EXECUTIVE SESSION

The PRESIDING OFFICER (Mr. CHAMBLISS). The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I yield myself such time as I might consume.

Mr. WARNER. Mr. President, parliamentary inquiry: Can the distinguished Senator from Iowa—we were told to come here at certain times, and if he were to take as much as he wishes, that would preclude any other Senator speaking in the time period.

Mr. GRASSLEY. I yield to the Senator whatever time he needs.

Mr. WARNER. I withdraw my parliamentary inquiry.

Mr. GRASSLEY. I yield the Senator whatever time he wants.

Mr. WARNER. I will sit down. The Senator may go ahead.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I rise today to discuss the Democrats’ filibuster of President Bush’s judicial nominees. The Senate Democrats still think it is Halloween and are trying to spook us into believing that President Bush has nominated a bunch of extremist individuals that cannot be good judges. The Democrats are claiming that these nominees are “outside of the mainstream”. The truth is that these individuals will not implement a liberal agenda on the bench. The truth is that these individuals will follow the law, rather than bend to the will of the political left. But these inside the Beltway, left wing groups have gotten the Democrats to do their bidding. They have hijacked the judicial confirmation process in an unprecedented filibuster of judicial nominees, and they are denying these good men and women an up or down vote. Federal judicial seats will remain unfilled, and litigants seeking justice from those courts can expect further delays.

The reality is that the Constitution of the United States gives the President the power to appoint individuals to seats on the Federal judiciary. The Constitution gives the Senate the responsibility to advise the President in this process. And the Constitution requires the Senate, by a simple majority
vote, to give its consent to the President’s choices for Federal judgeships, or to withhold that consent. But through an unjust abuse of the filibuster, a minority of Senators is preventing the majority of the Senate from taking an up or down vote on President Bush’s judicial nominee. That is not right.

I have always been of the position that judicial nominees should be carefully scrutinized by the Judiciary Committee because they are life-time appointments. It is my opinion that judicial nominees should have intellect, experience, character and integrity. They should also have the right judgment and temperament for the job. But most importantly, they should understand their role on the bench, which is to interpret the law and to follow the law, not to make the law and legislate from the bench. That is the most important credential in my book. And I take that job of looking at judicial nominees very seriously.

However, once the Senate Judiciary Committee has had the opportunity to review these candidates and to approve them, these individuals should get an up or down vote by the full Senate. This is the right process. This is a fair process. During my tenure with the United States Senate, I have always agreed with a sitting President’s choices for the Federal bench. I have voted against a number of judicial nominees because I didn’t believe they were qualified to be a judge, or because I didn’t believe that a seat needed to be filled. But I have never filibustered a judicial nominee.

But that is just what is happening right now. We are seeing the unprecedented use of the filibuster rule to stop judicial nominees from being confirmed. An exceptional group of men and women are being used for political gain by this minority group of Senators that the Senate is considering right now. Janice Rogers Brown, Carolyn Kuhl, and Priscilla Owen, as well as Bill Pryor and Charles Pickering, two nominees that have been filibustered, they all are distinguished individuals that deserve an up or down vote. They all deserve to be confirmed.

Let me say a few words about the men and women that are being filibustered. These men and women are being characterized as outside of the mainstream, extremist people. They are being characterized as “bad judges” that have to be stopped. Nothing is further than the truth. The reality is that some left-wing interest groups are skewering these nominees’ reputations with baseless allegations because they don’t have a liberal ideology. And the Senate Democrats are more than happy to do nothing to stop these real outside groups. And our nation will suffer dearly for it.

Priscilla Owen is currently a judge on the Texas Supreme Court. She was unanimously well qualified by the ABA and enjoys a stellar reputation in her home state. She’s been repeatedly reelected to the Texas Supreme Court by wide margins and has served that court admirably. Judge Owen enjoys the support of her two home state Senators and has been endorsed over and over again by elected officials, fellow jurists, and attorneys alike. Janice Rogers Brown, the daughter of a sharecropper who attended segregated schools, put herself through California State University and even had aĘdual degree. She did all this while raising two children as a single mother. She served her state in a variety of legal roles, including Deputy Attorney General and then later as a legal affairs secretary to the Governor. Judge Brown served on the California Supreme Court since 1996. Carolyn Kuhl has been a judge on the Los Angeles County Superior Court since 1996. She served in a variety of positions in the Justice Department, and then was a partner at a prominent Los Angeles law firm. Judge Kurl received a well qualified rating by the ABA, and enjoys bipartisan support.

Three other exceptional nominees have already been filibustered. Bill Pryor has earned the reputation as one of the most experienced state attorneys general in the country. He graduated from Harvard School magna cum laude, and clerked for Fifth Circuit Judge Wisdom. We have seen that he enforces the law regardless of his personal convictions. General Pryor also has overwhelming support from across the political spectrum.

Judge Charles Pickering has been a lawyer and county prosecutor, and has served as a distinguished federal district court judge for the past 11 years. He received the ABA’s highest rating, “well qualified.” He stood up against the Ku Klux Klan, and has been a leader for equal rights, integration and inclusion in his community. The people that know Judge Pickering best support his judicial qualifications.

Finally we have Miguel Estrada, who was nominated to the D.C. Circuit Court of Appeals. He become so frustrated with the process that he withdrew his nomination after awaiting over 2 years for an up or down vote. Yet he is the true American inspiration story. Born in Honduras, he came to America as a young boy and through determination and hard work, elevated to the top echelons of the law profession. He was an Assistant Solicitor General of the United States in the Clinton Administration, and was a partner in a prominent law firm. Mr. Estrada received the highest rating from the American Bar Association, and is well respected by colleagues and friends alike.

It is a real shame that this fine man felt he had to withdraw his nomination from consideration because of the guerrilla smear tactics of the far left and because of the guerrilla smear tactics of the far left and because of the Democrats’ unprecedented filibuster tactic. And it is a real shame that these other exceptional nominees, like Priscilla Owen, have to go through this same miserable saga. As I think about these nominees with their stellar reputations, outstanding intellects, and their compelling life stories, it saddens me to know that the Democrats have been so ready and willing to stomp all over their good names and to deny the American people quality jurists—all for the benefit of special left wing interest groups.

I have served in this body for many years. And I have seen the filibuster used to leverage a better bargaining position on legislative matters. But it has never been used to prevent a judicial nominee, and especially not where that nominee enjoys majority support by the Senate. This is the first time in history that the filibuster has been used to prevent a judicial confirmation, even though my colleagues on the other aisle say that isn’t the case. It is wrong and probably unconstitutional. It is an abuse of the process. The Senate is supposed to provide advice and consent. The Democrats are denying the rest of the Senate our responsibility under the Constitution to give our consent—or even to withhold our consent. It is a terrible disgrace and ought not to continue.

The Democrats are leading us down a path that is just going to make matters worse. The judicial confirmation process is already in an unhealthy state of repair—we don’t need to destroy it altogether. The Democrats need to stop playing politics with the judicial process. They need to stop spooking people about the qualifications and ability of these nominees to be good federal judges. They need to stop spooking away qualified nominees like Miguel Estrada. We need to stop this unjust filibuster and give these worthy nominees what they deserve—an up or down vote.

I yield the floor. I yield whatever time the Senator from Virginia needs.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, I thank my good friend, my colleague from Iowa.

Mr. President, what is the parliamentary situation, and what time remains under the control of my distinguished colleague from Iowa who is managing this set of debates at this time?

The PRESIDING OFFICER. The majority controls 10 minutes, the minority has 30 minutes.

Mr. WARNER. So we have 10 minutes remaining.

The PRESIDING OFFICER. That is correct.

Mr. WARNER. I thank the Chair.

Mr. President, I commend my good friend from Iowa for adhering to the principles of the Senate and the responsibilities of the Judiciary Committee on which he has served these many years.

I turn to the following. If we look back in history in the summer of 1787, 55 individuals gathered in Philadelphia to create a Constitution. It was a very hot summer, and it was a long and arduous debate, many drafts back and forth, but careful consideration was...
given. Finally, in mid September, it was over. It was a monumental achievement. But the Framers did not know at that time what a great achievement they had made, one that would enable the United States, today, these 200-odd years later, to be the oldest continuously surviving Republic form of government on Earth today.

Almost every other government in existence at the time of the Constitutional Convention has fallen or is in the dustbin of history. So we must ask ourselves, why? It is very clear to this humble Senator that it was due, in part, to the wisdom of the Framers to have three coequal branches of the Government. I view this debate as one to determine the survivability of the coequal stature of the three branches.

I am not going to argue about all the things that have taken place back and forth, but just go to this magnificent document—the Constitution. The President placed a copy of it on every desk in the Senate chamber, and many of us daily carry it in our pocket.

The Constitution very clearly states that a simple majority vote is the regular order of business, with the exception of a few instances specifically enumerated in the Constitution that require super-majority votes. Had the Framers decided that we should require 60 votes for the confirmation process of the Senate, they would have explicitly written such a requirement in.

It is quite interesting to note that:

—Two-thirds of the Senate must vote to ratify a treaty; two-thirds of the Senate must vote to convict on an article of impeachment; two-thirds of a House of Congress must vote to expel a Member of that body; two-thirds of a House of Congress must vote to override a President’s veto; and two-thirds of each House of Congress must vote to override a President’s veto.

—Two-thirds of each House must vote to propose an amendment to the Constitution.

—Two-thirds of each House must vote to override an executive order issued by the President.

—Two-thirds of each House must vote to request that the President send for a member of the Cabinet.

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Two-thirds of the Senate must vote to ratify a treaty; two-thirds of the Senate must vote to convict on an article of impeachment; two-thirds of a House of Congress must vote to expel a Member of that body; two-thirds of each House of Congress must vote to override a President’s veto; and two-thirds of each House must vote to propose an amendment to the Constitution. To the ultimate, the address and consent, clearly enumerated in the Constitution, and given to only one body of Congress, the Senate, there is no mention of a higher than simple majority vote. It is there to protect, again, the checks and balances. It is there to protect against an executive branch nominee which, in the fair judgment of the Senate, does not meet the high standards to become a member of the judicial branch.

There is a very simple: Are we going to abide by what the Framers laid out, what has kept this great Nation together these 200-plus years? Or are we going to devise and contrive in our own words some system by which to prevent a simple vote up and down on a judicial nomination?

The Constitution does not include that super-majority. If the bar is to remain at 60 votes, as my colleagues on the other side have so vehemently argued, I say, then the Senate would have far more power on questions of judicial nominees than it was intended by the Framers. The checks and balances concept of our Constitution would be changed. And how would that affect our Republic?

Well, when the Constitutional Convention was over in September 1787, Benjamin Franklin emerged and was greeted by a crowd, some were reporters. He was asked, “What have the Framers wrought?” He replied, “a Republic, if you can keep it.”

And that is what we are doing here in this historic debate. We are determining the rules by which we keep that Republic.

Throughout this historic debate, this Chamber has resonated with the use of the word “filibuster.” I ask: Can any Senator point to use of that word in any of the rules of the U.S. Senate? In every desk, every Senator has their book on the rules of the Senate and procedures of the Senate. You can’t find the word “filibuster” in that book because it is not there. But, should I be wrong, parliamentary inquiry to the Presiding Officer, can the Senator find the word “filibuster” in the rules of the Senate or any definition in the rules of the Senate?

The PRESIDING OFFICER. The word “filibuster” is not contained in the standing rules of the Senate.

Mr. WARNER. If we were to set a precedent that nominees reported out of the Judiciary Committee were subjected to a 60 vote requirement, this precedent would disrupt the carefully crafted system of checks and balances embedded in our Constitution by giving the Senate far more power in the judicial selection process than the Executive Branch.

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Mr. WARNER. I ask unanimous consent for 1 additional minute.

Mr. LEAHY. Then I ask for 1 additional minute on our side.

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

Mr. WARNER. I ask unanimous consent for 1 additional minute.

Mr. CARPER. Mr. President, I am honored to follow the Senator from Virginia. I want to return to the Constitutional Convention that he spoke of from 216 years ago. Among the last issues resolved at the Constitutional Convention was the question of whose job it is to select the members of this third branch of Government that was to be created.

We have an executive branch, the legislative branch with the House and Senate, and a judicial branch. At that time, there was a great concern on the part of those framing the Constitution and trying to craft a framework of our Government. Foremost among the concerns they had was the concern that somehow we would unintentionally invest too much power, too much authority in one person. Having dealt with the King of England and not wanting to have to deal with another figure of authority with the kind of powers of a monarch, there was a debate as to how the power be for this new President and how would we constrain those powers.

Among the last issues resolved at the Constitutional Convention was the
question of who selects the judges, who selects the members of that third branch of the judiciary. There were plenty at the Convention who thought that in order to make sure we didn't end up with another monarch in this country, we should give the judiciary should lie with the legislative branch. There were those who thought the Senate or the House or some combination thereof should select who the judges would be. There was another school of thought that said, in fact, it should be the President, our Chief Executive, the power to select who our judges would be. As we all know, the compromise that was struck was one that says the President may nominate with the advice and the consent of the Senate.

Yesterday, as our youngest son came home from school, he shared with his mom and me some good news. He shared with us that while he won't get his report card for another week or so, he has already learned the results of his first report card this year. His grade in English language arts? He is in the eighth grade. He came home and he said: I got a 94 for English language arts in this grading period, dad. I get an A. I get an A.

We know that he has a tough teacher. He has worked real hard, and he earned a 94. He is going to get an A. We hope he does as well in his other courses.

On the scorekeeping for how this President is doing with respect to getting his nominees confirmed, I think of the 172 we voted on so far; 168 have been confirmed, 4 have not. That is 98 percent. In my book, in my son's book, that is an A. That ain't bad.

Before I came here to serve in the Senate with my colleagues, I was a Governor. I know some people get tired of hearing me talk about that. But it was a great privilege to be Governor of my State. In our State, Governors make nominations serve on the bench. The Senate can confirm. Whether it was a judge, supreme court, magistrate court, any commission, I would like to have had every single nominee confirmed. I suspect that most other Governors who similarly make nominations for appointments in their States would like to have all their nominations confirmed as well. Not all of my nominations were confirmed.

There is a give and take with the Senate, as there is a give and take with the Senate in this city for our National Government. I don't often quote Mick Jagger and Keith Richards, but there was an old song from my youth they used to sing: "You can't always get what you want, but if you do, sometimes, you get what you need."

We need from this President good nominees. I expect they are going to be Republicans. I expect they are going to be supportive. My guess is of the 98 percent who have been confirmed, they were all Republicans. For the most part they were all conservative. I don't think it is realistic of this President to expect that we are going to confirm 100 percent of his nominees.

It sure wasn't the expectation of his predecessor, Bill Clinton. He got a majority of his nominees confirmed but not 100 percent, not 95 percent, not 90 percent, not 80 percent. But about 80 percent were actually nominated, had hearings, and their names actually ended up on the floor for a confirmation vote. That is a B-minus. Compared to the A-plus that this President is getting with respect to confirmations, I think it is only fair to say that there is great dissent and the great disappointment and the great frustration our friends on the other side have shared.

Here is my frustration. I didn't come here to be about partisan politics. I didn't come here to be about gridlock. I didn't come here to pursue that agenda. I came here as one who wants to work with people on the other side of the aisle. I want to get things done.

I have voted with this President more than 75 percent of the time. I am told that only 7 Democrats have voted with this President more than I have in the last 2 years. I have tried to provide leadership on issues that both of my colleagues are concerned with, Senator HATCH, class action, asbestos reform, bankruptcy, welfare, a comprehensive energy policy.

Meanwhile, while we are standing here tonight debating on whether or not 98 percent is good enough, we don't have an energy policy. Half the energy we get that we use in America comes from foreign sources, a lot of it controlled by people who don't like us. We don't have an energy policy. We should be debating an energy policy and adopting it.

Standing here tonight we have a legal system that has lost its sense of balance, whether the issue is class action litigation that is being heard in small, remote courthouses around the country or whether the issue is asbestos or folks sick and dying getting the help they need. Meanwhile, the people who will never be sick will get money from those who need it. We should be debating those issues here tonight.

We have too much sulfur dioxide or nitrogen oxide and mercury in our air, putting out too much carbon dioxide, causing global warming. We should be addressing those issues.

We had a budget in the last year that exceeded $400 billion. It is getting worse. We have a budget deficit that this year will approach $500 billion in 1 year alone. We are paying today on our national debt, just today, $800 million—plus just in interest on the debt. We ought to be debating how we rein in those budget deficits and trade deficits, not deciding is 98 percent enough or is 97 percent high enough in terms of success in nominations.

As the Governor and someone who was once privileged to chair the National Governors Association, we looked at the States as laboratories of democracy. We looked at the States to provide best practices, whether it was moving people off welfare, helping to make sure people coming out of prison didn't recidivate and go back to prison, what could we do to raise student achievement.

It sure wasn't about one model that works real well with respect to judicial nominations, and one I know the most about is my State of Delaware. Since 1897, the constitution of my State has called for balance with respect to our judiciary. We have year after year a Chief Justice, a Governor, and a Senate that is acknowledged by some of the foremost attorneys who practice in this country as the best—the best legal climate, the fairest of any State in America. We are proud of our judiciary.

In the 8 years I was Governor, I nominated as many Republicans to the bench as I did Democrats. MIKE COTTLE, my predecessor, now a Congressman, when he was Governor, he nominated as many Democrats to the bench as the Republican Party.

In our State, there has to be a symmetry. Essentially, for every Democrat you nominate, the next one has to be a Republican. We have done that for over 100 years and have ended up with a tribunal, with judges respected at home, across the country, and even beyond our borders. There is a saying, "If it ain't broke, don't fix it." That is not what we ought to say. We should say if it is not perfect, make it better.

We have to find some combination in our National Capital for our Federal Government is broken and it needs to be fixed. Whether George Bush is President or Bill Clinton is President, we waste more and more time on judicial nominations. We are bogged down in that. We still haven't passed our spending plan for the new fiscal year, which started a month and a half ago. We are still wrestling with our appropriations bills. This system is broken.

The convention may be in Delaware, it may be in Vermont, or it may be how they nominate judges in Georgia or in Iowa. There is a better way to do it than what we are doing here. We have to find it and we have to come to some kind of closure around a better plan. When we do, instead of facing the prospect of leaving here without action on class action legislation, action on asbestos, or action on an energy bill, or without action on transportation policy, our childhood programs, maybe we do not take jobs and even pass appropriations bills on time instead of the kind of mindless—oftentimes mindless debate we devote to judicial nominations.

That having been said, I yield to the former chairman of the judiciary Committee, the ranking Democrat, Senator LEAHY, with my thanks.

Mr. LEAHY. Mr. President, I thank the Senator from Delaware for what he said. He has a distinguished record in the other body, as Governor and now here. We listened to him in this Chamber. I wish they would listen to him on the other end of Pennsylvania Avenue.
because the person who makes the nominations is the President. I have been here with six Presidents. I have never known a time when a President is less willing to engage the Senate in advise and consent. President Ford did, President Carter did, President Reagan did, former President Bush did, and President Clinton did. I hope this White House would begin to do that also.

Interestingly enough, today I was given a petition signed by 320,000 Americans, a large number over the country. This petition supports a filibuster of extreme judicial nominees of the President. In fact, in the last 72 hours, 172,000 Americans signed these petitions. I went through them, thanks to the ability to search electronically, and picked out some from my State of Vermont.

In Moretown, VT, someone wrote:

It is a disgrace how this administration is attempting to pack our Federal courts with right-wing judges that undermine the hard-fought pillars of legal precedent that reflect the values of a vast majority of Americans. I wholeheartedly support the efforts of the Senate Judiciary Committee Democrats to oppose this blatant abuse of the majority power. . . . The Senate GOP leadership should be ashamed of wasting precious legislative time to engage in what amounts to a publicity stunt. . . . Shame on them. They don't deserve the seats that the people have entrusted in them.

Moretown, VT, is a little town a few miles away from where I live. It is straight down the valley; you can look straight down the valley from the front lawn of my home. We used to go to mass there on Sunday. It is the only place of my grandmothers was born. So I was pleased to see that.

I received this petition from West Townsend, VT:

Thank you very much for all your hard work and valuable work. We appreciate it.

West Townsend is a very small town in Vermont. People are very independent there.

This one is from South Burlington, VT:

I support any measure to prevent Bush's extreme judicial appointments. Keep up the good work.

This is from Barre, VT:

Please be strong and stand against the Republicans. Ashcroft has already taken away too many of our civil liberties; we cannot have judges doing the same.

Barre, VT, is considered the granite center of the world, with the largest granite quarries in the world. My father, Patrick J. Leahy, was a stonecutter in Barre, VT. My grandfather, Patrick J. Johns, was a stonecutter in Barre, VT. My father was born in Barre, VT. The people of Barre, VT, are as strong and independent as the beautiful granite in their quarry.

I have one from South Ryegate, VT:

You must protect the cherished rights of women to control their own bodies. Do not approve judges whose records show that they do not believe in women's rights.

South Ryegate, VT, is a beautiful little town on the eastern side of Vermont. I know it well. When my maternal grandparents immigrated to this country from Italy, not speaking a word of English, they came to South Ryegate, VT, where my Italian grandfather was also a stonecutter. My mother, a first-generation American, was born there, her first language was Italian, but she learned English at school. She was proud of the judicial and constitutional system of this country, and so proud of taking the oath of citizenship. My father, in Barre, VT, was so proud of the separation of powers in this country—the legislative branch, independent and equal to the other two; and the judicial branch, independent and equal to the other two.

I remembe him sitting in the gallery when I was first sworn in as a Senator, knowing I was part of that triumvirate of powers in this country, which is why our democracy has lasted this long. But throughout it all, it was so important to the country that one individual, one politician, that one was independent of either of the political parties, and that is the judiciary. It should not be a Democratic judiciary or a Republican judiciary.

The battle we are having now is because this White House does not want it to be an independent judiciary. They want it to be the most extreme possible. They want it to be an arm of the Republican Party. One hundred sixty-eight to four. We have confirmed 168 of President Bush's nominees. We stopped four of the most extreme. Lordy, the crocodile tears that have been shed here, at great cost to the American taxpayers, over the last 24 hours—the crocodile tears that have been shed for that.

I do not remember one single Republican standing on the floor and saying how terrible it was when the Republicans blocked 63 of President Clinton's nominees, when a Republican President in came, they said: Look at all these vacancies. My God, we have to move as fast as we can to fill them. This is terrible. This is a crisis in the judiciary. How could this possibly have happened? How could this possibly have happened; there are 63 vacancies here. My Lord, the sky is falling down.

How did those vacancies come from? They came from one person, one Republican, holding an anonymous filibuster. If one Republican said, I don't want this judge of President Clinton's, the nominee went no further. Notwithstanding that, some of them had the highest qualifications this country has seen. Notwithstanding that, some of them were the most brilliant judges. Notwithstanding that, they were Hispanics, women, African Americans, people of faith, and people of great conscience. They were not allowed to go forward because one member of the Republican Party said he or she did not want them to go forward. But notwithstanding that the Republicans created all those vacancies, notwithstanding that, the Democrats said, we will help you fill them.

Notwithstanding the arrogance and the one-person filibusters on the other side, the Democrats started filling those vacancies with President Bush's nominees. We have filled those vacancies. We stopped four of the most extreme nominees. And now, lordy, lordy, lordy, the Niagara Falls of tears comes from the other side—crocodile tears, hypocritical tears, from those who said not a word, not a word when they blocked 63. Not a word. Not a word. They blocked 63. Not a word. They blocked 63. Not a word. They blocked 63. Not a word. They blocked 63. Not a word. They blocked 63. Not a word. They blocked 63.

The President said that he wanted to be a uniter and not a divider. Oh, how much I wish he were. If there was ever a time that this country needs a uniter, not a divider, it is right now. But, instead, in deference to groups on the far right, the President has nominated judicial activists about whom one cannot help but raise questions regarding their ability to act impartially, with justice for all. We need an independent judiciary. We are fortunate in Vermont because we have the most independent Federal judges you can imagine—people with total integrity, who will treat whoever comes into their court with impartiality regardless of whether they are Republican or Democrat or independent. That is what all courts should do.

Time and time again, Democratic Senators have acted in good faith to fill vacancies Republicans kept vacant by blocking a Democratic President's nominees. Republicans, when a Republican President nominated judges, blocked 63 of President Clinton's nominees, when a Republican President came in, they said: Look at all these vacancies. My God, we have to move as fast as we can to fill them. This is terrible. This is a crisis in the judiciary. How could this possibly have happened? How could this possibly have happened; there are 63 vacancies here. My Lord, the sky is falling down.

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told, upwards of a quarter of a million dollars of the taxpayers’ money to have this debate. I apologize for that. I am not the one who wanted to do this. I apologize to all the staff—the police officers, who should be home with their families, parents, the staff—to keep the journal of these proceedings—who are some of the finest men and women I have worked with in nearly 30 years here.

But that quarter of a million dollars the Republican leadership is spending on this charade of crocodile tears could almost be worth it if one thing comes out of it. If the President would realize that this whole process begins with him, not with the Senate. The President has an absolute right to nominate anybody he wants. The Senate has an absolute right to advise and consent, to determine whether nominees are confirmed, especially to lifetime jobs.

I ask him once again, work with the Senate. This has been our tradition. The Senate has sought the advice of the Court of last resort. Presidents have sought the Senate advice and consent before his nominees would go through. This is the role the Senate and the confirmation process is to play. The Senate has an absolute right to advise and consent, to confirm, especially to lifetime jobs. Presidents have not always sought advice and consent. They have not always liked what they have heard. Five of the six Presidents have been willing to work with the Senate on judicial nominations: Presidents Ford, Carter, Reagan, former President Bush, and President Clinton. I urge the current President to follow their example. Things will go far more smoothly. I do yield the remainder of my time.

Mr. LEAHY. Mr. President, let me say this. Again, I have been here with six Presidents, Republican and Democrat. Presidents have always sought advice and consent. They have not always liked what they have heard. Five of the six Presidents have been willing to work with the Senate on judicial nominations: Presidents Ford, Carter, Reagan, former President Bush, and President Clinton. I urge the current President to follow their example. Things will go far more smoothly. I do yield the remainder of my time.

Mr. Sessions. Mr. President, I appreciate the remarks of the distinguished ranking member of the Judiciary Committee. He has been around the Senate and the confirmation process for a long time.

He said he wanted to apologize for people staying here and having to work tonight. I understand that. We are here because we have a filibuster organized and sustained by the Democratic leadership against six nominees. We have more in the pipeline to be blocked, so it is not just four. I want to ask, would the Senator want to apologize? For his remarks that he made in 1998 when he, Senator LEAHY, in the CONGRESSIONAL RECORD, said: ‘I cannot recall a judicial nomination being successfully filibustered. I do recall earlier this year, however, filibustered nominees by the Judiciary Committee and I noted how improper it would be to filibuster a nomination.’

That was when President Clinton was in office and Chairman HATCH, a Republican, was chairman of the Judiciary Committee. Chairman HATCH said on the floor of the Senate and in committee and in private Republican conferences that a filibuster was not good. Senator LEAHY and the Democratic leadership all said filibusters were not good. We have had those filibusters.

Now it is amazing to me now that within a year or two after making statements such as that, and taking that position, we now have those very same people leading a filibuster. I would say apologies need to come from the other side.

Let me mention a few basics about confirmations under President Clinton: 377 nominees were confirmed, 1 was returned to the President, 17 nominees were confirmed by September 30. We still haven’t. We don’t want to vote on veterans benefits even though the administration seems hell-bent on cutting veterans benefits.

We don’t want to do any of those things. We have a quarter of a million tax dollars on the Republican’s charade. I say the same thing today that the Senate said to George Washington and said to Franklin Roosevelt: We are going to ask for advice and consent. The Senate is going to stand up for its rights. I yield the floor.

The PRESIDING OFFICER. Does the Senator yield back his time? He has 56 seconds.

Mr. LEAHY. Mr. President, let me say this. Again, I have been here with six Presidents, Republican and Democrat. Presidents have not always sought advice and consent. They have not always liked what they have heard. Five of the six Presidents have been willing to work with the Senate on judicial nominations: Presidents Ford, Carter, Reagan, former President Bush, and President Clinton. I urge the current President to follow their example. Things will go far more smoothly. I do yield the remainder of my time.

The PRESIDING OFFICER. All time has expired. Who yields time? The Senator from Alabama.

Mr. SESSIONS. Mr. President, I appreciate the remarks of the distinguished ranking member of the Judiciary Committee. He has been around the Senate and the confirmation process for a long time.

He said he wanted to apologize for people staying here and having to work tonight. I understand that. We are here because we have a filibuster organized and sustained by the Democratic leadership against six nominees. We have more in the pipeline to be blocked, so it is not just four. I want to ask, would the Senator want to apologize? For his remarks that he made in 1998 when he, Senator LEAHY, in the CONGRESSIONAL RECORD, said: ‘I cannot recall a judicial nomination being successfully filibustered. I do recall earlier this year, however, filibustered nominees by the Judiciary Committee and I noted how improper it would be to filibuster a nomination.’

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So it is amaz—amazing to me now that within a year or two after making statements such as that, and taking that position, we now have those very same people leading a filibuster. I would say apologies need to come from the other side.

When former President Bush was President, there was a Republican-controlled Senate that left 54 of his nominations hanging. So under Senator HATCH’s leadership and under TRENT LOTT’s leadership, only 41 were left unconfirmed when President Clinton left office.

The Senate, not the President, blocked them with holds. Holds were put on nominations, just as they are today. Senator LEVIN has a hold against four circuit judges for the Sixth Circuit. They say they are only holding up four; this is not true. They have 13 circuit judges who are being held up and blocked by Senator LEVIN they are holding at least eight. In fact, there are 13 circuit judges who are being held up and blocked by the Democrats right now. It just so happens we are only in full-blown filibuster of five, one having withdrawn, making six.

I will say one more thing. My colleagues on the other side of the aisle just blithely and consistently and repeatedly say these nominees are extreme, but they are not. They are not extreme. They are not extreme, they are not extreme. They are not extreme. ‘I believe that is the phrase I have heard: Most extreme possible; extreme judicial nominees. As if saying this can make it so.

When we talk about judges, each judge is a human being. Each judge is entitled to a fair and decent consideration on the floor of this Senate and in committee. If they are not extreme, they ought not be called extreme. That is wrong for us to do that. That is the truth; with the nominees being blocked by Senator LEVIN they are holding at least eight. In fact, there are 13 circuit judges who are being held up and blocked by the Democrats right now. It just so happens we are only in full-blown filibuster of five, one having withdrawn, making six.

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well-qualified rating by the ABA to be a judge—she is not extreme. J udge Janice Rogers Brown from California, who got 76 percent of the vote in the State of California, not a conservative State, for justice of the supreme court of that State, is not extreme. And neither is Carolyn Kuhl, who rated the highest rating possible by the American Bar Association, who has received incredible bipartisan support from the hundred or so judges in her area where she practices as a State judge. She is in no way the result of Senator Feinstein’s opposition. The people we ought to have on the bench. It is wrong for them to be accused of being out of the mainstream.

President Bush knows what the people want in Federal judges. He has nominated people that are the kind of Federal judge. The people will support him on that, and it is very disturbing to hear them called extremists when they are mainstream and effective judges and nominees.

I now recognize the Senator from Colorado. I believe he is prepared to make some remarks.

THE PRESIDING OFFICER. The Senator from Colorado.

Mr. CAMPBELL. Mr. President, this evening I am pleased to join my fellow Senators—including my good friend from Utah—Judiciary Committee Chairman Hatch—for this “Justice for Judges” Marathon. I doubt if anyone will change their minds, but the debate is one we need to have.

First of all, I would like to thank Senator Hatch for the excellent work he has been doing—just as he consistently does day after day and hearing after hearing—as the Chairman of the Judiciary Committee.

I also thank Chairman Hatch for his support for another bill I am sponsoring this year, the Law Enforcement Officer’s Safety Act of 2003. Every one of our Nation’s leading law enforcement organizations—including the Fraternal Order of Police—consider this bill to be one of their top legislative priorities. I am especially pleased that this bill now enjoys the strong bipartisan support of 66 cosponsors—including 41 Republicans and 25 Democrats. I also want to point out that Senators Leahy and Hatch are lead original cosponsors of this important legislation, and thank them for their support. Unfortunately, this bill is a perfect example of how the intent of the U.S. Senate can be subverted by the few opposed to a bill.

I also want to point out that even though this bill enjoys bipartisan support, and easily enough to get it passed by the Senate in an up-or-down vote—or even to invoke cloture—-it is still being held hostage by a few Senators who have dug in their heels and refuse to let it pass.

It is not just nor just in a body where fairness and justice is paramount that a minority of a few can hold up the will of 67 Senators. I want to let my fellow Senators know that I will be pushing for the passage of the Law Enforcement Officers Safety Act early next year.

The challenges we are now facing in the form of the unprecedented filibustering of Circuit Court judicial nominees is in no way the result of Senator Hatch’s ability as a Chairman or as one of the Senate’s great gentlemen. Unfortunately, we are now facing a situation in which judicial nominees that clearly have the bipartisan support they need to be confirmed by the Senate in an up-or-down vote simply cannot get the vote they deserve.

Repeated refusals to allow Circuit Court nominee Miguel Estrada the straight up-or-down vote he deserved unfortunately led to him withdrawing his nomination.

As a Coloradan, I am not alone in my assessment that an injustice was done, and not just to Miguel Estrada, but to our finely balanced system of Constitutional government as handed down by our Founding Fathers.

We all know the history of Miguel Estrada. He is a great American success story. He is a man of impeccable credentials dedicated to upholding the law. Unfortunately, as he committed the high crime of being a conservative. He does not deserve the insult of being called a “lemon” as one Senator has done today. Whether to vote against nominees is each Senator’s decision, but they do not deserve insults. On September 10, 2002, the Pueblo Chieftain editorial stated:

One would think that Democrats in the Senate, who claim to hold diversity in such high esteem, would be amendable to Mr. Estrada’s nomination as a Chairman or as one Senator has done today. Whether to vote against nominees is each Senator’s decision, but they do not deserve insults.

The Pueblo Chieftain went on to say:

For the first time in the Nation’s history, Senate Democrats filibustered the nomination. By doing so they turned the Senate’s historic practice of advice and consent into a litmus test for liberal interest groups. The Democrats also have launched filibusters to stall the confirmations of a half-dozen other candidates.

The editorial continues:

Mr. Estrada asked President Bush to withdraw his nomination, which had languished in the Senate for nearly two years. Mr. Bush did so, with regret.

Mr. Estrada should have been confirmed. He was just as qualified as a dozen other judicial nominees who were eventually confirmed. But Democrats have resorted to the filibuster to stop those judicial candidates they feared to be opposed to abortion. But when asked about the Roe v. Wade abortion ruling during confirmation hearings, Mr. Estrada said, “It’s the law.”

