are unable to get this additional care. I know we cannot give it to every caregiver. I know it will be limited, and we will have to make that decision as part of our deliberation as to what we can do. But to say we should do nothing for these people is to make a mockery of this Veterans Day. If we truly care for these veterans, let us care for these families who are giving their lives to help them.

I hope the Senator from Oklahoma will lift the hold on this bill, give us a chance to debate it, offer his amendments. That is what we are here for. But to merely stand and say: No, stop, I will not allow it, I don't think is what the Senate should be about. Let us debate his point of view, my point of view, other points of view, and try to reach some conclusion.

AMENDMENT NO. 2759 TO AMENDMENT NO. 2730

I ask that the clerk call up my pending amendment No. 2759.

The PRESIDING OFFICER. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from Illinois [Mr. DURBIN] proposes an amendment numbered 2759.

The amendment is as follows:

(Purpose: To enhance the ability of the Department of Veterans Affairs to recruit and retain health care administrators and providers in underserved rural areas)

On page 52, after line 21, add the following:

SEC. 229. (a)(1)(A) Of the amount made available by this title for the Veterans Health Administration under the heading ''MEDICAL SERVICES'', $1,500,000 shall be available to allow the Secretary of Veterans Affairs to offer incentives to qualified health care providers working in underserved rural areas designated by the Veterans Health Administration, in addition to amounts otherwise available for other pay and incentives.

(B) Health care providers shall be eligible for incentives pursuant to this paragraph only for the period of time that they serve in designated areas.

(2)(A) Of the amount made available by this title for the Veterans Health Administration under the heading ''MEDICAL SUPPORT AND COMPLIANCE'', $1,500,000 shall be available to allow the Secretary of Veterans Affairs to offer incentives to qualified health care administrators working in underserved rural areas designated by the Veterans Health Administration, in addition to amounts otherwise available for other pay and incentives.

(B) Health care administrators shall be eligible for incentives pursuant to this paragraph only for the period of time that they serve in designated areas.

(b) Not later than March 31, 2010, the Secretary of Veterans Affairs shall submit to the Committees on Veterans' Affairs and Appropriations of the Senate and the House of Representatives a report detailing the number of new employees receiving incentives under the pilot program established pursuant to this section, describing the potential for retaining those employees, and explaining the structure of the program.

AMENDMENT NO. 2760 TO AMENDMENT NO. 2730

Mr. DURBIN. Mr. President, I ask unanimous consent that the amendment be set aside and the clerk call up amendment No. 2760.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from Illinois [Mr. DURBIN] proposes an amendment numbered 2760 to amendment No. 2730.

The amendment is as follows:

(Purpose: To designate the North Chicago Veterans Affairs Medical Center, Illinois, as the ''Captain James A. Lovell Federal Health Care Center'')

At the end of title II, add the following:

SEC. 229. (a) NAMING OF HEALTH CARE CENTER.—Effective October 1, 2010, the North Chicago Veterans Affairs Medical Center located in Lake County, Illinois, shall be known and designated as the ''Captain James A. Lovell Federal Health Care Center''.

(b) REFERENCES.—Any reference to the medical center referred to in subsection (a) in any law, regulation, map, document, record, or other paper of the United States shall be considered to be a reference to the Captain James A. Lovell Federal Health Care Center.

Mr. COBURN. Madam Presiding, during today's conversation, the Senator from Illinois stated that S. 1963 had been on the Senate calendar since September 25, 2009. In fact, S. 1963 was read the second time and placed on the calendar on October 29, 2009. A request was not made for unanimous consent to pass the bill on the minority side until Friday, November 6, 2009.

There are currently 35,000 veterans receiving aid and attendance benefits from the Department of Veterans Affairs, which provides funding for veterans who need extra help at home but do not need institutional care. The aid and attendance program assists all disabled veterans of all wars. Out of this population, around 2,000 veterans received their injuries after September 11 and would qualify for extra caregiver assistance in this bill. However, caregivers for tens of thousands of veterans of prior wars would not. Of course, that assumes that the House passes the Caregiver Assistance Act in its Chamber and the President signs it into law. Then it assumes that next year, in the discussion on the fiscal year 2011 budget, the President requests funding for caregiver assistance, or that both appropriations committees include funding, and that the President signs this into law. The absolute earliest that a caregiver would receive assistance is October 1, 2010. However, that date is not likely given the performance of the Department of Veterans Affairs. Right now, the average processing of a disability claim is 162 days at the Department. Given that the Department will have to make rules on this new benefit, it will be well into 2011 before any caregiver benefits from this program. However, passing this bill before Veterans Day will give benefits to politicians, who will have made an empty promise in 2009 that might not be realized until 2011, and even then, would be paid for by our children and grandchildren.

EXECUTIVE SESSION

NOMINATION OF ANDRE M. DAVIS TO BE UNITED STATES CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The legislative clerk read the nomination of Andre M. Davis, of Maryland, to be United States Circuit Judge for the Fourth Circuit.

The PRESIDING OFFICER. Under the previous order, there will be 60 minutes of debate, equally divided and controlled between the Senator from Vermont, Mr. LEAHY, and the Senator from Alabama, Mr. SESSIONS, or their designees.

The Senator from Maryland is recognized.

Ms. MIKULSKI. Madam President, I am a little confused about the order. Parliamentary inquiry of the pending business: Are we now considering the nomination of Andre Davis?

The PRESIDING OFFICER. The Senator is correct.

Ms. MIKULSKI. Madam President, as the senior Senator from Maryland, I have been designated as the Democratic representative. Of course, I note on the floor the distinguished ranking member, Senator SESSIONS. I was going to lead off, if that does meet with the Senator's approval.

Mr. SESSIONS. Yes, I say to the Senator from Maryland, I think that would be quite appropriate and fine with me.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Ms. MIKULSKI. Madam President, this is an exciting day for me. It is an exciting day because I am here to present a distinguished jurist from Maryland to be nominated to sit on the Fourth Circuit Court of Appeals.

Judge Davis is from my hometown of Baltimore. He has been nominated to sit on the Fourth Circuit Court of Appeals. He comes before the Senate for a vote on his confirmation. His nomination has been approved by the Judiciary Committee, and I thank both the chairman of the Judiciary Committee, Senator LEAHY, and the ranking member, Senator SESSIONS, for moving this nomination through the committee process and the majority and minority leaders for bringing this nomination to the floor.

For 8 years as the Senator from Maryland, I have pressed for a qualified Marylander to fill the Maryland vacancy on the Fourth Circuit Court of Appeals. I have worked with my colleague, Senator Sarbanes, and now Senator CARDIN. This seat was once held by the late Judge Francis Murnaghan, a true legal giant, with deep roots of civic engagement as well as a record of extraordinary judicial competence. Today, we are presenting a nominee who is worthy to fill this seat.

I am honored to introduce Andre Davis to serve on the Fourth Circuit Court of Appeals. He is a man of the highest caliber, one of judicial experience, one of great integrity and also outstanding intellect. He has received the American Bar Association's highest ratings.

When I consider a judicial nominee, and particularly one for the circuit court of appeals, I have four criteria. No. 1, that person must be someone of absolute personal integrity. They are, after all, a judge. They must bring judicial competence and a record demonstrating judicial competence and also a record showing judicial temperament. My third criterion is they must have a commitment to core constitutional principles and also a history of civic engagement in Maryland. In other words, they must be a real Marylander, not just a ''ZIP Code'' Marylander, meaning living in Maryland as a matter of convenience.

Judge Andre Davis passes all these tests with flying colors. When I introduced Judge Davis at the Judiciary Committee hearing, I wished to present to my colleagues then, as I do now, that he has a compelling personal narrative. He comes from roots of very modest means. His father was a teacher, his stepfather was a steel worker, he grew up in the gritty neighborhood of east Baltimore in a family who valued hard work and also community service.

He earned a scholarship to attend Phillips Academy, Andover, no small feat for an African American. He was 1 of 4 African Americans in a school of over 800 students, and even then, as a young man, he knew that with opportunity came responsibility to help others who were not so fortunate.

He earned his bachelor's degree at the University of Pennsylvania and then graduated from the University of Maryland School of Law. While at the Maryland School of Law, he won the Myerowitz Moot Court Competition. He chaired the Honor Board and the law faculty awarded him the prestigious Roger Howell Award at graduation. He had a distinguished career as an undergraduate and graduate.

