshrine the Oath of Allegiance in law. I was joined in that effort by 34 colleagues, including the Senator from New York, Mr.

SCHUMER, as the lead cosponsor. That legislation was introduced, in part, in response to reports that the Bureau of Citizenship and Immigration Services, or BCIS, an agency of the Department of Homeland Security, may have been planning to change the Oath of Allegiance that immigrants take to become a citizen of this nation. Other Senators and I felt the proposed language, as reported in the press, would have weakened the Oath.

Today, I introduce a bill that puts forward a compromise that I hope everyone can support. I am again grateful to be joined in this effort by the senior Senator from New York. This bill introduces a modified Oath of Allegiance that is just as strong as the current one, but that uses more modem language.

I was surprise to learn that Congress has never voted on the content of this Oath. We have left it to Federal regulators. That's not how we treat other symbols of our Nation or other statements on what it means to be an American.

For example, the American Flag, with its 50 stars—one for each State—and 13 stripes for the original colonies, cannot be altered by Federal regulation. The only way a star gets added is when Congress acts to admit a new state. And we've never changed the 13 stripes since the flag was first adopted in 1777.

The Pledge of Alliance, which we repeat each morning in the United States Senate, can't be altered by Federal regulation. The Pledge is a statement of some of the values of the American Creed: ''one nation, under God, indivisible, with liberty and justice for all.'' What if a Federal agency decided we should take out justice, just saying ''with liberty for all''? It can't happen: because the Pledge can only be altered by Act of Congress, as it last was in 1954 when the phrase ''under God'' was added.

The National Motto ''In God We Trust,'' which appears on all our coins and dollar bills, can't be altered by Federal regulation. It is a fundamental statement of the religious character of the American people—even though we don't permit and don't want the establishment of state religion. The Treasury Department can't decide to leave the motto off the next dollar bill it prints because the motto was adopted by Congress—at first in 1864 to be printed on the 2-cent piece, an later as the official National Motto in 1956.

Our National Anthem, the Star Spangled Banner, can't be changed by Federal regulation. It, too, is a statement of our values, declaring our country ''the land of the free and the home of the brave.'' If a government agency decided it preferred America the Beautiful, or the Battle Hymn of the Republic, or God Bless America, all of which are great songs, the agency would have to ask Congress to act. Why? Because the Star Spangled Banner was named our National Anthem by law in 1931.

Likewise, the Oath of Allegiance should not be altered lightly—by a government agency, without public comment, and without approval from Congress. Of the five symbols and statements I've described—the Flag, the Anthem, the Pledge, the Motto, and the Oath, only the Oath of Allegiance is legally binding on those who take it. New citizens must take it, and they must sign it.

On September 11, 2003, when I spoke about my legislation, I said:

> To be clear, I have no objection to others proposing modifications to the Oath of Allegiance that we use today. . . . perhaps ways can be found to make it even stronger.
>
> Still, let's make sure any changes have the support of the people as represented by Congress. The Oath of Allegiance is a statement of the commitments required of new citizens. Current citizens, through their elected representatives, ought to have a say as to what those commitments are. That's a lesson in democracy. A legally binding statement on American citizenship ought to reflect American values, including democracy.

It is in that spirit that I offer this compromise language that prescribes an updated but very strong Oath of Allegiance. This is the right way to go forward in considering any changes, and, I hope, will allow us to finally enshrine this statement of what it means to be an American in law.

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By Mr. KYL:

S. 1088. A bill to establish streamlined procedures for collateral review of mixed petitions, amendments, and defaulted claims, and for other purposes; to the Committee on the Judiciary.

Mr. KYL. Mr. President, I rise today to introduce the Streamlined Procedures Act. This legislation will reduce delays in federal courts' review of habeas corpus petitions filed by State prisoners.

Currently, many Federal habeas corpus cases require 10, 15, or even 20 years to complete. These delays burden the courts and deny justice to defendants with meritorious claims. They also are deeply unfair to victims of serious, violent crimes. A parent whose child has been murdered, or someone who has been the victim of a violent assault, cannot be expected to ''move on'' without knowing how the case against the attacker has been resolved. Endless litigation, and the uncertainty that it brings, is unnecessarily cruel to these victims and their families. As President Clinton noted of the 1996 habeas-corpus reforms, ''it should not take eight or nine years and three trips to the Supreme Court to finalize whether a person in fact was properly convicted or not.'' For the sake of all parties, we should minimize these delays.

The 1996 habeas corpus reforms were supposed to prevent delays in Federal collateral review. Unfortunately, as the Justice Department noted in testimony before the House Crime Subcommittee in March 2003, there still are ''significant gaps [in the habeas corpus statutes] . . . which can result in highly protracted litigation, and some of the reforms that Congress did adopt in 1996 have been substantially undermined in judicial application.''

The Streamlined Procedures Act is designed to fill some of these gaps. First, the SPA imposes reasonable but firm time limits on court of appeals' review of Federal habeas petitions. It requires a court of appeals to decide a habeas appeal within 300 days of the completion of briefing, to rule on a petition for rehearing within 90 days, and to decide a case on rehearing within 120 days before the same panel, or 180 days before an en banc court.

As generous as these time limits are, they would make a real difference in some cases. In Morales v. Woodford, 336 F.3d 1136, 9th Cir. 2003, for example, the Ninth Circuit took 3 years to decide the case after briefing was completed. And after issuing its decision, the court took another 16 months to reject a petition for rehearing. Similarly, in Williams v. Woodford, 306 F.3d 665, 9th Cir. 2002, the court waited 25 months to decide the case—and then waited another 27 months to reject a petition for rehearing, for a total delay of almost 4½ years after appellate briefing had been completed. This is too long for either defendants or victims to have to wait.

The SPA also bars courts of appeals from rehearing successive-petition applications on their own motion—current law bars petitions for rehearing or certiorari for such applications, but some courts have interpreted this restriction to not preclude rehearing by the court of appeals sua sponte. The SPA also bars Federal courts from tolling the current 1-year deadline on filing habeas claims for reasons other than those authorized by the statute, and clarifies when a State appeal is pending for purposes of tolling the deadline.

In addition, the SPA creates uniform, clear procedures for review of procedurally improper claims. Current judicial caselaw creates a series of different standards for addressing claims in a Federal petition that were not exhausted in state court, that were presented in a late amendment, or that were procedurally defaulted. The SPA sets a uniform standard, allowing procedurally improper claims to go forward only if they present meaningful evidence that the defendant did not commit the crime, with all other improper claims barred.

The SPA also expands and improves the special expedited habeas procedures authorized in chapter 154 of the United States Code. These procedures are available to States that establish a system for providing high-quality legal representation to capital defendants. Chapter 154 sets strict time limits on Federal court action and places limits on claims. Currently, however, the court that decides whether a State is eligible for chapter 154 is the same court that would be subject to its time limits. Unsurprisingly, these courts

have proven resistant to chapter 154. The SPA would place the eligibility decision in the hands of a neutral party—the U.S. Attorney General, with review of his decision in the DC Circuit, which does not hear habeas appeals. The SPA also makes chapter 154's deadlines more practical by limiting the claims that can be raised under its provisions to those presenting meaningful evidence that the defendant did not commit the crime, and by extending the time for a district court to review and rule on a chapter 154 petition from 6 months to 15 months.

The SPA also eliminates duplicative Federal review of minor sentencing errors that already have been judged by State courts to be harmless or not prejudicial. It limits Federal courts to asking only whether the type of sentencing error at issue is one that could not have been harmless.

The SPA also applies the deferential review standard enacted in the 1996 reforms to all pending cases. Remarkably, some current habeas petitions still are not governed by the 1996 reforms. The SPA corrects this oversight, ending the need to apply the pre-1996 legal regime to any cases that still are being litigated today.

And finally, the SPA limits judicial review of State clemency and pardon decisions, guaranteeing that a State won't be sued for formalizing and regularizing its pardon procedures; it limits defendants' ability to ask Federal courts for investigatory funds without allowing prosecutors to be present and rebut defense allegations; and it guarantees a crime victim's right to be notified of, to be present at, and to speak at a criminal defendant's Federal habeas hearing.

To many people, the issues addressed by the SPA—petitions for rehearing, State remedies exhaustion, procedural default, chapter 154, AEDPA deference—may seem abstract and remote. For surviving crime victims, however, these matters can be very concrete.