In the long run, Democrats may have hurt themselves and their outreach to Hispanic moderates and independents by denying all Hispanics a historic moment—the first and highest-ranking Hispanic on the Federal bench who also had strong backing from a wide range of Hispanic groups.

Mr. President, let me say a few words about the towering figure in Colorado history, Byron White, a football star and then a conservative U.S. Supreme Court Justice who retired in 1993 after 31 years on the Federal bench. After having lived a long and fruitful life, Justice White passed away on April 15, 2002. I met Justice White. His many achievements made most but not all Coloradans proud.

Justice White was appointed to the Nation’s highest court by President John F. Kennedy in 1962. I knew Justice White—he had a handshake that would make you wince, even in his 80’s. Byron White combined physical prowess—as a nationally acclaimed football star in the 1930’s who went on to become a Rhodes scholar and, even, the starting quarterback for the University of Colorado Buffaloes. He led the nation in both scoring and rushing yards while leading an unbeaten team. He never liked his nickname, “Whizzer.” But sports writers did so he was stuck with it.

He also was an outstanding football player in the earliest days of professional football, playing running back for both the Pittsburgh Steelers and the Detroit Lions. He used his professional football signing bonus to pay his way through Yale Law School. He graduated first in his class.

During World War II he served as an intelligence officer with the U.S. Navy. It was Byron White who wrote the official report on the sinking of John F. Kennedy’s patrol boat, the PT-109.

White “had excelled in everything he had attempted” President Kennedy said admiringly when he appointed his long-time friend and the Deputy Attorney General as our Nation’s 98th Supreme Court Justice in history.

However, despite the outstanding strengths and qualifications, as articulated by President Kennedy, Justice White had some views that most likely would have led to filibuster by today’s Senate. In fact, if it had been a Republican President who nominated Byron White in 1965 instead of a Democrat, he probably would not have been confirmed even then.

For instance, he dissented from the historic 1973 ruling that declared that women have a constitutional right to an abortion.

In 1986, he stirred a storm of controversy by writing the Supreme Court’s opinion that constitutional protections of privacy do not extend to homosexual conduct.

Justice White consistently opposed restrictions on law enforcement officers, which led him to dissent from the famous 1966 Miranda ruling that police
officers inform a criminal suspect being arrested of their rights.

Justice White also dissented from rulings that outlawed voluntary prayer for children in public schools.

By the late 1960s, Justice White had joined conservatives in opposing “affirmative action” programs on the grounds that they amounted to reverse discrimination.

The point is that he was appointed by President Lyndon B. Johnson—but even so—under today’s atmosphere, including political correctness and in-your-face special interests—with litmus test approaches to public policy—justice White would have almost certainly been filibustered, and would probably not be confirmed.

I am not sure that I would have voted for his confirmation had I been here, because I disagree with some of his decisions, but I would have been given the chance.

The way that today’s Senate is treating judicial nominees stands in even starker contrast when it is pointed out that Justice White was confirmed by the Senate by a voice-vote, and without objection. Not one Senator objected.

Justice White also dissented from the Supreme Court’s decision in Wyoming, and we had about 14 minutes.

Mr. ENZI. Mr. President, first, I wish to concentrate a little bit on some of the comments I heard during the 3½ hours I chaired last night.

A lot may have made of this number, 168 to 4. But you cannot compare district court judges with circuit court nominations. Instead, you should look at the situation for what it is, an attempt to obstruct the confirmation of circuit court judges.

Since January 2003, President Bush has nominated a total of 29 circuit court judges. Of those judges, only 12, or 41 percent, have been confirmed. Of the remaining 17, my colleagues across the aisle have obstructed or threatened to obstruct the confirmation of qualified and talented judges. In other words, almost 50 percent of the circuit judges ready to come to the floor for confirmation have been held up by the Democratic side for political purposes.

Last night, this 98 percent factor, and I heard it said that if my child came home with a test and he got 98 percent, I should congratulate him and work hard to get the other 2 percent.

I will tell you what ought to happen if your kid comes home with only 50 percent, and that is what we are talking about when we are talking about circuit court judges, we are talking about failure of the system, a total breakdown of the system.

You have to look at the concentration that there is on the circuit court. That is because those circuit court folks could become Supreme Court justices. And Lordy, we don’t want to pass anyone who would make it to that.

Every day the Senate is in session we begin with a prayer and the Pledge of Allegiance. I know my colleagues on both sides of the aisle are firmly committed to this country, and that as we say the words of the pledge, like me, they mean every word of it and they honestly pledge their allegiance to the flag and to this Nation. But I have to wonder if they haven’t forgotten the meaning of all of the words in the pledge. It took me and I put forward the argument that we do not need to vote on all the judicial nominees because we have already voted on most of them.

The last six words in the Pledge of Allegiance are “with liberty and justice for all,” and we do not preserve justice or liberty for just a few people or for most of the people and leave a few or even an individual behind. It means we have justice for all, for everyone. That is 100 percent. We pledge that and we don’t sacrifice that because we have a high percentage of success.

In fact, this is one of the situations that the courts were created to protect: the rights of the individual. I think it is a little ironic that there are those in the Senate who would be willing to withhold justice and rights from some, in this case four highly qualified individuals, and the cases they could be hearing, if they were confirmed.

That is justice being denied as well. That is justice only for a few, or maybe most, but not all—just because the individuals don’t have the same political philosophy as those across the aisle.

While it may be true that the percentage of judges we have voted on—when you are the one who is left out and are not allowed justice, that is 100 percent of your life—the one who is being affected, and 100 percent of justice that is being denied as an individual.

I think this is wrong. I sincerely hope we move off this obstructionism and have an up-or-down vote on the highly qualified individuals with talent, experience, and integrity, and who could be considered as the ideal we want in all judges.

I think everybody knows about the qualifications.

The comments made last night are what we are seeing here for the first time change in me—do judges. The problem with it is it probably will continue and at some point there will be a reversal of roles. We will spiral down and down until we are not approving judges. It won’t be 2 percent counting all of the district judges not doing the true statistics on just the circuit court judges. It will not be approving a majority of them.

I have to tell you, I have been through that spiral once before. When I first got here, there was a judge nominated. She would only sentence a person to 90 days in jail who had raped a minor because she didn’t like the rehabilitation system of the prisons in her State. I was appalled by it. In our State, there are a lot of people who are denied justice because they may not even be convicted. She would sentence a person to 90 days in jail who had raped a minor because she didn’t like the rehabilitation system of the prisons in her State. I was appalled by it. In our State, there are a lot of people who are not convicted, but may be convicted of every crime.

I have a hold on that person so we could have a debate instead of a unanimous consent. I eventually got the debate.

I had an unrelated piece of property that some people had been paying taxes on for 70 years which they had bought from the BLM but the title had never changed. It took an act of Congress to change the title. Because I put that through, they said that maybe he should have been shot. He raped a minor.

I put a hold on that person so we could have a debate instead of a unanimous consent. I eventually got the debate.

I put a hold on that person so we could have a debate instead of a unanimous consent. I eventually got the debate.

I have to tell you that unless an up-or-down vote is heard on that judge, that is the way it is supposed to be.

It was exactly 200 years ago, in 1803, that the Supreme Court and our Nation’s judicial system went through its first and most dramatic change since it was established by the Judiciary Act of 1789. This change is so profound that Chief Justice John Marshall issued his decision in the landmark case, Marbury v. Madison. In that decision
Marshall established the responsibility of the Federal court to review the constitutionality of congressional actions. His action brought the courts out of almost obscurity, seen as the weakest and most timid of the three branches of government. There was no independence and power that is not equaled by any other court system in the history of the world.

Before Justice Marshall was appointed to the court in 1801, the court seemed impotent. There was no clear idea of purpose or vision about whether or not the court could consider itself to be an important entity. The very first Supreme Court Session was held in New York City in 1790. It was almost postponed when only three of the original six justices arrived for the court's opening session. The court had to wait and put off doing business until a fourth justice arrived and they had enough judges to constitute a court.

Justice Marshall himself did not initially consider the court to be a prominent institution. At the time of his appointment to the court, he was also serving as Secretary of State for President John Adams and he had turned down an earlier appointment to the court in order to run for a seat in the U.S. House of Representatives. After President Adams finally talked him into serving as Chief Justice of the court, Justice Marshall served as both Chief Justice and Secretary of State for 2 months because he felt it wasn't worth giving up the position of Secretary of State to serve on the Supreme Court.

Over the next 34 years Justice Marshall reinvented the court and provided the leadership it needed to assume the prominent role it plays in our court system today.

One has to wonder what Justice Marshall would think about what is going on in the Senate today. Would he agree with my colleagues across the aisle that it is all right to put partisan politics and partisan bickering ahead of the rights of judicial nominees if those impacted are just a small fraction of society. Would he agree with them that justice denied for a few was acceptable? Or would he hold true to the basic tenants of the Constitution that all men are created equal and that everyone has the right to their day in court?

A few days ago, during the Senate discussion about numbers 169 to 4. You really can't compare district court judges with circuit court nominations. Instead we should look at this situation for what it really is, an attempt to obstruct the confirmation of circuit court judges. Since January 2003 President Bush has nominated a total of 29 circuit court judges. Of those judges only 12 or 41 percent have been confirmed. Of the remaining 17, my colleagues across the aisle have obstructed the debate to obstruct 11 qualified and talented judges. In other words, almost 50 percent of the circuit court judges ready to come to the floor for confirmation have been held up by the Democrats for political purposes.

Every day that the Senate is in session we begin with a word of prayer and with the Pledge of Allegiance. I know that my colleagues, on both sides of the aisle, are committed to the greatness of this country and that, as they say the words of the Pledge, like me, they mean every word of it and that they honestly pledge their allegiance to the flag and to this Nation. But I have to wonder when they do it whether or not they mean the meaning of all the words in the pledge, especially when I hear them put forward the argument that we do not need to vote on all of our judicial nominees because we have already voted on some or most of them. The last six words in the Pledge of Allegiance, “with liberty and justice for all,” mean that we do not preserve justice or liberty for a few people, or for most of the people, and leave a few, or even an individual, behind. It means we have justice for all, liberty for all, and that we don’t make exceptions because we have a high percentage of success.

In fact, this is one of the situations that the courts were created to protect, the rights of the individual. I believe that what many in the Senate believe is that there are those here in the Senate that would be willing to withhold justice and rights from some, in this case four highly qualified individuals, and would not extend justice to all, just because those individuals don’t have the same political philosophy.

While it may be true that the percentages of judges that have been voted on is high, when you are the one that is left out and are not allowed justice, that is 100 percent of your life that is being affected and 100 percent of justice that is being denied you as an individual.

I think this is wrong, and I sincerely hope we move off this obstructionism and that we hear from those highly qualified individuals, whose talents, experience and integrity can easily be considered the ideal for what we want in judges.

We often talk about the ideal in our debates in the Senate. We hold up a picture of what things should look like and how things should be done in the hopes that someday, we can move our Nation forward to the point where the ideal is, more often than not, reality. One of the ideals that has been presented is a world where our judges and our courts are more representative of America. Our courts have often been accused of being elitist. The Bush Administration has been working hard to change that image by making sure our judges are more diverse. By nominating people like Miguel Estrada, Carolyn Kuhl, Janice Rogers Brown, Priscilla Owen, William Pryor, and Charles Pickering, President Bush has set an example by selecting people from different backgrounds, with different styles, who share the same passion and enthusiasm for the law.

The list of judges that is before the Senate represents a group of candidates who are well educated, fully talented, and well qualified for the posts for which they have been nominated. Unfortunately, for some, this list has not been completed. Today we are threatened to obstruct the system—a system which, in theory, guarantees each nominee a vote—but in practice, can be used to deny a nominee a vote.

So here we are, well down the road, holding a list of candidates that still haven’t received a vote. In spite of all their qualifications and the personal integrity they have shown throughout the process, these judges have been forced to wait as the Senate decides whether or not we can simply hold an up or down vote on them. Why? It’s pretty clear to just about everyone. Because these are good nominees and in a fair and just world, they’d win the vote. Hands down. Therefore, the only way to stop the spread of their philosophy is to deny a vote.

What is most tragic about this situation is that these delays have not come about because of the cost. There aren’t the only ones who are being denied their rights. Let’s not forget the other victims in this situation who have been denied their right to a fair and impartial judicial process because there are not enough judges to hear all their cases. The real victims of these delays are not the nominees, or the Bush administration, or even the Republican Party. No, the real victims are the people whose rights have been denied to accommodate some increased partisan bickering.

There is a saying “justice delayed is justice denied.” We make people with very real needs and very real issues wait while we try to score a few points in the game of politics. We stall out their court costs, their attorney's fees, and delay their restitution and damage payments all because we want to get one up on the other party. We have a crisis in our courts that we can solve today. I urge my colleagues to step up to the plate and become a part of the solution. I urge them not to accept the belief that justice for some is sufficient. I urge them to allow the Senate to conduct its constitutional duty and hold an up or down vote on these judges. If you don’t agree with them, or feel they are not qualified, then vote against them. That is your prerogative and duty as a Senator. But do not continue to deny justice for the nominees and the courts any longer.

Mr. SESSIONS. Mr. President, the Senator from Montana is here and I know he would like to finish up.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BURNS. Mr. President, a lot of questions are being asked about this debate as we roll along. We went late last night and there are probably some folks who have been short of sleep. Let there be no doubt about it, as we close this half hour, this is obstruction.
A week ago tomorrow, we argued about definitions. Now we are worried about ideologies and how we appoint our judges. Here is one way you can have an issue and you can be on both sides of it and never worry about the consequences. That is healthy for us. We passed that through this Senate with strong bipartisan support and only 14 folks voting against it. Now we can't name conferees. "Well, I voted for it." But we do not want it to get to conference.

I am fighting for two judges, Janice Rogers Brown and Carolyn Kuhl. Both of them are nominated to the Ninth Circuit. Why am I fighting so hard for them? Let me tell you why.

I am sponsoring legislation to split up the Ninth. It is too big. It covers California, Arizona, Nevada, Idaho, Washington, Oregon, Alaska, Hawaii, and my home State of Montana. It covers 14 million square miles—that is a fairly good-sized pasture—with 45 million people. The second highest population is the Sixth Circuit with 29 million. It has the highest number of active judges with 28. The average number per judges per circuit, including the Ninth, is 12.

Let me tell you another reason why. The decisions that have been handed down by the Ninth lately—from 1996 through 1979—the Supreme Court heard 228 cases from the Ninth Circuit, and 27 of those decisions were overturned, 17 of them by unanimous decision.

From 2001 through 2002, 12 of the 17 Ninth Circuit decisions were reversed, and 7 of those were unanimous.

How do you like to have that track record? And we live in that circuit. Then you wonder why we get excused about the appointment of judges to that Ninth Circuit.

It is absolutely absurd.

I am an original cosponsor of S. 562. We must get it done.

What we are talking about here is people in a circuit who can't handle the work and come up with decisions that can't stand in the Supreme Court. That is pretty bad—1 in 27. That is almost as bad as 0 and 1 in a gunfight in judicial terms.

I am not an attorney. I don't think I will ever be one. But I will tell you that you can read and you know where the American people are, and those people are denied representation on the Ninth Circuit.

Definitions: We have heard it. If we cooperate, things would really get along. Good here. If we cooperate—we did—that is healthy for us. Now we can't name conferees to finish the job that is in front of us.

This is not my first rodeo. I know what is going on here. They should be ashamed—to ashamed to contradict their own conscience.

Obstructionism: Give these judges a vote up or down. That is the way you got here. They deserve the same.

The PRESIDING OFFICER. The Senator from Alabama has 3 minutes 30 seconds remaining.

Mr. SESSIONS. The Senator from Virginia.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. ALLEN. Mr. President, I wish to speak to the Senate about the nominations that have been made in the past and the inconsistency of these statements with the ones we are hearing today.

Let me quote for my colleagues some sentiments with which I very much agree, and I will ask you all to listen as you guess who said it: "I find it simply baffling that a Senator would vote against even voting on a judicial nomination.

Let the Senate vote on every nomination."

Here is another quote. See if you can figure out who said this: "I don't know how Members tell the Hispanic community we are being equally as fair with them as we are with all non-Hispanic judges when that simply is not true. Hispanic or non-Hispanic, African-American or non-African-American, woman or man, it is wrong not to have a vote on the Senate floor. What are they afraid of? What are they afraid of? What is wrong with a vote?"

Another quote from one of our colleagues who quoted Chief Justice Rehnquist: "As Chief Justice Rehnquist has recognized, the Senate is surely under no obligation to confirm any particular nomination but after the necessary time for inquiry it should vote them up or vote them down. An up-or-down vote that is all we ask."

Have you guessed the speaker yet? No, that is not Orrin Hatch; it is not Senator Kuhl; it is not Senator Enzi and it is not me. That is Senator Tom Daschle, the Democratic Minority Leader. These quotes are from October 5, 1999 and October 28, 1999.

Senator Daschle, the Democratic Minority Leader, who quoted Chief Justice Rehnquist, said: "If our Republican colleagues don't like them, vote against them. But give them a vote. Don't just sit on them. That is obstruction of justice."

My goodness, Senator Daschle and Senator Kennedy certainly had the right idea 3 years ago.

Senator Daschle also said that Senators "have a constitutional outlet for antipathy against a judicial nominee. Vote against that nominee."

Senator Daschle, the Democrat leader in all of this obstruction and delay, said, in 1998: "All we are asking of our Republican colleagues is to give these nominees a vote and hopefully the fair consideration they deserve. We will press this issue every day and at every opportunity until they get the vote."

Doesn't that sound familiar as to what we have been trying to do for the last several years?

Senator Daschle is also on record complaining about how long it took for some cases and decisions that had been pending for months. He said for "anyone to be held that long is just an extraordinary unheard of to the nominees but to the system itself."

The PRESIDING OFFICER. The time has expired.

Mr. ALLEN. If I may, with consent, have 2 minutes that is attributed to our time at 9 o'clock.

The PRESIDING OFFICER. Is there objection?

Ms. STABENOW. Reserving my right to object, my colleague, I appreciate the time, but in order for us to stay on schedule and given the fact I have been waiting here at this point, I would appreciate his wrapping it up. If he would like to use 1 minute to wrap up, I would not object to that.

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

Mr. ALLEN. I would like to close with the final quote from Senator Daschle that he made in September 1999: "It is so incredibly unfair to me that they would continue to persist in the determination not to allow these very qualified people to even have a vote."

Mr. President, that is what all of this is about. Tomorrow morning we will have a chance to end debate on these nominees and allow for fair up or down votes. In addition we will be able to determine the veracity, truth, and sincerity of our colleagues that I have previously quoted. If they were willing to tell the truth 3 or 4 years ago, they will have an opportunity to stop this spiral of unfair actions and delays which only bring more retaliation and more delays.

Senators will then be upholding the Constitution and will be accounting to their constituents, as well as giving fairness to the nominees.

I thank the President and I thank my colleagues.

The PRESIDING OFFICER. The Senator from Michigan.

Ms. Stabenow. Mr. President, as I said before on the floor, all the statements that are being made, and all the time we spend in relation to our values and our priorities, I also believe we get things done when we work together, when we work in a bipartisan way. That is what our constituents expect us to do.

I see the esteemed chairman of the Judiciary Committee on the floor. I thank him publicly for working with the senior Senator from Michigan as we work through difficult issues that relate to Michigan. I appreciate his willingness to do that. That is how we get things done—when we work together.

When we look first at the record of legislation taken up on this floor, I think it shows we work together. I think when we have worked together to confirm 168 judges, most of those I have voted for overwhelmingly, and when we see that we have only had a disagreement on 4, I think that shows bipartisanship. I think that shows what the people of this country, and certainly the people of Michigan, want to see done. There is no question in my mind that this demonstrates our willingness to roll up our sleeves, to work together.
It also shows, though, that we are willing to make a critique, that we are not a rubberstamp for this administration, nor should we be for any administration of either party. It shows we are willing to make a judgment. When the nominee goes too far, we say no. That is what happened four times.

What I am most concerned about now, though, in this 30 hours—which now, instead of ending at midnight, is going to go until 9 in the morning—is that we are saying our values and priorities are spending time talking about four people who already have jobs and want to get a promotion that will last a lifetime. These are lifetime appointments.

My concern is that we need to be spending time on this floor not only talking but doing something about the 3 million people who have lost their jobs in the last 2½ years—3 million people. They do not have a lifetime job. They would just like to know that they have a future, a future for their families. They would like to know that the job probably carries health care with it and will be there so they can pay the mortgage, the car payment, send their kids to college, and know they can have a good life in America that they assume if they work hard they will be able to achieve.

That is the debate I have said a number of times that we need to be having. One-hundred and sixty-thousand-plus of these 3 million are people who have lost their jobs in Michigan; people who have lost good-paying jobs, good-paying jobs with health care and pensions. They find themselves in very difficult circumstances and they are asking us to help them.

I am very proud of the fact that Michigan is the first in the production of automobiles. Thirty-one percent of all the automobiles in this country are produced in the State of Michigan. My dad and my grandfather owned a Cadillac dealership in Claire, MI. We have been proud to be a part of supporting the Michigan automakers.

We also are first in the production of trucks, producing 17 percent of trucks. We have the three leading office furniture manufacturers in Michigan and produce nearly half of the office furniture.

Why do I say this? Because we have a crisis in manufacturing in this country that we need to be addressing in this Senate. Jobs can’t all be in the service industry. We need to make things and we need to grow things. That is what we do in Michigan. We make things and we do it well. We will compete with anybody any time. I just give us a level playing field. We also grow things. We are willing to compete with anybody any time. I just give us a level playing field. We also grow things. We are willing to compete with anybody any time. I just give us a level playing field. We also grow things. We are not addressing what is happening with the fact that China is violating the WTO or that China and Japan basically have put a tax on American goods and services sold in this country by manipulating their currency. We are not doing anything about that.

As a member of the Banking Committee, I sit and listen to the Treasury Secretary basically acknowledging that something is not right but not wanting to step up and take the tough action on behalf of American manufacturers and American workers.

We need to be talking on this floor and taking action on behalf of the men and women who have been the backbone of this country in manufacturing and have created the middle class that separates us from other countries around the world.

Who are the four people we are having that debate? Not a debate about 4 people who already have jobs, who want to get promoted. Three million people do not have a job and are now struggling with their families. I want to share a few comments that I have heard. Earlier today I shared some headlines from newspapers in Michigan about what is going on. I want to share one of those this evening with my colleagues. It is from the Ludington Daily News in northwest Michigan. It says: “Tough Loss, Straits Steel closing sad news for plant’s 180 employees.” Then it starts out by saying:

Despite the looming possibility over the past few months that their plant might close, workers at Straits Steel & Wire Co. kept their production quality high and their attitudes positive, said General Manager Tyndall.

But on Friday, Tyndall was forced to tell his co-workers and friends that corporate officials decided to close the Ludington plant, 56 years after it began operations in 1947.

Making the announcement twice—to the first shift in the morning, then the second shift in the afternoon—was not easy for Tyndall, who joined Straits Steel as a foreman of the production plant as he shared the bad news with the group.

“People are down,” he said Friday afternoon. But he stressed the plant’s closing is not related to performance. “When we walk out, we can hold our heads high and go chest out, we can hold our heads high and go chest

They did their jobs well. But because of what is happening and the unfair competition around the world and the stress and struggle as it relates to cost, the plant closed.

Why are we dealing with issues that will help this Straits Steel and Wire Company in Ludington, MI? Those are the jobs I want to be talking about. Those are the jobs people in my State want us to be trying to fill. Let me tell you, I have been receiving from people in Michigan that say it better than I can. First from a gentleman who says: I am writing you regarding the health of my business. I have a high tech business servicing industrial lasers, much like the one that was being cut in Ludington. I am cutting metal subassemblies for our armed services use as well as civilian businesses. My business has the flu. It is feverish and sluggish almost to the point of no business at all. Our country was initially built on small businesses providing services and employment. Our government encourages small business growth yet at the same time small businesses are being destroyed. We have to regain our status as the greatest producing country in the world but we have to also regain our status as the greatest concentrating country in the world, as we did in World War II. That is, as you remember, the reason we won.

From Bridgman, MI: I would like to say I have worked in manufacturing for 20 years. This is the first time in my career that my hours have been reduced. I have a house payment, utility bills, children to feed and clothe, doctor bills, car payment, insurance, school lunches and preschool. This is just a few of my expenses. We are hanging on by a thread, day by day living. This is not the way Americans should have to live, especially in this day and age.

I agree. If people work hard, they get up in the morning and they go to work and they work all day, they ought to be able to know they are going to be paid a good wage, that they can count on. That has been the plan. We want them to be able to have health care. We want them to be able to put money aside for a pension, and we want them to know they will have the security of being able to take care of their families. It is not the plan for part of the great middle class of America.

Our manufacturing economy has given us that. We are losing that.
are losing that. We need to pay attention. We need to talk for 30 hours on the floor about jobs and how to help our manufacturing sector. We need to talk for 60 hours or 90 hours. More importantly, we need to act to do something about the jobs and the playing field. As I have said before, I will put our workers and our businesses up against anybody, if it is a level playing field. Just make it fair and we will compete.

We need to address issues of health care. One of the biggest challenges right now for our manufacturers is the explosion in the prices of health care. I also know from talking to our automakers about half of that is because of prescription drug prices, the lack of competition, and the explosion in prices. We ought to be doing something about that.

We have bills in front of us right now in the Medicare conference where we could do something, if we wanted to, about that to lower prices. I would love to have a 30-hour debate on that because there is nothing right now more challenging to businesses and workers than the issues of health care. Workers are finding they are being asked to pay more in premiums and deductibles or their jobs are being cut in order to pay for health care increases or, worse yet, they are losing their jobs because of the increases. That is a debate worth having. That is a debate that would result in our focusing on something that means something very important to the people of this country. I would look forward to that debate.

Let me read a couple more letters: I’ve worked in manufacturing for 23 years, and this is the first time in my career I have had my hours reduced. I am worried about losing my job. My family is suffering because of my reduced income and planning for the future of my trade. I am a mold maker, and this has always been a solid trade. My trade is not only the backbone of the economy but also because of foreign competition. How can we compete with countries that pay drastically reduced wages with no benefits?

We have to address that, not by saying you have to work for less, Michigan workers. You have to work for less and you have to take no health care and no benefits. We have to be fighting for our middle class and creating a way to raise the standards of living around the world, stopping our business ours, which is exactly what is happening right now. It is probably the most serious threat to our future in terms of maintaining our economy and our middle class. That is worthy of a 30-hour debate.

There are many more letters I could read that are the same. So where are we, when we are talking about 3 million jobs lost and counting just in the last 2½ years, a little less than 3 years. What is the response from the administration to the number? Are we getting everybody together to figure out what we can do to lower health care costs? Are we figuring out what we can do to level the playing field and stop China and Japan from using advantages and manipulating their currency and creating a situation that is unfair to us? Are we looking for ways to stop the small manufacturers from going and moving their plants overseas? No.

What is the Administration doing about that? The first thing is to propose to cut people’s overtime pay, people who already are working. We are going to cut their overtime pay. That is one of the major points the administration has been willing to get tough with China, has not been willing to deal with what is happening in Japan. I am not willing to address the high cost of health insurance and do those things that will bring prices down. Earlier today I offered a unanimous consent request to increase the minimum wage $1.50 an hour so 7 million people, a large share of them women with children who are working for the minimum wage and trying to make it and don’t have health insurance, paying their child care every day, trying to make it, trying to do what we are asking them to do in this country, could get a raise. It was objected to by colleagues. So we are going to fight through the Senate at least can’t get a raise. The administration won’t support 7 million folks getting a raise. They want to take over any way from the folks who are already working, not wanting to deal with those who are out of work with unemployment, not wanting to level the playing field so we can keep our manufacturers here and keep those good-paying jobs.

Over and over again, we see efforts that our government and others have in mind to turn the number around of 3 million jobs lost and counting.

That is the reality of what is happening. Frankly, I am disappointed we are not willing to spend time. If we are going to ask people to stay up all night and the staff to be here and so on, let’s address something that affects them and their families and everyone who is listening and watching, and that is how we move this economy forward, how we protect manufacturing, how we support the middle class, and our workers working harder and harder every day just to make ends meet, so we can make sure the quality of life and standard of living we want for our families is maintained in this country.

We are the greatest country in the world. But we are truly in crisis, I believe, as it relates to what is happening in our economy and with our manufacturing sector.

Let me take an opportunity to read a few more of the letters I get every day, unfortunately, from the people of Michigan. A letter that says: I have never written to a Michigan Senator before, but for me, now it the time. You see, I am one of the discouraged unemployed in Michigan. After over a year of fruitless searching for a non-existent job in my field as a CAD designer, I have given up. It breaks my heart to leave the field I love. I must ask you this: Where are all the automotive engineering jobs? Is it true that we in Michigan have lost much of our employment base as it relates to engineering through outsourcing? I know many colleagues who are also out of work. We are not willing to spend time. If we are going to ask people to stay up all night and so on, let’s address something that affects them.

From Union City, MI: I am writing this letter because there seems to be some confusion about our economy. Our government seems to think that a tax cut will help but I don’t think so. Since the year 2000, there has been over 3 million manufacturing jobs that have been lost, gone to China. My wife and I own a small machine shop in Union City, Michigan. At one time we had 7 employees. Now my wife, my son and myself are all that is left. Most of the time we don’t even have enough work for ourselves. I have watched as many of my friends and competitors have gone out of business. As we closed their doors or filed bankruptcy. While we fight the war on terrorism, if we are not careful, we will lose a much bigger war to the rest of the world without a shot being fired.

From Clyde, MI: My husband, a 25-year mechanical engineer, designer of automotive special machines, has been laid off for seven months. The company he worked for was bought by Fiat and within two years, began outsourcing the engineering to countries such as Brazil where engineers would work for $6 an hour. Our workers can’t compete with that obviously. The engineering department is now closed.
I call on my colleagues to spend this time on how we move forward and take this number of 3 million jobs down to 2 million and to 1 million and get it down to zero, because that is the number that truly counts for all of us. Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. I inquire of the time. Where are we?

The PRESIDING OFFICER. The majority still has 41 seconds remaining.

Mr. REID. We are happy to yield 41 seconds to the majority.

The PRESIDING OFFICER. Does the Senator from Idaho seek time?

Mr. CRAIG. The chairman of the Judiciary Committee is on the floor. I will yield to him.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I apologize to those listening in and to my colleagues for having laryngitis. Mr. REID. I want my 41 seconds back with that voice.

Mr. HATCH. Your voice is not much better than mine, from what I can hear.

Whenever you are losing an argument, you try to bring up something that might help you to win. This argument about jobs is very important, but I remember all last Monday being wasted by our colleagues on the other side. I have job actions that have occurred this year, time after time, when we tried to do something that might be good in that area. This phony chart of 168 to 4, it doesn't take any brains to realize that is totally false.

Tomorrow, we are going to have two cloture votes on two more, so there are at least six. If you go through all those who really do plan to filibuster, you get up around 15, 16, or 17. This is the first time in history this has happened.

There are six to 12 per cent. The rise to the judiciary nominees being filibustered by a majority of Senators. I have served in the Senate for 27 years, and I can honestly say President Bush's nominees are among the best I have ever seen. They are experienced, intelligent, ethical, hard working, respected in their communities, and they have given their lives to public service. We honor these nominees who are currently being considered, another record. Shortly, we will yield to him.

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Thank you, Mr. President.
our judicial nominees a fair chance before shooting them down.

The other side, before they heard one word out of Janice Rogers Brown’s mouth, was already shooting her down; they didn’t give her a chance.

I have been applying labels to the fine men and women who have volunteered to serve their country through judicial service. Our duty under the Constitution is to determine whether judicial nominees possess the expertise, intelligence, and temperament needed for judicial service. Our constitutional responsibility is to judge whether judicial nominees are willing and able to place the rule of law above all other concerns in rendering justice. The Senate cannot fulfill its constitutional duty when a minority of Senators refuses to allow an up-or-down vote for the President’s nominees. As it stands, a bipartisan majority of U.S. Senators stand ready to vote on and confirm each of these excellent nominees.

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

Mr. HATCH. Yes, I am happy to.

Mr. COLEMAN. A concern we have with nominees is they are competent and able to do justice and do the right thing. There are ways to measure that. I ask the chairman, is it true the three nominees we are debating have been rated qualified or well qualified by the American Bar Association? Is that an objective standard by which nominees can be rated?

Mr. HATCH. That is true. Remember, all throughout the Clinton administration, on all their nominees, our friends on the other side were saying if the ABA approves them with a qualified rating, then they deserve to have an up-or-down vote. When they have a well-qualified rating, the highest rating you can possibly have, then there is no question they deserve an up-or-down vote.

Mr. COLEMAN. Sometimes the people can rate judges, when judges are up for election. I might add Justice Owen was elected to the Texas Supreme Court by 83 percent of the vote in Texas?

Mr. HATCH. Absolutely true.

Mr. COLEMAN. Is it true Janice Rogers Brown was retained to serve by 76 percent of the vote in the year 2000. That is the highest support of any State supreme court justice that year. Most every major newspaper in Texas endorsed her. Our colleagues on the other side say she is out of the mainstream. Give me a break.

In the case of Justice Brown, she won 76 percent. I think there were four, if I recall correctly, supreme court justices up for election. She won the highest vote of all of them in a State not known for conservative politics. Yet they have tried to paint her like she is some sort of a rightwing nut. Well, just look at NBC News. They made it pretty clear she is no rightwing nut. She is a very good person.

Mr. COLEMAN. I ask the chairman, someone only a few weeks ago decided by his peers, folks who served with them, who know firsthand the quality of the work they do. Is it true Judge Kuhl has the support of over 100 California judges across the political spectrum?

Mr. HATCH. Yes. I think both Democrats and Republicans. She is one of the most highly rated judges in California. She is outstanding. Frankly, these are Democrats saying she made one of the best judges on the Ninth Circuit Court of Appeals.

Mr. COLEMAN. I ask one last question. How is it the opponents of these nominees can claim these nominees are extreme or out of the mainstream, or not qualified?

Mr. HATCH. Well, I suppose the overwhelming majority in the most populated State, in the case of California, is out of the mainstream. I guess the overwhelming majority in one of the largest States in the Union, Texas, is out of the mainstream. You know, I suppose I have a similar feeling in the support of her fellow judges, in the case of Carolyn Kuhl, across the board, Democrats and Republicans, is out of the mainstream. According to these people over here—I tell you who is out of the mainstream, it is these people over here who are filibustering judges for the first time in history and really endangering this process. It is ridiculous. It is wrong. I think the American people have to rise up and let them know it is wrong.

Mr. COLEMAN. I thank the Senator. Mr. ALLARD. Will the Senator yield for a question?

Mr. HATCH. I am happy to.