He comes before us for this vote as someone who has judicial competence. He was originally nominated by President Clinton in the year 2000 for the Fourth Circuit. At that time, the ABA unanimously gave Judge Davis its highest rating of ''well qualified.'' Why? Because, for the last 22 years that Andre Davis has served as a judge, he served at three different levels—at the State courts and at the Federal courts. He currently sits as a Federal district judge for the Maryland District, nominated by President Clinton and unanimously confirmed by the Senate. So he served in the State courts, where his judicial opinions, judicial behavior, judicial judgment could be observed. People like him, they know him, they respect him.

His judicial record demonstrates an ability to handle difficult situations with a calm, thoughtful, rational temperament. He is known for thorough reasoning. He has not only served as a distinguished judge, but also he came to the courts as an experienced prosecutor. He was with the Civil Rights Division at the Department of Justice and with the U.S. Attorney's Office in Maryland.

In addition to being a judicial leader, he has also been a community leader. He, again, believes for every opportunity there is a responsibility. He served on the board of directors of the Baltimore Urban League, which provides so many vital services to our underserved communities. He was the president of the Legal Aid Bureau and a founding member and chair of the board of the Baltimore Urban Debate League, so that young people in our public schools could learn the excitement of high school debate which, for many of our inner-city youth, was a pathway not only to eloquence and rational argument and the love of combat over the clash of ideas but gave them a taste of a world outside their own community and even put them on the road to scholarships.

He served for 4 years as the president of Big Brothers and Big Sisters of Central Maryland, knowing not everybody had a dad and not everybody has a mom. If we can come up, through the Big Brothers and Sisters, with programs showing a caring adult, it also helps with our young people.

Judge Davis has great integrity, a strong work ethic, and a commitment to public service. He presents uncompromising views on judicial independence. He is an independent thinker, dedicated to the rule of law and core constitutional principles. Well-respected colleagues consider him a first-rate judge, with an unassailable record in the community as a lawyer and as a judge.

I hope the Senate will confirm him. I am proud to be here to speak up for him and to stand for him and I will be proud to cast my vote in support of him.

With deep roots in the Maryland community, distinguished and experienced as a judge, I think he would be an excellent addition to the Fourth Circuit Court of Appeals. I am going to thank my colleagues today for giving this matter their attention.

As I conclude my initial presentation with Judge Davis, I would like to take a moment and speak on personal privilege. This is a big day for me. It is a big day for Andy Davis. He has been waiting a long time since he was first nominated by President Clinton. But now his time will come to be judged by the Senate whether he is deemed worthy of someone on the Fourth Circuit.

But it is a special day for me. Today is the first day in over 124 days since my accident coming out of Catholic Mass where I broke my ankle. This is the first day that I can actually come to the floor of the Senate and stand up for someone in whom I truly believe because I believe he will stand up for the Constitution that made our country great. I come with no space boot; I come with no props to hold me up. It is a very big day. So I am very excited about the fact that I am able to do this.

FALL OF THE BERLIN WALL

It is also a special day in world history. Today is the day the Berlin Wall came down. I was filled with excitement on that wonderful day because the roots of my own heritage lie in Poland. We are proud American citizens, but we kept the heritage of the old country alive in our home, particularly because Poland, after World War II, was sold out at Yalta and Potsdam through an agreement that was ill-conceived, and history bore the point.

We watched Poland fall as Hungary and the Czech Republic and others behind the Iron Curtain. They were called captive nations. Then we saw in Berlin that another wall went up and began the famous Berlin Airlift where America came to the rescue. They themselves in East Berlin were behind another version of the Iron Curtain called the Berlin Wall.

Today we commemorate that 20 years ago—through nonviolent participation and the efforts of people such as Ronald Reagan, Maggie Thatcher, the world's prayers, a strong Democratic United States of America saying, ''Mr. Gorbachev, tear down that wall''—that wall came down.

It started when an obscure electrician jumped over a wall in a shipyard in Gdansk. His name was Lech Walesa. It started the Solidarity movement. It sparked all of Central Europe through dissidents such as Haval. It led finally, through political leadership—such as President Reagan, such as Maggie Thatcher, such as all of us here—to bring down that wall.

So today we commemorate bringing down the Berlin Wall, bringing down the Iron Curtain. When we elect Andrew Davis as an African American to the Fourth Circuit, that famous Fourth Circuit with roots deep in the South, we are going to bring down another wall. But is that not what a great democratic nation does? We bring down walls through democratic action, through commitment and resolve, and doing it through nonviolence.

This is indeed a great day for the world and a great day for Andrew Davis and a very special day for me.

I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. CARDIN. Madam President, let me first compliment my colleague, Senator MIKULSKI, for her leadership in bringing forward the nomination of Judge Davis to the circuit court of appeals. I join her in her comments about the fall of the Berlin Wall, the importance that meant not just for Europe. The Berlin Wall represented not only a divided city, a divided country, but a divided continent. And the fall of that wall that we commemorate of 20 years

ago has significance well beyond that one city.

I was privileged to be in Berlin as the wall came down and will never forget those moments.

It is also nice to see my colleague on the Senate floor without the need of any aid. She has been a fighter all of her life. She has been a fighter during this episode. She never missed a beat as far as representing the people of Maryland.

But I particularly want to point out to my colleagues how proud I am of Senator MIKULSKI for the manner in which she has handled judicial appointments in our State. She is interested, as I am, in getting the very best on our Federal courts, and in the process that was set up for us to make recommendations to the President and make recommendations to our colleagues on the confirmation of judges from those who apply from Maryland. This represents an open process, a process that encourages our very interest to apply and become Federal judges, and one that is solely aimed at getting the very best talent onto our Federal courts.

That is certainly true with Judge Davis. It is certainly true with that nomination. Judge Davis had a hearing before the Judiciary Committee in April. In June, our committee reported him out favorably with a strong bipartisan vote of 16 to 3.

I am not going to go through all of the points that Senator MIKULSKI raised as far as his background. But I do want to underscore a few points I think are very important in the filling of this particular judicial position.

Judge Davis has strong roots in Maryland. This is a Maryland seat on the Fourth Circuit. He was born in and raised in Baltimore. He is still a resident of Baltimore. Judge Davis has an exceptional record of legal experience in our State, including working as an assistant U.S. attorney, as a State district court judge, as a State circuit court judge, and now as a U.S. district judge.

He received his bachelor's degree from the University of Pennsylvania and graduated cum laude with his J.D. degree from the University of Maryland School of Law where he still teaches classes as an adjunct faculty member.

He served as a district judge for the U.S. District of Maryland since his Senate confirmation in 1995. You see Judge Davis has deep roots in Maryland and deep roots in the judicial branch of government.

He has a longstanding record that he has demonstrated in protecting civil rights and liberties. I agree with my colleague, Senator MIKULSKI, that one of the principal standards we want to see in judges on our courts is an understanding of our Constitution and the protection it provides our citizens. That is particularly important on our circuit court of appeals.

To give you one example of Judge Davis's record in protecting the rights of our people, this was a landmark decision on civil rights, Reid v. Glendening, where Judge Davis ruled that the Baltimore City Courthouses were not wheelchair accessible, in violation of the Americans with Disabilities Act. He then ordered the city and State to create a plan to make the buildings accessible.

I think that is pretty gutsy when we realize that some of the support our judiciary needs comes from local government. Yet Judge Davis did what was required under our Constitution.

He has been praised by lawyers in Maryland as a smart, evenhanded, fair, and open-minded judge. He has served as a judge for 22 years. He has handled somewhere around 5,300 cases. Judge Davis received a ''well qualified'' rating from the American Bar Standing Committee on the Federal judiciary.

If confirmed, Judge Davis would be the third African-American judge to serve in the Fourth Circuit, which has one of the highest percentages of minority populations of any circuit in the country.

As my colleague pointed out, the Fourth Circuit has one of the highest vacancy rates of any court, any circuit in our Nation. Five out of the fifteen seats are vacant, which constitutes one-third of the appellate court. Indeed, Judge Davis is a replacement for Judge Francis Murnaghan, who died in August of 2000.

Judge Murnaghan also had a lifelong record as a Maryland resident who served on the Federal bench for 20 years and was one of the most respected lawyers and judges in our State. Judge Davis served as a law clerk for Judge Murnaghan on the Fourth Circuit from 1979 to 1980. So I think this is a very appropriate appointment.

I am proud to join the senior Senator from Maryland, Ms. Mikulski, in recommending to our colleagues the confirmation of Judge Davis. We believe he will continue the great tradition, the great record he has established as a Federal judge, as a State judge, and he will continue that when confirmed by this body to serve on the Circuit Court of Appeals for the Fourth Circuit.

We are proud to recommend his confirmation to our colleagues. With that, I see that the senior Republican on the Judiciary Committee, Senator SESSIONS, is on the Senate floor.