A case recently in the news illustrates the importance of these concerns: that of the man who murdered three member of the Ryen family and Christopher Hughes in Chino Hills, California in June 1983. The killer in that case was an escaped convict from a nearby prison. He has since admitted that he spent 2 days hiding in a vacant house next to the home of the Ryen family. After several unsuccessful telephone calls to friends asking them to give him a ride, the killer took a hatchet and buck knife from the vacant house and set out to find a vehicle. The California Supreme Court describes the rest of what occurred, 53 Cal.3d 771, 794–95:

On Saturday, June 4, 1983, the Ryens and Chris Hughes attended a barbecue in Los Serranos, a few miles from the Ryen home in Chino. Chris had received permission to spend the night with the Ryens. Between 9 and 9:30 p.m., they left to drive to the Ryen home. Except for Josh [the Ryen's 8-year-old son], they were never seen alive again.

The next morning, June 5, Chris's mother, Mary Hughes, became concerned when he did not come home. A number of telephone calls to the Ryen residence received only busy signals. [Mary's husband] William went to the Ryen home to investigate.

William observed the Ryen truck at the home, but not the family station wagon. Although the Ryens normally did not lock the house when they were home, it was locked on this occasion. William walked around the house trying to look inside. When he reached the sliding glass doors leading to the master bedroom, he could see inside. William saw the bodies of his son and Doug and Peggy Ryen on the bedroom floor. Josh was lying between Peggy and Chris. Only Josh appeared alive.

William frantically tried to open the sliding door; in his emotional state, he pushed against the fixed portion of the doors, not the sliding door. He rushed to the kitchen door, kicked it in, and entered. As he approached the master bedroom, he found Jessica on the floor, also apparently dead. In the bedroom, William touched the body of his son. It was cold and stiff. William asked Josh who had done it. Josh appeared stunned; he tried to talk but could only make unintelligible sounds.

William tried to use a telephone in the house but it did not work. He drove to a neighbor's house seeking help. The police arrived shortly. Doug, Peggy, Chris, and Jessica were dead, the first three in the master bedroom, Jessica in the hallway leading to that bedroom. Josh was alive but in shock, suffering from an obvious neck wound. He was flown by helicopter to Loma Linda University Hospital.

The victims died from numerous chopping and stabbing injuries. Doug Ryen had at least 37 separate wounds, Peggy 32, Jessica 46, and Chris 25. The chopping wounds were inflicted by a sharp, heavy object such as a hatchet or axe, the stabbing wounds by a weapon such as a knife.

The escaped prisoner who committed this crime was caught 2 months later. Again, he admitted that he stayed in the house next door, but denied any involvement in the murders. According to the California Supreme Court, however, the evidence of defendant's guilt was ''overwhelming.'' Not only had the defendant stayed at the vacant house right next door at the time of the murders; the hatchet used in the murders was taken from the vacant house; shoe prints in the Ryen house matched those in the vacant house and were from a type of shoe issued to prisoners; bloody items, including a prison-issue button, were found in the vacant house; prison-issue tobacco was found in the Ryen station wagon, which was recovered in Long Beach; and defendant's blood type and hair matched that found in the Ryen house. Defendant was convicted of the murders and sentenced to death in 1985, and the California Supreme Court upheld the defendant's conviction and sentence in 1991.

The defendant's Federal habeas proceedings began shortly thereafter, and they continue to this day—22 years after the murders. In 2000, the defendant asked the courts for DNA testing of a blood spot in the Ryen house, a t-shirt near the crime scene, and the tobacco found in the car. Despite the overwhelming evidence of his guilt, the courts allowed more testing. All three tests found that the blood and saliva matched defendant, to a degree of certainty of one in 320 billion. Blood on the t-shirt matched both the defendant and one of the victims.

One might have thought that this would end the case. Not so. In February 2004, the en banc Ninth Circuit sua sponte authorized defendant to file a second habeas petition to pursue theories that police had planted this DNA evidence. Since the evidence had been in court custody since 1983, the Ninth Circuit's theory not only required police to plan and execute a vast conspiracy to plant the evidence—it also required them to foresee the future invention of the DNA technology that would make that evidence useful in future habeas proceedings.

The Streamlined Procedures Act would have made a difference in this case. For example, it would have eliminated the need to return to state court to exhaust new claims, reducing the delay in the Federal proceedings by nearly 3 years. It would have applied the 1996 reforms to this case, allowing deferential review of state factual findings and legal analysis. It would have placed time limits on Federal appeals court decisionmaking and grants of rehearing. And it would have prevented the court of appeals from ordering rehearing of the defendant's successive-petition application on its own motion, thereby barring the current round of O.J. Simpson-style conspiracy-theory litigation. The SPA could have brought this case to closure a long time ago.

And this case deserves to be brought to closure. One cannot underestimate the grievous impact that crimes like these have on the families of the victims. Mary Hughes, the mother of 11-year-old Christopher Hughes, who was sleeping over at the Ryen house on the night of the murders, has spoken movingly of the loss of her son:

Christopher Hughes loved his bicycle, swimming and showing off for his mom and dad.

The 11-year-old's bedroom was filled with swimming trophies and Star Wars collectibles. He was a handsome kid who was chased by a lot of fifth-grade girls on the playground during recess at Our Lady of the Assumption in Claremont.

He wasn't short on friends, either.

Christopher really liked Joshua Ryen, an 8-year-old boy who lived up the street from him. They would trick-or-treat together on Halloween, play together, and their parents were good friends.

On the night of June 4 1983, Christopher asked his parents if he could spend the night at the Ryen house.

It was a decision that would change the Hughes family forever.

[Mary Hughes'] son Christopher would have been 32 today. She sometimes wonders who he would have been, what he would've looked like, and even during her most solemn moments, she wonders what life would've been like if Cooper had never gone to the Ryens' house.

''It never really ever gets better,'' she said. ''Kevin Cooper robbed him of the chance to be a child, to attend his first dance, to have a girlfriend, and to one day get married and

have kids of his own. He robbed me of my child.''

Mary Ann Hughes does have one special memory of her son she holds close to her heart. A week before his death, she took him to see the movie ''Return of the Jedi.''

''He was so happy. It was such a great day,'' she said. ''It seems like such a small thing, but it's the best memory I have of both of us.'' (Sara Carter, ''He Was at the Beginning of His Life When He Died,'' Inland Valley Daily Bulletin, February 9, 2004.)

In light of how much the surviving family already has suffered, one might expect that all participants in the criminal proceedings would take great concern and care for the feelings of the family. Unfortunately, that has not been the case. The Ninth Circuit has proved willing to turn the appeals into a three-ring circus, allowing continual pursuit of the most frivolous conspiracy theories. The impact of these now 22 years of trial and appeals on the victims' families has been predictable: they feel that they and the victims have become irrelevant to the entire process. Shortly after the Ninth Circuit authorized an additional round of appeals in this case, a local newspaper described what the families have experienced:

For nearly 20 years, since convicted murderer Kevin Cooper was sentenced to death for the 1983 slayings of a Chino Hills family and their young houseguest, families of the victims have waited silently for the day the hand of justice would grant them peace.

For those families, the last two decades have seemed like an eternity.

''I lived through a nightmare,'' said Herbert Ryen, whose brother Douglas Ryen was among those killed, along with Douglas' wife Peggy, their 11-year-old daughter Jessica, and her 10-year-old friend Christopher Hughes.

[O]n the morning of Feb. 9, [2004,] the day of Cooper's scheduled death by lethal injection, word came down that the 9th U.S. Circuit Court of Appeals had decided to block the execution.

[T]o the Ryen and Hughes families, the stay just hours before Cooper's scheduled execution at San Quentin State Prison was nearly incomprehensible. The indefinite delay has left them in a sort of emotional limbo, questioning whether the legal system had abandoned them.

''The bottom line is that this whole issue is not about Kevin Cooper . . . it is about the death penalty,'' said Mary Ann Hughes, the mother of Christoper Hughes. ''We're so mad—mad because we feel as though the courts turned their back on my son.''

''They (Court of Appeals) are holding us hostage,'' Hughes said.

For Herbert Ryen and his wife Sue, waiting for justice has taken an equally destructive toll on their lives. The torment their family experienced following the murders, and the subsequent years lost to depression, could never be replaced, he said from his home in Arizona.

Mary Ann Hughes said the pain her family suffers is only amplified by the seemingly continuous bombardment of celebrities campaigning against Cooper's execution. She wonders who will cry out in anger for the victims.

One former television star and anti-death penalty activist, Mike Farrell of the popular series MASH, spoke of the case on a recent news program.

''He claimed that we must feel relieved since the stay of execution was granted,'' Hughes said. ''How can (Farrell) have the audacity to say he knows what we are feeling?''

Farrell could not be reached for comment.

Since Christopher's death, the Hughes family has chosen to remain out of the media spotlight. And until recently, their efforts were successful, due largely to the support of their surviving children, family members and a strong network of close friends, Hughes said.

The court's decision Feb. 9 has re-opened the case, forcing the families to re-live the nightmare they have fought so hard to leave behind, they say.

Mary Ann Hughes is left wondering about other families who have had loved ones taken from them, about the legal battles they have had to endure in their own quests for justice.