Mr. ALLARD. I am a veterinarian by profession and I have a code of ethics in our profession. I understand we are expected to abide by the code of ethics, and I understand the American Bar Association has a code of ethics for judges. My understanding is the code of ethics says you will not take a position when you are in the process of seeking a position on the bench, that might prejudice your ability to decide a case. Every one of these individuals up for consideration is highly respected in their field. I suspect it is because they are honorable and they live by the code of ethics.

I am disturbed by the specific questions that come from members of the committee when, in my view, it makes it difficult for the nominee to answer those questions because it would make it difficult for them to be objective in the way they look at a case that comes before them. I wonder if you would share with me about the code of ethics and how judges, in other circumstances, use the code of ethics?

Mr. HATCH. Yes, I have had a vote. I have had a vote. I have had a vote. Usually by this time in a President’s career about 90 percent have had a vote.

Ms. COLLINS. The Senator from Utah is an extraordinary lawyer, and he also has a distinguished history in the Senate and has served so ably as the chairman of the Senate Judiciary Committee. I would like, given the Senator’s breadth of experience, if he happens to know the origin of the word filibuster and could he enlighten the Members of this body and those who
We are both leading conservatives, but we knew that was a disastrous thing to do in this body because it would lead to animosities you could never quite—that would remain. It would lead to partisanship. It would make it almost impossible to give consent to a filibuster which would violate the advice and consent clause, the great power we have been given by the Founding Fathers.

Frankly, as the distinguished Senator has pointed out, I stood up and said that is not going to happen. Let me explain. Every Clinton nominee who came to the floor, who was brought to the floor, got a vote up or down. Only one was defeated and that was Ronnie White, on a straight vote up or down. But every other one, all 377 of them, the second highest total in history, passed.

Did we have some cloture votes? Yes. But the cloture votes were to get to the nominee so we could vote. Every Clinton nominee who came to the floor, who was brought to the floor, got a vote up or down. Only one was defeated and that was Ronnie White, on a straight vote up or down. But every other one, all 377 of them, the second highest total in history, passed.

Did I agree with all the judges? You bet your life I didn’t agree with any of them. But they were qualified. The fact I didn’t agree with them ideologically was irrelevant. What is relevant is, Are they qualified? I certainly would not take away the right of the American people to make up their own mind about the person they want, but I would challenge a filibuster that violated the Constitution, it would violate the Constitution, it would lead to partisanship. It would lead to obstruction, from the Spanish word, ‘filibustero,’ meaning a pirate or hijacker. Just one more objection. Now we have six more objections, as of tomorrow—actually they require cloture votes to be filed on Janice Brown, and of course Carolyn Kuhl, so we now have six. I could name up to 17 they have threatened to filibuster and probably will.

To keep bringing that phony chart up here is an insult to everybody on this floor. It is an insult to everybody watching. It just shows they are void of any real arguments. It is just pure, baseless, to change the nature of the debate to jobs, when they have obstructed all year long, is an insult.

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

Mr. HATCH. I think it is clear to me, it is your position, the position of Trent Lott, has not changed as to whether a filibuster was appropriate, and neither has that of our majority leader, Bill Frist?

Mr. HATCH. It has not changed. But their positions have changed.

Mr. SESSIONS. Let me ask you with regard to Tom Daschle, the Democratic leader, and Senator Leahy, the ranking member on the Judiciary Committee, who argued so aggressively against filibusters just 2 or 3 years ago, has their position changed today? Are they, in fact, participating in an unprecedented procedure, an unprecedented filibuster of judicial nominees?

Mr. HATCH. No question. They were very forthright and very strong that there should never be filibusters of judicial nominees. Now all of a sudden when it is to their advantage, they think—I think it is to their great disadvantage. They lost the 2000 election in part because of the way they are treating judgeship nominees. I think they are going to lose a lot of standing in this country. The way they are treating filibuster of judicial nominees is abysmal, like Bill Pryor. Like Charles Pickering.

It doesn’t take any brains at all to realize they just don’t think these two able people are worthy of being on the bench when in fact they are more worthy than many of the nominees we approved for them in the 8 years of the Clinton administration.

Mr. SESSIONS. I thank the Senator for his leadership. I asked those questions last night in debate that somehow on this side had changed our view. I think it is quite crystal clear the only views that have changed and only positions...
that have been changed are those on the other side. Unfortunately, it has changed the historical principles of this Senate with regard to filibusters of nominees.

The PRESIDING OFFICER. The Senator for Nebraska.

Mr. CRAIG. Mr. President, will the chairman of the Judiciary Committee yield for a question?

Mr. HATCH. I will be happy to.

Mr. CRAIG. The chairman in earlier questioning by the Senator from Minnesota alluded to the fact that NBC News tonight featured as their lead story Janice Rogers Brown, Supreme Court justice from California. I am a freshman on the Judiciary Committee so I have not had the experience you have had, going through numerous years of confirmation hearings. But I must tell you I was so impressed with this woman's talent and her clarity in answering questions.

What is her background? What was her beginning, if you will? I think it is the great American story, I am told.

Mr. HATCH. She was born a sharecropper's daughter. This woman had it rough all the days of her life. She put herself through college and law school as a single mother. She has worked in State government now for I think it is 26 years. And they are trying to say she is against government? My gosh, she has worked there and been supportive for I think 26 years. She is one of the best nominees I have ever seen.

If we had done to three woman nominees what they are doing to these three—Priscilla Owen, who broke through the glass ceiling, getting women a right to be partners in law firms; Carolyn Kuhl has the support of 100 of her fellow judges out there, Democrats and Republicans; Janice Rogers Brown, sharecropper's daughter, has risen to the top of the heap, has fought her way all her life, has risen to the top of the heap, has the support of 100 of her fellow judges out there, Democrats and Republicans; and they are treating them like dirt. I don't understand it, myself.

Mr. CRAIG. Will the Senator yield for another question?

Mr. HATCH. I will be delighted to.

Mr. CRAIG. It was also mentioned in that questioning by the Senator from Minnesota that Justice Brown had received—I think your response was—74 or 76 percent of the vote of the State of California, the State of California acceptance of her position. We have heard a great deal about judges who dissent too much. She was criticized by the Democrats for some of her speeches, that she was "out of the mainstream," even though she received this phenomenal vote in California. Didn't Justice Brown write more majority opinions than any other justice in the Supreme Court of California—in the last term, I believe is what they were? Of course.

Mr. HATCH. Yes, the distinguished Senator makes a good point. She was elected by 76 percent of the vote. I would have to say, she wrote a majority of the majority opinions, and joined in the majorities more correctly, unanimously opinions. In other words, she is not only in the mainstream, she is one of the best justices, State justices in the country. They are treating her like dirt. I don't understand that kind of treatment.

The PRESIDING OFFICER. The majority's time has expired.

Mr. CRAIG. I thank the Senator for his answers to my questions.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. NELSON of Nebraska. Mr. President, I rise tonight to express what might be best described as my disappointment in what has occurred during the past 24 hours, now I understand perhaps another 12 hours. I ask we move the process forward.

Mr. HATCH. Will the Senator yield for an unanimous consent request? It will only take a few seconds.

UNANIMOUS CONSENT AGREEMENT

I ask unanimous consent at 8:30 a.m. on Friday the Senate begin an hour of debate equally divided prior to the first cloture vote; further, that the last 20 minutes be equally divided, the first 10 minutes under the control of the Democratic leader or his designee and the last 10 minutes under the control of the majority leader or his designee.

Mr. REID. No objection.

Mr. CRAIG. I thank the Senator for his support.

The PRESIDING OFFICER. The Senate from Nebraska.

Mr. NELSON of Nebraska. Mr. President, I rise tonight to express disappointment over what has happened over these past nearly 24 hours, or past 24 hours-plus, and perhaps another 12 hours. I just ask we move the process forward.

I would like to make very clear a few statistics I think are appropriate tonight. We have seen many statistics or many different versions of the same statistics over the past many hours. Tonight I would like to make very clear a few statistics with respect to my voting record on confirmation of judicial nominees, which is really based on the principles I hold as a Member of the Senate.

I voted to invoke cloture 13 times. That is a 100 percent voting record on judicial nominees. To date, I have never voted against invoking cloture on a judicial nominee, not one. And I have voted in favor of confirming all nominees except one, and I voted for cloture to move the process forward, even on a nominee I cannot support.

I have done all these things because I believe in moving the process forward. As Governor of Nebraska, I had the great privilege of appointing judges to the bench. I appointed the entire Nebraska Supreme Court and the entire Nebraska Court of Appeals, and nearly 50 percent of the judges in Nebraska. I may not be good at it, but I have had a lot of experience.

I would hope we could move forward this process. If we cannot agree, then we should at least have some kind of agreement. That is happening right now during these hours of debate is not about moving the process forward. In fact, what is being accomplished seems to me to be just the opposite, setting us back. This debate has served only to further frustrate the work of this body, delayed action on critical legislation that must be addressed, and has further polarized the competing sides on these very controversial appointments.

The question I ask tonight is, Does using a tactic of delay to criticize and attack another tactic of delay cause you to make the point or lose the point?

To add further frustration to this matter, this delay occurred only after we were forced to cancel voting on Tuesday, Veterans Day, or cancelling the many obligations most of us made to our constituents to participate in events to honor veterans back home. The leadership basically decided having these hours of debate seemed to be more important than honoring those who fought and died while protecting the freedoms that under ordinary and normal circumstances are debated and defended in this very Chamber every day. By having votes on Veterans Day, I could not participate in that exercise, and I didn't appreciate having to choose between Nebraska veterans and votes on legislation before this body. Like others, I chose to watch my veterans. I missed two votes. I would do it again in a heartbeat.

But it is not only our veterans who were not given the consideration they deserve. It is also our seniors, who are anxiously awaiting a prescription drug benefit. What do I say to George and Lee back home when they ask me, "Why haven't you been able to get a prescription drug benefit but the Senate could debate on other issues for 30-plus days"? It is those who suffer from mesothelioma who desperately await an asbestos reform bill. What do I say to a widow of a recently deceased judge in Nebraska who was waiting to collect money because of the bankruptcy of a particular company? She is unable to collect it, but would have the opportunity, under an asbestos reform proposal, to collect on behalf not only of herself, but on behalf of her young children.

I am just one of 100 in this great legislative body, and I am very honored to be here. Even though I am relatively new to the scene, I think it is very
clear each of us is entitled to his or her own opinion. I have to say some of us are moving the process forward. I find it difficult to explain to others why we cannot be independent in our thinking about judges. Someone might say there is nothing new about this exercise. It is the same old story. I do not believe that philosophy because I too would always like to have everything go my way. I would like to see every bill read exactly as I wish and every nominee be the one I choose. Instead, I do embrace that philosophy because I believe we can have those differences of opinion, hold different views on the issues, serve different constituencies from diverse regions of this great Nation, and we can agree, that is, embrace and support progress in addressing the critical issues of our entire Nation.

I don’t believe these hours of debate have helped us move closer to resolving our differences on these nominees. In fact, I am afraid it has achieved just the opposite. I fear this exercise may have poisoned the well, leaving this body with such stark disagreements, and any progress on the issues that matter to my constituents—a prescription drug benefit, an energy policy, asbestos reform, welfare reform—and the bills that run the Government may not be now attainable.

Many Americans question the motives and actions of those on both sides of this issue. I, for one, uniformly object to the current course of action, not to waste 30 minutes or 30 hours. In the interest of moving forward, making progress, and doing good work for the people, I urge my colleagues, not in any partisan way, to think long and hard about what is being orchestrated here for these hours and what the American public expects of us during the final days of the session—so we can deal with the prescription drug benefit, so we can deal with the energy needs, so those folks who are today worried about the cost of natural gas and the high cost of energy sources in the future know there is a solution in sight.

Drought relief: I can go back to Nebraska and say, Well, we couldn’t get a drought bill. I guess it was OK that we debated 30 hours on other issues, but in fact when you are losing your family farm as a result of the continuing drought, that isn’t going to probably help them.

Highway reauthorization: Many States today are waiting for the high- way reauthorization. They can con- tinue to build and improve their infra- structure, because that relates to jobs—jobs in construction, but also jobs because of the improved infrastructure. Many States are worried today about FAA reauthorization. I have airports in smaller communities in Nebraska that are worried about being able to build and expand and improve their airports due to part of the reauthorization. What do I say to them if that doesn’t get accomplished? What do I say to those who are waiting for asbestos legis- lation? What do I say about class ac- tion? When are we going to get that accomplished?

When are we going to say enough is enough? If these 30 hours-plus that are now going into more hours had been used to debate health insurance, the full funding of special education, dealing with the Federal unfunded mandates, or some of us had worked pre- viously on the Stalking Act or the Violence Against Women Act, finding more ways to create jobs and improve the jobs and the markets we have today, looking for ways to make trade not only free but fair so we don’t export jobs but we do import and ex- port our products at the same time—if we had spent the time on that, then this time could have been productive.

In many ways perhaps there can be a catharsis as we move forward on find- ing new ways to deal with the judici- ary. I have looked back and forth over the years looking at the role of the judi- ciciary to see if there is anything any- where that ever gives the judge the right to legislate or to make law. The one thing I made clear with every judicial candidate was: Are you going to be in the position of a judge or do you want to be a legislator? Are you going to legislate or are you going to adjudicate? The position of a judge is not to legislate. It is to interpret law, to apply law, and to adjudicate.

To win constituency groups in Presi- dential elections, the unfortunate thing for some time has been to say I am going to appoint judges to do cer- tain things, to rule certain ways on the Supreme Court bench, to rule in cer- tain ways on certain issues that will appeal to a constituency or to win con- stituency groups.

Sometimes I think we politicize the judiciary, and that is why we are where we are today. We need to move away from worrying about ideology, political philosophy, and to make sure judicial activism is not a part of what we do. If Presidential candidates say they are going to appoint Supreme Court judges to their political philosophy, not to interpret the law, but those who will fairly apply the law and those who will do what they think is right under the law, not to make the law, then I think it is important. Poli-
manufacturing jobs have been lost in the last couple of years.

This morning I described legislation I introduced to address this manufacturing crisis. I happen to feel very strongly about that legislation. As I explained, the bill I crafted would offer relief to American manufacturers in three ways:

First, by lowering the effective corporate income tax rate by about 3 percent; second, by providing employers with a 75 percent tax credit to help cover the cost of health care coverage for retirees who had worked for that company; and, third, by strengthening our trade protection laws. There is a plan I laid out to help stem the terrible flow of manufacturing jobs from the United States overseas. I recognize other Senators have different ideas about the best way to help our Nation’s manufacturing companies compete. I welcome the vigorous debate. I believe we ought to leave no stone unturned when looking for a solution to this tragedy which is so vital to so many of our people. That is why, frankly, I am so frustrated and disappointed we are going through this 30-hour charade.

On the 1st of October, the Senate Finance Committee, on which I am proud to serve, approved legislation known as the JOBS Act. That stands for “Jumpstart Our Business Strengths.” The legislation enjoyed broad bipartisan support in the Senate Finance Committee and passed out of it. But 6 days later it is still awaiting action by the full Senate.

I do not necessarily agree with every provision of that bill, but that did not happen to be important to me because it represents a serious effort to help America’s factories and the people who work in those factories. I care about those people. I represent those people and I will fight for those people.

The more important provision of the bill was the corporate tax rate, much the same as my own legislation would do. Unfortunately no debate has been scheduled for this important legislation. Some seem to believe we will not have time to consider the legislation before adjourning this year. That is tragic for the people who are not working. This Presiding Officer faces that in his own State, the State of Illinois.

I cannot understand that thinking. How can we possibly have 30 hours to air our grievances about judicial nominees when we all know exactly what the result is going to be? There is no time to debate a way to protect American factory jobs. I could pick on many other subjects and would be happy to do so, but I pick one subject tonight.

I believe if the Senate took up the JOBS Act, we could have a thoughtful, constructive debate and we could pass it. In fact, as I look about the Senate floor today I see the Senator from Nebraska, the Senator from Maine, and the Senator from West Virginia, and the last time we were on the floor together, we passed a bill which spread out to the States $6 billion of Medicaid assistance which they desperately needed—two Democrats and a Republican. It could have been two Republicans and one Democrat. It makes no difference. We got the job done. The bill passed, and the States benefited from it.

But what is the result? We are talking. We could pass legislation on all kinds of things. I would ask all of my colleagues to think for a minute about the Americans who right now as we speak are toiling away in those factories right now, we cannot help but be inspired ourselves to concentrate and to do some heavy lifting of our own. We must work hard and do our jobs. It is our job as Senators to look at the serious policies that make our country work or work less well. People having a job and putting food on the table is a very major part of that.

Much to my dismay, we are not engaged today in serious debate about ways to create and maintain jobs in America. That is the subject of discussion in my State. We are not a wealthy State. We are a good State. Our people are as good or better than anybody in any other State. They buy homes. But they need work. Instead, our factories continue to struggle and are forced to shut down. Millions of Americans are out of work. Because so many of our factories are leaving the country, it is more and more difficult for Americans to find new jobs.

People always think when you lose a job, you can get another job. There was a day when that was true. That is no longer true. Indeed, economic experts have concluded the majority of jobs lost in the last few years are permanent, are not replaceable. Factories are closed and will not reopen.

Let me take a moment to discuss the economic situation in my own State of West Virginia. Our steel industry has been struggling to recover from years of unfair and illegal competition against steel that was dumped on our markets and sold in America at below the cost that it produce it. In the case of steel, it can mean dumped steel, illegal steel, breaking our national law.

What was once our State’s largest employer, Weirton Steel, recently announced it will cut an additional 800 jobs. I can remember when 13,000 people worked at that company. If President Bush backs down on the steel tariffs, of course, it will hurt the industry just as it is poised to recover. Ending the tariffs early will cost many more Americans their jobs.

We know that new factories are not being opened in steel. We have to protect those steel jobs we have. I mean “protect” in the best sense of the word by using the American law and by being faithful to our own conscience.

Employment in the coal fields is also affected. The coal industry has long supplied our steel industry with the finest quality coal in the world. That has continued to decline even more as many coal miners left anymore in West Virginia. Indeed, the manufacturing base all over my State continues to shrink drastically, and, as it diminishes, so do jobs with good wages and good benefits. That is the American dream.

In the southern coal fields, two other established prominent manufacturers—EIMCO, a Norwegian company that manufactures mining equipment, and the Dean Company, with which I spent most of my life, a maker of wood veneers—are closed; they went overseas.

The past year has brought the closing of two long-time manufacturers in north-central West Virginia, the Clarksburg Casket company and Glassworks Company in the Mid-Ohio Valley. In the Kanawha Valley, two long-time manufacturers, John Manville and Ames True Temper, closed plants. Just a week ago, it was announced another 50-year-old plant was scheduled to close in Parkersburg, putting 700 workers at Schott Scientific Glass out of work. Their jobs went overseas.

In the Kanawha Valley where this Senator lives, two well-established chemical companies are closing, Flexys and Nitro and FMC in South Charleston. These closings mean hundreds of jobs lost.

Where are these workers supposed to turn? Their average age may be 45 to 55. What are they meant to do? Take up computer sciences? Biochemistry, physics? They can’t do that. There is no place for them to go. There are no replacement jobs. Some of them take temporary jobs where they don’t get benefits and try as best as they can to work with their hands.

I was extremely pleased at the recent news of the strong economic growth in the third quarter of this year in this country. This does not translate into new jobs in West Virginia. New jobs is what we look at. People do not feed their families and do not pay their mortgages with news of strong economic growth. They need paychecks. It comes from jobs.

This Congress has not done enough to protect the paychecks of hard-working Americans. We have failed to stem the flow of jobs overseas, a subject about which I could speak for 6 hours. We have not done enough to provide temporary assistance to workers who have lost their jobs. Currently, 9 million Americans are unemployed and almost 2 million Americans have been unemployed for more than 6 months. In West Virginia, almost 42,000 workers are facing the holidays without a job.

I am pleased to be addressing the needs of these workers. Therefore, I am pleased to be a cosponsor of legislation introduced by Senator Kennedy that would extend the
unemployment compensation for those Americans of which I speak who are still struggling to find work in our so-called jobless economic recovery.

As factory after factory closes its doors, or freezes hiring, workers are unable to find jobs. They are running out of unemployment benefits at an alarming rate. As many as 80,000 workers per week are expected to exhaust their unemployment compensation in December itself. Senator KENNEDY's bill would continue federal unemployment compensation for an additional 6 months. The legislation would also provide 33 weeks of additional Federal benefits in States with especially high unemployment rates.

This bill provides crucial assistance for long-term unemployed workers. There are more than 1 million workers who have already exhausted their extended benefits but have not been able to find a new job.

Let it be clear. Men and women in West Virginia and across the country would rather have a paycheck than an unemployment check. We all know that. However, the jobs are not available. The choice is not theirs. They have families to feed. The federal Unemployment Insurance Program was specifically created to help workers when the economy suffers prolonged downturns. Workers have paid into the unemployment compensation fund and they deserve to collect benefits from the fund during such a weak jobless recovery.

Currently, the unemployment insurance trust funds have $20 billion sitting in a bank. The benefits outlined in Senator KENNEDY's bill would cost $16 billion. To me it is unconscionable to leave the funds in the bank when they are needed by workers during hard times. Moreover, by making additional unemployment benefits available, Congress will also obviously be helping our economy.

I am afraid that the charade we are engaged in at the moment is a lose-lose proposition for the American people. I do not diminish the importance of unemployed workers whose self-esteem is destroyed and whose skills are ready to be put to work. It does nothing to help 9 million Americans who have already exhausted their extended benefits and have nowhere near 168.

Jobs. Of course, we are debating something that is equally important; in fact, over the long run, much more important than almost anything else we can debate. That is, are we going to have an honest, decent judiciary to uphold the Constitution and the laws of this body and the other body pass unconstitutional legislation many times in my 27 years. I have seen Presidents act unconstitutionally a number of times in my 27 years, and before that. It has been the judiciary that has determined the Constitution. It has been the judiciary that has corrected matters. It has been the judiciary that has helped small business, where the jobs are. It has been the judiciary that has given justice to this country, that has protected Americans from criminals, that has done so much good for this country. That doesn't mean all judges are perfect or right. But by and large, it has worked very well. That is why we make these positions lifetime appointments, so they don't owe anything to anybody but the law.

Here we have a distortion for the first time in history, filibustering judges and phony, untrue charts of 168 to 4. Let me tell you, they wouldn't have allowed the 168 to go through had we not been fighting as hard as we could and forcing them to allow those judgeships to be brought up. We would have nowhere near 168.

With regard to the four, we are already up to six, we were there last night. We were there months ago when they indicated they were going to filibuster Justice Rogers Brown and Kuhl, in addition to the other four who have been mentioned. Then there are probably at least 13 others who I can name. There will be more, because there is an arrogance here, it seems to me, that goes beyond doing what is right for this country.

Very few things rise to the dignity of the impeachment of judges and getting a good Federal judiciary. I am for jobs like everybody else, but because they don't have any other arguments, that is why they are doing that.

I would be happy to listen to my colleagues on any suggestions they have with regard to jobs. Usually it is another big Federal program that literally doesn't create any jobs. It just creates another burden for taxpayers. That is what these two bills do.

I am happy to yield to the distinguished Senator from Virginia.

Mr. WARNER. I listened carefully as our distinguished chairman was referring to other nominees who have been acted upon by the distinguished members of the Senate Judiciary Committee. I have been studying extensively the very impressive record of achievement of a number of these individuals who are awaiting action on the floor.

You mentioned Justice Janice Rogers Brown, a distinguished jurist of 25 years on the California Supreme Court. The record shows that she was born to very proud parents but ones of modest means. Sharecropping was their profession.

This distinguished, hard-working young person worked her way through college, worked her way through law school, and has now served the people of California for a quarter of a century, including the last 10 years as a California Supreme Court justice. That is remarkable.

Further, we heard that she was elected or reelected to the California Supreme Court. I think the chairman might comment on the distinction between our Supreme Court, which is subject to the process we have been discussing these several days. But in a number of States, they do have a State election. All of us in this Chamber are here by virtue of the support of people in elections. But how many of us have been elected to the Senate with 76 percent? I don't think my distinguished junior colleague from the State of Virginia got that.

Mr. ALLEN. Far from it.

Mr. WARNER. Well, I was pretty close to it, I mention to the Senator. But I don't claim 76 percent. That is quite a record. We have heard that she has ruled for the plaintiffs in many civil rights and consumer protection cases. She is supported by her colleagues in California, those who know her best.

But could the distinguished chairman advise the Senate with regard to his opinion with respect to the nomination as it is hopefully brought before the whole Senate?

Mr. HATCH. Well, of course, she is an African-American woman who has come from nowhere, in a sense, a sharecropper's daughter, to be a justice of our Supreme Court.

Mr. WARNER. That is a dream of millions of students all across this country, to have that opportunity to
come up through our system, to gain their degrees, to take their place in society, to stand for the cause of freedom in this great country, and some few do manage to get on the judiciary of the States. I know that Presidents look to the jurists in States, because they have a proper perspective to select them for the Federal judiciary.

Mr. HATCH. That is right.

Mr. WARNER. I do hope this distinguished nominee will fare well and be treated with fairness when that name is brought before the Senate.

Mr. HATCH. I appreciate my dear colleague. But we will find out tomorrow that the other side is going to vote against cloture. They are filibustering this terrific African-American woman justice who has made it on her own throughout life, who wrote most of the majority opinions in the California State Supreme Court while joining unanimously with others in over seven cases just last year. They tried to paint her as though she is out of the mainstream. I would like to suggest who is out of the mainstream. It is a high percentage of those on the other side of the aisle who think that only the left has any ideas in this regard. She is a conservative black woman and she is not monolithically in step with what they think black people ought to be, they are against her. If we did that to one of their nominees, the whole world would come down on us.

Mr. WARNER. She is proud of her African-American heritage. I hope the Senate gives her fair treatment.

Mr. HATCH. I do, too. I hope the Senator is right. But from what I have seen here, she is going to be filibustered right along with the rest of them.

I recognize the distinguished Senator from Virginia, and then I will come to the distinguished Senator from North Carolina.

Mr. ALLEN. Mr. President, following up on my esteemed colleague from Virginia’s comments and observations on Justice Janice Rogers Brown, she is the first African-American woman to serve on the California Supreme Court, having come from segregated schools in the South, worked her way up.

I find it very interesting that the following quote was made a few years ago: Whether it is Hispanic or non-Hispanic, African American or non-African American, man or woman, it is wrong to not have a vote on the Senate floor. What are they afraid of? What are they afraid of? What is wrong with a vote?

Tomorrow the person who made that statement on October 28, 1999, Senator Tom Daschle, Democratic leader, is going to lead a filibuster against Justice Janice Rogers Brown.

Mr. HATCH. That is my understanding.

Mr. ALLEN. Clearly, a prior consistent statement showing duplicity. I would ask, when you referred to some of their arguments that she is out of the mainstream, I was looking at the record from the hearings. I understand Justice Brown was criticized for a single ruling she made on a parental consent case. We have parental consent laws in Virginia. The vast majority of people, even some who consider themselves pro-choice, recognize that if an abortion is going through the trauma of an abortion, that at least the mother or father ought to be notified, ought to be involved, because it is a medical procedure that even for ear piercing or tonsils being taken out, you need consent. So for something as traumatic as abortion, as something which is physical obviously, but also something that is emotional, parents should know when their 17, 18, 15-year-old daughter is going through such a procedure.

She is being criticized for that. I don’t find that, at least from Virginia standards, or if the Senator could share with us, do you consider that out of the mainstream? From what I can see from surveys, 80 percent-plus of all Americans, regardless of the color of their skin or their ethnicity or gender, think parents ought to be involved when their unwed minor daughter is contemplating such a procedure.

Mr. HATCH. Well, the Senator raises a good point. But not according to that side. It is out of the mainstream. I just think about it. The Senator is correct. Eighty-two percent of the people are for parental notification laws. Challenging the reasonableness of parental notification statutes lies somewhere between hard and impossible. That is why an overwhelming majority of Americans support those laws, including the parents of Holly Patterson. Holly was a young girl who died 7 days after taking RU-486, the abortion drug.

Her father learned about her abortion just hours before her tragic death. If there was a parental notification statute, Holly might still be alive today.

Parents do have some rights here. Most people acknowledge that. But that is one of the big reasons why our friends on the other side are against all three of these women nominees, I suppose. If there had been a parental notification statute, young Holly would be alive today.

It is ridiculous to criticize these two fine nominees for their opinions holding parental notification statutes. Justice Brown’s opinion on the parental consent statute is well within the legal mainstream. The U.S. Supreme Court has routinely found notification statutes constitutional.

So the Senator has raised a very important point. But that is considered out of the mainstream by our colleagues. Again, we know who is out of the mainstream. It certainly isn’t Janice Rogers Brown.

I will just point to the side that is out of the mainstream. Yet they are trying to make everybody march in accordance with their liberal plan for America. That is not right. I turn to the distinguished Senator from North Carolina.

Mrs. DOLE. Mr. President, will the distinguished Senator yield for a question?

Mr. HATCH. I would be delighted.

Mrs. DOLE. I have heard that the Senate minority leader called Priscilla Owen qualified. That is unbelievable. Justice Owen attended Baylor University and Baylor University Law School, graduating cum laude from both institutions. I understand that she finished third in her law school class and earned the highest score on the Texas bar exam. And she accomplished these remarkable achievements at a time when women were a distinct minority in the legal profession.

Isn’t it true that 15 past presidents of the Texas State bar, both Democrats and Republicans who hold a variety of views on important legal and social issues, agree that Justice Owen is an outstanding nominee and should be confirmed as a Federal judge?

Mr. HATCH. Absolutely true. By the way, one of the arguments that she is the mainstream again is over parental consent, a dissent that she had written, upholding the finder of fact in the lower court. The majority just ignored that. The members on this side are saying parents ought to consult with their daughter before the daughter had an abortion.

She is not out of the mainstream. Guess who is out of the mainstream? I think she is the Senator.

Mrs. DOLE. Senator, is it not the case that former Texas Supreme Court Justice John Hill, Jack Hightower, and Raul Gonzalez, all Democrats, say Justice Owen is unbiased and restrained in her decisionmaking?

Mr. HATCH. That is correct. These are people who know her or who have worked with Justice Owen on the Texas Supreme Court. They are all Democrats. They are all partisan Democrats, by the way. They think she would make a fine judge on the circuit court of appeals.

Mrs. DOLE. As I understand it, some of our Democratic colleagues oppose Justice Owen because she is too pro-life, that her opinions are results-oriented. Didn’t the leading tort law professor, Victor Schwartz, look at Justice Owen’s opinions and find those opinions, those characterizations of the opinions to be untrue?

Mr. HATCH. Victor Schwartz is one of the law professors who wrote the book on torts. He is one of the most distinguished legal thinkers in the country. In fact, Professor Schwartz wrote:

Any characterization of Justice Owen as pro-plaintiff or pro-defendant is untrue.

But we are getting used to that. The reason they are all talking about jobs, it is a political reason, of course. They are trying to get people to not pay attention to this debate. But the reason they are talking about jobs is because they don’t have a good argument against Priscilla Owen, nor do they have one against Janice Rogers Brown, nor do they have a good argument
against Carolyn Kuhl. And three outstanding women who, if we treated three of their women justices like that or nominees like that, all hell would break loose.

In all honesty, Professor Schwartz said that is just not true.

Mrs. LANDRIEU. Parliamentary inquiry.

THE PRESIDING OFFICER. Does the Senator from Utah yield?

Mr. HATCH. Not yet, I yield to the distinguished Senator from Texas.

Mrs. HUTCHISON. To follow along with what the distinguished Senator from North Carolina was saying, Justice Priscilla Owen, a personal friend of mine who I have known for years, isn't it true that she was endorsed by every newspaper in Texas when she ran for reelection to the Supreme Court of Texas, every single one?

Mr. HATCH. The distinguished Senator from Texas knows that is true. That is not easy in the State of Texas. There are some very liberal newspapers down there that scrutinized every aspect of her life.

Mrs. HUTCHISON. It was really phenomenal. In fact, isn't it true that she got the highest number of votes of any person running for the supreme court that year?

Mr. HATCH. No question about it. She is a terrific person.

Mrs. HUTCHISON. I heard one of my colleagues on the other side of the aisle say: There are not enough hours in the universe that would be sufficient for debating Justice Owen's nomination. I thought that was very interesting because, the fact is, if we had 1 more minute of debate, it wouldn't matter, because she already has a majority vote in the Senate. Isn't that true?

Mr. HATCH. That is true. In fact, all three of them do.

Mrs. HUTCHISON. If she has the majority vote on the floor of the Senate, and the Constitution says that advise and consent is not a supermajority, that is what it implies because it didn't ask for a supermajority, then why isn't she sitting on the Fifth Circuit bench right now?

Mr. HATCH. Well, I think it is because she is not a liberal. That seems to be the only mainstream the other side is interested in. I cannot say she is all that conservative either. But the fact of the matter is, she is not a liberal. She has every credential in the world, as the Senator from Texas pointed out, who broke through the glass ceiling for women so women can now become partners in law firms, when that was tough to do. Here is a woman who has fought in the marketplace, when that was tough to do. Here is a woman who has fought in the marketplace.

And I think the Senator from Texas, who is a lawyer, from the University of Texas, and the Senator from North Carolina, Senator DOLE, who is a lawyer, who graduated from Harvard Law School, I think the other side ought to be listening, with regard to an eminent woman jurist named Priscilla Owen, and another jurist named Janice Rogers Brown, and another one named Carolyn Kuhl.

To make a long story short, if they don't like these nominees, then vote them down. The reason they are stopping them is because all three of them have a majority of the Senate willing to vote for them. They are flying in the face of the advice and consent clause, refusing to give the dignity of an up-or-down vote. I think it is a slap in the face to every one of them, the way these three women are being treated by the other side. I have heard for 27 years how much greater they are for women. Don't believe it. If they were, they would not be arguing against these wonderful women nominees. Don't believe that for one second. It is all politics.

The only reason they are talking about jobs, in all honesty, is because they don't have the arguments against these eminent women lawyers and judges. It is pathetic.

Mrs. HUTCHISON. I thank the Senator from Utah.

Mr. HATCH. How much time is left?

THE PRESIDING OFFICER. There are 6 minutes 15 seconds.

Mr. CRAPO. Will the Senator respond to a question?

Mr. HATCH. I surely will.

Mr. CRAPO. The Senator from Utah spent time responding to questions about the nominees we are going to vote on tomorrow. I note those who oppose this vote often bring up a chart that says 168 to 4, noting they have only filibustered 4 judges in this Congress. I think it is important to point out, though, that not only was the first time in the history of this country, in the history of the Senate, a filibuster has been sustained against a judicial nominee of the President of the United States.