I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Madam President, I would also like to speak on the Davis nomination and reluctantly I will speak in opposition to that nomination. There has been some discussion on the Senate floor today and previously in more detail about the need for the circuit judges. But I would just point out, having been through this system quite a bit, that during the 110th Congress four highly qualified consensus nominees to that court were presented to the Senate by President Bush and were not confirmed: Judge Robert Conrad, Judge Glen Conrad, Mr. Steve Matthews, and Mr. Rod Rosenstein.

I remember Judge Conrad. He is the presiding judge of his district and had been a U.S. attorney. I remember him testifying during President Clinton's difficulties, and then Attorney General Janet Reno looked all over the U.S. Federal prosecuting ranks to pick a U.S. attorney who would be a special prosecutor whom she would select to prosecute one of the allegations against President Clinton.

She chose Mr. Conrad. He concluded that there were no charges in that matter to be brought against President Clinton and was later appointed a Federal judge in the district and was confirmed, but he was blocked for the court of appeals. I always knew he would be a good decisive judge since he was a point guard on the University of North Carolina basketball team. They have to make decisions. They have to make decisions quickly.

So I would say a lot of effort went into confirming judges for vacancies that are not there today. Mr. Rosenberg was nominated to the seat as a judicial emergency in November of 2007, the very seat to which Judge Davis has been nominated. He was not confirmed. In fact, my colleagues on the other side of the aisle succeeded in holding that vacancy, this vacancy, open for 9 years.

I find it breathtaking that people would suggest that the Republicans, who tried to fill that vacancy for 9 years and had the nominees blocked, were responsible for vacancies which have been there for a long time. I find that quite an odd thing.

The ABA reported Mr. Rosenstein unanimously ''well qualified.'' In 2005 he was confirmed unanimously to be U.S. attorney for Maryland. Prior to his service as U.S. attorney, he held a number of positions in the Department of Justice under both Republican and Democratic administrations. Despite his stellar qualifications, he waited 414 days for a hearing and never got one. So his nomination expired in January of this year.

The reason, one reason, given for blocking his nomination was that he was doing a good job as U.S. attorney in Maryland, and that is where we need to keep him. Well, forgive me if I think that is a bit much, and I certainly do not think we need to have the outrage from the other side about vacancies on this court since they are a direct product of the efforts of my colleagues to keep that vacancy open.

But Judge Davis has fared much better than those four nominees did in the last Congress. He received a hearing a mere 27 days after his nomination. A committee vote occurred just 36 days later. Today the full Senate will vote on his nomination.

I would just say I think we need to take time to look at nominees and ask the tough questions. We are not a rubberstamp. Good nominees ought to

be confirmed. Sometimes we just have a disagreement, like we will about Judge Davis, and we will have a vote. They will be confirmed or not confirmed.

I would like to point out, however, that the average time from nomination to confirmation for nominees to the courts of appeals submitted by President Bush was 350 days, and that was the average. The majority of President Bush's first nominees, the first group—and Judge Davis is part of President Obama's first group—waited years for confirmation.

Some of them never even got a hearing, despite being highly qualified, outstanding nominees. So Judge Davis has done pretty well in getting his case before the Senate and being able to get a vote. The fact is, nominees are moving much faster than they did during the Bush years. But we do have a duty to fulfill in analyzing nominees because they are being considered for a lifetime appointment, an appointment to the court in which the only thing that constrains them in how they conduct their daily business is their personal integrity, their personal restraint, and the only thing that reduces the number of errors they might make is their ability and determination to do the right thing.

Judge Davis is currently a judge on the Federal trial court in Maryland. During his time on the bench, unfortunately, he has been reversed by the Fourth Circuit, the very court to which he is now being nominated, in a number of troubling cases. He has been criticized by that appellate court for misapplying the law, for throwing out relevant and lawfully obtained evidence and wrongfully dismissing cases where there were genuine unresolved issues between the parties.

If Judge Davis did not adequately assess the facts or apply the law in these fairly direct and simple cases, it raises a question as to why he would be qualified to be promoted to the Fourth Circuit, the appellate court, one step below the U.S. Supreme Court.

One of my colleagues on the Judiciary Committee argued that district judges are going to be reversed from time to time and that if we held every reversal against a nominee, no judge would ever be elevated to the court of appeals. That is a fair point. Even the best trial judge occasionally may be reversed by an appellate court. But I felt the responsibility to look at these reversals and ask whether these are normal kinds of reversals that could occur in tough cases. I have to say, I believe the cases reveal a disturbing pattern of mistakes, mistakes that consistently favor criminal defendants and evidence an anti-law enforcement tendency. That, as a former prosecutor in Federal court, makes me a bit nervous. Many of the rulings a Federal judge makes against a Federal prosecutor cannot be appealed. It is an awesome power they have.

These mistakes have real-world consequences for law enforcement officers who are out on the streets doing their best every day to follow the already complex body of law and rules required by the courts. Police train and work hard to try to do the things they are required to do by courts. Sometimes the courts have caused them to do things that are unwise, but they try to do them anyway. Yet in Judge Davis' courtroom, the rules seem to change from case to case. It is a dangerous thing. It leaves police unsure of how to comply with the law when they are trying to protect citizens from criminal activities. These kinds of mistakes and rulings in effect allow criminals to go free on technicalities.

Not only do the shifting ground rules make a police officer's job nearly impossible, these types of errors require appeals. Appeals cost money. They take time. They delay justice. Not only are many of Judge Davis' decisions wrong as a matter of law, they have an extremely detrimental impact on the workings of the criminal justice system. Within the last 5 years alone, the Fourth Circuit has reversed Judge Davis 13 times for errors that seem to consistently favor criminal defendants. Even more troubling is that those errors are basic errors of law. I have studied the cases and the issues involved. It seems to me these are errors that should not have been made. They raise doubts in my mind about whether he should be elevated—he has a lifetime appointment on the Federal district court—to a lifetime appointment on the court of appeals.

One of the most troubling cases he has ruled on was the case of United States v. Kimbrough. There the defendant was arrested in his mother's house. Police found him in the basement cutting cocaine, the ''knife on the mirror'' type cutting of cocaine. After the arrest and before police could read the defendant his Miranda warnings, the defendant's mother asked him if he had anything else in the basement—not the police, his mother. The defendant said he had a gun. The police went down and found the gun. They charged the defendant with unlawful possession of a firearm and possession of cocaine, both. The firearm charge would normally carry a mandatory penalty in addition to the cocaine possession charge.

Apparently, the judge didn't like that. Judge Davis threw out the defendant's statement that he had a gun because he said he had not been given his Miranda warning: You have a right to remain silent. The case went to the court of appeals, and he was reversed. The court of appeals in Kimbrough, the court he wants to sit on, had this to state, which is pretty obvious to me:

> The defendant's mother ''is a private citizen, her spontaneous questioning of [the defendant] alone, independent of the police officers, could never implicate the Fifth Amendment.''

Of course not. The Miranda warning is a court-created rule. It is not in the Constitution. Prior to its creation, police didn't give those warnings. But it is designed to help deter police from incriminating an individual and using the power of their badge to say something they didn't want to voluntarily say. But this was a question by the mother, not the police. It can, as the court said, never implicate the Fifth Amendment. The case was reversed after how many months and how much expense, we don't know. I do find it difficult to understand how that mistake was made.

Another of Judge Davis' cases that I find extremely troubling is United States v. McNeill. In that case, the defendant threatened to kill his girlfriend while in the presence of a police officer. What did the police officers do? They arrested him. At a minimum, this is a harassment charge, I submit, to threaten someone's life in the presence of the police. What would happen if the police officers hadn't arrested the man and they had walked off and left him there with his girlfriend and he had killed her? What would the public say then about the police officers? What would the average citizen say: Did you do your duty? Didn't you have the ability to make an arrest?

Judge Davis said he didn't. Judge Davis said he had no ability to make an arrest, to intervene in that circumstance. This is how it happened. They arrested him. They took him to jail. While he was in jail, he confessed to robbing a bank. Once again, Judge Davis threw out the confession, the whole case. If the arrest was bad and he was in jail, that was a product, I guess, of the poisonous tree and the confession was bad as to the bank robbery. So even though the police officer witnessed the defendant threatening his girlfriend, Judge Davis held the officer did not have probable cause to arrest the defendant. Once again, Judge Davis, however, was reversed by the Fourth Circuit.