She thinks of the parents of Samantha Runion, the 5-year-old Orange County girl who was murdered in 2003, and of what her family could face in the next 20 years.

For Bill Hughes, the anguish is intensified—he will forever know the pain of walking into the Ryens' home the morning after the murders, and finding his son, dead and covered in blood near the Ryens' bedroom door. He was also the first to discover Joshua Ryen, also drenched in blood, clinging to life.

''It is a memory he will always have to live with,'' Mary Ann Hughes said.

Indeed, time has been no friend to the victims' families, as California's recent appellate court ruling has further denied them closure, she added.

''What this decision has done to our legal system in California is unthinkable,'' she said. ''Somewhere along the line, the courts have got to uphold the law, and we will wait it out until they do.'' (Sara Carter, ''Families of Murder Victims Wait for Justice in Cooper Case,'' Inland Valley Daily Bulletin, February 24, 2004.)

Mary Hughes' story demonstrates why the use of Federal judicial power must be measured and fair it illustrates the heavy cost imposed by judicial excess.

No statement, however, better explains the gross cruelty caused by allowing endless litigation and appeals in a case like this than that given by one of the surviving victims of the 1983 attack. Josh Ryen was 8 years old when he was stabbed in his parents' bedroom and his parents and sister were murdered. He is now 30 years old. On April 22, 2005, he gave a statement pursuant to the recently enacted Crime Victims' Rights Act in the federal habeas corpus hearing for his parents and sister's killer. I will close my remarks by asking unanimous consent that Josh Ryen's statement be printed in the RECORD.

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

STATEMENT OF JOSHUA RYEN, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SAN DIEGO

APRIL 22, 2005.—The first time I met Kevin Cooper I was 8 years old and he slit my throat. He hit me with a hatchet and put a hole in my skull. He stabbed me twice, which broke my ribs and collapsed one lung. I lived only because I stuck four fingers in my neck to slow the bleeding, but I was too weak to move. I laid there 11 hours looking at my mother who was right beside me.

I know now he came through the sliding glass door and attacked my dad first. He was lying on the bed and was struck in the dark without warning with the hatchet and knife. He was hit many times because there is a lot of blood on the wall on his side of the bed.

My mother screamed and Cooper came around the bed and started hitting her. Somehow my dad was able to struggle between the bed and the closet but Cooper bludgeoned my father to death with the knife and hatchet, stabbing him 26 times and axing him 11. One of the blows severed his finger and it landed in the closet. My mother tried to get away but he caught her at the bottom of the bed and he stabbed her 25 times and axed her 7.

All of us kids were drawn to the room by mom's screams. Jessica was killed in the doorway with 5 ax blows and 46 stabs. I won't say how many times my best friend Chris was stabbed and axed, not because it isn't important, but because I don't want to hurt his family in any way, and they are here.

After Cooper killed everyone, and thought he had killed me, he went over to my sister and lifted her shirt and drew things on her stomach with the knife. Then he walked down the hallway, opened the refrigerator, and had a beer. I guess killing so many people can make a man thirsty.

I don't want to be here. I came because I owe it to my family, who can't speak for themselves. But by coming I am acknowledging and validating the existence of Kevin Cooper, who should have been blotted from the face of the earth a long time ago. By coming here it shows that he still controls me. I will be free, my life will start, the day Kevin Cooper dies. I want to be rid of him, but he won't go away.

I've been trying to get away from him since I was 8 years and I can't escape. He haunts me and follows me. For over 20 years all I've heard is Kevin Cooper this and Kevin Cooper that. Kevin Cooper says he is innocent, Kevin Cooper says he was framed, Kevin Cooper says DNA will clear him, Kevin Cooper says blood was planted, Kevin Cooper says the tennis shoes aren't his, Kevin Cooper says three guys did it, Kevin Cooper says police planted evidence, Kevin Cooper gets another stay from another court and sends everyone off on another wild goose chase.

The courts say there isn't any harm when Kevin Cooper gets another stay and another hearing. This just shows they don't care about me, because every time he gets another delay I am harmed and have to relive the murders all over again. Every time Kevin Cooper opens his mouth everyone wants to know what I think, what I have to say, how I'm feeling, and the whole nightmare floods all over me again: the barbecue, me begging to let Chris spend the night, me in my bed and him on the floor beside me, my mother's screams, Chris gone, dark house, hallway, bushy hair, everything black, mom cut to pieces saturated in blood, the nauseating smell of blood, eleven hours unable to move, light filtering in, Chris' father at the window, the horror of his face, sound of the front door splintering, my pajamas being cut off, people trying to save me, the whap whap of the helicopter blades, shouted questions, everything fading to black.

Every time Cooper claims he's innocent and sends people scurrying off on another wild goose chase, I have to relive the murders all over again. It runs like a horror movie, over and over again and never stops because he never shuts up. He puts PR people on national television who say outrageous things and then the press wants to know what I think. What I think is that I would like to be rid of Kevin Cooper. I would like for him to go away. I would like to never hear from Kevin Cooper again. I would like Kevin Cooper to pay for what he did.

I dread happy times like Christmas and Thanksgiving. If I go to a friend's house on

holidays I look at all the mothers and fathers and children and grandchildren and get sad because I have no one. Kevin Cooper took them from me.

I get terrified when I go into any place dark, like a house before the lights are on. I hear screams and see flashbacks and shadows. Even with lights on I see terrible things. After I was stabbed and axed I was too weak to move and stared at my mother all night. I smelled this overpowering smell of fresh blood and knew everyone had been slaughtered.

Every day when I comb my hair I feel the hole where he buried the hatchet in my head, and when I look in the mirror I see the scar where he cut my throat from ear to ear and I put four fingers in it to stop the bleeding which, they say, saved my life. Every year I lose hearing in my left ear where he buried the knife.

Helicopters give me flashbacks of life flight and my Incredible Hulks being cut off by paramedics. Bushy hair reminds me of the killer. Silence reminds me of the quiet before the screams. Cooper is everywhere. There is no escape from him.

I feel very guilty and responsible to the Hughes family because I begged them to let Chris spend the night. If I hadn't done that he wouldn't have died. I apologize to them and especially to Mr. Hughes for having to find us and see his son cut and stabbed to death.

I thank the judge who gave my grandma custody of me because she took good care of me and loves me very much.

I'm grateful to the ocean for giving me peace because when I go there I know my mother and father and sister's ashes are sprinkled there.

Kevin Cooper has movie stars and Jesse Jackson holding rallies for him, people carrying signs, lighting candles, saying prayers. To them and you I say:

I was 8 when he slit my throat,
It was dark and I couldn't see.
Through the night and day I laid there,
trying to get up and flee.
He killed my mother, father, sister, friend,
And started stalking me.
I try to run and flee from him but cannot get away,
While he demands petitions and claims, some fresh absurdity.
Justice has no ear for me nor cares about my plight,
while crowds pray for the killer and light candles in the night.
To those who long for justice and love truth which sets men free, When you pray
your prayers tonight, please remember me.

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By Mr. AKAKA (for himself, Mr. COCHRAN, and Mr. DODD):

S. 1089. A bill to establish the National Foreign Language Coordination Council to develop and implement a foreign language strategy, and for other purposes; to the Committee on Health, Education, Labor, and Pensions.

Mr. AKAKA. Mr. President, today I rise to introduce the National Language Coordination Act of 2005 which provides a framework for leading and coordination the learning of foreign languages and cultures, with my good friends Senators COCHRAN and DODD.

The National Foreign Language Coordination Act would create the position of a National Language Director and a National Foreign Language Coordination Council to develop and oversee the implementation of a foreign language strategy. The proposed Council, chaired by the National Language Director, would identify crucial priorities, increase public awareness of the need for foreign language skills, advocate maximum use of resources, coordinate cross-sector efforts, and monitor the foreign language activities of the Federal Government.

The genesis of this legislation is a report entitled, ''A Call to Action for National Foreign Language Capabilities,'' issued by the National Language Conference held in June 2004 under the auspices of the Department of Defense. This conference was an extraordinary gathering of government, industry, academia, and language association representatives. The mission of this meeting was twofold: to discuss and deliberate initial strategic approaches to meeting the nation's language needs in the 21st century, and to identify actions that could move the United States toward a ''language-competent nation.'' It was hosted by the Office of the Under Secretary of Defense for Personnel and Readiness and by the Center for Advanced Study of Language (CASL) at the University of Maryland at College Park.

I ask unanimous consent that the executive summary of the report, ''A Call to Action for National Foreign Language Capabilities,'' be printed in the RECORD following my remarks.

I believe the recommendations of this report speak eloquently to the need for this legislation. As Dr. David Chu, Undersecretary of Defense for Personnel and Readiness, notes in his forward to the report, ''improving the nation's foreign language capability requires immediate and long-term engagement.''