I think it should be clarified to the American people that when we are now seeing a filibuster sustained against nominees of the President turns the Constitution on its head and begins a very dangerous precedent with regard to how the nominees for the judicial branch are treated by this Senate.

Mr. HATCH. No question about it. That 168 to 4 doesn't even begin to tell the story, because if it had been up to our colleagues on the other side, there would not be 168. We had to fight for every one of those people, and we had to fight hard fights. We had to force them to vote. They cannot vote against everybody. So there is not just four. We have already got six. We had to file cloture on Carolyn Kuhl and Janice Rogers Brown, which will be up tomorrow. I can name probably another 11 they are going to filibuster. So that is a blatant, outright lie.

Mr. CRAPO. Would the Senator from Utah care to list the number of the nominees of President Clinton to the bench who were filibustered during his Presidency?

Mr. HATCH. Not one. Our side would not permit that because of the detriment to the Senate, the detriment to the Federal judiciary, the detriment to the Constitution, the detriment to just good reasoning. We didn't filibuster one.

Mr. CRAPO. Isn't it also true that out of the last 11 Presidents—and I believe we used 11 Presidents because it was 1949 when the filibuster became possible—not one of their nominees, until today, until this Congress, not one of the President's nominees has
been successfully filibustered in the Senate of the United States because of the understanding of the fact that the Constitution gives the President the right to a vote?

Mr. HATCH. That is right. Once they hit that number, you have had a vote up or down. And 373 Clinton judges are serving in the Federal judiciary today because we had the decency to give them the dignity of votes up or down—something not being accorded our nominees.

Mr. CRAPO. It is my understanding that 2,300 nominations have come to the floor since the filibuster was possible.

Mr. HATCH. It is 2,372.

Mr. CRAPO. Zero were filibustered this year, and this year four have been successfully filibustered, and what is it, five, six, or seven more are scheduled to be filibustered?

Mr. HATCH. That is right. Actually, it is more than that. We have two more tomorrow. That gets us up to six. Then probably there are another 11 I can name. I won’t take the time to do that now. There haven’t been one filibuster by us. There have been cloture votes, but they were for time management purposes to get us to a vote. In every case, the Clinton nominee got voted up, except for one.

Mr. CRAPO. I thank the chairman. I think it is important to look at this and understand what that debate is about and why we are giving it this time, to focus on the threat to the Constitution that is being posed by the treatment of judicial nominations in this Congress. I thank the Senate.

Mr. HATCH. I thank my colleague. The real number, for the past 11 Presidents of judicial nominees confirmed versus the filibustering they are doing, is 2,372 that were confirmed. None were filibustered, until President Bush became President. He is being treated wronfully. It is unfair to him, unfair to these nominees. I like what the Senator said earlier. I think he said we gave a fair trial to 2,372—actually 168. We gave a fair trial to them and with regard to the four, we just hung them. That kind of shows in that one sense it is great to give a fair trial, but we are not giving a fair trial to these four. They are arguing it is all right for four, but we are not going to.

Ms. LANDRIEU. The number the distinguished Senator from Utah had a system in place that was not recognized by the committee on which he serves as chair. I ask the chairman if he recognizes the number on this chart. Could he state for the record what it is.

Mr. HATCH. I don’t recognize the number. However, I do recognize the argument.

Ms. LANDRIEU. The Senator from Utah has answered the question.

Mr. HATCH. May I please finish?

Ms. LANDRIEU. He has answered my question. He said he didn’t know what the number was. I would like to explain to him and to the other Members.

Mr. HATCH. Will the Senator yield?

Ms. LANDRIEU. No, I will not.

The number is 98 percent.

The PRESIDING OFFICER. Senators will address other Senators through the Chair.

Ms. LANDRIEU. The number the distinguished Senator from Utah did not recognize—I don’t know why he wouldn’t recognize it since he is chairman of the committee, but he says he doesn’t recognize it. The number is 98. Ninety-eight percent of the judges that were sent to this Senate by President Bush were approved. There are not many people in America, not white people, or black people, or Spanish people, or women, or men, who think the Senate should approve 100 percent of any President’s nominations. It is beyond the realm of reason, particularly a President who did not win the popular vote.

Earlier in the debate, the chairman, who also doesn’t recognize this number, this 98 percent, also fails to recognize the numbers in the last election. The numbers of the last election were Bush 50,456,169; Gore 50,996,116. So 500,000 more people voted for Vice President Gore in the popular vote than President Bush. He was won by a handful of electoral votes in Florida, and we know that. The Court decided it. I am not complaining about it, but numbers are important. Let me tell you another number—

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

Ms. LANDRIEU. I will not.

Mr. REID. Regular order.

Ms. LANDRIEU. I will not yield for a question.

Another number is 63. I want the public who is watching this—and I think a lot of people are watching this, and I am glad because this is what the next election is going to be about, and I am very excited to help lead this fight. Sixty-three nominees were blocked. It wasn’t an open filibuster. It wasn’t debated in the open, like tonight where there are no secrets and we can all speak about what we believe. This was done in secret, and not by many Senators who represent millions of people, but maybe by one Senator who just decided he or she didn’t like the nominee, and so they would not sign the slip.

The chairman of the committee reigns over this. He understands this number 63. They didn’t even have the decency of getting a vote or a hearing in committee because the chairman from Utah had a system in place that blocked them.

Mr. HATCH. Will the Senator yield?

Ms. LANDRIEU. No. I will not yield.

Mr. HATCH. I have a question.

Ms. LANDRIEU. I object.

Mr. HATCH. I object to that, Mr. President.

Mr. REID. How rude that is.

The PRESIDING OFFICER. The Senator from Louisiana has the floor.

Ms. LANDRIEU. Thank you, Mr. President. I will not yield the floor, and we are not going to yield this point.

Technically, the majority is correct that there has not been a technical filibuster successfully completed. But there have been filibusters on this floor that have been tried, but they weren’t strong enough to stand up to them because their arguments weren’t strong enough. The only way a filibuster can survive is if the arguments and the truth is strong enough to stand up to lies. That is the only way a filibuster survives. That is why this filibuster survives, because the truth is always stronger than a lie.

This 63 people never could come out of committee. I am not even going to go into that. I am going to talk about something else.

Mr. HATCH. I surely will.

Ms. LANDRIEU. The Senator from Utah has the floor.

Ms. LANDRIEU. I object.

Mr. HATCH. I object again to the Senator’s action against the doctor who was negligent, and she kept the lawsuit alive so that woman could have a recovery? The PRESIDING OFFICER. The time of the Senator is expired.

Mr. HATCH. I ask unanimous consent for 30 seconds.

Ms. LANDRIEU. I object.

Mr. HATCH. Let me just say that it is true.

Ms. LANDRIEU. I object. I know the distinguished chairman has been on the floor for some truly offensive statements to colleagues on this side of the aisle that, in my opinion, are beneath the dignity of the committee on which he serves as chair.

I ask the chairman if he recognizes the number on this chart. Could he state for the record what it is.

Mr. HATCH. I don’t recognize the number. However, I do recognize the argument.

Ms. LANDRIEU. The distinguished Senator from Utah has answered the question.

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How much time do I have remaining?

The PRESIDING OFFICER. The Senator has 24½ minutes.

Ms. LANDRIEU. Thank you, Mr. President. Good. I am going to take every one of them.

I want to tell the Republican majority something quite simple. This country, no matter your past efforts, will not be divided. No matter your vicious rhetoric about Protestants and Catholics and blacks and whites and Hispanics and women, we refuse to be divided. In a time of war, which we are in, the country is under assault, and we have men and women dying in Iraq, it is the height of disrespect and un-Americanism to come to this great floor and talk about the pettiness and say this woman Senator, who has spent 25 years in public office, who has worked in every pharmaceutical company, who worked with doctors, who has said there is something wrong if I don’t want a woman as a judge or I don’t want African Americans to be here. 
The Senator from Utah must forget where I am from. I would like to remind him where I am from. I am going to fight for Louisiana. In the 63 years before Rosa Parks decided to sit down in her seat because her feet were so tired that she could not hold the arm rest, and Homer Plessy decided he would get on a rail car that was entitled “whites only.” He got on it in New Orleans, my hometown. He rode on the train and he knew he would be arrested. But a group of lawyers, African-American free men of color, thought that he was right. They had to suffer anymore. You think that Republicans on that side refuse to raise, and a paycheck of $672 a month, which the government does. They have a right to grandchildren, because they have a right to be united and fight together. But they have us fighting against Catholic, Protestant, rich, poor, young and old. It is a disgrace, and it is not the Democrats fault. It is the Republican majority.

I will just say this. I know the men and women who serve over there and individually they are fine. But, boy, collectively they can sure get themselves in a mess. The country deserves better. The people want better.

We have an Energy bill to pass; we have appropriations bills to pass; I have 400,000 veterans in my State who are looking for help, and they turn on to the television to see the chairman from Utah saying something about the women in the Senate don’t want women on the bench, and we don’t want Hispanics on the bench, and we don’t want African Americans on the bench? Who ever heard of such ridiculousness?

I beg this body, let’s stay on the track. The facts are that we have approved 98 percent of President Bush’s nominees. We have rejected people such as Janice Rogers Brown to serve on the bench, to hold up Rosa Parks, to honor the work of Louis Martinet, and to honor the memory of Plessy. The only person they can find to serve on the bench is a woman who says—and I want to read what she says so the people in this country can just decide for themselves. Don’t listen to all the technical parts. I am just going to read to you what the woman said and you decide for yourself if you think this is not intruding or not:

Some things are apparent. When government moves in, community retreats, civil society disintegrates, and our ability to control the policy making process. The result is families under siege, war in the streets, the precipitous decline of the rule of law, the rapid rise of corruption, the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

What do you think Rosa Parks thought when the Federal judge came down to her hometown and government intruded and said: Lady, you don’t have to suffer anymore. You think that Rosa Parks thought that government was bad?

Let me go on to say what this mainstream woman thinks of all the grandparent in the United States.

My grandparents’ generation thought being on the Government dole was disgraceful, a blight on the family honor. Today’s seniors and they right to get as much “free stuff” as the political system will permit them to extract.

Excuse me, but on behalf of all the grandparents I represent, this is an insult to every single one of them who raised their children, and then when some of their children got into trouble, raise the grandchildren and the great-grandchildren on their Social Security paychecks of $872 a month, which the Republicans refuse to raise the minimum wage which is $5.50. They don’t want it, and you are asking me to put a woman on the court that insults the grandparents of Louisiana? Take your dossier and go somewhere else.

Now, if these people are in the mainstream, then I don’t know what mainstream we are talking about, because it is not the mainstream Louisiana. That is what this debate is about.

The Senate Democrats didn’t want to have this filibuster. We are made to have this filibuster because the Republicans on that side think they can divide us. We have split us up and cause trouble. I will tell you what people at home want. We are in a war. They want us to be united and fight together. But they have us fighting against Catholic, Protestant, rich, poor, young and old. It is a disgrace, and it is not the Democrats fault. It is the Republican majorities.

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Do you think he ever consulted with them? No. The President, this White House, or the Republican leadership never called the National Bar Association, which is the most prestigious group of African-American lawyers, to just ask them. Is there any conservative judge you all would think would be good that I could appoint?

This is not about doing what is right. This is about winning elections and gaining the right in the wings. I think that the President, the Senate, and the Republicans on that side think they can divide us. But they have us fighting against Catholic, Protestant, rich, poor, young and old. It is a disgrace, and it is not the Democrats fault. It is the Republican majorities.

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judges were blocked. It is a different technique under the rules of committees as opposed to here on the floor, no committees, no votes, no reports—63 qualified judges, at least in the opinion of the then-President, never had a chance to fill that void, and 25 percent of seats went unfilled. Now 95 percent are filled.

When there is cooperation—I can tell you there has been cooperation in New Jersey. We have had five district court judges and a circuit court judge, we worked with the White House and the Judiciary Committee, and it has worked very smoothly. It can work if we reach out and work with each other, which we have to do in this society if we are going to get good things done—not by dividing us.

You know, it strikes me that we spent a lot of time talking about four judges or six judges. One of those 63—by the way, who couldn't get a hearing, it went on for a year and a half—was the dean of the Harvard Law School. It is hard to understand how he wasn't qualified to be considered for the bench but is qualified to be the dean of the Harvard Law School.

By the way, this shows it in a pictorial way. This is the list of 63. This is the 4. It is very clear. I want to dwell on something else. The real issue is not 4 people who are not being approved on this Senate floor. The real issue are the 3 million people who have lost jobs since 2000, the 9 million Americans who do not have a job, the 2½ million Americans who have lost manufacturing jobs, and the real agony we have in the country because we are not creating jobs fast enough in this country.

We have gone fast enough to get 98 percent of the judicial positions filled, but we have not gone fast enough to take care of the 3 million Americans and the 9 million unemployed and the 2 ½ million manufacturing jobs lost. I think we have our priorities wrong.

We have been debating 4 people while there are 9 million Americans out of work. We have been doing that now going on 24, 26 hours. We are going to go on some more.

Americans know what impacts their lives: their ability to take care of their kids, their families, their grandparents, their future. They are interested in having a job. Jobs count. We are talking while 9 million are missing in action in our debates on the floor of the Senate.

I think it is disingenuous. I think it is clearly stated. I think we are off on the wrong target.

I point out today I went through some of the press reports that came out over the AP wire today. The U.S. trade deficit grew to $41.3 billion in September—$41.3 billion. We are going to have a $500 billion current account deficit in this country, and what we are going to have, more importantly, is a deficit in manufacturing jobs because they are all going overseas. We ought to have a debate here about economic policy that puts Americans to work—a $41.3 billion trade deficit this month. It is going to be $500 billion for the year. We have had discussions in committee—which, by the way, we had to cancel all our committee meetings—about what the proper trade policies, the proper positioning with China where we are losing jobs right and left across the manufacturing sector. We had the biggest trade deficit with China we have ever had in the month of September.

Why are we talking about 4 jobs when we are losing millions of jobs, 2½ million jobs, because we have an economic policy that is out of kilter with the needs of the American people? If that is not enough, the poverty rate has grown 1 percent in this country in the last 3 years. That is about 1.7 million people. We have seen the uninsured in America, those without health insurance, get now little over 2 million. We are having no discussion on issues that impact people's lives who are watching this debate. We want to have real debates that make a real difference in people's lives. We ought to be talking about it. We ought to be talking about health insurance.

We ought to be talking about that trade deficit, ripping out the heart of middle-class America's jobs.

I don't understand why we have our priorities on 4 people when we have a 98-percent positive ratio of confirming judges. It doesn't make sense, particularly when we can argue about whether they are mainstream or they have made the kinds of statements the Senate from Louisiana quoted from one of those individuals who is going to be considered tomorrow for confirmation.

It doesn't make sense.

There are all kinds of things we could be doing right now, get no little could be raising the minimum wage. That would improve the lives of about 4 million Americans. We could pass a transportation bill that would create, by almost every estimate about 1 million jobs. It is 1 million. We don't want to talk about it on the floor, but it is a million jobs. It builds America; it invests in our future.

We could talk about increasing investment in higher education or maybe do something about making sure we don't take 8 million Americans away from having the opportunity to make overtime pay so they can operate and live in this community of America in a more secure way.

Then, the greatest tragedy, in the last 13 days we have had 42 Americans killed in Iraq. We have changing policies. We have generals in Iraq saying we are not living in the real world. We are not talking about the war. General Sanchez today said we are not walking away from using the word; we are going to win this battle—no, we are going to win this war because the people back in Washington need a dose of realism in their debates about this issue.

Then we have a meeting to discuss the intelligence report that was leaked by someone with regard to what is happening on the ground in Iraq, and nobody shows up because we are debating 4 judges.

It strikes me we have our priorities wrong in this country when we are going on about 4 judges when we have 9 million people unemployed, when we have lost 2.5 million manufacturing jobs, when we have 2 million people losing their health insurance. We have a tie-up on the prescription drug benefit bill and the Energy bill and we can't get a vote on the Energy bill in Iraq saying we don't have a realistic view of what is going on in the debates we have here in Washington. There are real issues that matter to real people across this country, in the millions—in the millions, not 4—not when 168 are approved and 4 are not.

I don't know where our priorities are when we turn our attention to such an issue when there are real debates about whether they fit into the mainstream or not, whether they are mainstream or they have made the kinds of statements the Senate which are authorized under the Constitution. I hear all this "unconstitutional" view. That is not unconstitutional. We should change the rules if we don't like the rules of the Senate, just the same way that we can change the rules in committees.

It is not sensible that we are not putting our priorities on the loss of jobs and taking care of the American people in the way they expect us to—to debate and put in the time and effort.

This whole debate, which has now gone on for 26 or 27 hours, should be about jobs—not 4 but 9 million. It should be about the important issues that impact people's lives, the people who are uninsured, the people who haven't had an increase in the minimum wage in 7 years. We can't get a vote on that. We can't get a vote on the Transportation bill that would create a million jobs. There are all kinds of things we can't get votes on around here because people don't want to have them. They use the rules for those purposes.

Four out of 172, 98 percent have gotten votes. It is very hard to see how we have our priorities straight in this area tonight and have had properly placed priorities for the last 9 or 27 hours. We hope we can get focused on something other than 4 jobs. We should get focused on the 3 million people who have lost them, the 9 million people who don't have jobs. We ought to be talking about extending unemployment benefits to the 80,000 people a day who are going to lose those in another 30 days when we are not in session.

It is incredible—our priorities. It is incredible. I believe as much as anyone else that we ought to cooperate. We have many issues that is how we got 168 judges approved. That is how we got to a 95-percent fill rate on the number of judges' slots that have
been filled. But we have major problems with employment and the economics of this country. It is time we get our priorities straight.

I yield the floor.

The PRESIDING OFFICER. Who yields the floor to the Senator from Utah?

Mr. HATCH. Mr. President, it has been a good debate. But I have noticed the folks on the other side of the aisle want to shut down the debate on judges because they don't have an argument. Jobs, where it seems their only argument is, and more federal government programs. In fact, they don't even have very good arguments there. It is "increase the minimum wage." I am not sure it will create jobs. And "re-up insurance," which certainly doesn't create more jobs.

On the other hand, I am not saying they are not compassionate. They are decent people wanting to do those things. But when you do not have any arguments against the judges we are talking about, you change the subject. That is exactly what they have done.

If the distinguished Senator from Louisiana were here, I would ask her why she took the number 129 because, of course, a number of confirmed judges were left off her chart. We have had distortions of the facts. We have had distortions of the statistics. You can prove anything with statistics if you want to manipulate them. There are 375 judges left off that chart she was showing. We confirmed 377 Clinton judges—not 240. If you want to be factual, be factual. Don't distort the facts.

I was a little surprised that now at the 28th hour of debate an awful lot of Democrats come on the floor without any arguments that are really valid against those nominees we are talking about. They are changing the subject because their arguments don't hold water.

As for Democrat claims that they have been blocking only the most extreme Bush judicial nominees, let us look at the facts.

Priscilla Owen won 84 percent of the vote in her last election for the Texas Supreme Court. Bill Pryor won 58 percent in his last election for the California Supreme Court; Priscilla Owen won 76 percent in her last election for the California Supreme Court; Priscilla Owen, 84 percent; William Pryor, 59 percent of the vote.

What is more extreme, receiving 76 percent of the vote in California, the most populous State in the nation, as Justice Brown did in her last election to the California Supreme Court—filibustering a brilliant nominee to the Fifth Circuit for the first time in American history. That is what they are doing, without any real arguments against her. They don't have any. They do not have the facts on their side so they change the subject.

I think jobs are important. I will tell you, there will not be any jobs in this country if we lose our freedoms because we don't have the federal courts staffed by competent and decent judges.

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

Mr. HATCH. I would be happy to yield.

Mr. COLEMAN. I listened to the Senator from Louisiana. She was talking about filibusters, I am glad to hear her say unequivocally that it was a filibuster. We will filibuster these nominees. There is no question.

Mr. HATCH. We are not going to let these people filibuster. Mr. COLEMAN. She also said, I believe the only way filibusters survive is the truth—truth. I have only been in this body for less than a year. I know there is history in this body. The history is not on our side. This greatest history when it comes to filibusters. There were attempts on the floor of this Senate to make sure that minorities didn't have certain rights; that minorities had poll taxes; that anti-lynching laws were filibustered. I have a chart here that talks about filibusters.

I ask the distinguished chairman whether under F.D.R., civil rights was filibustered; under Truman, civil rights was filibustered; under L.B.J., civil rights was filibustered.

Again, would it be the Senator's belief that necessary laws that were filibustered is something to be ashamed of and they were not the truth; filibusters were not the truth; the attempts to provide civil rights and opportunities for Americans for good things and they were filibustered, and filibustered was not the truth?

Mr. HATCH. Absolutely right. In every case it was Democrats who led the filibuster. In every case, including this one, it is not the truth. It was the filibuster. As the Senator from Louisiana was talking about, it was the filibuster. Jancie Rogers Brown, 76 percent of the vote, State of California Supreme Court; Priscilla Owen, 84 percent; William Pryor, 59 percent of the vote.

What is more extreme, receiving 76 percent of the vote in California, the most populous State in the nation, as Jancie Rogers Brown did in her last election to the California Supreme Court—filibustering a brilliant nominee to the DC Circuit, the Nation's second highest court. If Justice Brown is so extreme and liberal, California voters certainly would have recalled her, but they didn't. Three-quarters of them voted to keep her on the bench.

By the way, the late Justice Stanley Mosk on the California Supreme Court was the California Supreme Court's well-known liberal voice for decades. In that same election, she got 76 percent. He only got 68 percent of the vote in the last retention election.

Mr. HATCH. Absolutely right. In every case it was Democrats who led the filibuster. In every case, including this one, it is not the truth. Jancie Rogers Brown, 76 percent of the vote, State of California Supreme Court; Priscilla Owen, 84 percent; William Pryor, 59 percent of the vote.

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These nominees are hardly extremists as painted by the other side who claim that is what they are talking about. Give me a break.
issue than the appointees? Those law changes were bigger than filibustering one law. This is about the impact on all of society, on a whole culture.

Mr. HATCH. That is right. Frankly, yes. It is as important as these four and tomorrow all of society, on a whole culture.

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President Clinton, with 6 years of a Republican Senate after 1994, had 377 of his judicial nominees confirmed without a single filibuster by Republicans, even though Republicans had to swallow hard on a lot of them. Only President Reagan, with 36% of his judicial nominees filibustered, 5 more than President Clinton. But Reagan had 6 years of a Republican Senate to help him. Clinton only had 2 years of a Democrat Senate. Yet he came out with almost the same number as Ronald Reagan. Senator Schumer is No. 2 in U.S. history, even though his opposition controlled the Senate for 75 percent of his term.

I just to give you a sense of how unprecedented Democrat current filibusters are, here is another scorecard we have talked about: 2372 judges have been confirmed in the last 11 Presidents and zero were filibustered. The 11 Presidents that preceded the current President Bush, back to President Franklin Delano Roosevelt, never had a judicial nominee filibustered and had 2372 nominees confirmed. So these filibusters are empirically unprecedented.

How about this scorecard? Years since the Judiciary Act in 1789 that we have had filibustered. Since the Judiciary Act in 1789, there have been four, and there will no doubt be two more tomorrow. How many more? Up 10 percent, 15. 18. percent as Senator Schumer suggested last week in the Judiciary Committee? If there is some filibuster percentage the Democrats have in mind, what is it? The majority of the Senate and President Bush would really like to know. I think the American people would really like to know, too.

One final word on the Democrat scorecard. Even one filibuster of a judicial nominee is too many, because every person who reads this Senate floor should be afforded the dignity of an up-or-down vote. We owe our third branch of government no less. By way of analogy, would it be acceptable to enforce all but four of the constitutional amendments that comprise the Bill of Rights? Of course not. It is no more acceptable to allow up-or-down votes on all but four and counting of the President’s judicial nominees. Vote them up or vote them down. Just vote. That is all we are asking.

The Democrats have a right to consent. They have a right to advise. If they don’t want to give their consent, then they have a right to vote against any of these 10 percent. That I will find no fault with. I might disagree, but they have a right to do that. What they don’t have a right to do is to subvert the Constitution for the first time in history and allow 41 Senators to prevent an up-or-down vote of these judicial nominees.

The distinguished Senator from Minnesota, with his chart on the terribly wrong filibusters, brought out a very good point. I don’t want to compare rankings or anything, but this one is just as important as the others because without a good Federal judiciary, our civil rights would not be enforced. Explanations may be one thing, but I think people have to listen. But in all of those, those filibusters were conducted by Democrats, and every one of them was wrong, especially this 188 to 4 we are going through right now, but especially the other three as well. Mr. Hatch, will the Senator yield for a question?

Mr. HATCH. I am happy to yield. Mr. COLEMAN. Again, I listened to the words of my friend from Louisiana, where she made the comment that the only way a filibuster survives is if it is the truth.

I was reflecting on the history of filibusters. I read about it when I was a young man. Certainly preceding my time, the great youths of Harry Truman and FDR, unfortunately, there is a terrible history in this body of opposing efforts to provide civil rights opportunities, opposing efforts to ensure that there were anti-lynching statutes, opposing efforts to get rid of things like the poll tax. This is a sad part of the history of this body. I ask the distinguished chairman, who has a much better sense of history than I, is it true the tool that was used to oppose those efforts, oppose good things, was the filibuster, and the filibuster did not represent the truth? Would that be a fair statement?

Mr. HATCH. The Senator is absolutely correct. Here we have a situation where we have a terrific African American justice on the U.S. Supreme Court who won 76 percent of the vote, who came from nowhere to somewhere, who fought her way throughout her life to be what she is, who has ruled in favor of plaintiffs, civil rights claimants, the poor, the disadvantaged throughout her career, who is being treated in this shabby fashion with a filibuster.

Mr. COLEMAN. Would it be the truth in regard to these nominees, in regard to Owens and Kuhl and Pickering and Estrada, who we haven’t talked about, that in each and every case the measures of their competence, be it the bar association, the gold standard my colleagues across the aisle have talked about, be it the recommendations of their colleagues, other judges with whom they have worked, be it the recommendations of the voters when they put themselves up for a vote—in each and every case, they received the highest recommendations that is the truth, isn’t it?

Mr. HATCH. That is right. And let me just say this: Filibusters are not the only means the Democrats are using to obstruct. During the 3 years of the Bush administration, the Senate has tabled 108 roll call votes on judicial nominees at Democrats’ insistence. Eighty-seven percent of these votes have been unanimous, 87 percent, calling into question why we needed these roll call votes at all. Contrast that to 8 years of the Clinton administration during which the Senate took only 46 roll call votes out of 377 judges, only 39 percent of which were from Republicans.

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November 12, 2003

CONGRESSIONAL RECORD — SENATE

Mr. SCHUMER. I yield myself 15 minutes and the remaining 15 minutes to my colleague from New Jersey.

I have enjoyed these debates. I said at the very beginning these debates would be good for our side. They have proven to be. One little chart here, this chart seems to be under all of my colleagues’ desks. The filibusters on judges, compare Clinton; we didn’t require roll call votes on unanimously to-be-approved judges. Look what they have done to the Bush administration. This President is being treated very unfairly. You hear them talking about jobs, look, I am as interested in jobs, and so is every other Republican, as they are. The only reason jobs is coming up is because they know they can’t handle the criticisms that are coming their way for the way they are treating these judicial nominees. They just can’t. They can distort the facts. They can distort the statistics. They can distort the record. But they really can’t justify what they are doing.

Again, go back to your chart, the distinguished Senator from Minnesota. Every one of those unjust filibusters that took away rights from people and kept people enslaved to a large degree, every one was led by Democrats.

The Senator from New York.

Mr. SCHUMER. Mr. President, I yield myself 15 minutes and the remaining 15 minutes to my colleague from New Jersey.
from Utah: Rollcall votes are obstructionist.

My goodness. What are we called on to do here if not vote. And letting people know how you voted, isn’t that the whole mark of democracy?

I realize my colleagues on the other side of the aisle are frustrated, and so they have had to come up with all kinds of sophist arguments. But this one tops the cake. The fact Democrats have asked for rollcall votes on judges is a perversion of obstructing. Maybe we should just, when the President nominates somebody, not have a hearing and not have asked questions and not have any votes and just let the President appoint all the judges. Next we will be hearing from my colleagues on the other side of the aisle that is what the Founding Fathers really wanted.

Again, to all of those who are listening, I hope there are a few left, 168 to 4. That fact is immutable, unchangeable, irrefutable. The reason it has such a hold on us is because the other side fails to mention it. Whether it be our colleagues when they speak, whether it be the rightwing radio shows when they say we are obstructing all of the President’s judges or most of the Senate’s judges, whether it be the editorial pages that try to kneecap us, 168 to 4, 168 to 4, 168 to 4. Don’t forget it. There is no judiciary in crisis. There is no obstructionism.

There are some judges—whether they be Black, Hispanic, women, Catholic, Jewish, Muslim, Baptist, southern, northern, eastern, western—who are so far out of the mainstream that they should not be on the bench, and we are upholding the Constitution by doing that.

The arguments of my good friend from Minnesota, these charts, are getting to the point of ridiculous. They are what logicians and lawyers would call outcome determinative. We want another woman, another Catholic, another Jewish, another Muslim, another Baptist, southern, northern, eastern, western—who are so far out of the mainstream that they should not be on the bench, and we are upholding the Constitution by doing that.

Now the arguments of my good friend from Minnesota, these charts, are getting to the point of ridiculous. They are what logicians and lawyers would call outcome determinative. We want another woman, another Catholic, another Jewish, another Muslim, another Baptist, southern, northern, eastern, western—who are so far out of the mainstream that they should not be on the bench, and we are upholding the Constitution by doing that.

Do you know what the other side is saying? We are just going to take judges in green shoes and give you the number of women and not judge in pink shoes or purple shoes. They are differences that don’t make a difference. What we are talking about here, again very simply, is how many judges have come before this Chamber and how many have been approved. One-hundred sixty-eight to four. No denying it. No refuting it. No getting around it. The truth hurts because the American people know—30 hours, I guess now it is 39 hours, you can debate this for 390 hours, 3,900 hours, 39,000 hours. If all your words are not equal to 168 to 4.

For those who watched this debate, this has been elucidating, because what
to the United Nations. He is not demanding Roe v. Wade be repealed at this very moment. By nominating somebody like Justice Brown, maybe he appeases them, even though he may know she will not be approved. I don’t know how theory.

But I will tell you this. If Justice Brown were White, or Asian, or Hispanic, a man, or if she were Protestant, Catholic, or Jewish, or Muslim, or Hindu, I would oppose her nomination. If I just ran 100 percent of the vote in California, I would oppose Justice Brown. Justice Brown does not belong on the DC Court of Appeals where over decades, over centuries, beliefs among Democrats, Republicans, liberals, conservatives, 99 percent of Americans about what Government should and could do would be totally rejected. Justice Brown will be defeated tomorrow, I hope and I believe. It will not be because of outside groups and it will not be because of any of the women standing up for women. It will simply be because her views are so ideologically out of the mainstream that she does not belong on the DC Court of Appeals. It is that simple.

When we knock out Justice Brown, I believe the Founding Fathers are smiling upon us. One of them might believe the Founding Fathers will be pleased because her views are so outside groups. It will not be because of outside groups. It will not be because of outside groups. It will not be because of outside groups.

A couple of judges in this four have serious issues some people think approach or have gone over the line of ethical violations. I have heard almost everybody say at some level they believe there are serious concerns about actions of several of the people who are involved—aside from their views. I will not even mention the judge. One judge said, talking about the role of Congress:

The Senate will be the body in which we are going to get people who are not necessarily following precedent, settled law. That is one of the judges.

The numbers fit the commonsense judgment of the American people that somehow we are trying to change the subject. I want to say this: I think there are reasons to debate whether 4 judges out of 172 and they have been approved. Have not been sustained under the rules of cloture. And 98 percent—you can talk about it any way you want. The numbers fit the commonsense judgment of the American people that somehow we are trying to change the subject. I think there are reasons to debate whether 4 judges out of 172 and they have been approved. Have not been sustained under the rules of cloture. And 98 percent—you can talk about it any way you want.

The fact is, 172 nominations have come to the floor; 168 have been approved. 168 to 4. 168 to 4. Nobody is going to talk about four judges when we have a war going on and all these economic issues before the country. They say we are changing the subject. I think we ought to change the subject. I would imagine the people watching this debate are changing the channel because they want to know what is happening to their health insurance. They would like to know whether school class size is going to be 18 or 26. Those are things that matter, and we are debating four judges who, as I read some of the most extreme comments here—again, we are debating whether it is appropriate to have a filibuster about somebody who says “where government advances”—it says “advances, freedom is imperiled.”

We are debating that, as opposed to worrying about whether 9 million people can get extended unemployment benefits, whether we can get a jobs bill to build highways and bridges and other things in this country, whether we can have an honest debate over intelligence operations in this country. It strikes me we have our priorities out of place. It just makes no sense in the world we are living in that we are debating 4 judges out of 172 and they have been approved. Have not been sustained under the rules of cloture. And 98 percent—you can talk about it any way you want. The numbers fit the commonsense judgment of the American people that somehow we are trying to change the subject. I think there are reasons to debate whether 4 judges out of 172 and they have been approved. Have not been sustained under the rules of cloture. And 98 percent—you can talk about it any way you want.

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with and you talked about this issue, with this language, and this perspective on judicial philosophy—would say I would rather you be focusing your time on the floor of the Senate at 5 minutes to 12, 29 hours and 55 minutes into the debate. It is more important that we are talking about that judge than we are talking about what is happening with our men and women in Iraq, or whether we have appropriate investment in our intelligence operations that want to stop them, or the 9 million people are getting the proper attention on their unemployment benefits. I don't get it. There is no comparison of the importance. It is not changing the subject. It is getting to the subject the American people want us to do. At least that is the way it is in New Jersey. I have not had one single person ask me about a judge, until today when we got a call-a-thon calling—in the first time we got a call with regard to whether the filibuster was holding up these rights. I had my people read back this: "When government advances, freedom is imperiled." About half of the people said I don't know whether that is somebody I want to stand with. I don't know what that is, position that really fits with the American Constitution, in my view, of what the American democracy is about. It is very hard for me to understand where we have our priorities.

Last time I brought up a point that filibusters weren't only used to stand in the way of civil rights acts by Democrats back in the 1930s or 1940s. On February 3, 1991, a filibuster was executed on this floor on the Family and Medical Leave Act. There were no Democrats who voted for that cloture. Let's see. Handgun violence prevention on November 19, 1993. I think that is the Brady bill. Let's see. Goals 2000, to educate America on March 24. I have a list of about—something that apropos. It may be a little more than that—60 filibusters that were executed, including a couple with regard to judges, where judges withdrew their nominations that were executed by the other side of the aisle.