The judge's troubling pattern of errors in criminal cases is further reflected in United States v. Dickey-Bey. There the defendant was charged with drug trafficking after he picked up packages that contained two kilograms of cocaine. Police had more than enough evidence against the defendant. This is what they had: Before the packages were mailed or when they were being mailed, a drug-sniffing dog detected the cocaine. The police then obtained a warrant, searched the packages and discovered two kilograms of cocaine in the package. The police then resealed the packages and allowed the packages to continue through the mail, apparently to their destination in Maryland. That is what we call—and hundreds of thousands of police officers call—a controlled delivery. The cocaine is not allowed to get out on the street, but they ship it. And let's see who comes up to pick it up. This is a common police procedure.

The defendant fit the description they had of the person who routinely picked up packages such as this from

this specific mail box. At the time of his arrest, the defendant had keys in his pocket to other mailboxes which had also been known to be destinations for packages of cocaine. Pretty good case, it looked like to me. In spite of all this, Judge Davis ruled that the police lacked probable cause. Probable cause to arrest is a low standard. If the defendant had a defense, he could always present it later and go to trial and be acquitted. But it certainly met the probable cause standard to make an arrest. He had two kilos of cocaine in his hands, apparently.

I will quote from the Fourth Circuit court he wants to sit on and what they said about his decision in Dickey-Bey:

> In reaching its conclusion, . . . the district court failed to step back and look at the totality of the circumstances and the reasonableness of the officers' belief, in light of those circumstances, that Dickey-Bey was a knowing part of a larger drug operation.

Pretty simple case. The impact for every police officer in America who might be listening today, the impact of this ruling, if that is not probable cause, is that controlled deliveries of this kind that occur quite frequently in law enforcement would be eliminated.

How much cocaine is two kilograms? It is a lot. Under the sentencing guidelines, two kilograms of cocaine powder would yield an offense level of 28 which means a 78 to 97 months' sentence for a first-time offender, mandatory. That is the range the judge would have to sentence within the sentencing guidelines, 78 to 97 months.

A bulk package of 2 kilograms of cocaine would sell for anywhere from $20,000 to $50,000 on the street, depending on the geographic region. According to the Sentencing Commission's 2007 Cocaine and Federal Sentencing Policy Report, the average ounce of cocaine sold on the streets of America for $1,150 in 2005. If it is broken into 1-ounce packages for resale, the 2-kilogram package could sell for over $81,000. So this is not a little bitty deal. That amounts to 10,000 to 20,000 dose units.

I am baffled how anyone could think there was not a crime being committed, how there was not probable cause to believe this individual was involved in a crime. Once again, Judge Davis was reversed by the Fourth Circuit Court of Appeals, fortunately; and, presumably, this case went on to trial.

Judge Davis threw out yet another confession in the case of United States v. Jamison. In that case, the defendant, a convicted felon, shot himself. He shot himself. He went to the hospital and called out to the police for help and confessed that it was his gun that he shot himself with. Well, he was a felon. He could not have a gun. So the police charged him with being a felon in possession of a firearm.

Judge Davis, however, threw out his confession, his statement he made to the police based on the finding that the defendant made the statement while in police custody and without the police having given him Miranda warnings. The Fourth Circuit reversed because the defendant was not in police custody; he was in the hospital. He had pretty good corroboration—the fact that he had a gun—because he had a bullet hole in himself, apparently.

This is what the court said, unanimously reversing this decision—the trial stops. Prosecutors have to appeal. The case is thrown out. They file the appeal. All this money is spent. The court pays for the defendant's lawyer to go up and argue the case. They have to write cases. Months go by.

Madam President, how much time do we have on this side?

The PRESIDING OFFICER. The Senator has 7½ minutes.

Mr. SESSIONS. I thank the Chair.

This is what the court said, in reversing him unanimously:

> [The defendant], and the court below, however—

The ''court below'': Judge Davis—

> misunderstand the reach of Miranda. . . . Miranda and its progeny do not equate police investigation of criminal acts with police coercion. This distinction is especially salient when the victim or suspect initiates the encounter with the police.

He asked for them to come and help him.

Of course, this pattern has been noted by the lawyers who appear before Judge Davis. One assistant U.S. attorney—a Federal prosecutor—was quoted as saying:

> While Judge Davis is well-respected by the defense bar for his patience and open-minded approach to legal arguments, Assistant United States Attorneys are often frustrated by his rulings in criminal cases . . . and have not hesitated to appeal.

Apparently they have been pretty successful in their appeals.

This assistant U.S. attorney also said that ''some prosecutors believe Davis doesn't trust . . . [the] police. . . .

Well, that is what I would say the record seems to indicate.

As a district court judge, Judge Davis' errors have been reviewed by the Fourth Circuit Court of Appeals. If he is elevated to that court, only the Supreme Court will then be able to review his decisions. But the Supreme Court only hears a small fraction of cases from the appellate courts and cannot continually correct garden variety legal errors.

If confirmed, Judge Davis will be the final avenue of appeal for many litigants. Of all the possible nominees who could have been submitted to this court, is this the one we believe would be best?

Courts of appeal have great power through their rulings and can create serious problems for prosecutors. So I would say, just based on my review of the cases I have mentioned, Judge Davis' decisions, if not reversed—fortunately, they were reversed—would have seriously damaged, if not eliminated, a police technique of controlled delivery of drugs to persons who would pick them up.

He seems to ignore the requirement that an individual has to be in custody by the police or be interrogated by the police before Miranda has to be given. That is a fundamental principle of universal acceptance. But, apparently, the judge is not one who follows that, and he has altered the standard for probable cause in a case that I think is troubling.

So the types of mistakes Judge Davis has made can indeed be a threat to public safety. Wasn't it fortunate they arrested the man who threatened his girlfriend and then that he blurted out he committed a bank robbery? Aren't we happy? But if his ruling had been upheld, the effect of that would be to tell every police officer if a person threatens their girlfriend in the presence of a police officer, they cannot make an arrest.

Our law enforcement officers work hard under dangerous conditions to investigate crimes and to apprehend and lock up criminals, many of whom are dangerous, carry guns, threaten girlfriends, shoot themselves. It could well have been somebody else who got shot. Yet the President is now seeking to elevate a judge who seems to have a real personal bias against the work that they do. He has nominated Judge Davis for elevation to the Court of Appeals for the Fourth Circuit—one step below the U.S. Supreme Court.

I think he does seem to have, if not a bias against, a lack of respect for clarity and consistency in the enforcement of criminal justice, and his errors tend consistently to favor the criminal defendant.

I am sure this nominee is a fine man. He has been on the bench a number of years. I have nothing against him personally. I am not questioning his integrity. But it does appear to me he has a cavalier or a lack of substantive commitment to get criminal justice matters right and has shown, by specific rulings against police and prosecutors, that he could do harm on the court of appeals.

So, Madam President, for the reasons I have stated, I am reluctantly voting against the nominee and would ask my colleagues to consider doing the same.

I yield the floor.

Mr. BUNNING. Madam President, today I rise in opposition to the nomination of Mr. Andre M. Davis to the U.S. Court of Appeals for the Fourth Circuit.

This position has been vacant since 2000, despite the previous administration's best efforts to nominate a qualified candidate. For example, President Bush nominated remarkable candidates when he sent Mr. Rod Rosenstein before the Senate in 2007 for the Fourth Circuit judgeship. At the time, my colleagues on the other side of the aisle argued that Mr. Rosenstein was ''too qualified'' to be appointed to this position. Now, President Obama has nominated Mr. Andre Davis, who has made very questionable rulings while enjoying the support from the same

Senators who opposed more qualified candidates.

While I do not raise issue with Mr. Davis's character, I find his judicial record very troubling. His rulings have been overturned by the Fourth Circuit numerous times. In over six different cases, Mr. Davis was noted and reversed by the Fourth Circuit because he suppressed evidence. Because of his rulings, criminals could and have been allowed to walk. The U.S. Supreme Court only hears a limited number of cases, which means that the final ruling on many more cases are made at the U.S. Circuit Court of Appeals level.

It is clear that President Obama and my colleagues on the other side of the aisle care less about sending a good candidate to the Fourth Circuit bench and more about pushing their own agendas. After holding up several more qualified candidates for this position, my colleagues in the majority insist on appointing someone who was reported out of the Judiciary Committee just 36 days after being nominated by President Obama. I urge my fellow Senators to oppose this nomination. Our justice system should not be compromised over political agendas.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Madam President, I came over here and listened to the debate, and I was wondering just who was being considered. It is not the description I would have of Judge Andre Davis of Maryland. I will, in a moment, go to that.