The intent of this legislation is to ensure that immediate and long-term engagement.

The establishment of a National Language Director and the creation of a National Foreign Language Coordination Council will ensure that the key recommendations of the Department of Defense sponsored conference will be implemented, which include: developing policies and programs that build the nation's language and cultural understanding capability; engaging federal, state, and local agencies and the private sector in solutions; developing language and cultural competency across public and private sectors; developing language skills in a wide range of critical languages; strengthening our education system, programs, and tools in foreign languages and cultures; and integrating language training into career fields and increase the number of language professionals.

The terrorist attacks of September 11, 2001, showed how much more was needed to improve education in these critical areas. The investigations surrounding the attacks have underscored how important foreign language proficiency is to our national security. The Joint Intelligence Committee inquiry into the terrorist attacks found that prior to September 11, the Intelligence Community was not prepared to handle the challenge of translating the volumes of foreign language counter-terrorism intelligence that had been collected. Agencies within the Intelligence Community experienced backlogs in material awaiting translation and a shortage of language specialists and language-qualified field officers in the most critical terrorism-related languages used by terrorists.

America needs people who understand foreign cultures and who are fluent in locally-spoken languages. The stability and economic vitality of the United States and our national security depend on American citizens who are knowledgeable about the world. We need civil servants, including law enforcement officers, teachers, area experts, diplomats, and business people with the ability to communicate at an advanced level in the languages and understand the cultures of the people with whom they interact.

Experts tell us we should develop long-term relationships with people from every walk of life all across the world, whether or not the languages they speak are considered critical for a particular issue or emergency.

They are right.

As then-Deputy Secretary of Defense Paul Wolfowitz noted at the National Language Conference, ''The greater our ability to communicate with people, the easier the burden on our troops and the greater the likelihood that we can complete our missions and bring our people home safely. Even better, the greater our linguistic skill, the greater the possibility that we can resolve international differences and achieve our objectives without having to use force.''

I am proud of my own State of Hawaii, whose language patterns reflect that we are a mixing pot of varying cultures. According to the 2000 Census, more than 300,000 people or about 27 percent of those five years and older spoke a language other than English at home. This is compared to about 18 percent nationwide. Language education offerings to improve conversational proficiency with formal training in non-English languages are working to keep pace with increased demand. In addition, enrollments in foreign language courses at the University of Hawaii have been markedly increasing—a trend that I am gratified to see happening across the country. But more needs to be done both in Hawaii and the rest of the country.

I am a passionate believer in beginning these programs at the earliest age possible. Americans need to be open to the world; we need to be able to see the world through the eyes of others if we are going to understand how to resolve the complex problems we face.

The need to hear and understand one another is timeless and essential.

An ongoing commitment to developing language and cultural expertise

helps prevent a crisis from occurring and provides diplomatic and language resources when needed. We cannot afford to seek out foreign language skills after an event like 9/11 occurs. The failures of communication and understanding have already done their damage. We must provide an ongoing commitment to language education and encourage knowledge of foreign languages and cultures.

The answer is simple. If we are committed to maintaining these relationships and creating a language proficient citizenry, we must have leadership. The National Foreign Language Coordination Act will provide this leadership and ensure that we are aware and involved in the world around us.

I ask unanimous consent that the text of the bill be printed in the RECORD.

I urge my colleagues to support this important legislation.

There being no objection, the materials were ordered to be printed in the RECORD, as follows:

EXECUTIVE SUMMARY—A CALL TO ACTION AND LEADERSHIP

Vision: Our vision is a world in which the United States is a stronger global leader through proficiency in foreign languages and understanding of the cultures of the world. These abilities are strengths of our public and private sectors and pillars of our educational system. The government, academic, and private sectors contribute to, and mutually benefit from, these national capabilities.

The terrorist attacks of September 11th, the Global War on Terrorism, and the continued threat to our Homeland have defined the critical need to take action to improve the foreign language and cultural capabilities of the Nation. We must act now to improve the gathering and analysis of information, advance international diplomacy, and support military operations. We must act to retain our global market leadership and succeed against increasingly sophisticated competitors whose workforces possess potent combinations of professional skills, knowledge of other cultures, and multiple language proficiencies. Our domestic well-being demands action to provide opportunities for all students to learn foreign languages important for the Nation, develop the capabilities of our heritage communities, and ensure services that are core to our quality of life.

Success in this crucial undertaking will depend on leadership strong enough to:

Implement policies, programs, and legislation that build the national language and cultural understanding capability;

Engage Federal, state, and local agencies and the private sector in solutions;

Develop language and cultural competency across public and private sectors;

Develop language skills in a wide range of critical languages;

Strengthen our education system, programs, and tools in foreign languages and cultures; and

Integrate language training into career fields and increase the number of language professionals, especially in the less commonly taught languages.

Leadership must be comprehensive, as no one sector—government, industry, or academia—has all of the needs for language and cultural competency, or all of the solutions. Some actions must be initiated immediately by specific agencies and Federal Departments should organize to work on proposed recommendations. Other necessary solutions must be long-term, strategic, and '' involve multiple organizations in all levels. To accomplish this agenda, the Nation needs:

A National Language Authority appointed by the President to develop and implement a national foreign language strategy;

A National Foreign Language Coordination Council to coordinate implementation of the national foreign language strategy.

This is the Call to Action to move the Nation toward a 21st century vision.

S. 1089

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the ''National Foreign Language Coordination Act of 2005''.

**SEC. 2. FINDINGS.**

Congress finds that—

(1) there is a severe shortage of qualified language professionals, including teachers, translators, and interpreters, especially in less commonly taught languages, across the United States;

(2) Federal, State, and local governments need individuals with bilingual and bicultural capabilities, including—

(A) diplomats;

(B) defense and intelligence analysts;

(C) military personnel;

(D) foreign language instructors;

(E) health professionals;

(F) medical and social services providers;

(G) court interpreters;

(H) translators; and

(I) law enforcement officers;

(3) deficiencies in the national language capabilities have—

(A) undermined cross-cultural communication and understanding at home and abroad;

(B) restrained social mobility;

(C) lessened national commercial competitiveness;

(D) limited the effectiveness of public diplomacy;

(E) restricted justice and government services to sectors of society; and

(F) threatened national security;

(4) ample resources are not available to develop language and cultural capabilities in all of the world's languages, requiring prioritization of such resources; and

(5) a National Foreign Language Coordination Council and a National Language Director can help to raise public awareness and provide top-down coordination and direction.

**SEC. 3. ESTABLISHMENT OF THE NATIONAL FOREIGN LANGUAGE COORDINATION COUNCIL.**

(a) ESTABLISHMENT.—There is established the National Foreign Language Coordination Council (referred to as the ''Council'' in this Act), which shall be an independent establishment as defined under section 104 of title 5, United States Code.

(b) MEMBERSHIP.—The Council shall consist of the following members or their designees:

(1) The National Language Director, who shall serve as the chairperson of the Council.

(2) The Secretary of Education.

(3) The Secretary of Defense.

(4) The Secretary of State.

(5) The Secretary of Homeland Security.

(6) The Attorney General.

(7) The Director of National Intelligence.

(8) The Secretary of Labor.

(9) The Director of the Office of Personnel Management.

(10) The Director of the Office of Management and Budget.

(11) The Secretary of Commerce.

(12) The Secretary of Health and Human Services.

(13) The Secretary of the Treasury.

(14) The Secretary of Housing and Urban Development.

(15) The Secretary of Agriculture.

(16) The heads of such other Federal agencies as the Council considers appropriate.

(c) RESPONSIBILITIES.—

(1) IN GENERAL.—The Council shall be charged with—

(A) developing a national foreign language strategy within 18 months of the date of enactment of this Act; and

(B) overseeing the implementation of such strategy.

(2) STRATEGY CONTENT.—The strategy developed under paragraph (1) shall include—

(A) identification of crucial priorities across all sectors;

(B) identification and evaluation of Federal foreign language programs and activities, including—

(i) recommendations on coordination;

(ii) program enhancements; and

(iii) allocation of resources so as to maximize use of resources;

(C) needed national policies and corresponding legislative and regulatory actions in support of, and allocation of designated resources to, promising programs and initiatives at all levels (Federal, State, and local), especially in the less commonly taught languages that are seen as critical for national security and global competitiveness in the next 20 to 50 years;

(D) effective ways to increase public awareness of the need for foreign language skills and career paths in all sectors that can employ those skills, with the objective of increasing support for foreign language study among—

(i) Federal, State, and local leaders;

(ii) students;

(iii) parents;

(iv) elementary, secondary, and postsecondary educational institutions; and

(v) potential employers;

(E) incentives for related educational programs, including foreign language teacher training;

(F) coordination of cross-sector efforts, including public-private partnerships;

(G) coordination initiatives to develop a strategic posture for language research and recommendations for funding for applied foreign language research into issues of national concern;

(H) assistance for—

(i) the development of foreign language achievement standards; and

(ii) corresponding assessments for the elementary, secondary, and postsecondary education levels, including the National Assessment of Educational Progress in foreign languages;

(I) development of—

(i) language skill-level certification standards;

(ii) an ideal course of pre-service and professional development study for those who teach foreign language;

(iii) suggested graduation criteria for foreign language studies and appropriate non-language studies, such as—

(I) international business;

(II) national security;

(III) public administration; and

(IV) health care; and

(J) identification of and means for replicating best practices at all levels and in all sectors, including best practices from the international community.