Filibusters have been used. No one was calling them unconstitutional when you were trying to deal with family and medical leave, or nobody was calling them unconstitutional when we were talking about the Hatch Act. Unfortunately, saying it was more about the Hatch Act. Unfortunately, saying it was more about the Hatch Act. I guess what I am trying to focus on for the next few minutes is, What about the future? I guess that is my biggest concern. We have had all kinds of charts about how nominees were treated in the past. I have been here a year. Since I have been here, it has been like pulling teeth to get certain people on the floor for a vote. But that is OK. The process is what it is. The Constitution says what it says and we will all have our chance to express what we think is right versus what we think is wrong. This is a big deal. It is a big deal for the Senate. There are a lot of other issues that need to be talked about.

Sure, Iraq is certainly one of them, people out there in harm's way. We have 9 million people unemployed. I am the first to admit there are a lot of issues in this country that need to be talked about and addressed. You are raising this in today's debate. One of the reasons Senator CORZINE has not had too many calls is Americans are able to walk around with a pretty secure feeling that the system works. I think it is a blessing we are not nervous every day about whether or not you can go to court. Because we do have a problem, a legal problem, there will be a place to go to get it resolved. That is just part of our mindset. We don't worry a whole lot about that and I think that is great.

But, really, that is a luxury. There are a lot of countries in this world where there is no venue to get to settle disputes. You have to go by force or violence, or you have nobody to help you out when you are down.

We have a pretty good legal system. God knows it needs to be fixed in some respects, but the idea of a rule of law nation caring about how you appoint judges is a big deal. Imagine if you had a system where it would be almost impossible to confirm somebody who had an actual belief or opinion. What you would find is there would be a lot of vacancies and there would be a backlog of cases. The things we assumed were always there for us would no longer be there. That is what this is about, that is what this is about.

If you believe in a system where the weak can hold the strong accountable, then you ought to be listening to this debate because only in a rule of law nation, a courtroom, is that possible, because in a political environment the strong always win over the weak. In a confrontation of resources, the strong always win over the weak.

But America is a little bit different. You can hold anybody accountable. You can have all the power and there are a lot of countries in this world where there is no venue to go to settle disputes.

That is a big deal. That is something worth fighting for. Some people believe that is worth dying for.

Now, that is very much at risk. The way we do business with our legal system is very much at risk. Because you can put up all the screens you want to put up and you can play all the number games you want to play, but the truth is, and I challenge someone to prove me wrong, that this is the first time in the history of our Nation that nominees have come out of the Judiciary Committee with a majority vote and have been blocked by a filibuster from being voted up or down. This is unprecedented. This is dangerous. We find ourselves in political and constitutional quicksand.
have happened politically, no one before has chosen to go down this road. The road our friends on the other side have chosen to go down really is the road to oblivion, in terms of trying to get good men and women to be willing to serve as a judge.

My friend and colleague, Senator Coleman from Minnesota, is new to the Senate like myself. The strength of this Nation is people with accents have a chance to get ahead in life. I am the first in my family to go to college. My dad was a World War II veteran and came out of the war and started his own business and married my mom and neither one of them finished high school. But they impressed upon me and my sister the value of an education. Because of the good, sound, strong public school system of which we partook, I was able to do things I never dreamed of doing. Now I find myself in the Senate.

I am a lawyer. If you can't take a joke, I think it would not be a lawyer, because there is a lot of lawyer jokes out there. But I have always enjoyed the role of being an attorney because I like representing people and I like representing causes. The law to me was not just a job; it was a passion.

The ultimate ascendency for somebody in the law is to become a judge. You will make less money but you will get authority and respect, and you will have a chance to mold the law. To many people that is much more important than money.

To me it is a shame, if you are willing to apply for the job, that you have to be treated so poorly as these four people we are talking about have been treated. But make no mistake about it, they are not four people; there are going to be at least a dozen in the next couple of weeks. They are being treated differently than anybody in the history of the Nation. They are having some very real issues about them. It is not what they want to do, and all they are willing to do, is to serve their country in the Federal judiciary.

Our friends on the other side have pulled out a chart, 168 to 4, with an illustration: 168 apples represented those four people, 4 lemons represented those four people. Our friends on the other side have a long talk about the people they have labeled as lemons.

We are going to have a long talk about the four people that have been called lemons are very fine Americans and deserve more respect than they have gotten.

The thing I like most about serving with my colleague, Senator Coleman from Minnesota, is that his race was one of the most unusual races in the Nation. It was full of triumph and tragedy. His opponent, Senator Wellstone, who I knew fairly well and certainly respected for his strong beliefs, tragically died right before the election. Senator Coleman ran against former Vice President Mondale.

The thing that impressed me most about his race, as I watched the debate, was the sincerity he had when it came to present the reason he wanted to be a Senator for the people of Minnesota, along the lines of: I would like to go to Washington and do something. I watch you from afar and you seem to be fussing and fighting about everything. People are hurting out here and I would like to be a Senator who could go to Washington and work across the aisle and actually do something.

Tonight, at almost quarter after midnight, I would argue to the people who are listening at midnight and unusual races in the Nation. It was not what he envisioned. It is not what he hoped for. It is not what I hoped for. I hoped to be home right now. And we passed some legislation long overdue. But I guess from Minnesota is doing something that needs to be done; that is, standing up for his beliefs and his view of the Constitution.

I am confident that over time this exercise will be judged well in history. When there is an accounting in this period of the Senate, it will be one of the darker periods of the Senate and my hope is it will be a period that will not have lasted long because the future is why I am here. The future is why I and Senator Coleman ran. We have a lot of problems with Social Security and Medicare and a budget and a war to fight and many obstacles facing this country. It is going on with just this one. We really do want to help win this war on terrorism and make the economy better and stronger and fix the retirement problem the Nation faces.

We didn't ask for this. But if it came up or if Coleman ran. I think this may be one of the most important things we will ever do as Senators.

With that, I will yield to my good friend, Senator Coleman from Minnesota, and let him know in my opinion that he is doing something that is very important to the country by participating in this debate.

The PRESIDING OFFICER. The Senator from Minnesota is recognized.

Mr. COLEMAN. Mr. President, first, I thank my friend and colleague, the Senator from South Carolina. We came in in the same class. He served in the Congress. He is more experienced and understands the ways of Washington. He is about as real as he can be. People think of Washington as a phony town. I look at my colleague, my friend from South Carolina, and he is very real. That is a good thing.

In the discussion we have had tonight—now past 30 hours—I appreciate his effort to humanize the four individuals whose lives have been, in some ways, put on hold, their future put on hold, so to speak. No, they are not lemons and they are not simply numbers. They are people. They are moms, dads, fathers, daughters, sons. They are folks who have the capacity to have an incredible impact on our lives.

I was a former prosecutor. The Senator from South Carolina had that experience of doing some prosecution in his time. I can tell you, courts have an impact on your lives, on your family's lives in many ways. When I talk about it, if we move now into the morning hours, there will be votes coming up this morning—not tomorrow morning, this morning—to put a human touch on what this is about.

I think there was a mood or a feeling in the country at the time that we got elected that really did focus on getting something done. I was running for office and disaster assistance bills were being debated in the Congress. The House of Representatives was not. I can tell you my constituents were unhappy. They were concerned.

Last year there was a debate over a prescription drug benefit. I was running for office. There were still senior citizens forced to make the choice between prescription drugs and food. That is a bad thing. That is not a good thing. Hopefully, this year we are close and before we get out of here, assuming folks come together, we can get something done.

I think that was the tone. That was the message. By the way, I hope, certainly the message I heard—it should not be a partisan thing. There are a lot of things I heard in the debate tonight from my colleagues on the other side. I don't disagree with all of it. My colleague from Louisiana made a comment that we can't be divisive. She is right. I can tell you we are not trying to be divisive. Being divisive is when you do something that is unprece- dented and that is really what we are talking about today.

The fact is, one of the things we did kind of settle tonight is the filibuster.
There was a discussion all along about whether they are really filibustering nominees, a lot of discussion about filibustering. 

First, I say again I was disappointed what I heard tonight. If anything, it was bowing to my colleague from Louisiana saying filibuster was the successfulness of the truth. No. With filibusters we have stopped some very good legislation. We have used the filibuster in a very terrible way in this body. It has been used. We have filibustered to try to prevent antilynching laws coming into effect. We have filibustered civil rights legislation. We have filibustered against the poll tax. We filibustered about a lot of things and not often good. A filibuster is often to be ashamed of and this one is to be ashamed of.

My colleague asked what is the difference between filibustering legislation and judges? The difference is this little book, it is called the Constitution. That is the difference. The Constitution laid out very clearly when the President has certain powers. The President, by the way, doesn't get elected unanimously. He gets elected following the laws. Not everyone votes for him when he becomes the President. Once you become the President, you have certain powers and the Senate has certain powers and responsibilities. So it is a matter of seeing there is a difference between what one can do legislatively, using filibusters, and what the Constitution provides.

There is a reason why, in the history of this country of 214 years, up until this Congress, this body has never used a filibuster to stop circuit court nominees once they got through committee. That is the reality.

You can put all the charts up and all the statistics; that is the reality. If folks are listening, they have to be thinking there has to be some reason in going this way. Why folks is that done what is being done today. In part, it is because of the consequences. If we do that, what we do is we let a minority—that is what we have here because in each of these cases the judge is being filibustered, a majority of the Senators, Democrats joining with Republicans—yes, they are going to vote for them. We know that. That is why the minority is filibustering, stopping the vote.

So what you have here is a situation where the minority stands up and says: We don't support a person. Maybe it is because of a particular issue. Maybe the issue of abortion comes up again and again, which, by the way—and we will have plenty of time to talk about this—which is so interesting if you look at the record, the nominees who have been criticized or attacked because of their position on abortion, to a person have said that they would follow the law, that they would put personal beliefs aside and make a judge.

You choose a judge and what you ask of them over here is can you put your personal beliefs aside and make a judge—ment. That is what these folks have all said. Because they have those beliefs, the minority comes together and blocks them. What is the outcome?

This, I know, frustrates my friend from South Carolina and it frustrates many in this body. I campaigned and I wanted to be a charter member of the “Let's Get It Done Coalition.” Let us figure out a way to solve problems.

The Senator from New Jersey is right. We have to get an energy bill through. I hope we get it through. We have to do something about prescription drugs. We have to do something about jobs, and something about medical malpractice. We should do something about class action. Those efforts are not going to be allowed to come to a vote. Those are the jobs bills. Let us get it done. Let us put the bickering and partisan stuff aside and figure out a way to get it done.

The problem we have as we look to the future is who is going to get confirmed. If anybody with deeply held views is going to be filibustered by one side, now the Democrats are in the minority, there may come a point in my time where my friend from South Carolina and a Democrat President may propose a judge, and I will say to the body that I intend to use the same standard with a Democrat President. Are judges qualified? Will they commit to uphold the Constitution? Will they filibuster folks who will use the Constitution to create laws of their own beliefs. But if they agree to follow the Constitution and are qualified, then you support them. The President has that authority.

If you look at the history of the judiciary, it is kind of a balance. There have been Democrat Presidents and Republican Presidents going back over the last 12 years—8 years of Bill Clinton, 8 years of Reagan, 4 years of Bush, 4 years of Carter. There are about equal numbers of Democrats and the Republicans on the judiciary. It is balanced. What is happening here today is we are changing that balance. When we allow minorities to take hold, we change that balance. That is what happens.

In the future, you are going to get folks with strongly held beliefs and there may be a Ruth Bader Ginsburg, a liberal who went to my high school, I am not sure which school, in Farmingville, NY. I disagree with some of her reasoning on decisions. She is a good judge. She is bright. She exercises her judgment. I don't think in this environment if the Democrats are in charge that Ruth Bader Ginsburg would be confirmed. That would be said for America. That would be true with Scalia and a number of members of the Court.

What are you going to get? The best and the brightest are going to be cast aside because they may have a strongly held belief, which is what you see in some of the nominees here because a minority says we don't want them to come forward. A minority then filibusters in a way again in contradiction to article II of the Constitution. That is why we are raising this. That is what we are talking about and doing something that has not been done in history.

It is interesting. In terms of the Constitution, it is very clear. The President has certain powers—unlike, by the way, in European countries and in contrast to monarchs who would simply make treaties. Leaders in Europe could make treaties. Our folks said, no, the President’s power of making treaties is going to be contingent upon two-thirds of the Senate present and concurring. That is in the Constitution. We wanted to limit the powers of the President. When it came to appointment of judges, it is not two-thirds. Two-thirds is only for treaties. Very clearly there is a delineation.

For some reason to date, 214 years into our country’s existence, the standard has been changing. That is an important issue. As a former mayor, I have said I 1,000 times the best welfare program is a job; the best housing program is a job; the best health care comes with jobs. Jobs are important. I understand that. What is interesting is that the one side, now the Democrats are saying the other side is crying economic—by the way, never once mentioning 9/11. If you talk about what has happened to this economy, you have to talk about the impact of 9/11. You have got to talk about the recession that occurred before the President came into office. You have to talk about the impact of WorldCom and the impact of Enron.

The reality is now because of the policies, many of which this Congress passed, policies which cut taxes, which put money in the pockets of moms and dads which give businesses the incentives to invest, the economy is starting to move forward. The last numbers reported indicate almost 4 million new jobs, 7.2 percent gross domestic product growth, and over 200,000 more jobs in the last couple of months. The number is revised upward. Business investment is moving forward, in part in large measure because of the tax cuts. Yet the other side of the aisle says we want to talk about jobs. I am looking forward to that debate. But it is all important. The judiciary is important. What we do with judges is important.

In order for businesses to operate and for families to operate, you have to have a judiciary that works.
judge issues an opinion, there is a review process. It is reviewed by the circuit courts. The courts of appeal level, by the way, is right below the Supreme Court, which is one of the things I think comes into play here.

When you pick judges who may be on the circuit court, what happens is they then become a candidate for the Supreme Court. That is the real deal. They are all the real deal. Being a judge on the court of appeals is an incredible honor. It is a higher court than the circuit court. What is happening is the President has had 29 circuit court judges confirmed. We as of tomorrow will have six who have been filibustered. There are more in the hopper. That does not come from the last year. It is not a rubber stamp. I am not asking my colleague, the Senator from New York, to vote for these folks.

They have lost their jobs. In America today, things are so difficult dealing with jobs. For the 2,833 Americans who have lost their jobs during the last 30 hours, the average time for them to find a good job will be 5 months. Five months, 2,833 Americans will wait an average of 5 months to find another job.

It is not to say that it would be good for us rather than spending 30 hours plus on 4 people and not a single vote has been changed—4 people who have jobs, good jobs—that we would spend some time talking about how to create more good jobs.

I say this: The 30 hours we have spent, we would create 47,000 jobs as opposed to 4 people who have jobs, thirty hours of debate here in the Senate about programs.

For example, I think what we should have is an infrastructure development program where the Federal Government is involved in putting out money so the contracts can be let in the private sector so companies can build roads, they can build dams, they can build bridges, they can do water systems, sewer plants. We could spend some time here debating where it should go and how much we should spend. We know for every $1 billion spent, we would create 47,000 jobs. As to the people who have lost their jobs, I have already talked about parents, single parents, families. It is really sad to understand that 2,833 people are going to have to wait on average 5 months to find another job.

During the last 30 hours, 8,698 people have lost their health insurance. A man flew from Arizona to meet with me today. He graduated from Utah State University. He is a big man physically and a big man emotionally. He flew back here because he is now a physician. He was a star football player at Utah State University. He is a big man physically and a big man emotionally. He flew back here because he is now a physician. He was a star football player at Utah State University. He is a big man physically and a big man emotionally. He flew back here because he is now a physician. He was a star football player at Utah State University. He is a big man physically and a big man emotionally. He flew back here because he is now a physician. He was a star football player at Utah State University.

There are more in the hopper. That is very clear from my colleagues on the other side of the aisle. They will be filibustered. Out of the circuit court, the other side is saying 168 to 4, and some judge like wearing pink shoes and green shoes—no. The difference between circuit and district court judges is not the color of their shoes. The difference between circuit and district court judges is whether they are on a higher court. These are the judges who are right below the Supreme Court.

District court judges sit in a particular district. Circuit courts sit in a multistate area. They have a broader range and geographic jurisdiction. It is the higher court.

What has happened here is that the Circuit Court of Appeals is not the other side of the aisle. There are more in the hopper. That does not come from the last year. It is not a rubber stamp. I am not asking my colleague, the Senator from New York, to vote for these folks.

The reason you have seen all the charts on the other side of the aisle change is because this number. Mr. SCHUMER talked about bothers them a lot. Now they have come up with judges who haven’t even come before the Senate. They know only four have been turned down. But now they have the other thing. That there is going to be 12. We might wait and see what is going to happen. Why don’t we wait?

I say this: The 30 hours we have spent has so far been totally wasted. There isn’t going to be a single vote changed. Nothing is going to change. This has brought a lot of heat to the rightwing extremists. Many Senators— and I say many—certainly at least a dozen Republican Senators approached me and made different excuses and apologies for what is going on on the other side. They know this is very non-negotiable. But we are involved in this and we are going to proceed in the best and most dignified way we can.
How does a mother feel, does a father feel, who have children or no children, how do they feel going to bed at night recognizing if something happens to them or their family, they have no health insurance. What do they do? They do not get the treatment they need. They do not go when something desperate has happened to them. An automobile accident, they go to the emergency room. Preventive care, forget about it. During the last 30 hours, 6,698 people have lost their health insurance. Every one of the four have health insurance. They have jobs.

What does it mean not to have a job? Does it take away someone's dignity? Does it cause divorce, dissenion? Does it cause kids not to be able to go to school, to college? Of course it does. Does it cause crime? Of course it does. Does it cause our welfare rolls to go up? Of course it does.

But the 4, the 188 to 4, those 4 have jobs. They have health insurance. Why are we not here talking for 30 hours of constractive debate about doing something in this Nation about health insurance so people when they get sick can go to a doctor when they need preventive care. We are doing nothing about it. We have a trade deficit with China. They juggle their money, and it is continuing. We are afraid to take that issue up here.

My friend, the distinguished Senator from New York, Mr. SCHUMER, has attempted on several occasions to bring forth an amendment to stop the Chinese from playing with the numbers so that the trade deficit continues. But we have been unable to do that. Why? Because we are talking about four people who have jobs, who have health insurance, and could care less about the trade deficit.

In the last 30 hours, focusing away from problems that to some may not seem important—the trade deficit—we could talk about something that is really important. During the last 30 hours when we have been here talking about four people who have jobs, who have health insurance, and who have health insurance, and we have lost the trade deficit but are keeping us from talking about it, during that 30 hours the food stamp rolls in this country have gone up by 6,237. During the last 30 hours, 6,237 desperate people have signed up for food stamps saying, in effect: We are hungry. Government, will you help us buy food for our families? We have never done it before. But these are new people signing up for food stamps. Wouldn't it be good for us as a nation to spend some time talking about food stamps?

I could say without any qualms or reservations, the four people I have talked about here tonight and the majority has talked about here for a long time, they have not lost their jobs. They have not lost health insurance. They have not signed up for food stamps. But wouldn't it be good for us as a nation to spend some time talking about food stamps?

I can remember when I was a new Senator, the great Senator Pat Moynihan—his chair was right back there. There was a vote going on about the homeless. Senator Moynihan said to me: We have helped create the home- less by Federal policies where we have, in effect, emptied out our mental institutions, but we have done nothing to have community health centers. A lot of the people who are homeless are people who need medical attention. Well, food stamps, we need to do something about that.

About preventive care. In America today, as sad as it seems, the rich are getting richer. The rich are doing fine. The wealthy are doing fine. The elite of America are doing great. The poor are doing real bad. The middle class is narrowing all the time. We need as a nation to figure something out to do something about that. We don't want to live in America like many countries where you have the rich and the poor and no middle class. Why don't we spend 30 hours talking about four people who are well educated, have jobs, have health insurance, are not on food stamps.

During the last 30 hours, when we have been here in the Senate talking about these four people, we have had in America 36 mass layoffs. Employers have had 36 experiences where they said: We have to lay off more than 50 people. A mass layoff, by Department of Labor standards, is more than 50 people. During the last 30 hours, we have had 36 of those.

Why are we having so much trouble in America today keeping people working? Why is it taking so long for people who lose a job to find a job? I would think this Nation would be better served talking about jobs, not about four people who have jobs, who have health insurance, who are not on food stamps, who have not been part of a mass layoff in the last 30 hours.

On this Senate floor, during these last 30 hours, there have been seven attempts by the minority to extend unemployment benefits for people whose unemployment benefits have run out. Is that important? During the last 30 hours, while we have been here talking about four people who have jobs, who have health insurance, who are not on food stamps, who have not been part of mass layoffs, 13,194 people have had their unemployment benefits run out. The people who have lost unemployment benefits are real. These are not statistics that somebody made up. Let me read to you a letter I received from a woman in Las Vegas, NV. We will just call her Margo. I won't give her full name. She writes, October 10, 2003:

Dear Senator Reid:

On July 2, 2003 I became a displaced airline worker after 38 years as a TWA (now American Airlines) Flight Attendant. As a result of union concessions given to American Airlines, I received no severance pay.


Congress has passed new legislation which made December 26, 2003 the cut-off day for Temporary Extended Unemployment Compensation. After that date, there will be no more extensions. I will miss the deadline for Extended Unemployment Benefits by 5 days.

I am a single woman and a sole supporter.

I have no skills applicable to this difficult job market and my age makes an already bad job market even more limited. I will take time to learn skills and find a suitable job. Extended Unemployment Benefits will be needed for my very survival.

I ask you—

She has it in bold type—

please support S.1708

The one we have tried to move seven times to the floor in the last 2 days, objected to by the majority which will extend the TEUC [benefits] and provide additional Unemployment Benefits to those who cannot find jobs.

This is a real person. This is not someone who is made up. This is descriptive of the 13,194 people who, during the last 30 hours, have lost their unemployment benefits. That is sad.

I have another letter here from another woman. I will read the last paragraph:

...I am not writing this letter to get a hand out or sympathy. For every job that is open, 50 people apply. I have faith in God that he will give...
Gentlemen, this is the greatest country in the world. The middle class needs a break. I don't want a free ride. I just want a job or jobs that will supply the basic needs for our family.


Hon. HARRY REID, U.S. Senate, Hart Senate Office Building, Washington, D.C.


Congress has passed new legislation which made December 28, 2003 the cut-off date for Temporary Extended Unemployment Compensation (TEUC). After that date, there will be no more TEUC extensions. I will miss the deadline for Extended Unemployment Benefits by 5 days.

I am a single woman and sole supporter. I have no skills applicable to this difficult job market and my age makes an already bad situation worse. It will take time to learn skills and find a suitable job. Extended Unemployment Benefits will be needed for my family survival.

I ask you to please support Senate Bill S. 1708 which will extend the TEUC bill and provide additional Unemployment Benefits to those of us who cannot find jobs.

Thank you for your consideration in this matter.

Respectfully submitted.

Mr. REID. I would also say that this woman says she would take two jobs at minimum wage just to make things work. She has a husband who is disabled. That is what this is all about.

We know that during the last 30 hours people in America have had some problems. Two thousand eight hundred thirty-three people have lost their jobs; 6,968 have lost health insurance; food stamps increased by 6,237; the trade deficit has gone up $300 million; 36 mass layoffs, 13,194 people lost their unemployment.

We are not going to do it talking about people who have suffered as a result of suicide. These are real people. The distinguished junior Senator from Oregon lost a 22-year-old son about 2 months ago as a result of suicide. In this Senate Chamber, there are lots of people who have suffered as a result of suicide. My father killed himself.

We need to learn more about suicide. More than 31,000 people in America a year kill themselves. We don't know why. It is one of the leading causes of death for teenagers. Why are we spending time on these four people? Why couldn't we spend 30 hours trying to find out why people kill themselves? We don't know. And we, as a Congress, have trouble even having a hearing on it. The first hearing on this was held less than 10 years ago. We have done a little since then but not very much. This is desperate people. Many are trying to decide are they going to kill themselves today.

I met up here in my office today with a prominent person, a prominent name in Washington, D.C. She proceeded to tell me when she was 17 years old she tried to kill herself. She took a lot of pills. She described to me how she believed she went to the other side and came back. This isn't some nut. This is a good friend, someone who a lot of work, someone who needs to learn more about suicide. But we are not going to do it talking about these four people, these four people who have jobs, who have health insurance, who are not on food stamps, who have not been part of mass layoffs, who have not filed for unemployment benefits or bankruptcy.

During the last 30 hours—and this is very difficult to comprehend—during the last 30 hours, 10,000 people have died in Africa because of AIDS; 20,000 people in 30 hours have died in one continent because of AIDS; 70,000 people in a week. There are no vacations. Christmas, Thanksgiving, Easter, it doesn't matter, they keep dying. What about a debate for 30 hours recognizing what we can do to approach the needs of this worldwide problem which has an affect on America?

During the last 30 hours, Nairobi, Iraq, a suicide bomber, 31 killed; during the last 30 hours, Baghdad, Iraq, 2 of the 1st Armored Division killed; during the last 30 hours in Iraq, 37 attacks by terrorists, many of our troops not dead but injured; during the last 30 hours,
seven funerals of American servicemen killed in a helicopter downing in Iraq, seven funerals.

I understand how strongly people feel about these four people. I know how strongly people feel about this. But as I said yesterday, I don’t in any way suggest we are wrong. I believe as strongly as I can that we have done the best thing for America in turning down these people who would be bad for the judiciary.

I have been to juries lots of times. I have tried over 100 cases with juries. I have the greatest respect for our justice system. I have tremendous respect for judges who try cases themselves. But I also have some idea in my own mind, having been a trial lawyer, how important it is to have good people on the bench, especially the Federal bench. These are appointments for life. I think no matter how strongly people feel about this issue, and assuming for purposes of this discussion that we are wrong, which I disagree, but let purposes of this discussion that we are wrong, we have to talk about this issue, and assuming for purposes of discussion, don’t you think we have carried this thing a little too far? Don’t you think the same points could be made?

I have tremendous respect for my friend from South Carolina. I sit right here, just like this, scared to death 5 years ago. It was the first time I had ever sat this close, first time I ever had the job as the assistant leader of the Democrats. I was afraid to be here. The first big thing was the impeachment trial of the President of the United States. The Senator from South Carolina was one of the managers. He is a fine lawyer. I have great respect for him. He is a man of courage. He breaks from his party on occasion. I admire him for that.

But I say to my friend, I think we have made our points. I mean, you make a good case. But for Heaven’s sake, everything has been said by your side, everybody has said it. On our side, I think everything has been said, and everybody has said it.

Enough is enough. I think during the last 30 hours we could have been discussing issues that are more important, such as jobs, not the four people who have jobs, who have health insurance, who have not had to go on food stamps, who have not been part of mass layoffs. They have not lost unemployment benefits. They haven’t had to file bankruptcy. There are just so many priorities that we need to deal with that we have not done because of these 30 hours.

I say to my friends, we have had an equal discussion. I think that is good, that the two leaders worked that out, because it could have been a real nasty situation here without allocating the time in a balanced fashion. Maybe history books will look at this as something that has been important to the country. I hope so. But I have my doubts.

I think the more important issues are not those dealing with these four people. The more important issues are those dealing with the personal lives of other than those four people.

I would ask that we recognize that. I know the content of the character of the Senator from South Carolina who is leading the debate on the other side. I know he is a good person. I appreciate that. But I just say: Why don’t we all just wrap it up and go home. Come back and vote at 8:30. That is what the schedule is anyway. I think that would be better for the whole body.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. REID. Whatever time we have remaining, I yield to the majority.

The PRESIDING OFFICER. Time is yielded back from the minority side. The Senator from Minnesota.

Mr. COLEMAN. Mr. President, I have great respect for the Senator from Nevada and the deep concerns he has for a range of problems and concerns that he talked about. They are real. We are talking about more than just four people. We have to recognize that. It is not just about four people. For people who were confirmed and should be confirmed as court of appeals judges, we are talking about the lives of the folks about whom the Senator from Nevada was talking. That is what the courts do. It is not a personal thing. This is not a measure of whether these nominees have jobs, don’t have jobs. It doesn’t do anything else. This is about the third leg of the stool of Government: legislative branch, we are part of that; executive branch; and judicial. Those are the three legs of the stool that uphold the system we have.

It is not about four people. The Senator is right. There are so many important issues to talk about, such as AIDS. I came back from a trip to Africa with the majority leader and a group of my colleagues. We saw the devastation and destruction. We were there in South Africa where 5 million people are HIV positive, and 20,000 of them on treatment. We looked into the eyes of people who were dying and into the eyes of the doctors treating them. We are doing stuff about that; we are acting. We passed in this body a bill that provides over $2 billion—$2.4 billion, and you add in our commitment to the global fund. The President made a commitment of $15 billion, which is unprecedented and overwhelmingly we are acting on it.

It is not enough to simply lay out a litany of problems. Maybe I am more of an optimist and a realist. My favorite quote is from the first Prime Minister to serve Israel, who said that anybody who doesn’t believe in miracles is a realist. Goodness gracious, the world is not falling apart. There is a lot of hope and optimism. It is not just enough to talk about problems, as my colleagues on the other side of the aisle do. We can talk about the economy and jobs. What are you doing about it? That is the question. What is the plan? Their plan has been to roll back the President’s tax cut. That is what their nominees for President are talking about—rolling back the tax breaks we are giving to moms and dads, that we are giving to small business, accelerating depreciation, increasing the opportunity to expense capital investment and generating investment. The latest survey shows that business investment is up by 15 percent. So it is not simply to lay out a litany of woes, how terrible the world is. What are you going to do about it? That is what my colleague from South Carolina and I talked about in our campaigns. We want to do something about it. It is not enough to lay out just how the sky is falling and how the world is falling apart. We are trying to do things here.

We will have time to debate the economy. We have debated it, and we passed the third largest tax cut in the history of this country. And what do you see? The GDP is estimated at 7.2 percent, down from the third quarter. Employment increased by 126,000 in October, while the number of jobs added in September was revised to 125,000 from the previous estimate of 57,000. The unemployment rate decreased from 6.1 percent in September to 5.9 percent in October. It is still too high but it is decreasing.

There is a downward trend in jobless claims. The stock market, on November 3, jumped to a new 17-month high. We have trillions of dollars of new investment in this economy.

The tax cuts we passed here, which were opposed by our friends across the aisle, are responsible for the accelerated growth in opportunity. Spending by businesses grew at an annual rate of 11.1 percent in the third quarter, following an impressive 7.3-percent gain in the second quarter. Again, these things we have done that have encouraged investment and, in the end, generated opportunity and are generating the wealth for the American people. We have a plan. We have a job. We have a way to go. Absolutely. But it is not enough just to lay out the litany of how terrible things are. What are you going to do about it? One of the things we do about it is why this debate is important—it is to make sure we have a strong Government, that we have a strong judiciary. That is what this is about.

The fact is, when the President of the United States has 30 percent of his circuit court judges and court of appeals judges filled, it is unprecedented in 214 years of the history of this country, and it is wrong. The fact is, we should talk about upholding the Constitution.

I was a former solicitor general in Minnesota. I had the opportunity to argue before the highest court of my State many times. I have great love and appreciation for its constitution and history, and it is important. To the person who is unemployed and is getting stuff from that important investment. I say to that person that I am committed to doing everything I can, with every breath that I have, to make sure
you have opportunity. I am going to do that. At the same time, we have the ability to do more than one thing at a time in this body. I can tell you, we are debating at 1 in the morning, but to those listening, I hope this is an education.

Let's talk about the Constitution now. By the way, to my friends across the aisle, I noted his conversation with the doctor from Utah State, that he was concerned about health insurance, as he was about the other things that make a difference in the lives of the people. I think we have to do for them what we say.

The things that we have done to generate new investment and grow jobs, that helps people get health insurance. I ask my colleague, the distinguished minority leader, whether the doctor talked to him about medical malpractice, whether he talked to him about the impact that medical malpractice has on his ability to practice and to provide quality health care.

The cost of that, the way, on both ends, makes it more difficult for them to grow jobs. That is another issue that was filibustered by our friends across the aisle.

I think we came within a vote or two on one action—within a vote of changing that. The fact is, it is not enough just to talk about it. So it is important to talk about the Constitution. That is what we are going to do.

The fact is that all of us, when we got sworn in, took the Oath of Office upon which I am about to enter, so here we go.

That is a pretty strong commitment. It is not a partial commitment. It is not a 98-percent commitment, and it sure as heck isn't a 70-percent commitment. That is what we are dealing with today. My colleagues seem proud of that. You are even using the 98-percent figure.

Again, the reality is we are dealing with circuit court judges, and close to 30 percent have not been confirmed and have not been confirmed for 6 years. The Senate has the power to change that right now. I hope it is four but tomorrow it will be six. We know the other six are there. Unless my friends from across the aisle would say we are not going to filibuster another six, I will run the chart and say something different. We will change the chart in a way that is something different. We all know the reality. Let's lay it out here at 11:30 in the morning.

Twenty-nine nominees were confirmed and 32 were not. Just think, if we took the approach that it is not important to have 98 percent, I go before the Senate and said I was confirmed. If you told me I had a 98-percent chance of getting there and a 2-percent chance I would crash, I would not be flying.

The Constitution is wonderful. The first amendment says:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

I want those listening to think why is it that in the 214 years of the history of this great Republic, this great country, the Senate has not done what we are doing now. We are changing the system. It is in our hands.

The second amendment says:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, not be infringed.

Minnesotans are pretty strong about the second amendment. We like to hunt and we like our firearms. That is OK. I imagine if I went to a group of 172 using my colleagues' chart and said 168 of you are going to have the second amendment, or if I went to 41 and said we are going to give these rights to 29 of you. There would be a revolution.

The third amendment says:

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Can you imagine if I went to 41 Minnesotans and said 29 of you are going to have a third amendment, right, but 12 may be be Quartered without your consent. I don't think they would do it. They would say, where is America? There is a reason why we have fidelity to the Constitution.

The fourth amendment says:

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

Can you imagine going to 41 Minnesotans and saying 29 of you will have the right not to be subjected to unreasonable searches and seizures but 12 of you don't have that right? There would be a revolution. On and on.

The fifth amendment talks about the right against self-incrimination.

The sixth amendment says:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Can you imagine if out of 41 defendants, 29 were told you would have a right to the foundations, and 12 of you told 168 they would have that right, but not the other 4, there would be a revolution.

We are not just talking about four individuals here. We are talking about one of the foundations and the underpinnings of this Government.

I tell the young people listening in the Chamber, this is your future. The greatness of this country is built on its fidelity to the constitutional principles. It has allowed us to kind of grow into the greatest nation in the world with the freedoms we enjoy, and those freedoms we have enjoyed have triggered great economic opportunity—growing jobs. It is tied together and it is about growing jobs.