But, first, Madam President, I ask unanimous consent that upon confirmation of Executive Calendar No. 185, the Senate remain in executive session and vote immediately on confirmation of Executive Calendar No. 471, the nomination of Charlene Edwards Honeywell to be U.S. district judge for the Middle District of Florida; that upon confirmation, the motion to reconsider be considered made and laid upon the table; no further motions be in order, and any statements relating to the nomination be printed in the RECORD; the President be immediately notified of the Senate's action, and the Senate then resume legislative session.

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

Mr. LEAHY. Now, Madam President, let me tell you who Judge Andre Davis is because listening to this description, you would not recognize the person. This is a nomination that should not have taken the Senate 5 months to consider—5 months—after it was reported by the Judiciary Committee on a strong bipartisan vote of 16 to 3. The Republicans who voted for him: Senator HATCH, Senator KYL, Senator GRAHAM, and Senator CORNYN—are not people who are apt to give an easy pass to somebody who is not qualified.

In fact, he is a well-respected judge who has served for 14 years on the Federal bench as a district court judge; and before that, 8 years as a Maryland State court judge.

Then, for an impartial review of who this person is—not a partisan review but an impartial review—the American Bar Association's Standing Committee on the Federal Judiciary rated his nomination ''well-qualified.'' That is the highest rating they can give to anybody. So there is no surprise Judge Davis enjoys the strong support of his home State Senators: Senator MIKULSKI and Senator CARDIN. In fact, Senator CARDIN chaired his confirmation hearing back on April 21, and he has been a strong advocate for Senate action on his nomination.

While it is not surprising, it is nonetheless disappointing the Senate has been prevented from considering this nomination for 5 months by Republican objections. I am not surprised because Senate Republicans began this year threatening to filibuster President Obama's judicial nominations before he had made a single one. They have followed through with that threat by obstructing and stalling the process, delaying for months the confirmation of well-qualified, consensus nominees. Last week, the Senate was finally allowed to consider the nomination of Judge Irene Berger, who has now been confirmed as the first African-American Federal judge in the history of West Virginia. The Republican minority delayed consideration of her nomination for more than 3 weeks after it was reported unanimously by the Judiciary Committee. When her nomination finally came to a vote, it was approved by an overwhelming vote of 97–0. That follows the pattern that Republicans have followed all year with respect to President Obama's nominations. I expect Judge Davis to be confirmed by a bipartisan majority, but only after a 5-month stall.

Last year, with a Democratic majority, the Senate reduced circuit court vacancies to as low as 9 and judicial vacancies overall to as low as 34, even though it was the last year of President Bush's second term and a presidential election year. That was the lowest number of circuit court vacancies in decades, since before Senate Republicans began stalling Clinton nominees and grinding confirmations to a halt. In the 1996 session, the Republican-controlled Senate confirmed only 17 judges and not a single circuit court nominee. Because of those delays and pocket filibusters, judicial vacancies grew to over 100, and circuit vacancies rose into the mid-thirties.

When I served as chairman of the Senate Judiciary Committee during President Bush's first term, I did my best to stop this downward spiral that had affected judicial confirmations. Throughout my chairmanship, I made sure to treat President Bush's judicial nominees better than Republicans had treated President Clinton's nominees. In fact, during the 17 months I chaired the Judiciary Committee in President Bush's first term, we confirmed 100 of his judicial nominees. At the end of his Presidency, although Republicans had run the Judiciary Committee for more than half his tenure, more of his judicial nominees were confirmed when I was the chairman than in the more than 4 years when Republicans were in charge.

Instead of building on that progress, Senate Republicans are intent on turning back the clock to the abuses they engaged in during their years of resistance to President Clinton's moderate and mainstream judicial nomination. The delays and inaction we are seeing now from Republican Senators in considering the nominees of another Democratic President are regrettably familiar. Their tactics have resulted in a sorry record of judicial confirmations this year—less than a handful—with 10 judicial nominees currently stalled on the Senate Executive Calendar.

By November 9 in the first year of the Presidency of George W. Bush, the Senate had confirmed 17 circuit and district court judges, four circuit court nominees and 13 district court nominees. By contrast, Judge Davis is only the second circuit court nomination Republicans have allowed to be considered all year. When his nomination is confirmed, it will only bring the total to five—less than one third of what we had accomplished by this time in 2001. I know because in the summer of 2001, I began serving as the chair of the Judiciary Committee. We achieved those results with a controversial and confrontational Republican President after a mid-year change to a Democratic majority in the Senate. We did so in spite of the attacks of September 11; despite the anthrax-laced letters sent to the Senate that closed our offices; and while working virtually around the clock on the PATRIOT Act for 6 weeks. By comparison, this year, the Republican minority has this year allowed action on only four judicial nominations to the Federal circuit and district courts. Judge Davis will be the fifth, and only the second circuit court judge.

Now we face this. Look at the chart I have in the Chamber. It is outrageous what is happening, the few nominees they are allowing through. This is not for lack of qualified nominees. There are 10 such nominees who have been reported by the Judiciary Committee on the Senate Executive Calendar. Had those nominations been considered in the normal course we would be on the pace I set in 2001 when fairly considering the nominations of our last Republican President.

Even though as Democrats we treated President Bush far more fairly than they had treated President Clinton, even though we tried to turn back the clock from when there were 60 judges Republicans pocket-filibustered during President Clinton's time, even though in 17 months Democrats confirmed 100 of President Bush's nominations, it looks as though, as far as President Obama is concerned: President Obama nominates them, then they have to

stall them. Rather than continued progress, we see Senate Republicans resorting to their bag of procedural treats to delay and obstruct. They have ratcheted up the partisanship and seek to impose ideological litmus tests.

The obstruction and delays in considering President Obama's nominations is especially disappointing given the extensive efforts of President Obama to turn away from the divisive approach taken by the previous administration. He has reached out to Members of both parties to select mainstream, well-qualified nominees. I have been at some of those meetings. I know the job he has done in reaching out to both Democrats and Republicans.

In a recent column, Professor Carl Tobias wrote about President Obama's approach:

> Obama has emphasized bipartisan outreach, particularly by soliciting the advice of Democratic and Republican Judiciary Committee members, and of high-level party officials from the states where vacancies arise, and by doing so before final nominations. Obama has gradually, but steadily, put forward his nominees, typically naming a few on the same day. This approach compares favorably with the approach of the two prior administrations, which often submitted large packages on the eve of Senate recesses, thus complicating felicitous confirmation. To date, Obama has nominated 23 well-qualified consensus candidates, who are diverse in terms of ethnicity, gender and ideology. This is sufficient quantitatively and qualitatively to foster prompt confirmation.

I will ask that a copy of Professor Tobias's column be printed in the RECORD following my statement.

Professor Tobias makes this point well and it is substantiated by the bipartisan support from Republican home State Senators for the President's nominees. Indeed, since he made these observations the President has nominated two North Carolinians for vacancies on the Fourth Circuit after consulting with both Senator HAGAN and Senator BURR.

His first nomination of Judge David Hamilton of Indiana to the Seventh Circuit came to the Senate with the strong endorsement of Senator LUGAR, the senior Republican in the Senate. Senator LUGAR praised the ''thoughtful, cooperative, merit-driven'' process he and Senator BAYH took in consulting on that nomination. Despite the bipartisan endorsement from his home State Senators, Judge Hamilton's nomination is the subject of a Republican filibuster and has been stalled since it was reported to the Senate in June.

Federal judicial vacancies, which had been cut in half while George W. Bush was President have already more than doubled since last year. There are now 98 vacancies on our Federal circuit and district courts, including 22 circuit court vacancies. Justice should not be delayed or denied to any American because of overburdened courts, but that is the likely result of the stalling and obstruction.

Despite the fact that Senate Republicans had pocket filibustered President Clinton's circuit court nominees, Senate Democrats opposed only the most extreme of President Bush's ideological nominees and worked to reduce judicial vacancies. That had led to a reduction in vacancies in nearly every circuit during President Bush's administration. One of the circuits where we succeeded in reducing vacancies was the Fourth Circuit, the circuit to which Judge Davis has been nominated.

After Senate Republicans had refused to consider any of President Clinton's four Fourth Circuit nominees from North Carolina, vacancies on the Fourth Circuit had risen to five. All four of President Clinton's nominees from North Carolina to the Fourth Circuit were blocked from consideration by the Republican Senate majority. These outstanding nominees included United States District Court Judge James Beaty, Jr., United States Bankruptcy Judge J. Richard Leonard, Professor Elizabeth Gibson, and North Carolina Court of Appeals Judge James Wynn. Had either Judge Beaty or Judge Wynn been considered and confirmed, he would have been the first African-American judge appointed to the Fourth Circuit. The failure to proceed on those nominations was never explained. Indeed, Senate Republicans refused to consider any of President Clinton's highly qualified circuit court nominations from any of its States in the Fourth Circuit during the last 3 years of his administration. That resulted in five continuing vacancies.