(d) MEETINGS.—The Council may hold such meetings, and sit and act at such times and places, as the Council considers appropriate, but shall meet in formal session at least 2 times a year. State and local government agencies and other organizations (such as

academic sector institutions, foreign language-related interest groups, business associations, industry, and heritage community organizations) shall be invited, as appropriate, to public meetings of the Council at least once a year.

(e) STAFF.—

(1) IN GENERAL.—The Director may appoint and fix the compensation of such additional personnel as the Director considers necessary to carry out the duties of the Council.

(2) DETAILS FROM OTHER AGENCIES.—Upon request of the Council, the head of any Federal agency may detail, on a reimbursable basis, any of the personnel of such agency to the Council.

(3) EXPERTS AND CONSULTANTS.—With the approval of the Council, the Director may procure temporary and intermittent services under section 3109(b) of title 5, United States Code.

(f) POWERS.—

(1) DELEGATION.—Any member or employee of the Council may, if authorized by the Council, take any action that the Council is authorized to take in this Act.

(2) INFORMATION.—The Council may secure directly from any Federal agency such information the Council considers necessary to carry out its responsibilities. Upon request of the Director, the head of such agency shall furnish such information to the Council.

(3) DONATIONS.—The Council may accept, use, and dispose of gifts or donations of services or property.

(4) MAIL.—The Council may use the United States mail in the same manner and under the same conditions as other Federal agencies.

(g) CONFERENCES, NEWSLETTER, AND WEBSITE.—In carrying out this Act, the Council—

(1) may arrange Federal, regional, State, and local conferences for the purpose of developing and coordinating effective programs and activities to improve foreign language education;

(2) may publish a newsletter concerning Federal, State, and local programs that are effectively meeting the foreign language needs of the nation; and

(3) shall create and maintain a website containing information on the Council and its activities, best practices on language education, and other relevant information.

(h) REPORTS.—Not later than 90 days after the date of enactment of this Act, and annually thereafter, the Council shall prepare and transmit to the President and Congress a report that describes the activities of the Council and the efforts of the Council to improve foreign language education and training and impediments, including any statutory and regulatory restrictions, to the use of each such program.

**SEC. 4. ESTABLISHMENT OF A NATIONAL LANGUAGE DIRECTOR.**

(a) IN GENERAL.—There is established a National Language Director who shall be appointed by the President. The National Language Director shall be a nationally recognized individual with credentials and abilities across all of the sectors to be involved with creating and implementing long-term solutions to achieving national foreign language and cultural competency.

(b) RESPONSIBILITIES.—The National Language Director shall—

(1) develop and oversee the implementation of a national foreign language strategy across all sectors;

(2) establish formal relationships among the major stakeholders in meeting the needs of the Nation for improved capabilities in foreign languages and cultural understanding, including Federal, State, and local government agencies, academia, industry, labor, and heritage communities; and

(3) coordinate and lead a public information campaign that raises awareness of public and private sector careers requiring foreign language skills and cultural understanding, with the objective of increasing interest in and support for the study of foreign languages among national leaders, the business community, local officials, parents, and individuals.

(c) COMPENSATION.—The National Language Director shall be paid at a rate of pay payable for a position at level V of the Executive Schedule under section 5316 of title 5, United States Code.

**SEC. 5. ENCOURAGEMENT OF STATE INVOLVEMENT.**

(a) STATE CONTACT PERSONS.—The Council shall consult with each State to provide for the designation by each State of an individual to serve as a State contact person for the purpose of receiving and disseminating information and communications received from the Council.

(b) STATE INTERAGENCY COUNCILS AND LEAD AGENCIES.—Each State is encouraged to establish a State interagency council on foreign language coordination or designate a lead agency for the State for the purpose of assuming primary responsibility for coordinating and interacting with the Council and State and local government agencies as necessary.

**SEC. 6. AUTHORIZATION OF APPROPRIATIONS.**

There are authorized to be appropriated such sums as necessary to carry out this Act.

## SUBMITTED RESOLUTIONS

### SENATE RESOLUTION 149—HONORING THE LIFE AND CONTRIBUTIONS OF HIS EMINENCE, ARCHBISHOP IAKOVOS, FORMER ARCHBISHOP OF THE GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA

Ms. SNOWE (for herself and Mr. SARBANES) submitted the following resolution; which was referred to the Committee on the Judiciary:

S. RES. 149

Whereas His Eminence, Archbishop Iakovos, former archbishop of the Greek Orthodox Archdiocese of North and South America and spiritual leader of Greek Orthodox Christians in the Western Hemisphere from 1959 to 1996, passed away at the age of 93 on April 10, 2005, in Stamford, Connecticut;

Whereas, when Archbishop Iakovos retired at the age of 85 on July 29, 1996, the Archbishop had given 37 years of outstanding service that were distinguished by his leadership in furthering religious unity, revitalizing Christian worship, and championing human and civil rights;

Whereas Archbishop Iakovos was born Demetrios A. Coucouzis on the tiny island of Imbros in the Aegean Sea to Maria and Athanasios Coucouzis on July 29, 1911;

Whereas Archbishop Iakovos enrolled in the Ecumenical Patriarchal Theological School at Halki at the age of 15;

Whereas, after graduating with high honors from Halki, Archbishop Iakovos was ordained deacon in 1934, taking the ecclesiastical name Iakovos;

Whereas 5 years after his ordination, Archbishop Iakovos received an invitation to serve as archdeacon to the late Archbishop Athenagoras, the primate of North and South America, who later became Ecumenical Patriarch of Constantinople;

Whereas in 1940, Archbishop Iakovos was ordained to the priesthood in Lowell, Massachusetts, beginning his service at St. George Church in Hartford, Connecticut, while teaching and serving as assistant dean of the Holy Cross Greek Orthodox Theological School, then in Pomfret, Connecticut, and now in Brookline, Massachusetts;

Whereas in 1941, Archbishop Iakovos was named preacher at Holy Trinity Cathedral in New York City, and in the summer of 1942 served as temporary dean of St. Nicholas Church in St. Louis, Missouri;

Whereas Archbishop Iakovos was appointed dean of the Annunciation Greek Orthodox Cathedral in Boston, Massachusetts, in 1942, and remained there until 1954;

Whereas in 1945, Archbishop Iakovos earned a Master of Sacred Theology Degree from Harvard University;

Whereas Archbishop Iakovos became a United States citizen in 1950;

Whereas in 1954, Archbishop Iakovos was ordained Bishop of Melita by his spiritual father and mentor, Ecumenical Patriarch Athenagoras, for whom he served four years as personal representative of the Patriarchate to the World Council of Churches in Geneva;

Whereas on February 14, 1959, the Holy Synod of the Ecumenical Patriarchate elected Archbishop Iakovos to succeed Archbishop Michael as primate of the Greek Orthodox Church in the Americas;

Whereas Archbishop Iakovos was enthroned April 1, 1959, at Holy Trinity Cathedral in New York City, assuming responsibility for a jurisdiction that has grown to be over 500 parishes in the United States alone;

Whereas the enthronement of Archbishop Iakovos in 1959 ushered in a new era for the Greek Orthodox Church in America, in which the Church became part of the mainstream of American religious life;

Whereas in 1959, shortly after being named archbishop, Archbishop Iakovos held a historic meeting with Pope John XXIII, becoming the first Greek Orthodox Archbishop to meet with a Roman Catholic Pope in 350 years;

Whereas Archbishop Iakovos was a dynamic participant in the contemporary ecumenical movement for Christian unity, serving for nine years as President of the World Council of Churches and piloting Inter-Orthodox, Inter-Christian, and Inter-Religious dialogues;

Whereas Archbishop Iakovos vigorously supported the passage of the Civil Rights Act of 1964, and had the courage to walk hand in hand with Dr. Martin Luther King, Jr. in Selma, Alabama, a historic moment for America that was captured on the cover of LIFE Magazine on March 26, 1965;

Whereas Archbishop Iakovos spoke out forcefully against violations of human rights and religious freedom and, in 1974, undertook a massive campaign to assist Greek Cypriot refugees following the invasion of Cyprus by Turkish armed forces;