You grow jobs when you have a Constitution that is adhered to and you have stability. I am chairman of a subcommittee of the Foreign Relations Committee on war, peace. I can tell you that the concerns I have about some of the countries in Latin America have to do with whether they have rule of law. The reality is, if there is no rule of law, we see there is no investment, you don't grow jobs. So they are related. They are related.

In the end, I want to get away from just talking about the principles, these sorts of abstract constitutional principles. They are important and that is what we are here here, because they have fidelity there. We have to get things back in sync. We have to get away from this process, this unprecedented filibuster. By the way, those are not my words. Those are the words, as I understand it, of my colleague, the chairman of the Democratic Senatorial Campaign Committee. In an e-mail he had—well, we have a chart here—it says:

Senate Democrats have launched an unprecedented effort by mounting filibusters against the Bush administration's most radical nominees. Senate Democrats have led the effort to save our courts.

Unprecedented filibuster, that is what this is about. There has to be a better way. This is about being divisive. We have to get away from divisiveness, from everything being a battle. We have to get back to a fidelity to the principles that founded this great country. They are pretty clear. You don't need a Ph.D. or a law degree to understand the Constitution. It is pretty clear, pretty easy reading.

So that is what this is about today. In the end, it is not simply about four people; it is not about whether they have a job. It is whether, in fact, we uphold the obligation that we have, that we do our duty, that we do our job. In the end, we should simply give people a vote. If you think that they are good nominees, vote for them. If you think they are bad nominees, vote against them. But do not give them a vote. That is what we have done for over 200 years. To fail to do that will have terrible consequences.

Once last story before I turn the floor over to my colleague from South Carolina. It is about this building and a little bit of history from a number of years ago. There is an old Senate Chamber down the hall. When you walk out of here, it is maybe about 50 yards away. When we get sworn in here in the official ceremony, we then have a second official ceremony, the official ceremony, we then have an official ceremony, the official ceremony with the Vice President. It is a very special moment for all of us, especially for kids from humble roots. I am one of 8 kids,
and to have my mom and dad there was very special.

In that old Senate Chamber, in the old days the Supreme Court actually operated on the floor above the Senate. At one time, they were planning on re-modernizing the Supreme Court chamber. Some enterprising young architect decided that one of the pillars was a kind of holding it up didn’t need to be there. So they said don’t worry about that. What happened was that the Supreme Court came into the Senate, disrupting its work.

There is a moral to that story. If you displace or undermine one of the pillars of Government, which is what we are doing here, beware of the consequences. We cannot let that happen. These nominees—100 percent of them—deserve what we have done for 214 years: give them a vote, vote them up, vote them down, but give them a vote. With that, I yield the floor to my colleague from Carolinas.

Mr. GRAHAM. I thank the Senator. The Senator did an excellent job of trying to put into perspective what we are trying to do. Senator REID from Nevada has left. If anybody deserves a break as the new man, a couple of days ago, he spent about 8 hours-plus on the floor trying to prevent some legislation from coming forward that he thought was inappropriate. He was committed to making sure that the activity of the Senate did not go forward. He used his right to go and stay on the floor. The Senator for Nevada—

I don’t agree with him, but the worst thing I think I can say about Senator REID is that sometimes I disagree with him. He is a very nice man. I have enjoyed getting to know him over the years and serving with him. I appreciate the nice things he said about me.

The point is that we disagree on this, and I don’t question his motivation. I just question the judgment of what we are doing here. He described the United States problems in very graphic terms. God knows we have problems in this country, but I think it was used to try to illustrate or trivialize what we are doing tonight. If we have all these problems, why are we talking about this? I am going to ask the Supreme Court to look at this case that is going on before the Senate and see if the filibuster, requiring 60 votes, violates the terms of the Constitution because the Constitution requires a simple majority vote to confirm a judge sent over by the President.

Since we are going to have about 8 hours, I will save some of the time to talk about the history of the constitutional debate that went into that clause, why they picked a majority versus a two-thirds requirement that you have for ratifying treaties and impeaching the President. There is absolutely a rhyme and a reason for everything in this document.

There is no rhyme or reason for what is going on now, other than politics of the usual kind. If you listen to Senator REID, you would want to leave the country. I mean it is an assessment of the problems of the country, given to try to trivialize our objection to the Constitution being changed in an improper way. But it is so lopsided, in my opinion, that we are as Americans, because Americans, given all of our problems, are still the most hopeful people in the world. After listening to this rendition you would just wonder why everybody is not moving to Mexico. We are not leaving the country. Other people are trying to get into our country. One of the biggest problems we have that he did not talk about is illegal immigration. People are literally risking their lives to get to be part of the American dream.

I would rather focus on some of the positive aspects of our country, one of which is that we have a country to everybody and anybody, regardless of your status in life, where you can go in hard in court, and that requires a judge. Judges are picked by the President and confirmed by the Senate. The advice and consent clause for the Senate has never meant a minority telling the President what to do. It has always meant a vote on the nominee with a majority being required to put you on the bench, until now.

Let’s talk a little bit about some of these people, the four names. But there are many more affected by this than just four. This is the America I like to talk about, and relish.

Judge Brown. Justice Rogers Brown is one of the four who is being filibustered. She sits on the California Supreme Court. Senator SCHUMER said she is out of the mainstream. She is not of the temperament and the thought process, in his opinion, that makes her on the bench. She is the kind of person who she would do damage to the country if she served as a judge.

President Bush disagrees with Senator SCHUMER because he chose her to go on the court of appeals. Senator SCHUMER has an obligation under the Constitution to give his advice and give his consent and eventually vote. He doesn’t have the right, in my opinion, to band together with 39 other Senators and bring us to a screeching halt. No one has ever done that before. It is called a filibuster. The number of filibusters in the last 11 Presidencies is zero up until now.

Let me tell you a little bit about Justice Brown. No. 1, she lives in California, and she got 76 percent of the vote. In California you get to vote on a judge. You get to decide. You, as a citizen, get to vote to retain a judge once they become a judge. You actually get to express yourself. I am going to go out on a limb here and say no right-wing nut is going to get to vote on Judge Brown. It is called a filibuster. The number of filibusters in the last 11 Presidencies is zero up until now.

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would never, ever make it. This is just one
equitable me, it is impossible. This is just
us to this. I have a clear and more accu-
the Senate. I am very proud of my par-
te small. They worked hard. They did
How I feel I am the luckiest person in the
She is the daughter of a share-

despite the fact that the statements being
direct in, time and for the first time in my life
while I had attended segregated schools. I
set, and I welcome the opportunity for him
congressional Research Service. This is the
the Senate. I am very proud of my par-
can remember, I think it was the sixth
is not very good on affirmative action. Perhaps
She was born in California; she was born in
and for the first time in my life having
Senator SCHUMER said she is not very
The following:
there is no evidence that any of them have
very wrong. This is just what Senator COLEMAN
иться. The standing order for affirm-
much as possible, nonbiased and reliable, which
that has been in existence since just
the right to disagree and he has
the Senate. This rule has been in exis-
and, as much as possible, nonbiased and
called Senator COLEMAN and myself
ought to be understood as indicative of the
the fact the statements being mailed
never, ever make it. This is just
you do what Senator COLEMAN and my-
ed on all four of these judges, with more
It is that I am just like George Wallace in
It is just like George Wallace in
This is just what Senator COLEMAN and
myself have done. I grew up in a pool hall
beer joint is probably a more accurate
made it to the Senate. I am very proud of my
parents. They worked hard. They are
1955. I can remember, I think it was the
Sixth and seventh grade
argue if she was somehow in the right
come to a lawyer.
She moved to Sacramento when she was
She was a teenager. She got a BA in economics
California from Sacramento in 1974, her J.D.
from the UCLA School of Law in 1977. She
in this Chamber by the Vice President of the United
3 years ago, that was the moment that
There is nothing I ever
I have never had occasion in my almost
not to cast aspersions on any other
We have information available to us
This book is 1,524 pages, called "Sen-
and perhaps see to do so, to uphold that. I
the people in California wouldn't have
of 216 years. The Senate has
of the majority has expired. Who yields
the floor the second time yesterday, 4
are not coming here if you are an
that came to existence.
It is that we have done. That is what
or whatever that have not been added to this
are all the different precedents, all the
difference. Because I guarantee
But to say we are violating the rules of
of this body for 216 years pre-
the House and the Senate have the right under the
of the Constitution to establish their own rules. This is
I ask the Parliamentary
and legislation and policy matters. From 1987 to 1990 she
as department secretary and general counsel
and, as much as possible, nonbiased and
called Senator COLEMAN and myself
from the beginning of clause No. 2
Several of the members have with us have passed
of the Constitution that we each took the oath of
the full extent and in fact is just beyond the
governor Pete Wilson, who
treasure in the Senate. It
of all that time, they either are woe-
fact that they have the mis-
I will join with him going to the
court of this country, right up to
The PRESIDING OFFICER. The time
The Senate from Minnesota.

Mr. DAYTON. Mr. President, I was on the
floor the second time yesterday, 4
in the afternoon. I observed, then, the
time we devoted to this had al-
definitely become excessive as indicated by the
fact the statements being mailed
were becoming increasingly repetitive
and redundant. Now I see the added
problem is, as we go even further, they
become less and less factually correct
and reliable, which is bad enough under
normal circumstances. But the accusa-
tions that are being made are the most
serious accusations that can be di-
rected toward another Senator.

One point of factual agreement is we
all do take an oath of office when we
are sworn in here in this Chamber by
the Vice President of the United States
and we do swear to uphold the
Constitution of the United States. When
I took that oath 3 years ago, that was
the moment when I entered this
chamber for the first time in my
lifetime. There is nothing I ever
committed to that I take more seri-
ously, and I do my best, as I can po-
sibly see to do so, to uphold that. I
have never had occasion in my almost
career here to question or certainly
certainly not to cast aspersions on any other
Member for failing to uphold that
solemn oath as he or she believes it is best
performed.

We have information available to us
through the Library of Congress and
the Congressional Research Service
that has been in existence since just just
about the time the country began. We
use it as a learned and nonpartisan
and, as much as possible, nonbiased
and, as much as possible, nonbiased
that is best performed.

They list the chronological history of
efforts to limit debate in the Senate. It
goes back to the Journals of the Con-
stitutional Congress in 1778. It ref-
ereferences the very first session of the
Senate in 1789, which started adopting
these rules of various sorts. You can
read, and it sums up the sum-
marizes, I am sure you can go back to
the Journals and read in greater detail,
how this has been discussed, consid-
ered, debated, argued, voted upon,
modified, turned down by Members of
this body for 216 years.

When people are accusing us of act-
ing outside the rules and the proce-
dures of this body in doing what has
been done here and debated about here
for all that time, they either are woe-
fully ignorant of the facts or they
know the facts and they are being,
I think, extremely irresponsible to the
American people, if they have the mis-
fortune to be watching this at this
hour, to lead them to believe we are
doing something here which is any-
thing other than our right, well estab-
lished in 216 years.

If the Members on the other side
want to disagree with what we are
doing, or why we are doing it, or who
we are doing it for or against, they are
perfectly within their rights to do so.
But to say we are violating the rules of
this body is not true. To say we are
violating the Constitution of the
United States is a heinous fault and I
will get with the other 99 Senators
in South Carolina, I will join with him going to the
courts of this country, right up to
the Supreme Court and let's get the
ruling he wants. Because I guarantee
what it will be. Courts have ruled for
the last 216 years the House and the
Senate have the right under the
Constitution to establish their own rules.
That is what we have done. That is
what this book is about.

This book is 1,524 pages, called "Sen-
ate Procedure." These are all the
precedents and changes in the rules
and modifications and the like. It only
goes up to about 1992 because over the
last 11 years the chief Parliamentary,
who is the editor of this book, hasn't
updated any of those. And it is highly
likely another 500 pages or whatever
that have not been added to this that
are all the different precedents, all the
different changes. Any time any one of
us thinks anybody else here is acting
down to these, we have some-
bodies right there. Every minute we are
in session we have somebody we can
ask and get a factual answer, an impar-
tial and nonpartisan answer, and that
is the Parliamentary.

I ask the Parliamentary if anything
in these books for 216 years pre-
cludes our right to do what we are
doing and if it is not within the rules of
this body. I think it is shameful that
anybody states otherwise.

One important rule, in 1902, was
adopted. Rule XIX was amended by
inserting at the beginning of clause No. 2
the following:

No Senator in debate shall, directly or in-
directly, by any form of words impute to an-
other Senator or to other Senators any con-
duct or motive unworthy or unbecoming a
Senator.

I can't think of any imputing of any
conduct or motive more unworthy to a
United States Senator than the viola-
tion of the U.S. Constitution and violation
of the Constitution that we each took the
oath of office to uphold. To do so
without basis in fact is just beyond the
pale.

The Senate from Mississippi, the
chairman from Mississippi, earlier
today said he had his disagreements, he
thought we should review these mat-
ters in the Rules Committee. I laud
him for saying so. He doesn't have to
agree with what we are doing. He has
even been with us. Well, I do agree that
he has every right as the chairman of
the committee to go through that process
and I welcome the opportunity for him
to bring in constitutional scholars, the
Congressional Research Service, the Library of Congress authorities, and go through all this and consider other questions about whether the minority should be able to hold up the nominations of some 60 nominees of a President by way of the roadblocks they have in the majority; as the Senator from Florida suggested, whether these should be lifetime appointments. By the time he passed away, Thomas Jefferson was opining that they should not be the federal judiciary.

Let's get the facts. Let's ask the Library of Congress, the Congressional Research Service, to tell us if this is wrong. It's on their stationary that up until 1917, when the Senate first adopted a cloture rule, until 1949, I read directly:

...cloture could be moved only on legislative measures and nominations could not be subjected to cloture attempts.

But then the Senate rule was changed, by the Senate. Following the rules and procedures of Senate they changed it so these steps could be taken with regard to nominations.

I am on page 3, reading again exactly:

Even after Senate rules began to permit cloture on nominations, cloture was sought not uncommonly. In 1967 the Senate most judicial nominations on which cloture had been sought have been to judicial positions. They have a table which says between 1967 and 2002 on judicial nominations, cloture was invoked not uncommonly. Executive branch positions, cloture was invoked 10 times, not 8 times.

Moving ahead:

Cloture was sought on no other nomination until 1990. Subsequent to 1980, of the 12 nominations on which cloture occurred during the 103rd Congress, ten were for executive branch positions. Of the 4 nominations most judicial nominations on which cloture had been sought have been to judicial positions.

They have a table which says between 1967 and 2002 on judicial nominations, cloture was invoked not uncommonly. Times. Executive branch nominations, cloture was invoked 10 times, not 8 times.

It is pretty easy to get this information. If somebody thinks they are just making it up, they are wrong. They should make that case. But otherwise people are making up misrepresentations and misinformation. It is outright lie doing a great disservice to this body and to the credibility we all strive to maintain.

One of our predecessors from Minnesota, a man I worked for back in 1975 as a law aide, Walter Mondale, former attorney general of Minnesota, served for 11 years as a Senator. He said one of his proudest accomplishments was modifying the procedures under Senate Rule XX, from two-thirds to three-fifths of Senators. On behalf of the change, Senator Mondale said at the time as sponsor of this resolution the proposal was a reasonable accommodation of the right to debate and the right to decision that this might be harmonized in such a way as to protect action.

Anybody in this body has a perfect right to disagree with that statement by Senator Mondale with the actions of the majority of his colleagues in that session to make this modification and to leave this rule as it essentially is today. But to just imply it is a violation of the rules in what we are doing—implying we disrespect the body and the purpose of the established procedures and upholding the best interests of this country for 216 years—by people who are unfit to take the job who are unfit, they are unqualified, they have shown they are likely to abuse their authority as circuit court judges who advance an extreme rightwing agenda and not in the best interests of America.

The Republicans so desperately wanted this talkathon to be a made-for-television movie they attempted to coordinate their efforts with FOX News, the providers of fair and balanced Republican television. It comes from the distinguished majority leader's office, one of his staff people. It says: "It is important to double your efforts to get your boss to S. 230 on time. FOX News channel is really excited about this marathon. We would love to open with all of our 51 Senators walking on the floor. The producer wants to know we will walk in exactly at 6:02 when the show starts so they can get it live to open Brit Hume's show. If not, can we get a time for the walk in start?"

That hardly sounds like a sincere effort to me to get something done.

I hear the outrage about how we are playing politics. What is this? If that is not raw production, I have never seen it. Line up. I wonder if the suit colors and ties were described at the same time. It is good to see a bunch of penguins walking down here 51 deep.

FOX News presents—it says 30 hours. They made a mistake. They didn't know how enjoyable this was, that we were going to go on with this. The passion are so high there are things said that are just not accurate.

I point to this hallowed document, Senate Manual, which talks about the Constitution of the United States. It is part of the actions of the Senate in forming the powers of the President. He shall have power by and with the advice and consent of the Senate to make treaties and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of United States."

Advise and consent—it doesn't say consent and advise. It doesn't say just approve them and we will talk about it later. We are maintaining our responsibility to the Constitution to a "". It is too late to ride roughshod over it and maybe perhaps find another way to curtail the appropriate dissent of the minority as has been evidenced so many times in the past.

I think about what is going on here after a visit I made yesterday along with others to Walter Reed Hospital, and I met a young man there. I knew he was in a ward in an area—a single room but in an area where the amputees are cared for. I didn't want to really inspect him with my eyes. I reached out my hand to shake his hand, and I wound up feeling a cloth and nothing in the cloth. His hand was missing. On the other side of his arm. He is about 23 years old, full of life. My guess is 23. I know he is young. He was positive and said, I am going to get on with this. We had the good fortune to have former Senator Max Cleland from Georgia who lost three limbs in Vietnam and was made out to be unpatriotic in the last election. Figure that one out. But he had the good judgment to ride in there in his wheelchair and look at this young fellow who had been the way he is and about 4 months in the Reserve; no hand on either side, and no arm on one side. He told this young man, Have courage. There is life for you. And then he gets visited by Danny Inouye, Congressional Medal of Honor winner, missing an arm. He comes in to say to this young fellow, There is life out there. You can accomplish something.

And here we stand on this nonsense. Why aren't we talking about what the problems are in Iraq and how we solve them?

Let me read to my friends on the Republican side what a very distinguished Republican Senator said, John McCain.

Few had his experience in military matters in a war. He said:

The Pentagon's proposed withdrawal of U.S. troops in Iraq would be an irrational move. "If anything," said McCain, a senior member of the Senate Armed Services Committee and an outspoken critic of the administration's postwar policies in Iraq, "the United States needs to increase its troop presence in Iraq, specifically special forces and Afghan-speaking intelligence officers. The attacks are up. The wounded Americans are up. Killed Americans are up, and the Pentagon announced a withdrawal or decrease in the number of American troops. It is not reasonable or rational," says John McCain.

I agree with him. Why aren't we discussing that? Why aren't we having a marathon, 30-hour marathon, and talking about the war, talking about what...
is going on and talking about what we do to make it easier on those to make them safer, and send the 10,000 or 20,000 additional troops John McCain says are necessary and I believe are necessary? I am no military expert. I spent 3 years in the Army. I was a corporal during World War II. But I know we need more there. We have to help our troops.

Do not talk about whether we are violating the Constitution. Where is your oath? Is it in your heart? It is the process we are talking about. Go to the Supreme Court. Have a great trip. We will escort you there. Take and read the Constitution—just like you can, just like I can. Forgive me—just like the Senator from South Carolina can.

That is what we ought to be talking about and not talking in front of the American people about the process and about how fair we have to be with judges we think are unfit and we are going to talk about it. Just as we were threatened that debate that went on, we are not going to go away, as I heard the Senator from South Carolina say. We are going to stay here. We are going to do this, and I am going to the Supreme Court. Have a good visit. The fact of the matter is it is very clear what our responsibilities are.

I talked about my trip yesterday to Walter Reed. On Monday, I made a trip to the Sacred Heart Cathedral in Newark and watched a young man who was on a Chinook helicopter. By the way, the fellow I saw in Walter Reed was not the American amputee. The other fellow, burned, broken bones all over his body, he was in the Chinook helicopter also. It wasn’t many days ago this fate befell them, and they were already in the hospital here.

But Sergeant Joe Perez—25 years old, wife, little baby girl, mother, father, brothers—was buried at the Cathedral in Newark. He was one of the 16 who perished when the Chinook helicopter went down.

We had a brief moment of conversation. I said we would try to be of help to the widow and the family. She is a very young woman totally overcome by the loss of her husband.

This was a week for me that brought home reality. I saw it when I served in the Chinook helicopter here. I saw it when I served in Walter Reed. We have set in motion something I don’t know of another way to make this go forward. The Constitution says advise and consent. It says nothing in the Constitution of history where the advice and consent clause has been the Senate speaking as a majority. What hurts the most about the filibusters, which are unprecedented and are harmful to the country, is every nominee that is being filibustered and are harmful to the country, is every nominee that is being filibustered.

We ought to make a pledge right now that we will do another 30 hours, or we can start right now. If we talk about the Iraq war, talk about our people, talk about how we are going to get them home and talk about how we are going to end it; talk about how we are going to justify to the American people why we are spending $20 billion for the reconstruction of Iraq but we can’t rebuild schoolhouses filled with asbestos or otherwise.

The PRESIDING OFFICER. The minority’s time is expired. Mr. LAUTENBERG. I yield the floor.

Mr. GRAHAM of South Carolina. Mr. President, I thank Senator LAUTENBERG for his services to this country. Serving in World War II is a big deal no matter your rank. My dad was a corporal, too. If you think it is a waste of time, have your say. This is a huge deal. The Democratic leadership and the members of the Democratic Party have set in motion something I don’t know how to stop. I had a chart that showed us that only once in 11 Presidencies we had 2,372 people confirmed and not one person filibustered. You decided to do something different. It bothers me as much as our response bothers you. The people being filibustered are very qualified people, in my opinion, and you certainly have your right to disagree.

I don’t believe the Constitution gives the minority of the Senate the right to advise and consent. We have 214 years of history where the advice and consent clause has been the Senate speaking as a majority. What hurts the most about the filibusters, which are unprecedented and are harmful to the country, is every nominee that is being filibustered by our friends on the other side has enough votes to become a judge. Literally a minority of Senators have taken it upon themselves for the first time in the history of the country to make sure a majority of the Senate cannot vote to confirm a judge by using a rule of the Senate.

I would like the Supreme Court to hear that case because I don’t know of any other way to make this go forward.
Chances are the Supreme Court may very well say this is not something we decide because you are the Senate. We are the Court. These rules are your rules. They may well say that, but I feel a need to push this as far as you can to get past and try to move on and have a better future.

The future of the Senate when it comes to judges is going to be lousy. We have four filibusters going on with another seven or eight to come. But if we behave with each other like this, we will have hundreds before long. As time marches on, we will have a lot of people caught in this vise.

Senator COLEMAN from Minnesota made a great point in my thought. Justice Ginsburg would not have a prayer because she has a liberal view of the law and a lot of people on this side voted against her. But they voted and she won the day. Justice Scalia is vilified by those on this side.

A lot of people on the Democrat side voted against him. But he won the day and he is sitting on the Court. That is the strength of the Nation. When you have someone like Ginsburg and Scalia in a room having to talk to each other trying to find a way to move forward in terms of judges, it is going to be very disappointing because good people are not going to put themselves through this.

Justice Brown will be filibustered just as sure as I am standing here. She is an African American who sits on the Supreme Court of California. She has authored more majority opinions in California than any other justice. I gave a rundown a while ago about her story coming from a sharecropper family in Greenville, AL. She is the first African American to sit on the Supreme Court in California, getting 76 percent of the vote in her last election. She has now a record in terms of judges in California. My argument is that no one would get 76 percent of the vote in California if they were the rightwing ideologue that the other side is describing.

I am not here to convince Members that I am right. I am here to set the record straight in terms of why I believe President Bush picked a good person. If you disagree, vote against her.

Don't allow the Constitution to be changed in the way you are doing it because you are putting the country in constitutional and political quicksand. Members will regret it down the road. I know the country will regret it.

Novelties going on here. I will put a human face on this. Justice Brown has had a pretty rough time of it in committee. She has been very successful with her career in California. She has been successful in every endeavor she has been involved in. She has a variety of capacities to the point that people want to promote her and the three-fourths of the citizens of her state think she has done a great job. But she comes to the Senate and she runs into a buzz saw because she is conservative. Apparently that is a crime.

This is a cartoon by the Black Commentator, a paper. The first amendment allows people to talk about public figures. This is just a little bit of what it is like to be in the environment our friends on the other side have created. This cartoon has “Welcome to the Federal Bench, Ms. Clarence, I mean, Ms. Rogers Brown. You'll fit right in.”

And it is a caricature of President Bush and a racial stereotype, an offensive drawing, of Miss Brown. The people in the choir are clapping, as Justice Thomas described picture which is offensive, I think—Colin Powell, African American, Secretary of State, a great general and somebody I admire, and Condoleezza Rice, our national security adviser, another African American who I think will help us do a good job in Iraq. This has been a miserable experience for this lady. I am very sorry she has had to go through this.

Over 50 percent of the Senate will vote for her. The future for her comes. Pickering, Owens, Pryor, all have received over 50 votes but we cannot get to passage because the filibuster rules require us to get 60 votes. Therein is my problem. The Constitution does not require 60 votes to confirm a judge in places where two-thirds are required. The Constitution says you will advise and consent by majority vote in the Senate.

They are using a procedural device, the Democratic Party is in this case, to block a vote on what I think are well-qualified people. No one else in the history of the country has done this before, Republican or Democrat. This is the first time someone has come out of the Judiciary Committee with a majority vote who cannot receive an up-or-down vote. There are four of them with a bunch more to come.

I give no apology for wanting to try to do something about this because, as sure as we are here tonight, there will be a Democratic President come later on and that person will make a recommendation to this body, a nomination to this body, and if we do not change the way this trend is going, it will be a miserable experience. We will get bogged down and we will never be able to move forward as the Constitution has envisioned. This has worked well for 214 years. This is not time to change it.

Senator Lautenberg was right, there is a political dynamic going on here. I am sure Republicans have been abusive in the past in terms of the way the judges have been treated. I have heard a lot about that. Like Senator COLEMAN, I am new to the Senate. I would rather not perpetuate that problem. I would like to be someone who solved that problem.

We have some quotes from the past that I will read quickly. Senator LEAHY and others that we will read later on, they have changed for some reason. Now they are going into the past and saying, we are doing this because you did that. Where does this end? This is a fact.

From the e-mail:

"Senate Democrats have launched an unprecedented effort. I will stop right there. I think that is a true statement. I don't believe Senator CORZINE is misleading the donor population. I think he is trying to tell them, folks, we are doing something nobody else has done before. This is unprecedented. You need to pay attention. You need to look at your Democratic Senators, pay attention to what we are doing, because we are taking a step no one has ever taken before. What is that step?"

By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.

This e-mail is designed, quite simply, to let people in the Democratic Party know that the Senate Democrats have done something different, something unprecedented, and they are filibustering the President's nominees because they are radical. You cannot send this e-mail out to collect money and spend 32 hours denying you are filibustering anybody. You are filibustering judges in an unprecedented way.
And they are the Bush administration's nominees. The question is whether or not they are radical.

If you think they are radical, vote against them. I don't believe Justice Brown is radical. I don't think 76 percent of the people in California have voted would have voted for her if she was radical. I think the attacks against her have been radical. But that is just my opinion.

This e-mail clearly establishes the fact that the Democratic Party has made a calculated effort in the Senate wing of the Democratic Party to do something different, to stand up against President Bush. They are blinded by the political moment. If we continue down this road, there will be more e-mails such as this on both sides of the aisle and it will be a disaster for the Constitution.

There are men and women serving in Iraq. There are people putting their lives at stake for this country. God bless them. I don't think anyone could make that argument—just let this go and make like it is no big deal because I think this is a huge deal.

I yield to the Senator from Minnesota.

Mr. COLEMAN. Mr. President, following up on the comments of my friend and colleague from South Carolina, you have to ask yourself, 214 years and the Senate has not done this, has not stopped a judicial circuit court nominee by filibuster. That is a fact. My colleagues on the other side can argue with charts but that is the reality.

You have to ask yourself, for 214 years was the Senate a rubberstamp for the President? I don't think so. I don't think anyone could make that argument. What you have is the reality that the Senate was exercising its constitutional responsibility. And doing it in a constitutionally responsible way.

That is what is important, doing it with respect for the Constitution, respect for the authority of the President to set forth the nominee, respect for the obligations upon the Senate to advise and consent by a majority vote. Again, the Constitution, article II, says treaties need a supermajority, not a simple majority vote. What we have here is the minority saying we are not living by majority votes when it comes to judicial nominees regardless of what is in the Constitution. That is unfortunate. It is more than unfortunate. It undermines the principles upon which this democracy is based.

My colleague from Minnesota, the senior Senator from Minnesota, talked about the temptation of precedent. We have done it before.

Here are the facts. This is a listing of judicial nominations subject to cloture attempts from 1968 to 2003. I will go through every one of them. The first one is Abe Fortas, Chief Justice.Closure was rejected. I will come back to whether that was even a filibuster. That was not a partisan filibuster. In fact, it was a bipartisan effort of ethic conservatives Fortas but it was not a partisan filibuster.

A letter was sent to John Cornyn, chairman of the Subcommittee on the Constitution from the former Senator from Michigan, a predecessor of my colleague. He is sitting there, talking about the Fortas nomination and basically saying that it was not a filibuster.

What happened, in a letter he says, while a few Senators might have contemplated use of the filibuster, there was no Republican Party position that it should be employed. Indeed, the Republican leader of the Senate, Everett Dirksen, publicly expressed his support for the Fortas nomination shortly after the vote on the cloture of his choice. Our position in 1968 to the Fortas nomination was not partisan. Some Republicans supported Fortas; some Democrats opposed him.

Go through every listing on this chart. One of the cloture attempts may have been rejected, may have been invoked, may have been withdrawn, but every nominee got a vote. That is what this is about. Vote them up or vote them down but give a vote.

We have the first time in the history of this body basically saying, regardless of what is in the Constitution, regardless of the language of the Constitution that makes it clear that the advice and consent is based on majority, they are changing the rules of the game. The argument is that these candidates, these nominees are outside the mainstream. What is the mainstream? Who is the mainstream? Priscilla Owen received 84 percent of the vote in the last election for the Texas Supreme Court.

I have to tell you, I would love to see an 84 percent in any election. Just about anybody in this body would love to see 84 percent. They would tell you that is mainstream. That is mainstream. That is the "wholstream." What is left is extreme. And that is what you have.

Bill Pryor, 59 percent in his last election for Alabama Attorney General—59 percent. Janice Rogers Brown received 76 percent in her last election to the California Supreme Court.

I would note one of the Senators from California, Mrs. Boxer, received 53 percent. Who represents the mainstream in California? Seventy-six percent of the vote. The other Senator from California, Mrs. Feinstein, by the way, former mayor of San Francisco—I am a former mayor. I have great respect and appreciation for mayors. It is not a job. The other Senator, I do not always agree with her, but she is a great Senator. She got 56 percent of the vote. Janice Rogers Brown, who supposedly is the extreme, got 76 percent in her last election for the California Supreme Court. That is mainstream, not extreme.

Charles Pickering was confirmed to the Federal district court in 1990 by the majority leadership and 13 Democrats. What that means is no one objected; everybody agreed. And today he is described as extreme.

If I could go through some of the candidates, Priscilla Owen—a whole bunch of nominees and if you are mainstream? I am not sure what they are talking about. She has served in the State of Texas on the highest court. She has been given the support of 15 past presidents of the State Bar of Texas, a bipartisan group. We are talking about the folks who know them best.

Justice Owen was unanimously rated as well qualified by the American Bar Association. Apparently, this unqualified rating of the American Bar Association is out of the mainstream as well. I would submit, by the way, the American Bar Association is not a conservative interest group. I do not know who the members are, but I have to guess it is a bipartisan group. I have to guess that there are some Democrats in that group.

It is clear the so-called mainstream being portrayed by some in this body is not only an incorrect reflection of the American Bar Association, but is an extreme which flows only in the direction of special interest groups. That is really what this is about.

You have to go through the records of these folks. I went to law school. Senator Graham went to law school. I went to the University of Iowa, did fairly well, and served 17 years in the attorney general's office, and solicitor general, chief prosecutor of the State of Minnesota. But you would love to have qualified credentials of the folks here. The folks the President has nominated. These are quality, quality people.

Then you read the statements of some of their supporters. Mary Sean O'Rally, lifetime member of the NAACP and a Democrat:

I met Justice Owen in January, 1995, while working with her on the Supreme Court of Texas Gender Neutral Task Force. . . . I worked with Justice Owen on Family Law 2000, an important state-wide effort, initiated in great part by Justice Owen. . . . In the almost eight years I have known Justice Owen, she has always been refined, approachable, even tempered and intellectually honest.

That is what you want from a judge. That is what you want from a judge. You do not want fiduciary on a single issue. What you want is the judge to be tempered, to be intellectually honest, to apply their best judgment, to interpret the Constitution.

Raul Gonzalez, former Democratic judge on the Supreme Court of Texas. In Texas they select their justices. In the elections, Democrats run, Republicans run. Senator Cornyn, one of our colleagues, also elected with us, is a
former member of the Texas Supreme Court, former attorney general.

Raul Gonzalez, former Democratic justice on the Supreme Court of Texas:

I found her to be apolitical, extremely bright, diligent in her work, and of the highest integrity. I recommend her for confirmation without reservation.

John L. Hill, former Democratic chief justice on the Supreme Court of Texas:

After years of closely observing Justice Owen, I can assert, with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well reasoned, and that her integrity is beyond reproach.

That is what it is about: integrity beyond approach, opinions that are fair, well reasoned. That is what you look for in judges. You cannot allow a minority of folks in this body to toss aside the label mainstream, fueled by folks with special interests. They are kind of pounding the drum, and people follow that drum.

But you have to ask, who is in the mainstream? Who gets overwhelmingly elected by the people of their State, who receive bipartisan support?

Another former Democratic justice on the Supreme Court of Texas, Jack Hightower:

I am a Democrat and my political philosophy is Democratic, but I have tried very hard not to let preconceived philosophy influence my decision on matters before the court. I believe that Justice Owen has done the same.

That is what you want. The reality is, judges are people. They have heart and soul like everyone else. If you are a defendant in front of them, you may worry about that. But they are people. They bring a life experience. They bring a perspective. They bring a philosophy. You cannot divorce that. You do not divorce that. Some may have been active in politics. There is no question about that. They bring perspectives they are not issued centrally. They have not been lobotomized. They bring a life experience and perspective.

What we ask of them is to do what these folks—their colleagues, by the way, are from a different political perspective—say they do. We look to their ability to be well reasoned. We look at their ability to have integrity. We look at their ability to put aside the preconceived notions and simply say they will examine each case on the facts, and apply the law, the law that is done by—yes, that is what we do. That is what legislators do. That is what you are looking for.