What followed was an effort by President Bush to pack the Fourth Circuit with ideologues. He nominated a political operative from Virginia for a vacancy in Maryland who was caught stealing from a local store and pleaded guilty to fraud. There was his highly controversial nomination of William ''Jim'' Haynes II to the Fourth Circuit who as general counsel at the Department of Defense was an architect of many discredited policies on torture and who never fulfilled the pledge he made to me under oath at his hearing to supply the materials he discussed in an extended opening statement regarding his role in developing these policies and their purported legal justifications.

Mr. Haynes nomination led the Richmond Times-Dispatch to write an editorial in late 2006 entitled ''No Vacancies,'' about President Bush's counterproductive approach to nominations in the Fourth Circuit. The editorial criticized the administration for pursuing political fights at the expense of filling vacancies. According to the Richmond Times-Dispatch:

> The president erred by renominating . . . and may be squandering his opportunity to fill numerous other vacancies with judges of right reason.

President Bush insisted on nominating and renominating Terrence Boyle, despite the fact that as a sitting U.S. district judge and while a circuit court nominee, Judge Boyle ruled on multiple cases involving corporations in which he held investments. President Bush should have heeded the call of North Carolina Police Benevolent Association, the North Carolina Troopers' Association, the Police Benevolent Associations from South Carolina and Virginia, the National Association of Police Organizations, the Professional Fire Fighters and the Paramedics of North Carolina. Law enforcement officers from North Carolina and across the country opposed to the Boyle nomination. Civil rights groups opposed the nomination. Those knowledgeable and respectful of judicial ethics opposed the nomination. Ultimately, President Bush withdrew the Boyle nomination.

I mention these ill-advised nominations because so many Republican partisans seem to have forgotten the reasons these ideological nominations did not proceed.

We did break the logjam in North Carolina. I worked to break through the impasse and to confirm Judge Allyson Duncan of North Carolina to the Fourth Circuit when President Bush nominated her. From the summer of 2001 through 2002, I presided over the consideration and confirmation of three Fourth Circuit judges nominated by President Bush. And in the Presidential election year of 2008, one of the final appellate court judges confirmed by the Senate was another Fourth Circuit nominee. Despite the confrontational approach taken by President Bush and additional retirements on the Fourth Circuit, we ended up reducing the vacancies on the Fourth Circuit during the course of his administration.

Despite our good efforts, the right wing seems intent on repeating its mistakes of the past and obstructing President Obama's nominees to the Fourth Circuit. That appears to be why Judge Davis has been delayed for months. That appears to be why they are resisting consideration of the nomination of Justice Barbara Keenan from Virginia. And that appears to be why following the announcement last week of the nominations of Judge James Wynn and Judge Albert Diaz to Fourth Circuit vacancies, the head of a right wing group urged Republican Senators to obstruct the nominees saying: ''I will predict . . . that life will not be made easy for these two nominees'' the same way when the heads of the Republican Party said they should block Eric Holder for Attorney General, and they did. They delayed him for weeks. Finally, when we did get to vote, he got more votes than any of the last four Attorneys General.

The Senate is finally being allowed to consider Judge Davis's nomination. He has had a long and distinguished legal career. During the last 14 years, he served as Federal district judge in Maryland. He has been a State judge. He has been a Federal prosecutor. He received his bachelor's degree from the University of Pennsylvania. He graduated cum laude with his JD from the

University of Maryland School of Law, where he still teaches classes as an adjunct faculty member.

I congratulate Judge Davis and his family on what I know will be his confirmation. I apologize to him for these unnecessary delays for such a very fine man. I applaud the senior Senator from Maryland, Ms. MIKULSKI, and my Senate partner from Maryland, Mr. CARDIN, a member of the Senate Judiciary Committee, for their work.

Mr. President, I ask unanimous consent that a copy of the article by Professor Tobias to which I referred be printed in the RECORD.

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

WITH OBAMA PROCEEDING REASONABLY TO FILL FEDERAL JUDGESHIPS, THE BOTTLENECK IS THE SENATE

(By Carl Tobias)

A growing drumbeat of commentary has recently criticized President Barack Obama for not acting quickly enough to fill the 96 present vacancies on the federal appellate and district courts. However, as I shall explain, closer evaluation of the record compiled by President Obama shows that these criticisms are actually unwarranted, and that responsibility should more properly be assigned elsewhere. In particular, blame should now be placed at the Senate's door.

OBAMA'S APPROACH: GENERALLY A WISE AND GOOD ONE

Many observers have voiced numerous criticisms of Obama Administration judicial selection. Some have suggested that the President should nominate candidates more swiftly and in greater numbers. Others have criticized the nominees' age (saying they are too old), experience (saying there are too many judges among them), and ideological perspectives (saying they are too liberal or, in some instances, too conservative). A few observers have also compared the number of nominees (23) whom Obama has submitted with the number (95) whom President George W. Bush had submitted at the identical juncture of his administration.

Yet careful analysis of Obama's record shows that these criticisms lack merit. Before Obama won the election, he had already started planning for appointments. And when he was elected, Obama quickly installed as White House Counsel Gregory Craig, a respected attorney with much pertinent expertise, who immediately enlisted several talented lawyers to identify judicial designees. The administration also capitalized on Vice President Joseph Biden's four decades of Senate Judiciary Committee experience in the nomination process. Accordingly, the selection group anticipated and carefully addressed contingencies that might arise when choosing judges. For example, it compiled ''short lists'' of excellent candidates for possible Supreme Court vacancies, should one arise.

Obama has emphasized bipartisan outreach, particularly by soliciting the advice of Democratic and Republican Judiciary Committee members, and of high-level party officials from the states where vacancies arise, and by doing so before final nominations. Obama has gradually, but steadily, put forward his nominees, typically naming a few on the same day. This approach compares favorably with the approach of the two prior administrations, which often submitted large packages on the eve of Senate recesses, thus complicating felicitous confirmation. To date, Obama has nominated 23 well-qualified consensus candidates, who are diverse in terms of ethnicity, gender and ideology. This is sufficient quantitatively and qualitatively to foster prompt confirmation.

Often before, and invariably following, nominations, the administration and senators have cooperated. To facilitate approval of nominees, Obama worked closely with Senators Patrick Leahy (D-Vt.), the Judiciary Committee chair, who schedules hearings and votes, and Harry Reid (D-Nev.), the Majority Leader, who arranges floor consideration, and their GOP analogues, Senators Jeff Sessions (Ala.) and Mitch McConnell (Ky.).

Thus, the committee has swiftly assessed nominees, with thorough questionnaires and hearings and prompt votes. Indeed, Leahy convened hearings so fast that GOP members complained they lacked sufficient preparation time, and he quite reasonably responded with another session for a nominee.

THE REAL PROBLEM HERE LIES MORE WITH THE GOP SENATE MINORITY THAN THE PRESIDENT

The Democratic panel majority, thus, has expedited review, but the Republican minority has delayed processing. For instance, it routinely delays committee votes for a week with no or minimal explanation.

This recently happened with four California District Court nominees, three of whom the panel then unanimously approved. And, last week, Senator Sessions held over Virginia Supreme Court Justice Barbara Keenan, even though he had praised the jurist's qualifications at her hearing two weeks earlier and despite the fact that the U.S. Court of Appeals for the Fourth Circuit, to which she was nominated, desperately needs more judges, as the court is operating with five of its 15 judgeships vacant. In fairness, yesterday, Sessions explained that Keenan's responses to some GOP written questions were inadequate, but that she promptly furnished more complete answers that were satisfactory, again lauded the jurist as a ''fine nominee,'' and supported the panel decision to vote her out without objection.

The committee has approved 14 federal court nominees, and the real bottleneck has been Senate floor action. Of those 14 nominees, only five have received floor debate and confirmation; nine are pending without GOP consent to consider them. Senator Reid has attempted to cooperate with Senator McConnell and Republicans—but to no avail. For example, McConnell insisted that the Senate consider no lower court nominees until it had confirmed Supreme Court Justice Sonia Sotomayor, which delayed the process until September.

The unanimous consent procedure allows one senator to stop the entire body, and anonymous holds have delayed specific nominees' consideration. Reid has been reluctant to employ cloture, which forces votes, mainly because this practice wastes valuable floor time. However, on Tuesday, Reid took the unusual step of invoking cloture to secure a floor vote on Southern District of West Virginia Judge Irene Berger. She is the third uncontroversial judicial nominee on whom Reid has been forced to seek cloture. Indeed, the GOP has ratcheted up the stakes with the unprecedented action of placing holds on noncontroversial nominees.