Whereas Archbishop Iakovos was a recipient of the Presidential Medal of Freedom, the Nation's highest civilian honor, which was bestowed on him by President Carter on June 9, 1980;

Whereas in 1986, Archbishop Iakovos was awarded the Ellis Island Medal of Honor and was cited by the Academy of Athens, the National Conference of Christians and Jews, and the Appeal of Conscience;

Whereas Archbishop Iakovos, during his stewardship of the Greek Orthodox Church in America, became an imposing religious figure and a champion of social causes, encouraging the faithful to become involved in all aspects of American life;

Whereas Archbishop Iakovos was a friend to nine Presidents, and to religious and political leaders worldwide, receiving honorary

degrees from some 40 colleges and universities;

Whereas Archbishop Iakovos presented a prayer at Presidential inaugural ceremonies in 1961, 1965, 1969, and 1972;

Whereas the Archbishop has said of his pastoral work with immigrants in New England and New York, ''I lived and struggled with them to maintain the faith and culture.'';

Whereas in a 1995 interview, the Archbishop said he had accomplished a major goal ''to have the Orthodox Church be accepted by the family of religions in the United States''; and

Whereas Archbishop Iakovos was interred at the Holy Trinity Cathedral in New York, New York, on April 15, 2005: Now, therefore, be it

*Resolved,* That the Senate—

(1) mourns the loss of Archbishop Iakovos and commends the life the Archbishop led;

(2) thanks Archbishop Iakovos for his service to the members of his church and to the people of this Nation;

(3) honors Archbishop Iakovos' commitment to the principles of equality, humanity, and peace; and

(4) recognizes that Archbishop Iakovos was a committed and caring pastor to a whole generation of Greek Americans—

(A) whose hard work, determination, and pride in their religious and cultural heritage Archbishop Iakovos embodied; and

(B) who will dearly miss the Archbishop.

## SENATE RESOLUTION 150—EXPRESSING CONTINUED SUPPORT FOR THE CONSTRUCTION OF THE VICTIMS OF COMMUNISM MEMORIAL

Mr. DURBIN (for himself, Mr. SMITH, and Mr. MARTINEZ) submitted the following resolution; which was considered and agreed to:

S. RES. 150

Whereas section 905 of the FRIENDSHIP Act (40 U.S.C. 1003 note) authorizes the construction of a memorial to honor the victims of communism;

Whereas the construction of a Victims of Communism Memorial near the United States Capitol in the District of Columbia is scheduled to begin in the fall of 2005;

Whereas construction of the Memorial is supported by many Americans whose country of origin is, or was, a ''Captive Nation'', from Baltic-Americans to Vietnamese-Americans;

Whereas communism has claimed the lives of more than 100,000,000 people in less than 100 years; and

Whereas it is important for the people of the United States to honor and remember the victims of communism by supporting the construction of this memorial: Now, therefore, be it

*Resolved,* That the Senate expresses its continued support for the construction of the Victims of Communism Memorial.

## SENATE RESOLUTION 151—RECOGNIZING THE 57TH ANNIVERSARY OF THE INDEPENDENCE OF THE STATE OF ISRAEL

Mr. FRIST (for himself, Mr. REID, Mr. MARTINEZ, Mr. LAUTENBERG, Mr. INHOFE, Mr. LIEBERMAN, and Mrs. DOLE) submitted the following resolution; which was considered and agreed to:

S. RES. 151

Whereas in May 1948, the State of Israel was established as a sovereign and independent nation;

Whereas the United States was one of the first nations to recognize Israel, only 11 minutes after its creation;

Whereas Israel has provided the opportunity for Jews from all over the world to reestablish their ancient homeland;

Whereas Israel is home to many religious sites which are sacred to Judaism, Christianity, and Islam;

Whereas Israel provided a refuge to Jews who survived the horrors of the Holocaust and the evils committed by the Nazis which were unprecedented in human history;

Whereas the people of Israel have established a unique, pluralistic democracy which includes the freedoms cherished by the people of the United States, including freedom of speech, freedom of religion, freedom of association, freedom of the press, and government by the consent of the governed;

Whereas Israel continues to serve as a shining model of democratic values by regularly holding free and fair elections, promoting the free exchange of ideas, and vigorously exercising in its Parliament, the Knesset, a democratic government that is fully representative of its citizens;

Whereas Israel has bravely defended itself from attacks repeatedly since independence;

Whereas the Government of Israel has successfully worked with the neighboring Governments of Egypt and Jordan to establish peaceful, bilateral relations;

Whereas, despite the deaths of over one thousand innocent Israelis at the hands of murderous, suicide bombers and other terrorists during the past 4 years, the people of Israel continue to seek peace with their Palestinian neighbors;

Whereas the United States and Israel enjoy a strategic partnership based on shared mutual democratic values, friendship, and respect;

Whereas the people of the United States share affinity with the people of Israel and view Israel as a strong and trusted ally; and

Whereas Israel has made significant global contributions in the fields of science, medicine, and technology: Now, therefore, be it

*Resolved,* That the Senate—

(1) recognizes the independence of the State of Israel as a significant event in providing refuge and a national homeland for the Jewish people;

(2) strongly supports efforts to bring peace to the Middle East, including the disengagement plan of the Israeli government, the Roadmap, and the recent Quartet decision to appoint World Bank President James Wolfensohn as Coordinator for Gaza Disengagement.

(3) commends the bipartisan commitment of all United States administrations and United States Congresses since 1948 to stand by Israel and work for its security and well-being; and

(4) extends warm congratulations and best wishes to the people of Israel as they celebrate the 57th anniversary of Israel's independence.

## SENATE CONCURRENT RESOLUTION 35—EXPRESSING THE SENSE OF CONGRESS THAT THE GOVERNMENT OF THE RUSSIAN FEDERATION SHOULD ISSUE A CLEAR AND UNAMBIGUOUS STATEMENT OF ADMISSION AND CONDEMNATION OF THE ILLEGAL OCCUPATION AND ANNEXATION BY THE SOVIET UNION FROM 1940 TO 1991 OF THE BALTIC COUNTRIES OF ESTONIA, LATVIA, AND LITHUANIA

Mr. SMITH (for himself, Mrs. FEINSTEIN, and Mr. DURBIN) submitted the following resolution; which was considered and agreed to:

S. CON. RES. 35

Whereas the incorporation in 1940 of the Baltic countries of Estonia, Latvia, and Lithuania into the Soviet Union was an act of aggression carried out against the will of sovereign people;

Whereas the United States was steadfast in its policy of not recognizing the illegal Soviet annexation of Estonia, Latvia, and Lithuania;

Whereas the Russian Federation is the successor state to the Soviet Union;

Whereas the Molotov-Ribbentrop Pact of 1939, including its secret protocols, between Nazi Germany and the Soviet Union provided the Soviet Union with the opportunity to occupy and annex Estonia, Latvia, and Lithuania;

Whereas the occupation brought countless suffering to the Baltic peoples through terror, killings, and deportations to Siberian concentration camps;

Whereas the peoples of Estonia, Latvia, and Lithuania bravely resisted Soviet aggression and occupation;

Whereas the Government of Germany renounced its participation in the Molotov-Ribbentrop Pact of 1939 and publicly apologized for the destruction and terror that Nazi Germany unleashed on the world;

Whereas, in 1989, the Congress of Peoples' Deputies of the Soviet Union denounced the Molotov-Ribbentrop Pact of 1939 and its secret protocols;

Whereas President Putin recently confirmed that the statement of the Congress of Peoples' Deputies remains the view of the Russian Federation;

Whereas the illegal occupation and annexation of the Baltic countries by the Soviet Union remains unacknowledged by the Russian Federation;

Whereas a declaration of acknowledgment of the illegal occupation and annexation by the Russian Federation would lead to improved relations between the people of Estonia, Latvia, and Lithuania and the people of Russia, would form the basis for improved relations between the governments of the countries, and strengthen stability in the region;

Whereas the Russian Federation is to be commended for beginning to acknowledge grievous and regrettable incidents in their history, such as admitting complicity in the massacre of Polish soldiers in the Katyn Forest in 1940;

Whereas the truth is a powerful weapon for healing, forgiving, and reconciliation, but its absence breeds distrust, fear, and hostility; and

Whereas countries that cannot clearly admit their historical mistakes and make peace with their pasts cannot successfully build their futures: Now, therefore, be it

*Resolved by the Senate (the House of Representatives concurring),* That it is the sense

of Congress that the Government of the Russian Federation should issue a clear and unambiguous statement of admission and condemnation of the illegal occupation and annexation by the Soviet Union from 1940 to 1991 of the Baltic countries of Estonia, Latvia, and Lithuania, the consequence of which will be a significant increase in good will among the affected peoples and enhanced regional stability.