Former law clerk of Justice Owen, Lori Plager:

During my time with her, I developed a deep and abiding respect for her abilities, her work ethic, and, most importantly, her character. Justice Owen is a woman of integrity who has a profound respect for the rule of law and our legal system.

That is what it is about: respect for the law and the legal system. To be described as extreme, when you have this body of opinion of folks who know you, who have worked with you, who have been your colleagues, who sit by side, who have watched you process and reason, and then to render judgments, when they are willing to put aside the preconceived notion of and what we are asking for is our colleagues to put aside the politicization of this process, put aside what we have done. Do not go back on a history of 200 years. We have not allowed this to happen on the floor of this Senate. We do not have to throw the floor of this Senate by virtue of filibuster for 214 years.

Hector De Leon, past president of Legal Aid:

As the immediate past president of Legal Aid of Central Texas, it is of particular significance to me that Justice Owen has served as the liaison from the Texas Supreme Court to statewide committees regarding legal services to the poor and pro bono legal services. Undoubtedly, Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit.

That is what you are looking for. You cannot get any better than that. Do not allow folks to wave a flag and say "extreme" when you have folks who in their own community, overwhelmingly—overwhelmingly—voted, re-elected her to the Supreme Court of Texas in overwhelming particularities, and her colleagues coming forth and saying: Hey, this is a woman who is right. This is a woman who is talented. This is a woman who will not put the life experience she brings, perhaps preconceptions about issues—you have folks saying she will do what judges need to do. That is what it is about.

Before the night is over, we will talk about others. We will talk about Bill Pryor. We will talk about Judge Kuhl. We will talk about Miguel Estrada, who has withdrawn. We will talk about Judge Pickering.

But the common denominator in all of these, what the President has done is he has exercised his authority under the Constitution to nominate people who have integrity, who have the qualifications, who have the support of those with whom they have worked, and who, in many cases, when they have had to go before the people of their State, have been overwhelmingly endorsed as being part of the mainstream, not the extreme.

The PRESIDING OFFICER. The Senate majority’s time has expired.

The Senator from Michigan.

Mr. LEVIN. Mr. President, how I wish we could take a week’s worth of time to debate the issues which are of some critical importance to the people of my State; namely, the loss of manufacturing jobs and the problems we have in Iraq, issues, the economy in general, job loss, particularly, and loss of our troops abroad dominate the minds and the hearts of my constituents.

But the majority has the power to take the Senate on a fruitless cruise. That is what we are about: rehashing the merits and demerits of 4 of the 172 candidates who we have voted on in this Senate. I know these numbers are not ones with which are relevant to the majority. I can tell that by the fact they have attempted to come back with a whole bunch of other numbers.

When this debate is over, when the dust is settled, what I think most people will remember, at least in terms of this debate, is that the filibuster was being tied up, night after night, with complaints that 4 of 172 judges have not been confirmed.

Mr. President, 168 is a number which is impressed on the minds of people who have watched this debate and heard this debate. The number four is a number which people now understand. Maybe the 98 percent confirmation rate is not quite at the same level as these 2 numbers, but those numbers—168 of President Bush’s nominees confirmed by this Senate, 4 have not been confirmed by this Senate—those numbers are very much emblazoned in the minds of people across this country.

In rejecting these four, the Senate has exercised its role according to the Constitution that gives us a check and a balance, according to the rules of the Senate.

I want to go back a little bit in history. We have heard quite a bit tonight that this is the first time a filibuster has been used against a judge on the floor of the Senate. I will get into this in a little more detail. I hope to have a little time to talk about the economy and manufacturing job loss, and other things which are very much on the minds of my constituents.

But since the majority has decided to set aside this time, mainly to debate the issues that only the judges who have come before us have been confirmed, and have now suggested, over and over and over again, that filibusters have never been used relative to judges, this is the New York Times headline of September 25, 1968, relative to Abe Fortas: “Critics Of Fortas Begin Filibuster. . . . “ This is what the Senate Web site says about that filibuster. This is not a Democratic Web site. This is the Senate Web site for the date October 1, 1968, “Filibuster Derails Supreme Court Nomination.” That is a Senate Web site.

Folks on the other side, our colleagues on the other side, are saying: Well, what about circuit court nominees? We sort of hear those words put in there when the statement is made that filibusters have not been used to derail judicial nominees. Sometimes the words “circuit court nominees” are put in there instead of “judicial nominees,” sometimes the words “circuit court” are left out, sometimes they are included.

If circuit court nominees have not been derailed by filibuster, it is not for
The complaint of our colleagues on the Republican side, it seems to me, more accurately would be: Well, we have tried filibusters many times, but we have not succeeded. You folks are succeeding.

This is the complaint when you strip away the rhetoric and look at the reality. If filibusters have not succeeded in delaying circuit court nominees of Democratic Presidents by Republican Senators, it is not for lack of trying. Because what was being filibustered over and over again with Clinton circuit court nominees. The difference is, the filibuster effort did not succeed because the supermajority, which was required during those filibusters, was achieved for those nominees. Our Republican colleague here in the Senate was pointing out the only power that was left to Republicans was the use of a filibuster and forcing a cloture vote. And I emphasize, this is on a nominee who had the votes. It was with the knowledge that there was no supermajority to an up-or-down vote as a judicial nominee because the nomination is governed by the same advise and consent clause of the Constitution as our judicial nominees. Here is what our colleague said.

In considering the nomination of Mr. Samuel Brown to be Ambassador...I have reflected on the latitude which ought to be accorded the President in making this decision for the Ambassadorship, reflecting as well on the constitutional responsibility of the Senate for advice and consent as a check. I am troubled by a situation where the only power the Senate has to control the flow of nominees is advice and consent, is advice and consent. The only place that Republicans can assert any effective, decisive action is by stopping somebody from coming up. We have 44 votes. That has been the case not just with ambassadorial nominations but with judicial nominees, the advice and consent clause. The only difference with the circuit court nominees of President Clinton, for instance, who were filibustered is that there was not a supermajority to stop the confirmation of the judges. That is not a distinction which the Republicans in this debate would want to emphasize, but it is a distinction in fact.

Mr. President, 160 of this President’s nominees have passed the test; 4 have not. When the filibuster has been used relative to those four, the rules of the Senate which provide for that to occur, and there was not a supermajority, then those nominees have not been confirmed.

What is at stake here is the functioning of the Senate as a check and a balance on executive power. Our Republican colleague who spoke that way in 1994 was exactly right. He was using the同比下降 and forcing a cloture vote. And if there is some constitutional distinction which I would think the Republicans in this debate would want to emphasize, it is a distinction in fact.

Mr. President, I of this President’s nominees have passed the test; 4 have not. When the filibuster has been used relative to those four, the rules of the Senate which provide for that to occur, and there was not a supermajority, then those nominees have not been confirmed.

Mr. Markus went on to testify that one Republican Senator told him the following:

This is bigger than you, and this is bigger than me.

Senator Kohl, who kindly championed his nominee in the Judiciary Committee, encountered a brick wall. The fact was a decision had been made to hold the vacancies and see who won the Presidential election. With a Bush win, all those seats could go to Bush, rather than Clinton nominees.

What is happening is exactly what happened to Kent Markus and his nomination. A hearing was denied to him. A vote was denied to him. And if there is some constitutional right which is being created here on the floor, I assume Kent Markus was denied his constitutional right to a vote, as were the dozens of other nominees of President Clinton who never got a hearing, much less a vote.

I can’t believe for one moment that any court, even if it reaches the merits of this case that is going to be brought, would say there is a constitutional right to have your nomination voted on when there are so many ways of blocking a nomination or getting a vote, starting with not having a hearing, starting with not having a markup, starting with not reporting a nomination to the floor, starting on the floor not reaching a vote up or down.

When the Republican Senate denied committee hearings and votes for 63 judicial nominees and more than 200 executive branch nominees, they blocked...
It can decide never even to give a nominee a hearing should it choose. I don't think that is a wise course, in most cases, but should the Senate choose not to give a nominee of the President a hearing, that is the Senate's right. What if it decides not to have a markup to vote that nominee either out of committee or to defeat that nominee, that is the Senate's decision. Should a chairman, acting alone, decide not to put a name on a markup, that may be that chairman's power.

So the suggestion that requiring a supermajority vote by filibuster is new to the Senate is simply wrong. We can argue—legitimately argue—and disagree over whether or not the Senate should give up this important check and balance on Presidential power, but we cannot argue, it seems to me, that it is unprecedented in its exercise.

Here are the words of one more of our colleagues during a filibuster of a Clinton nominee on March 3, 2000. During the filibuster of the nomination of Judge Richard Paez to the Ninth Circuit, this is what our colleague said:

"I say to the American people who may be listening today: actions have consequences. Big time in the decisions they make. Citizens complain about violence and the criminals getting out. There are bad judges making bad decisions that cost Americans their liberties, cost them their lives sometimes. That is wrong. We have an obligation in the Senate to take a hard look at a lifetime appointment to the circuit. The members are there forever, even when they get real old. It is pretty hard to get rid of them. This is a lifetime appointment. We have a responsibility to make darn sure these judges are going to represent the views of a majority of the American people in terms of the law. I intend to do that as long as I can stand here to do it."

He didn't have 39 others or 40 others to stand with him. As a result of that, there was a supermajority for that judge, but it was despite the filibuster. It wasn't that there was no filibuster. It was that the majority with which the Republicans had a right to stage and did stage. But most Republicans decided, or at least enough Republicans decided not to continue that filibuster but, rather, to invoke cloture.

To suggest that this letter has been referred to, apparently a fundraising letter, be printed in the Record in full but in full but I think the words which were quoted by my friend on the other side had some very critical dots in there, and I think the dots should not have been there. The two sentences should not have been pushed together as though they were one. The chart does make Senator Corzine says the following:

"Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial."

That is the unprecedented effort. The next sentence is:

"By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts."

The suggestion that the words read "an unprecedented effort to mount filibusters" is not an accurate reflection of that letter. The dots which were in the chart, it seems to me, take the place of some very critical words making two sentences look as though it is one sentence.

I ask unanimous consent, just so we can have full disclosure of this letter, that this letter be printed in the RECORd.

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

Despite the administration's desire to ignore the Constitution's rule of ADVICE and CONSENT, Senate Democrats are holding Republicans accountable.

"Why must the Democrats continue their fight against Charles Pickering?" While in law school, Mr. Pickering wrote an article suggesting ways the state of Mississippi could better enforce its ban on interracial marriage. As a state senator in the 1970s, Mr. Pickering worked to repeal important provisions of the Voter Rights Act. In 1994, he went out of his way to seek a more lenient sentence for a convicted cross-ducer.

Once defeated when Democrats had a majoritiy in the Senate, President Bush nominated Charles Pickering for a second time after the 2002 election. Now two successful filibusters launched by Senate Democrats have kept him off the bench!
The Bush Administration is devoted to using the courts to its political advantage. Time and again, this administration has nominated ultra-conservative candidates who are zealously devoted to advancing corporate interests, taking away reproductive freedom, smashing the wall of separation between church and state, and dismantling equal employment opportunities.

But the Administration has got a big problem: Senate Democrats. Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters against the Bush Administration’s most radical nominees, Senate Democrats are helping to save our courts.

Help the Senate Democrats keep fighting. Support the DSCC efforts to help elect more Democrats who are zealously devoted to advancing corporate interests, taking away reproductive choice, and dismantling the way some of them are still here in some of the cases he talked about—what was going through their minds when they were faced with the same circumstances we are faced with today; that is, a group of folks in the majority, who opposed some cases that objected to a particular_nomination. We can use the Clinton years as an example. There was a Republican majority for 6 years of President Clinton’s term. No judicial nominee, not one judicial nominee, was ever deprived of a vote on the floor of the Senate. That is what we are talking about, a vote on the floor—not one.

My colleague and friend from Michigan made reference to the cases of Marsha Berzon and Richard Paez in the year 2000, Ninth Circuit. Although most Republicans opposed their confirmation—and we heard some of my colleagues earlier tonight. Senator Sessions talked about that case. Senator Lott talked about that case. He was majority leader. They also opposed any effort to prevent the full Senate from voting on their nominations. They did so and they told you it was because of their reverence and respect for the historic role of the Senate. That is the principle that has guided us for 214 years before today, before this 108th Congress.

Colleges had the opportunity to invoke cloture only if the Republican majority said go along, and it was not because, as my colleague from Michigan somehow inferred, that they could not kind of put together the necessary votes to block it. No. What happened is that they were not willing to ignore the history and the tradition, and I think most importantly what the Constitution says, and that is that supermajorities are not required to confirm nominees for circuit courts.

Debate on each of these nominations, Berzon and Paez in the Ninth Circuit, including over 20 Republicans who would eventually vote against confirmation and a majority of the Republican members of the Judiciary Committee. Senator Hatch talked about that. So our colleagues at that time faced two candidates in the Ninth Circuit. By the way, the same circuit that ruled the phrase “under God” unconstitutional. That is the same circuit that initially was going to prevent the California recall from taking place until finally, on banc, the entire circuit had to come together and change that.

In neither case did Republicans mount a party-line filibuster effort to prevent voting on a nominee. In fact, Majority Leader Lott filed the cloture motions for the above debates. So what we have is the Senate majority and colleagues from Michigan would infer, that somehow before there was simply an ability—yes, there were cloture motions and either they were invoked or they were rejected, and that somehow they were invoked and that is why you were able to vote on it. No. Here you had the Republican majority leader file the cloture motions for Berzon, for Paez. My colleague, Senator Sessions, discussed those motions. I voted against the nomination, and that is what we are asking for.

Follow the history. That is what is at stake. Senate Bill 2 is about the historic role of the Senate. If it has changed it, it has changed it at great risk.

The situation was similar in 1994 when some Republican voices objected to President Clinton’s nomination of H. Sarokin to the United States Court of Appeals of the Third Circuit. A majority of Republicans supported a cloture motion after a relatively brief period of debate and cloture was invoked by a vote of 85 to 12. Judge Sarokin was then confirmed by a vote of only 65 to 35. Twenty-three then of my colleagues supported cloture. The majority supported cloture. Yet at the time they voted for the candidate. That is the history of this body. That is what the Constitution requires.

I am told that the only judge nominated by President Clinton who faced a bipartisan filibuster was that of Brian Sues, Stewart, a nominee to the Federal district court in Utah. However, it was Senate Democrats who filibustered the nominee in protest over purported delays in bringing other judicial nominees to the floor. A cloture motion was voted on September 21, 1999, and failed, falling short of the 60 votes by a vote of 55 to 44, with all Democrats except Senator Moynihan opposing cloture.

Once again, Democrats’ objection worked. Judge Stewart himself and on October 5, 1999, the Senate confirmed him by a vote of 93 to 5. For so all the handwringing that we heard about the treatment of President Clinton’s nominees, one is very clear: Every single one of them got a vote.

The fact is that what happened here is that my colleagues followed the history and tradition of this body and said they would make sure they got a vote because that is what the Senate is called upon to do, advise and consent. There is a principle of majority rule, a principle, again, espoused in this document, in this Constitution, of the United States.

My colleague also implied that it is just fine to prevent an up-or-down vote on at least 4 of these nominees because we blocked 60 of President Clinton’s nominees. I have two observations about that, and I know this is what frustrates me and my colleague Senator Graham. The fact is that there is and has been a tradition in this body, shortly before the end of the President’s term. What happens is that folks kind of say, well, let’s see who the new guy is, see what happens, and they slow it up.

The numbers are even more stark, by the way, if we compare the number of...
nominees left hanging at the end of the first Bush administration by Senate Democrats with the number of Clinton nominees awaiting confirmation at the end of the Clinton administration. The Democrat-controlled Senate left 54 of the 94 Bush nominees unconfirmed at the end of 1992. In contrast, at the end of the Clinton administration, 41 nominees remained unconfirmed.

Let's stop that practice, unless a game is being played, unless there are clearly unqualified nominees, unless there is some reason to suspect we are not having qualified folks coming before us and we are playing politics.

On the other hand, well, they did it to us and we are going to do it to them. It is like the Hatfields and McCoys, like Montague and Capulet. It is like a family feud. It is futile and it needs to stop. It needs to change.

I appreciate the comments of my friend Senator Levin at the end saying maybe they did not get this. I hope we can get beyond this. I hope we can do what Senator Graham talked about when we started this conversation a little over 3 hours ago and he said let's look to the future.

The future is only going to be a bright future if we, one, follow the dictates of the Constitution, understand that there is this concept of majority rule, that the Constitution dictates that laws be of general applicability putting aside what I am sure are personal opinions to enforce the law. That is not extreme. That is mainstream. That is what we want on a court.

Yes, we have people of character, principle, and strong beliefs. What the other side has done is they take folks who have these strong beliefs, who then espouse them. Along the way they may give a speech, they may give a writing, and then they wave that around to see how extreme they are, but we have to judge people by their actions. We have an attorney general who puts aside his personal beliefs to say he will enforce the law. That is what you do.

My distinguished colleague who will take the floor after me, Senator Pryor, was a former attorney general. I know he operated in the same way.

I yield the floor to my colleague, Senator Graham.

Mr. GRAHAM of South Carolina. I thank the Senator for yielding. I think he did a very good job of trying to explain the best we can that this has never been done before, that this is truly a new era for the Senate. We are filibustering judges who have been reported out of the Judiciary Committee for the first time in the history of the country. That fact will never go away. It has never happened before. Abe Fortas was not a partisan filibuster. Republicans and Democrats thought the man was not qualified to be chief judge because of some ethics complaints, and the President withdrew it. That effort to come together to send a message to the President that they did not think this person was promotable. They had 4 days of debate. It was not a filibuster. It wound up being a bipartisan effort to come together to send a message to the President.

There is nothing bipartisan about this other than the fact that every nominee who is being filibustered has Republican and Democratic support to sit on the bench in a majority fashion. That is the problem here, that if all of these people who are being filibustered had their day on the floor, an up-or-down vote, they would be judges and the Senate would have to confirm them. One of them has 55, we believe, because 55 people have voted to allow a vote on the floor. That is important.

These people would be judges, just like the two Senator Lott intervened for. Two Democrats being opposed by some Members of the Republican Party, Senator Lott stepped in and stopped it. He filed a cloture motion and it passed overwhelmingly to end debate, and they are sitting on the bench today. Good for him. I am glad he did it.

I want to be fair, too, to Senator CORZINE. There is nothing wrong with people talking about issues before the Senate is in trying to get money sent to those families. Both parties do that. I have never suggested that Senator CORZINE has done anything wrong. I am just trying to put in perspective what this debate truly is all about, because when you are out there talking to your base about what you are doing that can be a pretty good evidence of what is in your heart and what you mean to do.

Now I have the whole document. This chart is an excerpt from a November 3 fundraising e-mail sent out by Senator CORZINE, the head of the Democratic Senatorial Campaign Committee. It says:

Senate Democrats have launched an unprecedented effort... By mounting filibusters against the Bush administration's most radical nominees, Senate Democrats have led the effort to save our courts.

I have been saying for days now that this e-mail indicates that they view this to be an unprecedented effort by Democratic colleagues and the unprecedented effort is mounting filibusters. But this dot, dot, dot, now I have the whole e-mail and I do want to be fair. I do not think it has changed a thing. Having looked at the e-mail, I think it reinforces my point.

This is what the actual paragraph says in full:

Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters... I think a fair reading, a fair interpretation of the English language, is that the unprecedented effort refers to the filibusters. They are throwing in some nice language about being fair in there. Nothing has changed.

This was an e-mail sent out to try to tell Democrats that we are up here fighting Bush in an unprecedented way by filibustering his judges because we think they are radical. This e-mail is about a particular judge, and I am going to read the whole thing. This is the way it is entitled:

Senate Democrats protect our courts again. Dear Erin, Senate Democrats have stopped another judicial extremist who
Democrats will NOT rubber stamp extremist message to the Bush Administration

President of the United States re-nominated a judicial nominee Charles Pickering was defeated again on Thursday by Democrats in the Senate.

For the first time in history, a President of the United States re-nominated a judicial nominee that the committee had already voted down. But the Senate Democrats stopped the Bush Administration in its tracks.

That is true. When the Democrats had control of the Senate, Judge Pickering was voted down on a party-line vote. The President has a right to re-submit the nominee. I am very glad he did because this time he came out of committee on a party-line vote.

We just have a different view of whether or not this man is a racist, because there is no other way to interpret what this e-mail is saying about this man.

Continuing:

Despite the administration's desire to ignore the Constitution's rule of advice and consent, Senate Democrats are holding Republicans accountable.

Why must the Democrats continue their fight against Charles Pickering?

White school: Mr. Pickering wrote an article suggesting ways the State of Mississippi could better enforce its ban on interracial marriage.

As a state senator in the 1970's, Mr. Pickering worked to repeal important provisions of the Voter Rights Act.

In 1994, he went out of his way to seek a more lenient sentence for a convicted cross-burner.

They have described somebody who is not what you would want to have on the bench. There is no other way to say it other than this e-mail is directly and indirectly suggesting Charles Pickering is racially motivated. What a horrible thing to say about somebody if it is not true.

Once defeated when Democrats had a majority in the Senate, President Bush nominated Charles Pickering for a second time after the 2002 elections and now two successful filibusters launched by Senate Democrats have kept him off the bench!

The Bush Administration is devoted to using the courts to its political advantage. Time and again, this administration has nominated ultra-conservative candidates who advance conservative causes and appointing judges who ignore separation of power and appointing judges who ignore the Constitution.

But the Administration has got a big problem: Senate Democrats. Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats are making it impossible for the President to get his judicial nominees confirmed.

Help the Senate Democrats keep fighting.

Support the DSCC efforts to help elect more Democrats to the Senate—and keep the proven leaders we have. Help the DSCC send a message to the Bush Administration—Senate Democrats will NOT rubber stamp extremist judicial candidates. Help us fight to maintain judicial integrity by sending more Democrats to the United States Senate in 2004.

That is what the e-mail is making.

Now that accusations in that e-mail are strong, they are direct, and I think vicious. Judge Pickering, according to this e-mail, is someone who wanted to keep the interracial marriage statute alive when he was in law school by writing law school papers in support of this. However, by May 1994 to make a sentence more lenient for a convicted cross burner.

The only thing a rational person would receive from that litany is Judge Pickering is friendly to a cross burner.

If that is true, he should never have been a judge for 30 seconds. If the other things are true, it was a huge mistake to ever advance this man forward.

But here is the problem I have with believing what is in this e-mail. Number one, I have met the man, I have talked to him. I served in the House with his son, Chip, who is one of the nicest, brightest young men I have ever met. This e-mail describes him as a very intolerant, racially insensitive person. Is that without a doubt from personal experience he did a great job as a father because his son is anything but racially intolerant. His son is a wonderful young man.

If that e-mail is true, then you explain to me how the Mississippi Bar Association could give him the highest rating possible, well qualified. Did they miss this racial past? Or do they condone it? How about this, maybe this is a cut-and-paste job and they didn't buy it. He graduated first in his class; 99.5 percent of the cases were affirmed or not appealed. His reversal rate is below the national average, two times lower than the average district judge in the Fifth Circuit Court of Appeals. He has never had a voting rights case appealed but was recommended a plea bargain to the guy in that racial case reversed in 170 cases and is endorsed by the current president and 17 past presidents of the Mississippi State bar. Maybe they are all racist, too. He is endorsed by all major newspapers in Mississippi. He is endorsed by all statewide elected Democrats and the chairman of the Mississippi legislative black caucus. He was endorsed by former Democratic Governor William Winter, Bill Waller, former Democratic Lieutenant Governor, and the list goes on and on and on.

Other people object, but I assure my colleagues this e-mail is a distortion of this man. Here is the Judge Pickering I have come to know. In 1967 when Mississippi was red hot and racial tensions were very high in the South, particularly in Mississippi, he served as an elected county prosecutor. He was asked to testify against the Imperial Wizard of the Ku Klux Klan of Mississippi. He took the stand against the Imperial Wizard successfully but lost his job. He was not in the mainstream; he was swimming upstream.

In 1967, when schools were integrated in Mississippi—and I have told the story about integration in South Carolina—he chose to keep his children in public schools at a time when White flight was the dominant way of dealing with the problem in that part of Mississippi. You will see photos of that era of a lot of African-American children and a smattering of White kids. Among those White families, White kids were Judge Pickering's kids.

He chose at a time, when others did not in large numbers, to try to make Mississippi better. He has been head of the Mississippi Baptist Association. He has been on the Federal bench for a dozen years, rated well qualified by the American Bar Association.

Of all the events that have occurred in the Senate since I have been here, this one bothers me the most because southern White males are very open to the accusation that we are racially insensitive. This is not a race to the bottom, but to the way the South has conducted itself.

When I grew up, my family had a restaurant and African Americans came to get their food and to buy a beer and they had to leave because there was no integration of the races until I was in high school. That is not something to be proud of. Judge Pickering was part of the solution.

What they are trying to cast this man as being unfair to him; it is unfair to his family. It is unfair to his family to be so, you can vote against him. But he is the best example of how sick the Senate has become.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. I ask unanimous consent we use 5 more minutes of the majority's time and we subtract it from the next hour.

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

Mr. President, I will continue the Pickering story because I think it is important.

My colleague, Senator GRAHAM, has done a tremendous job of laying it out. I don't know Judge Pickering's son as well as Senator GRAHAM does, but I have met him. I have to go beyond that.

Senator GRAHAM mentioned when he was in law school that he wrote an article on interracial marriage. That was in 1967. If you believe it to be so, you can vote against him. But he is the best example of how sick the Senate has become.

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leader. So he gets off. There is a trial then for the other guy. Judge Pickering is there and he sees it is simply not proportioned. He told the guy he tried, who was not the ring leader—but the other got was off the hook. He said what he had done was heinous and despicable. I think he would have spent time in the penitentiary for his act and ruled according to the sentencing guidelines. On and on.

This is an individual who, again, sent his kids to interracial schools in the 1970s. This is a guy who testified against the KKK. This was a death sentence.

In 1985, he was president of the Mississippi Baptist Association, and he presided over the first convention addressed by an African-American pastor.

I could go on and on and on. Again, what we have here is mainstream, not extreme. This is a person who was supported by the folks who know him best. Many African-American judges have written in support of Judge Pickering, including Justice David Keith, the first African-American Federal judge in Mississippi, Henry Wingate, the first African-American Supreme Court judge in Mississippi, Rubin Anderson, and Mississippi Supreme Court Judge John Williams.

What we have is a case where the people who know him best see this is a decent man. This is a man without prejudice. We have, I believe, interest groups with their own agenda from outside looking to shoot him down. In doing so, what we have is this Senate undermining the Constitution and our obligation. They are doing something that has not been done before, without legitimate base. Vote them up, vote them down, give them a vote.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. PRYOR. Mr. President, I thank the cloakroom staff on both sides. I could go down the long list. The special sessions of judges that was held. There are so many people who should be thanked for allowing this marathon to go on. It has put strains on people. I am very sensitive to the fact they have families they need to get home to and they have lives outside of what goes on here on Capitol Hill. I express a deep and sincere debt of gratitude to those people.

Let me talk about the judicial nomination process. Both my colleagues across the aisle agree on this. I signed a letter with them this spring about trying to make this process work better. One thing I was concerned about in signing that letter is we might come to this point today where we would lock horns and have some gridlock on a few nominations. I hope we do not get to the point of gridlock overall in this process.

As to the numbers, since we have been here this Congress, I believe we have confirmed 66 or 67 of President Bush’s judicial nominees and 4 have been blocked. Last Congress, there were an additional 100, so I believe the grand total is 168.

We have seen a lot of charts with numbers and percentages, but I hope the whole process does not bog down. So the people around the country understand, we are talking only about a select few of the nominations, not the overall nomination process.

On this I was completely about and one reason why I wrote that letter several months ago was because we wanted to try to make the nomination process more productive. We want to try to make it more constructive and more productive. To me, a lot of that responsibility rests with the White House. We talked about that very briefly in that letter. I feel strongly that since the President, under the terms of the Constitution, is the one who begins the process of nominating, he and the White House staff need to try to get the Democratic and Republican leaders involved and sit down to try to work through some of these controversial nominations and the nomination process. I think we can do this better as we move forward.

One thing I am concerned about is we, around here in the Congress, particularly in the Senate, probably more than the House, are so focused on tradition and history and how things have been done in the past that it is human nature, I guess, that we oftentimes cannot put aside the things that happened in the past. Sometimes those things are perceived to have been ill-willed or for whatever reason perceived to have been unfair, unjust, whatever the case may be. Of course, I have said many times that I have a concern in this judicial nomination process there is sort of partisanship and gamesmanship on this side and it is just counterproductive for the people.

So, again, I hope we can move forward. I want to try to continue to work with President Bush on his nominations. I believe I voted for 66 of his judicial nominees, the one who begins the process of making people believe the Senate should not be a rubberstamp, I think the vast majority of Senators believe the Senate should not be a rubberstamp and an automatic approval process for the President.

I think we have a responsibility to the Nation to look at these—again, the one who begins the process of iron sharpening iron, the President and the Senate sharpening each other, because he knows we will review and look very carefully at the nominations he puts forward. He puts
I do think there has been a lot of discussion about some of these judges’ records. Again, I think those are subject to interpretation. I am not going to try to get into all the particulars of those. We do not have time tonight, plus my colleagues, for the last several hours, the last two days, I have tried to do that. Many of them have done a very good job.

What I would like to do, if I can, is talk about one thing that does bother me and that is the timing toward the end of our calendar year in the Senate and this is crunch time for the Congress to get its work done. In fact, right now our colleagues in the House, down the hall, basically are only meeting about 1 day a week, maybe 2, for votes because they have taken care of a lot of their legislative business—not all. They still have some things pending. But they have gotten their’s down to the point where they do not have to be in very many legislative votes. All that is being done is waiting on us to accomplish and to finish our business.

Well, here we are spending 30-plus hours in a talkathon about these four judicial nominations that have been in the Senate waiting for a vote for the last 30 days. One thing also we need to keep in mind is that reasonable minds can differ. There is another, a third, element I want to add. There is another, third, element I want to add. Reasonable minds can differ about if someone can be fair and impartial, and reasonable minds do differ.

Again, that is one thing we get back to in the Senate. Someone like either of my colleagues, who have served here in the last few minutes, who are so articulate and so good, they look at some of those nominees and there is no doubt in their minds, they are going to be fair and impartial. I look at them and I have some doubts. Again, that is how the process works. I am proud that their two States have sent them to the Senate. They are here to do their duty as God gives them the right to do it. I feel like I am here to do the same.

So reasonable minds can differ about being fair and impartial. But regardless of how you come out on the conclusion, that is one of the criteria I use. I think it is extremely important for a judge.

There is another, a third, element I look at. That is, the nomination, demonstrated an ability to exercise and to show the proper judicial temperament? For all the lawyers out there, and all the parties out there, if you have been in court before, you understand how important the judicial temperament can be in cases. Literally these judges oftentimes hold life or death in their hands for a criminal defendant. Or they may hold a business’s solvency or whatever the case may be. It is very important the talent, the temperament, of these nominees is demonstrated in how the case will come out. So again it is subjective, but I try to look at their judicial temperament.

Then the fourth criteria is sort of the elastic clause. The Constitution has an elastic clause, so part of my criteria is kind of an elastic standard—and I don’t say standard but elastic consideration—and that is, are there other factors or other circumstances, when you look at these nominees, that should be considered? And, boy, that is just open-ended.

But I think, as Senators, we should consider the totality of the circumstances. We should look at these nominees in a historical context; it may be a social context; it may be something unique to that region or that State or that person. I think it is incumbent on us to look at those carefully.

Here again, it is subjective. Is that something you can really write down as criteria of how it is going to work in every single case? No. Maybe it should not be. Maybe it should be left elastic so it can be changed and be looked at from different perspectives with each particular nominee.

But regardless of that, I do take my role and my duties as a Senator very seriously. One of those roles that I believe very strongly about is the people of Arkansas sent me here to work with everybody else who is up here. If the people of this country want to elect George Bush as President, I am here to work with President Bush. Mississippi sends their set of Senators and Texas sends their set of Senators and Massachusetts and California, and I believe my responsibility, as a Senator for Arkansas, is to work with who is here. That is what I have tried to do, and I will continue to try to do that.

Another thing I wish to say is that one thing I think we all keep in mind is that these judicial nominations we are talking about today and that we always have under consideration here in the Senate are lifetime appointments. Only under extreme circumstances will these people be removed from office. It is very rare that happens in American history, but it can happen. But these are lifetime appointments.

I think it is critical that our judiciary is independent. I think that is the way our Founding Fathers set it up. We better get these nominees right on the front end because these people will serve for life.

Like I said they hold justice in their hands. Their application of the law will be determinative for so many things during the course of their careers. I think, simply put, people are entitled to know what nominees think. I think people are entitled to know about the qualifications. They need to have the assurance that these nominees under consideration by the Senate—the people need to have an assurance that if these people do put on the robe, do serve on the bench, that the integrity of those nominees will be maintained and that these people will do justice, as their responsibility requires.

I personally believe the people of America want a moderate and balanced approach. Personally, I think most Americans do not want to see the courts packed with judges with a conservative agenda or judges with a liberal agenda. I think most Americans want to see moderate, fairminded people on the bench. Because people understand that if you go into this with an agenda, a political agenda, it will not be balanced and that judge and the court will have one dominant point of view. That is not good for our justice system.
Mr. PRYOR. How much time?  
THE PRESIDING OFFICER. Four and a half minutes.  
Mr. PRYOR. Let me read part of a letter from Robert Caro. He is the man who wrote the Pulitzer Prize winning book “The Power Broker.” “To: The New York Times.  
‘Master of the Senate’ is the story of Lyndon B. Johnson when he was a Senator. In June of this year, Robert Caro wrote a letter, not to me, but to TRENT LOTT and CHRIS DODD, the two leaders of the Rules Committee.  
Mr. President, let me read this:  
‘In the past few months, Senator Smith will go. The plans to move some of its refrigerator manufacturing jobs from Fort Smith, AR—to Fort Smith down to Mexico. Very sad news.  
Mr. President, that is of particular concern in the Whirlpool case is it was just a few months ago about a year ago when they made an announcement they were going to actually add 700 jobs in Fort Smith. Of course, there was a lot of excitement about that announcement. Now there is a lot of disappointment about what Whirlpool has decided to do. I am not saying this to be critical of Whirlpool, but I am saying to my colleagues instead of spending this much time on these four judicial positions, let’s spend this much legislative time in trying to figure out how we can actually save manufacturing jobs. Because I think long term when you look at what is good for technology and good for this Government, good for this country, saving these manufacturing jobs is probably more important than these four judicial bills we are talking about.  
Another thing that I must tell you I experienced today is I went to Walter Reed Hospital, the Army hospital here in the DC area, and talked to men and women who had come out of Iraq and Afghanistan. Very sobering, very serious. These are patriots of the first order. Some of them will have lifelong injuries due to their service to this country.  
One thing that was emphasized with us over and over is that Iraq is a very dangerous place right now. There again, I hope, and I sincerely hope, the Senate will spend this much time in deliberation and in consideration of how we should move forward in Iraq and what that future looks like for Iraq.  
Mr. President, it does not bother me to work late. This is the second night in a row that I have had a late night slot. But it does bother me a little bit that we may have lost some perspective in that we are manufacturing sector.  
Mr. President, may I inquire, how much time do I have remaining?  
THE PRESIDING OFFICER. Four and a half minutes.
counsels against the use of extended debate to resist Presidential authority. To the contrary, the nation’s Founders depended on the Senate’s members to stand up to a popular and powerful President. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role, providing both advice and consent to the President. That shared authority was critical to the balance of powers among the branches.