OBAMA'S NOMINATION RECORD THUS FAR IS STRONG GIVEN UNUSUAL CIRCUMSTANCES

The fact that Obama has nominated only 23 persons thus far to fill federal judgeships is not attributable to the White House or the Senate majority. Nor is the fact that of these, the Senate has confirmed only four lower court nominees. Justice David Souter's May resignation meant that filling his vacancy was a top priority, and that process consumed three months, during which lower court selection had to be temporarily frozen. The administration has, of course, also encountered the ''start-up'' costs of instituting a new government. Cabinet appointments consumed months, and the Senate has yet to confirm several Assistant Attorneys General nominees and many of the 93 U.S. Attorney nominees. There has also been a pressing need for the Obama Administration to address myriad intractable complications left by earlier administrations, such as the deep, continuing recession; Guantanamo; and the Iraq and Afghanistan conflicts.

For all these reasons, recent criticisms of President Obama for submitting judicial nominees too slowly are unfounded. Nor should the Senate Judiciary Committee majority be blamed: The panel majority has expedited its nominee processing, but the minority's virtually automatic reliance on holds has caused some delay. The true bottleneck, however, has been the nearly complete lack of floor consideration.

Senate Republicans must stop delaying floor action on the President's well-qualified nominees—nominees who typically have the blessing of the relevant states' senators. And, if Republicans in the Senate continue to delay, Senate Democrats should invoke cloture and related practices that will facilitate expeditious approval of Obama's nominees.

Mr. LEAHY. I yield back the remainder of my time and ask for the yeas and nays.

The PRESIDING OFFICER. The majority leader.

Mr. REID. I will use some leader time here to explain to everyone where we are.

At 10 o'clock in the morning when we come into session, there will be a moment of silence in honor of the soldiers and the civilians who were killed at Fort Hood.

I am working now with the Republicans to see if we can come up with an agreement to finish Military Construction. I would like to finish it tomorrow. It appears that it may not be doable, but we are going to have votes tomorrow unless we can work something out to complete the legislation on Monday.

If we can complete the legislation on Monday, the Military Construction legislation, part of the agreement has to be something with Judge Hamilton. Here is a man who has waited since April. We have agreed to give the Republicans all the time they want—if they want 30 hours to talk about him beforehand or 5 hours before and after—but we can't work out anything that satisfies them. So it appears we can only do cloture, which is such a shame. But that is fine. We are going to have to work something out as an agreement; otherwise, we will have to have some votes tomorrow. I know we have on this side a couple of Senators who, if there are no votes, would go down to Texas. We have KAY BAILEY HUTCHISON, who is the manager of the bill, who will not be here, but there are other people on the subcommittee who could do the bill. I hope we can work something out, but, as we have learned during this Congress, it is very difficult to work things out.

We are going to have votes Monday, a week from today, in the morning. Everyone should understand that. Monday, a week from today, we will have votes in the morning. We have to do that. The next week is Thanksgiving. We are going to get on health care the week we come back before Thanksgiving. We are going to at least give it our utmost to get on that bill.

We have a number of things that are very important. We have to do the highway bill. The day after tomorrow is Veterans Day. We have a number of veterans bills the Republicans have held up. They are bills dealing with homeless veterans, among other things. They are important pieces of legislation. Four or five of them are being held up. We put those together under rule XIV, and we are going to have a vote on them in the future. It is a shame that on Veterans Day we are not legislating for the veterans, but we have been held up doing lots of things.

I hope we can work something out with the Republicans so we can complete the Military Construction bill, if not tomorrow, then on Monday, but we are not going—this isn't going to go over for many hours. I have asked to work something out. I hope we don't have to file cloture on this bill.

I will tell everyone, I quite doubt that I am going to file cloture on Military Construction. If the Republicans don't want us to do that bill, then we will just do it some other time. It is Military Construction, an extremely important piece of legislation. In years past, we have done that bill in an hour. I can remember when DIANNE FEINSTEIN and KAY BAILEY HUTCHISON were managing that bill and we did that bill in an hour. Over the years—Senator LEAHY is on the floor, a longtime member of the Appropriations Committee—this was not something to send political messages on. It was a bill to do something to help our military, to build new bases, new recreation facilities, to renovate and repair facilities around the world.

So we have the situation here where it doesn't matter what we bring up, the Republicans stall it for time. That is why Senator STABENOW has been here with her charts indicating the—I think we are up to 87 now, or something like that—things they have held up in this Congress.

So I hope we can work something out so we don't have to have votes tomorrow, but I don't need the permission of the Republicans to have votes tomorrow. We can have votes on amendments that are offered by Democrats.

We are going to have a moment of silence. Everyone recognizes the tragedy of the event, and we want to be as positive as possible.

I hope we can work something out. I have two Democrats who have indicated they want to go, both freshman Senators, which doesn't matter—they have a right to go just as do senior Members of the Senate—and three Republicans have indicated they would like to go. I hope that is possible. They can go, I won't stop them from going, but we may have votes.

Mr. LEAHY. Madam President, would the Senator yield?

Mr. REID. I will be happy to yield.

Mr. LEAHY. I agree so much with our leader about the appropriations bills. I see the distinguished chairman of the Appropriations Committee, Senator INOUYE of Hawaii, on the Senate floor. He is the only person standing on this floor who has served longer in this Senate than I have. I have been on that committee for 35 years. These are things that are always done. Whether it is a Republican majority or a Democratic majority, they have always been done, almost in a pro forma fashion. If somebody wants to vote against it, they can vote against it. But with all of the tremendous bipartisan work that is done in the Appropriations Committee—nobody has worked harder than the chairman of the Appropriations Committee. Nobody has worked harder than he has to get a bipartisan bill to the floor. To have it delayed, especially Military Construction, especially matters that help our military at a time when they desperately need it, to have that held up just makes no sense. I share the leader's frustration.

I want to note for the record that nobody has worked harder to get a bipartisan bill on the floor than the chairman of the Senate Appropriations Committee. In years past, that would go through in no time at all. I cannot understand this kind of partisanship.

I yield the floor.

Mr. REID. I say to my friend, the distinguished Senator from Vermont, I didn't see the chairman on the floor. Everything my friend from Vermont said about the Senator from Hawaii is true, and then multiply it by 10. Here is a man who has lived the military—a Medal of Honor winner, an amputee. There is not a more bipartisan person in the whole body than Senator INOUYE from Hawaii.

In short, everyone here understand: Monday, a week from tomorrow, no matter what happens tomorrow, we are going to have votes in the morning. We have just a short week until Thanksgiving and we have a lot to do, including health care.

I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The Senator from Alabama is recognized.

Mr. SESSIONS. Madam President, I also assume we will soon be voting on Judge Honeywell for the U.S. district court in Florida. I enjoyed the dialog I had with her during the confirmation hearings. I was pleased to see good responses to questions for the record. She has served as an assistant public defender and an assistant city attorney, an associate and partner in a law firm, as well as both a county court judge and a State circuit court judge. I will be supporting her nomination.

I wish to note that when I asked her about what role empathy should play in deciding cases, she said:

Empathy does not play role in my consideration of cases. Presently, I decide cases by applying the law to the facts of the cases pending before me. If confirmed by the Senate to serve as a District Court judge, I will decide cases in the same manner.

I would expect, as I did for President Clinton, to vote for well over 90 percent of the nominees who are submitted by the President. I hope to be able to do that for President Obama. But I will say, for the reasons I gave earlier, I must oppose Judge Davis.

I ask unanimous consent that an article written by Larry Margasak from the Associated Press, dated Monday, November 9, 2009, be printed in the RECORD.

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

DEMOCRATS HAVE SHORT MEMORY ON JUDGE NOMINEES

(By Larry Margasak)

Ten months into Barack Obama's presidency, Democrats are accusing Republicans of creating ''a dark mark on the Senate'' by delaying confirmation of his federal court nominees.

The mark might not be as dark as Democrats make it seem.

Of the 27 judicial nominations Mr. Obama has made so far, all five brought up for votes in the Senate have won relatively quick confirmations, including new Supreme Court Justice Sonia Sotomayor.

So what is this ''dark mark'' that Senate Judiciary Committee Chairman Patrick J. Leahy, Vermont Democrat, talks about?

It's primarily two federal judges—one from Indiana, the other Maryland—who've been waiting five months for Senate Majority Leader Harry Reid, Nevada Democrat, to bring their nominations for appeals court promotions to the Senate floor.

Republicans contend that the nominees are activist judges, and Mr. Reid hasn't forced the issue—although he said Wednesday that he might do so by Veterans Day for at least one of the nominees.