## NOTICES OF HEARINGS/MEETINGS

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

Mr. COLEMAN. Mr. President, I would like to announce for the information of the Senate and the public that the Permanent Subcommittee on Investigations will hold a hearing entitled ''The Container Security Initiative and the Customs-Trade Partnership Against Terrorism: Securing the Global Supply Chain or Trojan Horse?'' In light of the September 11, 2001, terrorist attacks, concern has increased that terrorists could smuggle weapons of mass destruction in the approximately 9 million ocean going containers that arrive in the United States every year. As part of its overall response to the threat of terrorism, the Department of Homeland Security's Bureau of Customs and Border Protection (Customs) implemented the Container Security Initiative, CSI, to screen high-risk containers at sea ports overseas, thus employing screening tools before potentially dangerous cargoes reach our shores. Customs also implemented the Customs Trade Partnership Against Terrorism, C–TPAT, to improve the security of the global supply chain in partnership with the private sector.

Both CSI and C–TPAT face a number of compelling challenges that impact their ability to safeguard our Nation from terrorism. The Subcommittee's May 26 hearing will examine how Customs utilizes CSI and C–TPAT in connection with its other enforcement programs and review the requirements for and challenges involved in transitioning CSI and C–TPAT from promising risk management concepts to effective and sustained enforcement operations. These important Customs initiatives require sustained Congressional oversight. As such, this will be the first of several hearings the Subcommittee intends to hold on the response of the Federal Government to terrorist threats.

The Subcommittee hearing is scheduled for Thursday, May 26, 2005, at 9:30 a.m. in Room 562 of the Dirksen Senate Office Building. For further information, please contact Raymond V. Shepherd, III, Staff Director and Chief Counsel to the Permanent Subcommittee on Investigations, at 202–224–3721.

## AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON FOREIGN RELATIONS

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the Committee on Foreign Relations be authorized to meet during the session of the Senate on Thursday, May 19, 2005 at 9 a.m. to hold a briefing on Iran.

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

COMMITTEE ON FOREIGN RELATIONS

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the Committee on Foreign Relations be authorized to meet during the session of the Senate on Thursday, May 19, 2005 at 10 a.m. to hold a hearing on Iran.

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

PRIVILEGE OF THE FLOOR

Mr. KENNEDY. I ask unanimous consent for Franklin Thompson Reece be granted floor privileges during debate on judicial nominations.

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

Mr. CORZINE. Mr. President, I ask unanimous consent that Anne Milgram be granted floor privileges for the duration of the presentation.

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

## REFERRAL AND DISCHARGE—NOMINATION OF EDMUND S. HAWLEY

Mr. ALLEN. Mr. President, as in executive session, I ask unanimous consent that the nomination of Edmund S. Hawley, of California, to be Assistant Secretary of Homeland Security be referred to the Committee on Commerce, Science and Transportation, and that, further, upon the reporting out or discharge of the nomination, the nomination be referred to the Committee on Homeland Security and Governmental Affairs for a period not to exceed 30 days, after which time the nomination, if still in committee, will be discharged and placed on the Executive Calendar.

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

## EXPRESSING THE SENSE OF CONGRESS RELATIVE TO THE GOVERNMENT OF THE RUSSIAN FEDERATION

Mr. ALLEN. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of S. Con. Res. 35, submitted earlier today.

The PRESIDING OFFICER. The clerk will report the concurrent resolution by title.

The assistant legislative clerk read as follows:

A concurrent resolution (S. Con. Res. 35) expressing the sense of Congress that the Government of the Russian Federation should issue a clear and unambiguous statement of admission and condemnation of the illegal occupation and annexation of the Soviet Union from 1940 to 1991 of the Baltic countries of Estonia, Latvia, and Lithuania.

There being no objection, the Senate proceeded to consider the concurrent resolution.

Mr. ALLEN. Mr. President, I ask unanimous consent that the resolution and the preamble be agreed to en bloc; that the motion to reconsider be laid upon the table; and that any statements relating to the concurrent resolution be printed in the RECORD, without intervening action or debate.

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

The concurrent resolution (S. Con. Res. 35) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, reads as follows:

S. CON. RES. 35

Whereas the incorporation in 1940 of the Baltic countries of Estonia, Latvia, and Lithuania into the Soviet Union was an act of aggression carried out against the will of sovereign people;

Whereas the United States was steadfast in its policy of not recognizing the illegal Soviet annexation of Estonia, Latvia, and Lithuania;

Whereas the Russian Federation is the successor state to the Soviet Union;

Whereas the Molotov-Ribbentrop Pact of 1939, including its secret protocols, between Nazi Germany and the Soviet Union provided the Soviet Union with the opportunity to occupy and annex Estonia, Latvia, and Lithuania;

Whereas the occupation brought countless suffering to the Baltic peoples through terror, killings, and deportations to Siberian concentration camps;

Whereas the peoples of Estonia, Latvia, and Lithuania bravely resisted Soviet aggression and occupation;

Whereas the Government of Germany renounced its participation in the Molotov-Ribbentrop Pact of 1939 and publicly apologized for the destruction and terror that Nazi Germany unleashed on the world;

Whereas, in 1989, the Congress of Peoples' Deputies of the Soviet Union denounced the Molotov-Ribbentrop Pact of 1939 and its secret protocols;

Whereas President Putin recently confirmed that the statement of the Congress of Peoples' Deputies remains the view of the Russian Federation;

Whereas the illegal occupation and annexation of the Baltic countries by the Soviet Union remains unacknowledged by the Russian Federation;

Whereas a declaration of acknowledgment of the illegal occupation and annexation by the Russian Federation would lead to improved relations between the people of Estonia, Latvia, and Lithuania and the people of Russia, would form the basis for improved relations between the governments of the countries, and strengthen stability in the region;

Whereas the Russian Federation is to be commended for beginning to acknowledge grievous and regrettable incidents in their history, such as admitting complicity in the massacre of Polish soldiers in the Katyn Forest in 1940;

Whereas the truth is a powerful weapon for healing, forgiving, and reconciliation, but its absence breeds distrust, fear, and hostility; and

Whereas countries that cannot clearly admit their historical mistakes and make peace with their pasts cannot successfully build their futures: Now, therefore, be it

*Resolved by the Senate (the House of Representatives concurring),* That it is the sense of Congress that the Government of the Russian Federation should issue a clear and unambiguous statement of admission and condemnation of the illegal occupation and annexation by the Soviet Union from 1940 to

1991 of the Baltic countries of Estonia, Latvia, and Lithuania, the consequence of which will be a significant increase in good will among the affected peoples and enhanced regional stability.

## EXPRESSING CONTINUED SUPPORT FOR THE CONSTRUCTION OF THE VICTIMS OF COMMUNISM MEMORIAL

Mr. ALLEN. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of S. Res. 150, submitted earlier today.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The assistant legislative clerk read as follows:

A resolution (S. Res. 150) expressing continued support for the construction of the Victims of Communism Memorial.

There being no objection, the Senate proceeded to consider the resolution.

Mr. DURBIN. Mr. President, today I submitted a resolution with my colleague, Senator SMITH of Oregon, that I think is especially pertinent this week as we commemorate the 60th anniversary of the defeat of Nazi Germany. The end of World War II in Europe brought the end of Hitler's regime and all of its horrors, but it did not, unfortunately, usher in an era that was free of tyranny as so many had hoped. Instead, the Soviet Union solidified its illegal occupation of its three Baltic neighbors, Estonia, Latvia, and Lithuania, and communism's global expansion condemned millions to totalitarian rule or death.

The resolution we submitted expresses support for the construction of the Victims of Communism Memorial here in Washington, DC. Authorized by Congress in 1993, memoria1 will honor the more than 100 million victims of communist atrocities around the globe. The overwhelming carnage and suffering that occurred at the hand of international communism must never be forgotten. The Victims of Communism Memorial will pay tribute, in our Nation's capital, to those who lost their lives to communist tyranny. Construction of the Memorial is scheduled to begin in the fall of 2005, and when it is completed it will serve as an enduring reminder of communist atrocities and of the value of our Nation's commitment to freedom.

I will also join my colleague from Oregon in submitting a resolution that calls on the Russian Government to acknowledge the Soviet Union's illegal annexation of the three Baltic nations of Estonia, Latvia, and Lithuania during the Second World War and to condemn this aggression by the USSR. In 1939, Joseph Stalin allied himself with Adolf Hitler with the signing of the Molotov-Ribbentrop Pact, an agreement that led to the Soviet Union's occupation of the Baltic countries in 1940. For five decades, Estonia, Latvia, and Lithuania were forced to live under the authoritarian rule of the Soviet empire.