One other nominee has been waiting since Sept. 10. But seven others have been waiting from only one to five weeks. That's not a long time for the Senate, which prides itself as a deliberative body, and Republicans say they're ready to vote on most of them.

Democrats have a record of their own that is far from being a bright light. Just three years ago, they were blocking votes on some of President George W. Bush's more conservative judicial nominees.

Several of Mr. Bush's nominees waited for years—two years for eventual Supreme Court Chief Justice John G. Roberts Jr. when he was nominated for an appellate court post.

Priscilla Owen waited through four years of Democratic blocking tactics before she was confirmed for the New Orleans-based federal appeals court. Miguel Estrada withdrew his bid for an appellate seat after a Democratic filibuster lasting more than two years.

As an institution that lets the minority party use rules to block legislation and nominations, the Senate often acts as a filter for preventing the more politically strident bases of each party from tilting the judicial branch too much one way or the other.

Although moderate nominees win confirmation easily, both parties use what is essentially the same argument to block or at

least delay action on others: The particular nominee would substitute his or her own liberal or conservative philosophy for the law and the Constitution.

''It would be wrong for us to be a rubber stamp for each nominee,'' Sen. Jeff Sessions of Alabama, the senior Republican on the Judiciary Committee, said in a recent confirmation dustup in the Senate.

That sounds familiar.

After Mr. Estrada gave up, Sen. Edward M. Kennedy, Massachusetts Democrat, said, ''This should serve as a wake-up call to the [Bush] White House that it cannot simply expect the Senate to rubber-stamp judicial nominations.''

The Republican stall at this point is focused on two appellate court judges whose nominations were sent by the Judiciary Committee to the full Senate on June 4:

David Hamilton of Indiana, a U.S. district judge and nephew of former Democratic Rep. Lee H. Hamilton, chosen for the Chicago-based appeals court.

Mr. Reid said he wants a vote on Judge Hamilton by Veterans Day. He'll probably need a supermajority of 60 to get one.

Judge Andre Davis, a district judge in Maryland, nominated for a seat on the appellate court headquartered in Richmond.

Mr. Sessions made it clear that his party will put up a fight against confirming either. He cited Judge Hamilton's position in the late 1980s as a vice president for litigation and board member of the Indiana chapter of the American Civil Liberties Union. Mr. Sessions also complained about Judge Hamilton's judicial rulings.

''Instead of embracing the constitutional standard of jurisprudence, Judge Hamilton has embraced this 'empathy' standard, this 'feeling' standard. Whatever that is, it is not law. It is not a legal standard,'' Mr. Sessions said.

In Judge Davis' case, Mr. Sessions made the delay sound like a payback to Democrats, although he denied that was his purpose.

''We have had a number of battles over the failure to fill some of the vacancies on that court,'' Mr. Sessions said, referring to stalls of Mr. Bush's nominees for the Richmond-based appeals court—once known for its conservatism.

Mr. Sessions said Republicans have a problem with only one other current nominee before the Senate: Edward Chen, chosen for a U.S. district court seat in California. But Mr. Chen's nomination was only approved by the committee on Oct. 15, hardly enough time to make the case for a stall.

''Most of the nominees . . . will go through in an expeditious manner,'' Mr. Sessions said. He said Republicans are ready to support Beverly Martin, nominated for the Atlanta-based appeals court, but Democrats have not scheduled a vote. Her nomination reached the full Senate Sept. 10.

In the Senate's five judicial confirmation votes this year, only Justice Sotomayor generated significant Republican opposition, and she was approved 68–31.

Mr. SESSIONS. I thank the Chair and yield the floor.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Andre M. Davis, of Maryland, to be United States circuit judge for the Fourth Circuit?

The yeas and nays have been ordered.

The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD), the Senator from North Dakota (Mr. DORGAN), the Senator from Massachusetts (Mr. KERRY), and the Senator from Florida (Mr. NELSON) are necessarily absent.

Mr. KYL. The following Senators are necessarily absent: the Senator from Missouri (Mr. BOND), the Senator from North Carolina (Mr. BURR), the Senator from Georgia (Mr. CHAMBLISS), the Senator from Texas (Mr. CORNYN), the Senator from New Hampshire (Mr. GREGG), the Senator from Texas (Mrs. HUTCHISON), the Senator from Georgia (Mr. ISAKSON), and the Senator from Idaho (Mr. RISCH).

Further, if present and voting, the Senator from Texas (Mr. CORNYN) would have voted ''yea.''

The PRESIDING OFFICER (Mrs. SHAHEEN). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 72, nays 16, as follows:

[Rollcall Vote No. 342 Ex.]

YEAS—72

Akaka	Gillibrand	Merkley
Alexander	Graham	Mikulski
Baucus	Hagan	Murkowski
Bayh	Harkin	Murray
Begich	Hatch	Nelson (NE)
Bennet	Inouye	Pryor
Bennett	Johnson	Reed
Bingaman	Kaufman	Reid
Boxer	Kirk	Rockefeller
Brown	Klobuchar	Sanders
Burris	Kohl	Schumer
Cantwell	Kyl	Shaheen
Cardin	Landrieu	Snowe
Carper	Lautenberg	Specter
Casey	Leahy	Stabenow
Cochran	LeMieux	Tester
Collins	Levin	Udall (CO)
Conrad	Lieberman	Udall (NM)
Corker	Lincoln	Voinovich
Dodd	Lugar	Warner
Durbin	McCain	Webb
Feingold	McCaskill	Whitehouse
Feinstein	McConnell	Wicker
Franken	Menendez	Wyden

NAYS—16

Barrasso	Ensign	Sessions
Brownback	Enzi	Shelby
Bunning	Grassley	Thune
Coburn	Inhofe	Vitter
Crapo	Johanns	
DeMint	Roberts	

NOT VOTING—12

Bond	Cornyn	Isakson
Burr	Dorgan	Kerry
Byrd	Gregg	Nelson (FL)
Chambliss	Hutchison	Risch

The nomination was confirmed.

The PRESIDING OFFICER. Under the previous order, the motion to reconsider is made and laid upon the table.

(At the request of Mr. REID, the following statement was ordered to be printed in the RECORD.)

VOTE EXPLANATION

● Mr. KERRY. Madam President, I was necessarily absent for the vote on the confirmation of Andre Davis to the Fourth Circuit. If I were able to attend today's session, I would have voted for his confirmation.●

NOMINATION OF CHARLENE EDWARDS HONEYWELL TO BE UNITED STATES DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF FLORIDA

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of the Honeywell nomination, which the clerk will report.

The assistant legislative clerk read the nomination of Charlene Edwards Honeywell, of Florida, to be United States District Judge for the Middle District of Florida.

Mr. LEAHY. Madam President, Judge Charlene Edwards Honeywell has been nominated to serve on the U.S. District Court for the Middle District of Florida. Judge Honeywell's confirmation has been needlessly delayed. Judge Honeywell is a longtime State judge, last appointed by former Republican Governor Jeb Bush. She was one of three district court nominees reported by the Judiciary Committee on October 1 without dissent. Yet Senate consideration has been delayed for 5 weeks.

After a 3-week wait, the Senate was allowed to consider the nomination of Roberto Lange, who was confirmed by the Senate 100 to 0—unanimously—to serve on the U.S. District Court for the District of South Dakota after 2 hours of floor debate during which no Senator spoke in opposition. After a 4-week wait, the Senate was allowed to consider the nomination of Irene Cornelia Berger, who was confirmed by a vote of 97 to 0 to serve on the U.S. District Court for the Southern District of West Virginia after an hour of floor debate during which no Senator spoke in opposition. After more than 5 weeks, the Senate today finally considers the nomination of Judge Honeywell, and I expect a similar result.

At the conclusion of the hearing to consider these nominations, Senator SESSIONS, the committee's ranking member, said:

> It's a great honor that you've been given to be nominated and I expect things should go forward in a timely manner. I don't believe that any of you need to be held up based on what I know at this time. So, we'd like to see you get your vote as soon as reasonably possible.

I have been disappointed by Republican delays in bringing these well-qualified, noncontroversial nominees to a vote in the full Senate.

Judge Honeywell first served as a State court judge in 1994, and in 2001 was appointed by Gov. Jeb Bush to serve as a State circuit court judge. Her legal career also includes working in private practice, serving as an assistant city attorney and as an assistant public defender. She was unanimously rated ''well-qualified'' by the American Bar Association's Standing Committee on the Federal Judiciary, the committee's highest rating. She received the bipartisan support of Florida Senators BILL NELSON and Mel Martinez.