When I speak about the Baltic countries, I speak with a particularly personal interest. Lithuania has a special meaning to me because it is my mother's birthplace, and I have visited there a number of times. When I visited Lithuania for the first time in 1979, it was under Soviet domination. Freedom was at a premium, and the poor people of that country struggled day after day wondering if they would ever have another chance at self-governance. I have journeyed to the region on several occasions since then, and I have witnessed the miracle of independence and democracy coming to Lithuania, Latvia, and Estonia. The amazing transformation for these nations was something that many of us with strong ties to this part of the world had prayed for but never believed would happen in our lifetime.

The legacy of Soviet occupation remains strong even today. Unfortunately, Russia's leaders refuse to acknowledge the wrongs committed by the Soviet Union against the Baltic nations. Russian President Vladimir Putin rejected a suggestion from U.S. officials that he renounce the Molotov-Ribbentrop Pact, and he has publicly clung to the fiction that Estonia, Latvia, and Lithuania asked to become part of the Soviet Union. In order for relations between the Baltic nations and Russia to move forward, the Russian Government and its people must honestly and publicly confront the USSR's brutal legacy of repression. This resolution will call on Russian leaders to take that important step.

Mr. ALLEN. Mr. President, I ask unanimous consent that the resolution and preamble be agreed to en bloc; that the motion to reconsider be laid upon the table; and that any statements relating to the resolution be printed in the RECORD, without intervening action or debate.

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

The resolution (S. Res. 150) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, reads as follows:

S. RES. 150

Whereas section 905 of the FRIENDSHIP Act (40 U.S.C. 1003 note) authorizes the construction of a memorial to honor the victims of communism;

Whereas the construction of a Victims of Communism Memorial near the United States Capitol in the District of Columbia is scheduled to begin in the fall of 2005;

Whereas construction of the Memorial is supported by many Americans whose country of origin is, or was, a ''Captive Nation'', from Baltic-Americans to Vietnamese-Americans;

Whereas communism has claimed the lives of more than 100,000,000 people in less than 100 years; and

Whereas it is important for the people of the United States to honor and remember the victims of communism by supporting the construction of this memorial: Now, therefore, be it

*Resolved,* That the Senate expresses its continued support for the construction of the Victims of Communism Memorial.

## RECOGNIZING THE 57TH ANNIVERSARY OF THE INDEPENDENCE OF THE STATE OF ISRAEL

Mr. ALLEN. Mr. President, I ask unanimous consent that the Senate now proceed to the consideration of S. Res. 151, which was submitted earlier today.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The assistant legislative clerk read as follows:

A resolution (S. Res. 151) recognizing the 57th Anniversary of the Independence of the State of Israel.

There being no objection, the Senate proceeded to consider the resolution.

Mr. ALLEN. I ask unanimous consent that the resolution be agreed to, the preamble be agreed to, and the motion to reconsider be laid upon the table.

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

The resolution (S. Res. 151) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, reads as follows:

S. RES. 151

Whereas in May 1948, the State of Israel was established as a sovereign and independent nation;

Whereas the United States was one of the first nations to recognize Israel, only 11 minutes after its creation;

Whereas Israel has provided the opportunity for Jews from all over the world to reestablish their ancient homeland;

Whereas Israel is home to many religious sites which are sacred to Judaism, Christianity, and Islam;

Whereas Israel provided a refuge to Jews who survived the horrors of the Holocaust and the evils committed by the Nazis which were unprecedented in human history;

Whereas the people of Israel have established a unique, pluralistic democracy which includes the freedoms cherished by the people of the United States, including freedom of speech, freedom of religion, freedom of association, freedom of the press, and government by the consent of the governed;

Whereas Israel continues to serve as a shining model of democratic values by regularly holding free and fair elections, promoting the free exchange of ideas, and vigorously exercising in its Parliament, the Knesset, a democratic government that is fully representative of its citizens;

Whereas Israel has bravely defended itself from attacks repeatedly since independence;

Whereas the Government of Israel has successfully worked with the neighboring Governments of Egypt and Jordan to establish peaceful, bilateral relations;

Whereas, despite the deaths of over one thousand innocent Israelis at the hands of murderous, suicide bombers and other terrorists during the past 4 years, the people of Israel continue to seek peace with their Palestinian neighbors;

Whereas the United States and Israel enjoy a strategic partnership based on shared mutual democratic values, friendship, and respect;

Whereas the people of the United States share affinity with the people of Israel and view Israel as a strong and trusted ally; and

Whereas Israel has made significant global contributions in the fields of science, medicine, and technology: Now, therefore, be it

*Resolved*, That the Senate—

(1) recognizes the independence of the State of Israel as a significant event in providing refuge and a national homeland for the Jewish people;

(2) strongly supports efforts to bring peace to the Middle East, including the disengagement plan of the Israeli government, the Roadmap, and the recent Quartet decision to appoint World Bank President James Wolfensohn as Coordinator for Gaza Disengagement;

(3) commends the bipartisan commitment of all United States administrations and United States Congresses since 1948 to stand by Israel and work for its security and well-being; and

(4) extends warm congratulations and best wishes to the people of Israel as they celebrate the 57th anniversary of Israel's independence.

## MEASURES READ THE FIRST TIME—S. 1084 AND S. 1085

Mr. ALLEN. Mr. President, I understand there are two bills at the desk. I ask for their first reading en bloc.

The PRESIDING OFFICER. Without objection, the clerk will report the bills by title.

The assistant legislative clerk read as follows:

A bill (S. 1084) to eliminate child poverty, and for other purposes.

A bill (S. 1085) to provide for paid sick leave to ensure that Americans can address their own health needs and the health needs of their families.

Mr. ALLEN. I now ask for a second reading, and in order to place the bills on the calendar under the provisions of rule XIV, I object to my own request, all en bloc.

The PRESIDING OFFICER. Objection is heard. The bills will have their second reading on the next legislative day.

## MEASURES PLACED ON THE CALENDAR—S. 1061 AND S. 1062

Mr. ALLEN. Mr. President, I understand there are two other bills at the desk that are due for a second reading. I ask unanimous consent that they be read for a second time, en bloc.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 1061) to provide for secondary school reform and for other purposes.

A bill (S. 1062) to amend the Fair Labor Standards Act of 1938 to provide for an increase in the Federal minimum wage.

Mr. ALLEN. Mr. President, in order to place the bills on the calendar under the provisions of rule XIV, I object to further proceeding en bloc.

The PRESIDING OFFICER. Objection having been heard, the bills will be placed on the calendar.

## ORDERS FOR FRIDAY, MAY 20, 2005

Mr. ALLEN. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until 9:30 a.m. on Friday, May 20. I further ask that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, the time for the two leaders be reserved, and the Senate then return to executive session and resume consideration of the nomination of Priscilla Owen to the Fifth Circuit Court of Appeals; provided further that the time from 9:40 a.m. to 10 a.m. be under the control of the majority leader or his designee and the time from 10 a.m. to 10:30 a.m. be under the control of the Democratic leader or his designee, provided that at 10:30 a.m. the majority leader or his designee be recognized and floor time then rotate every 30 minutes between the two leaders or their designees until 1 p.m, at which time the Democratic leader or his designee be recognized until 1:45 p.m., to be followed by a Republican Senator until 2 p.m.

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

## PROGRAM

Mr. ALLEN. Mr. President, tomorrow the Senate will resume the consideration of the nomination of Priscilla Owen to be a United States circuit court judge for the Fifth Circuit. We have had another day of substantive debate on the Owen nomination. As announced earlier today, there will be no rollcall votes tomorrow. We will have a busy day of debate, surely, and Senators are encouraged to come to the Senate during the session. As a reminder, the majority leader has announced we will have a vote next Monday at 5:30 p.m. That vote is likely to be a vote on a motion to instruct and to request Members' attendance. More will be said regarding Monday's schedule at the close of business tomorrow.

## ADJOURNMENT UNTIL 9:30 A.M. TOMORROW

Mr. ALLEN. If there is no further business to come before the Senate, I ask that the Senate stand in adjournment under the previous order.

There being no objection, the Senate, at 8:52 p.m., adjourned until Friday, May 20, 2005, at 9:30 a.m.

## NOMINATIONS

Executive nominations received by the Senate May 19, 2005:

DEPARTMENT OF HOMELAND SECURITY

EDMUND S. HAWLEY, OF CALIFORNIA, TO BE AN ASSISTANT SECRETARY OF HOMELAND SECURITY, VICE DAVID M. STONE, RESIGNED.

IN THE AIR FORCE

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT IN THE UNITED STATES AIR FORCE TO THE GRADE INDICATED WHILE ASSIGNED TO A POSITION OF IMPORTANCE AND RESPONSIBILITY UNDER TITLE 10, U.S.C., SECTION 601:

*To be lieutenant general*

MAJ. GEN. TERRY L. GABRESKI, 0000