Surrendering such authority is not something which should be done just because of a Senator’s point of view on the particular issue of the moment—because much more than the particular issue is involved. What is a Senator, if not a senator from a population state without any other means of defense—votes to support a new limitation on debate today? What will he do in some future year when he is trying to stop an action that a bare majority of the Senate would support, but that he and 40 colleagues believe will be terribly detrimental to their states or to the nation—an action that he feels a few members of the Senate may change their view about if only he has enough time to frame up the full consequences to the nation and to the public? What will he feel when he suddenly realizes that his right to hold the Senate floor against that action has been taken away and that the bare majority can silence him before he is finished making his case? What will he do when he realizes that, without the right of extended debate, he is utterly helpless.

I am not attempting to say that the right of extended debate should not be modified. I am, however, attempting to say as strongly as I can, in considering any modification Senators should realize that they are dealing not with the particular dispute of the moment, but with the fundamental character of the United States, with the deeper issue of the balance between majority and minority rights.

As I told a group of Senators last month, you need only look at what happened when the Senate gradually surrendered more and more its power over international affairs to learn the lesson that once you surrender power, you never get it back.

Respectfully,

ROBERT A. CARO.

Mr. PRYOR. Mr. President, basically what Robert Caro points out in this letter is:

Several members of the Senate have asked me whether my research on the history of the Senate sheds light on the current debate over the role of the Senate with respect to President Bush’s judicial nominations.

Defining the right of extended debate is always tricky. If it is being used against you, it is a vicious weapon of obstruction whose use in a democracy is unconscionable. If it is you who is using that weapon, it is a great advantage to have in your arsenal.

More we fight each other, the deeper the road. Right now, unfortunately, we will find a way out of this in the past. I am here to talk about the future course of the Senate down a road where it will be hard to get good men and women to apply. Let me tell you why I think they will not apply.

I read a fundraising e-mail that concerned Charles Pickering. As one can tell when I spoke, it bothered me greatly what they are trying to do to J. Judge Pickering because I come from the South. I know how easy it is to be associated with the South to be. For lack of a better word, sometimes stereotyped. Here are the accusations in the e-mail:

Why must the Democrats continue their fight against Charles Pickering? While in law school, Mr. Pickering wrote an article suggesting ways Mississippi can better enforce its ban on interracial marriage.

That statement clearly tries to make the reader believe this is a person who has supported interracial marriage bans and is racially insensitive. I ask the country to look at it in these terms. He was unanimously confirmed by this body 12 years ago. Not one person objected. I can’t believe the whole body would hold, at the office and this law school article was not known. He didn’t advocate the ban on interracial marriage. It was under attack, and he wrote a scholarly dissertation about it.

I believe what the statement says, the entire Senate either didn’t know about this or ignored it because the entire Senate unanimously approved J. Judge Pickering 12 years ago, long after he got out of law school, to sit on the Federal bench as a district court judge.

The second point:

As a State senator in the 1970s, Mr. Pickering worked to repeal important provisions of the Voting Rights Act.

The reader of this e-mail who is being asked to give money to help Democrats fight President Bush’s nominees—what is the message you are trying to convey to the reader of this e-mail? That yet again in the 1970s this same person, who holds government office in Mississippi was working to undermine laws that protected African Americans in the State of Mississippi. There is no other fair interpretation of why that is in this e-mail and trying to cast him in that light.

Again, it is beyond my understanding and real belief, if that were true, if this man used his office in Mississippi in 1960 to undermine the Voting Rights Act, that this body 12 years ago would have unanimously approved him to be a district court judge.

I believe these two statements were designed to emotionally charge the reader and to unfairly label Judge Pickering in a way that was not deserved and flies in the face of the fact that the Senate confirmed him unanimously 12 years ago.

The last point:

In 1994, he went out of his way to seek a more lenient sentence for a convicted cross burner.

My colleague from Minnesota very eloquently spoke about that case. I am on the Judiciary Committee. When I heard that accusation, it really did pique my interest. I asked what was going on because none of us want a judge who is going to be sympathetic to such a horrible crime.
Here is what actually happened. There were three defendants, not two—three defendants. The ringleader and the second oldest man, I believe, received a probationary sentence. The youngest of the three was charged with a crime, and he got away because nobody is going to want to go through this—and I assure you it will be answered in kind, and that is sad because I know politics.

The other downside is special interest groups, that are going to have more power than they deserve over individual lives because all they need to do is get 41 votes.

Special interest politics is part of our political landscape. The Constitution has checks and balances against each branch. One of the checks and balances I like the most about the judicial nominating process works is if a majority of us feel a person is qualified, they get to sit on the bench.

Please, let special interest groups to the point that 41 of us can stop somebody from sitting on the bench because we will have rewritten the Constitution, not only in its letter but its spirit. I end with this. Federalist Paper No. 66 has the following comment:

It will be the Office of the President to nominate and, with the advice and consent of the Senate, to appoint. There will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the executive and oblige him to make another, but they cannot themselves choose. They can only gratify or reject the choice of the President.

For the sake of the future of law in this country, for the sake of the future of the Senate, let’s not let a small group make it impossible for good people to serve.

I yield the rest of the time to my good friend from Kansas, whom I have known since I have been in politics at the Federal level, Senator BROWNBACK. The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. Mr. President, I appreciate my colleague from South Carolina carrying the comments and the load for several hours in the early morning as we approach 4:15 in the morning. We are talking about something of great importance. He has real wisdom in his words, too, about the point that the process on which we are embarked has no upside to it. When you have good people, qualified people not being blocked away because a majority vote but by filibuster, you are headed down a bad path. This bad path doesn’t have a good ending.

We will continue to have division in this body. I don’t doubt we can be blocked on these for some time, but that is certainly going to carry over into the next election cycle, and this doesn’t have an upside to it. Plus, we have good people waiting. We have people who are qualified and not going to be served on the Federal bench.

We have a lot of hurt feelings. We have a lot of accusations made without truth. We have harsh words, harsh comments, and that all leads to a downward cycle. There isn’t an up cycle here.

I wish to take a few minutes to describe why I think we got to this point. We didn’t use to be here. We have approached the Congress today and have gotten people of different opinions in recent times. They have generally been from the left, and those have been approved during the Clinton years.

Lord knows we are talking about circuit court nominees now. What if we got a Supreme Court nominee? Does the body get tied up for 2 years? We have actually had one Supreme Court justice who has been filibustered in the past.

Why did we get to this point? It used to be if people had a litmus test on candidates, that was seen as a terrible thing and they were castigated. I don’t know if the Presiding Officer or others constitute what our record was accused of having a litmus test. That was just a terrible thing. His administration denied it. They didn’t put forward people under a litmus test, and we were moving forward.

Now people are being subject to a litmus test. They are being blocked. They are qualified, and they are being stopped. How did we get to this point? I want to take a shot at that and develop it from the standpoint of a case that is currently before the Supreme Court. It is the case of Michael A. Newdow v. The U.S. Congress, United States of America, George W. Bush, President of the United States, State of California, Elk Grove Unified School District. That would be the operative group in the Newdow case, the flag suit case. It is the case most people are familiar with where the Ninth Circuit Court of Appeals determined it was unconstitutional for a child in school to say the Pledge of Allegiance. The reason it is unconstitutional is because of something Dwight Eisenhower signed into law when he was President of the United States in 1954, and that is where the Congress of the United States added the phrase: “One Nation under God.”

That phrase was so offensive to Mr. Newdow or his child who was in the school that he said: I can’t stand this any longer. He was in court by some other people and took this case to the Court.

The Ninth Circuit said you are right. You should not have to. This is not right for our children to say one nation under God. That evoked quite a comment across the country. It evoked quite a comment by this body. I believe this body voted 99 to 0 to say that the flag salute is right; we should say this; it should be allowed.

There were a lot of protests and the people commented that it was terrible that the Ninth Circuit would be so out of whack, so lacking of mainstream thought, so out of court, and touching the American public that they would rule against something that 98 percent of the American public is for, the flag salute.
The problem with the public outpouring on Newdow and the problem facing the Supreme Court now on this Newdow case is that they were following precedence being developed over a period of 40 years, that the Supreme Court has been following. And others had been following for a period of 40 years to remove the recognition of a higher moral authority from the public square. They were saying this is something we do not want in the public square.

It started in 1962 that these series of cases is built upon. In 1962, Engel v. Vitale was the case that really started this whole string going. That was when our children were allowed to say a prayer at the beginning of the school day, and Engel v. Vitale said that was unconstitutional. It was followed by the Newdow case now before the Court. I predict it will be followed by a case that will call for this body to remove “In God we trust” off the mantle that is here. I predict it will be followed by a case that will call on us to remove off of our money any reference to a higher moral authority, “In God we trust” being taken off of the back of the one dollar bill. It will follow, follow, follow.

Well, people do not agree with that. Massive amounts of people in this country do not agree with that. People have mounted up now. Actually, some people do agree. Some people say, yes, we should remove the recognition of some higher moral authority, of God, from the public square. So we are engaged in this great ideological fight.

I contend that this battle, this fight, of blocking these justices started about 40 years ago. Some of us participating in this form of debate feel as if the last couple of days have been along that 40-year line. What we are seeing is the courts injecting itself here into a societal issue that many people feel deeply about and itself into a societal clash that both sides get fired up and we get good people such as Charles Pickering and Priscilla Owen and others—particularly a guy like Charles Pickering. He is probably the most instructive of the cases here. We have gone through ad nauseam his qualifications, but I want to make this point of him: First in his law school class, highest rating by Martindale Hubbell, unanimously approved for a district court judge in 1990, affirmed on appeal 99.5 percent of the time, reversed only 26 times out of approximately 5,300 cases, received the ABA, the American Bar Association, highest rating, well qualified.

So what is the problem with this picture? Mr. Pickering was president of the Southern Baptist Convention for Mississippi, so he is a man of faith. As such, when we have these 40 years of cases coming up that say we have to remove God from the public square and run into a guy such as Charles Pickering who says, I will uphold the law—and he has done just that—because if he had not, he would have been overturned many many times—he says I will uphold the law but I really think this line of cases and some of these discovered rights the court has done in just these last 40 years. I think they are wrong personally. I disagree with these. I will uphold the cases. But they run into people who are saying we are trying to remove God from the public square and we are going to try to remove people from God from serving in the public square.

You run into this clash, and you get this great clash in the civilization and you get this great clash in the culture. Now you have the courts injecting itself in the culture conflict that we are involved in in this country today. One of the key division issues in our country today is issues of culture. People ask what is that? Culture, it is difficult to say what that is, but people are concerned about it. There is not a company in this country that is not deeply concerned about its culture. There is not a company in this country that is not deeply concerned about its corporate culture. There is now in the country itself concern about what its culture is going to be. The central issue is, are you going to recognize a higher moral authority or not? Is the motto born of God trusted true or not? You get a guy qualified such as this who would say, yes, that motto is true. I believe it to be true. I will uphold laws as ruled to date, but I do believe this motto is true. And it runs through this series of cases and we are going to see it front and center again in Newdow. We will see it again and again.

That is the problem actually with this, because it divides us on something that should not. It divides us on something that should unite us. It divides us in a way that I do not think is healthy for the country. I do not think this is good at all. I think it divides us on something that I think is not good and that is why I think it is also bad politics when this happens. I think bad policy is bad politics. That is why we have this level of fighting today. That is why I am speaking on the floor of the Senate at about 4:30 in the morning.

We are going to continue to have this fight. Regardless of the vote that we take later this morning, how it takes place, probably really regardless of the outcome and what future ones coming on, this is the cultural clash that we have. It is not healthy but it is going to continue.

Mr. SANTORUM. Would the Senator from Kansas yield for a question?

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

Mr. SANTORUM. Mr. President, the Senator from Kansas points out that the Ninth Circuit, with a majority of Federal court judges right now, was affirmed in 99.5 percent of his cases. What I have heard from the other side is that we do not want these judges out of the mainstream being nominated.

I would think, with a Senator from Kansas say that someone who has been affirmed or not appealed in 99.5 percent of the cases since he has been on the Federal court is someone out of the mainstream?

Mr. BROWNBACK. Mr. President, the number speaks for itself. Absolutely, this is a mainstream judge. When you get approved on that percentage of your cases that you have ruled on—remember, this is at the district court level, so he is both finding fact and applying law. You have to be a really good judge, if you are going to be upheld by people reviewing you 99.5 percent of the time on both facts, that means there is wisdom there, and law, which means he is applying it correctly.

Mr. SANTORUM. I would ask the Senator from Kansas if he would look at maybe what the Senator from New York, Mr. SCHUMER, said yesterday he considers a mainstream judge. He referred to the Ninth Circuit, one of the judges that President Clinton nominated and were unanimously supported by Members on the other side of the aisle, a judge such as Richard Paez who was involved in the case the Senator just spoke of, the “under God” case in the pledge, who went in and tried to hold up the California election, ruled unconstitutional the California three strikes and you are out. This is a man that has been overturned—in fact the Ninth Circuit, with a majority of Democrat nominees, has been overturned more than any other circuit.

Is that group of judges mainstream in the Senator’s opinion?

Mr. BROWNBACK. It is not mainstream.

The PRESIDING OFFICER. The majority’s time has expired.

The Senator from Rhode Island.

Mr. REED. Mr. President, Once again, we are engaged in the early hours of the morning on about judges and the role of the Senate, and our role is stark. We have the responsibility under the U.S. Constitution to give advice and consent to the nominations of the President of the United States, not advice and approval, not just advice, but advice and consent. That requires the Senate to take a very active role in reviewing the qualifications of nominees who come before us and making judgments about their ability to serve as members of the Federal judiciary.

We take that seriously. I think that responsibility implies that at times we have to disagree with the President. It
is not unusual that such disagreements take place. This whole debate, I believe, might begin and end with a very simple statement of fact, 168 to 4. One hundred sixty-eight of President Bush’s nominees have been reviewed by this Senate and confirmed by the Senate, and of those nominees, not four have not. It suggests to me that the Senate is properly discharging its responsibilities to advise and consent with respect to the nominees of the President to the Federal judiciary.

In any case, individuals who represent, I would suspect, jurors who have a conservative outlook, probably a different outlook than I have, on certain issues. Yet they represent both in terms of their conduct personally, but just as importantly their judicial temperament and their judicial philosophy, individuals who uphold the tradition of the Federal judiciary at the level of the district and circuit court individuals who follow law, not try to make the case before them but, in fact, follow the guidance of the Constitution and the Congress in establishing the law.

It is in those cases and the very few cases, 4 out of 168, where there seems to be a logical commitment rather than legal scholarship, of political— with a small p— interest, rather than a judicial temperament that is fair and balanced, that the President’s nominees have not passed the test.

An example of this is the candidate I made in May of 2003 when I contrasted the nomination of Judge Edward Prado to the pending nomination of the Texas Justice Priscilla Owen. Judge Prado served 19 years on the United States district court. He is someone who has a record of fairness and evenhandedness. I would suspect, since he is a nominee of President Bush, that he has a conservative outlook in his approach to cases. But he is an appropriate judge. He follows precedence. He does not insert his particular philosophy, his particular ideology, into the cases before him. As a result, he was confirmed, an example of the 168 judges who have been confirmed by this Senate on behalf of President Bush.

The four who did not pass the test were those whose record suggested that they were not evenhanded, they were not balanced; that indeed they inserted political or ideological bias in the conduct of business. In that case, I think it is not only appropriate but it is our responsibility, as the constitutional body entrusted with advice and consent, to register our consent and to register our protest. And we have.

This is not an unusual circumstance in the history of this Senate and of this country. There have been instances several times when Republicans have used the device of cloture votes and filibusters to express their concern about the qualifications of a jurist. For a judicial nominee, it has gone back many years, and it certainly continued into the administration of President Clinton. Abe Fortas, whose nomination as Chief Justice of the Supreme Court of the United States was subject to cloture votes, was subject to attempted filibusters by the Republicans. So were Rosemary Barkett and Stephen Breyer as a judicial nominee for the circuit court. Justice Breyer is now a member of the Supreme Court. In fact, I was here yesterday morning and listened to my colleague, the junior Senator from Missouri, talk about how Justice Breyer was at a conference he was attending and how he was articulating an appraising whether he was someone he philosophically agreed with but that he was a good judge—but Justice Breyer was the subject of cloture motions and a filibuster.

Mr. SANTORUM. Would the Senator from Rhode Island yield for a question on that?

Mr. REED. Could I just continue? Mr. SANTORUM. Certainly.

Mr. REED. He was subject to a filibuster and subject to that that vote before he was ultimately confirmed, and then ultimately went on to the U.S. Supreme Court.

So this is not a procedure or a device that has not been used by the Republicans, because, in fact, it is a method, a significant part of the procedural devices of the Senate, something that is appropriate.

As I pointed out yesterday, what I find disconcerting and indeed somewhat contradictory to the argument of the Republicans is that they were quite adept during the Clinton administration of using delay and denial of hearings to frustrate the nominations of so many individuals, so many potential judges, because many of these individuals never even reached the floor of the Senate for a vote. It was, in my words, a pocket veto.

We are all familiar with the notion of a pocket veto. The President of the United States, in the last 10 days of a session, can simply put the bill in his pocket, not sign it, not comment on it, and it essentially dies as legislation. Well, that was done all too often in the Clinton administration.

The most significant case is the one I mentioned before. In fact, the Senator from Pennsylvania and I yesterday had a bit of a colloquy about this. That is a nominee, Elena Kagan, who was nominated in 1999, spent 18 months waiting for approval, no action was taken, session expired. Fortunately for Ms. Kagan, she has found other employment. She is now the dean of Harvard Law School, which might suggest that she certainly had some legal abilities that could have been used on the Federal bench. But that is an example of a pocket veto.

Again, we are engaged in this discussion, this debate. It is a serious one, but it is taking place at a time when there are other very serious issues pressing on this country. As my colleague from Nevada, Senator Harry Reid, pointed out in his long floor statement preceding this debate, that as we worry about four individuals who have not yet been confirmed, other Americans are seeing their jobs undercut. We are looking at unemployment rates of about 6.0 percent. They are hovering there. They seem to be persistent. Long-term unemployment is growing. It is becoming increasingly difficult for people to maintain their employment with good, solid jobs. We see the poverty rate going up. Meanwhile, the vacancies on the Federal courts have diminished significantly. We are at all-time levels of Federal judicial employment. But as we look at the people throughout this country, the poverty rate is growing. It is affecting children particularly. The rate of the uninsured, or people lacking health insurance, is becoming increasingly difficult. How do we work families additional resources by raising the minimum wage? That would be something that would be very beneficial to millions of Americans. Can we pass good legislation that allows us to continue to invest in our infrastructure, in our highways, in our roads? And then in international affairs, how do we come to grips with the international crisis that sees our soldiers, marines, airman, and sailors each day engaged in conflict over there in a very difficult insurgency?

As Senator Pryor mentioned, yesterday several of us had the opportunity to go up to Walter Reed Army Hospital. I have been there a few times over the last several months and have seen a Rhode Island military police officer assigned to Baghdad. They have suffered, unfortunately, casualties. To go there and see these young men, to see them having suffered, having served so magnificently, it makes you wonder why we are spending so much of this Senate debate, and not more time talking about the way ahead in Iraq, not talking about other situations of international concern.

I find it startling just a few days ago the Central Intelligence Agency released a report concluding the North Koreans likely have several nuclear devices and likely will be able to deploy
those devices without testing. That they have apparently mastered a technological means to circumvent testing is startling, in fact, horrific information, but this is being lost in the shuffle with the Iraq situation. This is a fact that is startling and is pressing on our national security and our future security.

But there is no extended debate on North Korean policy. There is no extended debate on the way ahead in Iraq. We have committed ourselves as a nation to a course of conduct that requires sacrifice, and yet we are not fully coming to grips with the nature of that sacrifice and what we should do.

For many of these reasons, although this debate is certainly appropriate—that is one of the great things about the Senate, you can talk of the issues of the moment, the issues of the time, but certainly there are so many more pressing issues, so many more critical issues of this country and to the future of America's families the continued obsession with this topic does disservice.

Mr. SANTORUM. We have had debates in the past and I would like to ask the Senator from Rhode Island the question, and I am posing a hypothetical. Assume that, and I am sure some in this country would like to see this happen, in the next election President Bush is overwhelmingly defeated at the polls, after his defeat at the polls in November, President Bush nominates a judge to a circuit court after the election, and that the Senate happens to be in a lame-duck session after the election. He would nominate a judge to the circuit court. Let's also assume when President Bush gets defeated, not only does he get defeated but the Republicans lose control of the Senate. It is a huge win by the Democrats. Assume all that happens.

Presently, the chance of that, comes out after the election, nominates a judge to the circuit court and the Republicans jam that person through committee, get him to the floor and try to move a vote on that nomination to confirm him prior to the end when the Republicans would lose control and a new Democrat President is in place. Does the Senator believe your side of the aisle would confirm that nominee like that?

Mr. REED. Reclaiming my time, I like your hypothetical. I like the context.

Mr. SANTORUM. I thought this would be an interesting example.

Mr. REED. I think you are being overly generous. I like to believe if the nominee was of the quality to serve on the Federal bench as a circuit judge, he or she would be approved, which is the rule that applies so far to 168 of the nominees of President Bush.

I say quite truthfully that, indeed, if someone was nominated by a President who did not measure up to those standards, the 168 judges who have been affirmed, they would not be voted in because they lack ability, skill, or judicial temperament, or the other criteria, and they would be opposed.

Again, the record suggests that in dealing with President Bush's nominees, 168 have been confirmed. I suspect all of the nominees are more conservative than any nominee suggested by President Clinton. All of them are individuals who, had a Democratic President been in office, would not have been nominated. That is the nature of the nomination process. Nonetheless, they were confirmed.

Now, the last 2 days of a legislative session, with a change of power, et cetera, that introduces a unique aspect.

Mr. SANTORUM. Do you believe anyone on your side of the aisle would try to block or attempt to filibuster given the unique nature of that circumstance?

Mr. REED. There might be an attempt to do that, but your question to me is, is this an expression of my beliefs. I would like to think that, as in the case of 98 percent of President Bush's nominees, they would receive not only careful review but ultimately confirmation.

Mr. SANTORUM. The Senator from Pennsylvania, What is the unique nature of that circumstance?

Mr. REED. Nominated in November, to be confirmed within 3 or 4 weeks, the Senator would agree a careful review would be very difficult during that period. Mr. R, you ask the Senator is trying to refer to the more philosophical than pragmatic logistics. The reality is if someone, either someone who is a sitting judge or otherwise, was nominated—

Mr. SANTORUM. Even assuming it was not a sitting judge.

Mr. REED. Nominated in November, simply the FBI, background checks, the questionnaires, reviews, all those things, take time. In fact, the reaction, frankly, if any President did that, President Bush or President X or President Y did that, the public reaction would be very adverse, regardless of the Senate, I would like to move on.

Mr. SANTORUM. The final point is, Justice Breyer, 1980, nominated by Jimmy Carter after the November election in 1980. The President's party lost the election, the Democrats lost the Senate, he was nominated after the election and was brought to the floor with a vote by the Republicans, who then took control of the Senate in 1980, were asked to confirm him.

What did the Republicans do? There were some on our side, I think the Senator can understand in response to the question, who said we should filibuster because we do not have the time to read his record, he has no judicial experience, but the Republican leader who was going to be the majority leader pushed his side not to filibuster, and moved him through. It was Justice Breyer.

Mr. REED. My point was Justice Breyer was subject to a cloture vote, subject to a procedure that is being used here.

Mr. SANTORUM. Under extraordinary circumstances, I think the Senator from Rhode Island would admit.

Mr. REED. Let me reclaim my time. There are a number of circumstances where we have an extraordinary but, again, this was an example of Republicans using the device of cloture votes, of threatened filibuster, of extended debate, to make a point that they felt uncomfortable with a judicial nomination. That is the principle.

There is no special rule for the last 20 days of a session. There is no special rule that says that is when the filibuster is OK. There were sincere, well-meaning Senators, Republican Senators, who felt that because they did not have a chance to evaluate his record or because they felt his record was too liberal, they needed to do what they did. Justice Breyer, in fact, was well known to every person in this body. He had been through to the Senate Judiciary Committee, and worked for Senator Kennedy on the deregulation of the airline industry. He was someone who had personal knowledge of every Senator in this body at the time.

So this was not a question of who is this person. This was a question of some people expressing their sincere belief that because of his judicial philosophy, because of his temperament, because of the way he conducted himself, the Senate should not go forward in this automatic fashion.

The point remains the same. This notion of the unprecedented, unconstitutional, un-American use of cloture votes and filibuster is quite wrong. It has been used before by both sides.

The question must be back to the original hypothetical posed by the Senator from Pennsylvania. What is the criteria we are using. I urge that criteria to be based upon a careful review of the conduct and temperament of the nominee. That is a better construct of the individual. Is this person who recognizes the careful balancing a judge must perform daily? Is this someone who, although he has very strong beliefs, strong ideas about the way the law should be interpreted, respects the fact that as a circuit judge or a district judge he or she has to follow precedent? Is this someone who does not try to impose their views on the law but tries to faithfully judge based on the law? That is the issue. That is the issue of all of these nominees, and 168 of President Bush's nominees have passed that test with flying colors. Four is not. That, I believe, is what we have to focus on.

Once again, as we move forward—and this is an appropriate debate, this is one of the virtues, the glories of the Senate. We can stand here at 4:50 in the morning and talk about great issues that affect this great country. However, this is not the only issue. I would say there are so many more pressing issues. We will conclude this extended
debate this morning. We will vote, and then we have the responsibility of getting back to some very critical business. The business of this economy, of this country, both here and across the globe.

There is one issue among many issues we have to be particularly concerned about and that is the issue of our long-term economic vitality. We have a situation in the country where we are losing jobs left and right. We are particularly vulnerable to the loss of manufacturing jobs. Under the Clinton administration, in a huge jobs growth of the late 1990s, we saw an increase of 257,000 manufacturing jobs. Now we are seeing a contraction of employment generally, and particularly in manufacturing. We have lost about 2.45 million jobs in manufacturing. We have to do something. I hope we can.

So far we have not taken action aggressively or as aggressively as we should. What we have seen in the past with respect to our manufacturing sector are jobs being lured overseas by lower wages, poor environmental quality standards, very little in the way of labor rights. It is attractive to employment because we have not protected it. We operate in a context of international trade rules where we cannot simply put up a wall of tariffs around our country, so we have to be more creative and innovative. One of the problems that create the erosion vulnerability and our innovation is the fact that to keep manufacturing concerns we have to provide some resources, in terms of the manufacturing tax credits, in terms of a solution or at least progress when it comes to the issue of health care costs to companies throughout this country, which is probably one of the key problems facing every business enterprise in this Nation. That does not come cheap. When you look at it as we are, not only erosion of jobs but an erosion of the productivity, they are blocking productivity, they are blocking job creation.

I yield the floor.

Senator SANTORUM. Mr. President, before I resume debate on the judicial nominations, all this talk about not having done work on the economy ignores the fact this Senate early this year passed a jobs and growth package that is working—7.2 percent growth in the last quarter. A lot of people, maybe some, may be upset we are having great economic growth and 300,000 jobs have been created.

As this chart shows, we are now in the most jobs in the history of America, 138 million people. See the signs of doom and gloom and 6 percent unemployment that 10 years ago would have been a long shot. There is a real fear in parts of this country that those jobs that were there 3 years ago, particularly in manufacturing, have not only been lost temporarily but have been lost forever. That is not just to the individual families that have been affected, it goes to the fabric of the lives of those families.

When a manufacturing plants closes, it is not just a sad day in the lives of the workers, it is a community feeling a loss. The strength of that in that. We have not only this challenge, we have the challenge of the tumultuous world. Again, when we look at the requirements and demands on our economy, and the requirements and demands of protecting ourselves internationally, we ask ourselves where are we going to get the resources, given the budget, to fund our military? To provide the resources to conduct a very expansive and aggressive foreign policy?

Just a few days ago this body voted $87 billion for reconstruction of Iraq. That is $87 billion in the context of a deficit in which we are spending money literally we do not have. I am sure that will not be the last time we consider additional resources for Iraq, Afghanistan, and other countries. Yet we are not doing those things we need to do to ensure fully that our nation is entirely protected.

We have serious challenges before us. I hope again at the conclusion of this very extensive debate and at the conclusion of these votes this morning, we can get back to that critical business. Interestingly enough, we interrupted Senate proceedings at a juncture where we were ready to pass the HUD-VA appropriations bill to get on to the discussion of these judges. At that point, we were considering how we could strengthen further, increase further, the resources going to our Veteran programs and another one is a hand basket with the economy, an area now. The idea we are going to hell in a hand basket with the economy, some may wish that to be the case for political purposes, but it just is not. It is not a fact. These facts are this economy is growing. Sure, we have more to do. That is why we have the jobs and growth package we are trying to push through having to do with litigation reform, which is being blocked by the other side of the aisle. On several fronts, whether it is medical lawsuit—whether this is class action reform—which we lost on the floor of the Senate by one single vote—which is class action reform—talk about manufacturing jobs. Asbestos litigation is killing us. What is happening? The other side of the aisle is blocking it because their trial lawyer friends in the Democrat Party, who support the Democratic Party more than any group, they are blocking productivity, they are blocking job creation.

They come to the floor and complain that there are no jobs available. The fact is, the policies of this administration are working, and it is just driving the other side crazy. They want to complain about the past.

Look to the future. Things are looking great, except when it comes to the third branch of Government.

The third branch of Government, the judicial branch of Government, is one of the most important branches at the Government because it interprets our Constitution. It says what our rights and responsibilities are according to that Constitution.

You have to wonder because I get this question all the time: Senator, why are you spending all this time on judicial nominations? What is so important? How does it affect me? I get reporters’ questions all the time. Reporters sometimes can be insightful and sometimes not. This is one of the most basic questions. And you wonder why. But in this case the basic question is a good question: Why should we care about this?
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Now, if you would listen to someone on the other side, they would tell you, you should not care about this. Turn your televisions off. Nobody is paying attention. The sign from the Senator from Iowa: I am going to be watching “The Bachelor.” The little bit of truth in it, has to be really effective, there has to be a little bit of truth in it. The little bit of truth in it, is one of the great things in our society, every society, because for humor to be really effective, there has to be a little bit of truth in it. The little bit of truth in it is one of the most telling things. It was a little bit of truth in it. The little bit of truth in it, was Howard Baker. You had people here on this side of the aisle who put the institution first, who said, as a leader: We are not going to filibuster. In fact, they moved the cloture vote to a Thursday, because we only had a week or so left when the nomination came up.

Here in the Senate just to move anything takes weeks. At the end of a session, one Senator has enormous power because they can make you go through the procedures in the Senate to get to a vote, which takes weeks if there is not consent. So just one Senator, at the end of a session—we all know it. We all use this leverage. It is the beauty of the Senate, the power of the Senate. It is so much more powerful than dozens and dozens of House Members. It is because of the rules here.

But the Senate minority leader, soon-to-be majority leader said: We are not going to do that. We are not going to filibuster. If there is a hold on soon-to-be Judge Breyer, we will work with the soon-to-be minority that was swept out of the election—huge losses; hemorrhaging—we will work with you to confirm someone who, by the way, is now on the United States Supreme Court and is writing opinions that make me throw up.

But we did it because the Senate was a different place then than it is now. We did it because the leaders were different then. Leaders did not respond to the latest pro-choice Web site. They were not manipulated by organizations far from this place, who fund their campaigns and support their grassroots activity, not leaders here. When you look at these things that were seep into this Chamber like hidden gases underneath the door panel. That is what is poisoning this atmosphere. That is what is poisoning this atmosphere. It is narrow zealous special interests. That is what has changed in this place.

But it is not just them. They cannot do it without us because there have been the NARALs and the ACLUs, and People for the American Way, and the trial lawyers association and all—labor union rules have been put there before. But people in the Senate always stood up for the Senate against the passions of the moment, the special interests of the moment, the needs and wants of your supporters at the moment.

They felt a responsibility. They felt a responsibility for their leadership in the Senate.

It is amazing to stand here. The Chamber is basically empty. Not only empty, it was a vote by vote basis. We were once. Kansas and South Dakota, but it is 5:30 in the morning, as my voice echoes, resonates without very many people here. But you still look around this place, and you look at the empty chairs and you close your eyes and you can just feel the presence of the greats who have been here in the past, of the people who have sat in these chairs—these very chairs. You can feel that beacon here. This beacon of deliberation, this beacon of sometimes delay and sometimes not particularly pretty debates in the Senate, but yet the essence of democracy here. And for 214 years—214 years—the leaders in this Chamber, not necessarily all the Members—we are a society of saints and sinners and everything in between, but the leaders in this Chamber always took the responsibility of leadership of this august body as a sacred trust because we do here sets precedent for what will happen.

The Senator from West Virginia changed the filibuster rule. I know with his sense of history he knew the consequence of his action. When he changed the rules for the recognition of a quorum, the Senator from West Virginia knew what the consequences of that would be. When we change any procedural thing in this Senate, we know because history has taken precedent that there are profound consequences.

So when Senator Daschle, Senator Reid, Senator Kennedy, Senator Leahy, Senator Durbin, Senator Clinton, and Senator Specter got together and leaders turned on to C-SPAN right now because what is happening on the floor of the Senate is an attempt by a minority to circumvent the Constitution.

Why? Circumvent the Constitution by requiring a higher standard for the confirmation of judges than has ever been held before. Well, they say there have been filibusters before. There has never been a case where there has been an organized attempt to block a nomination requiring a supermajority vote. There have been cloture votes filed here.

In the case of Stephen Breyer, J ustice Breyer, nominated after the 1980 election, after Jimmy Carter lost, after the Democratic loss of control of the Senate in a landslide election—can you imagine if President Bush had the gall to nominate someone to a circuit court after getting swamped in an election? There would be audible laughter on the other side of the aisle that we would consider a nomination at that point. Filibuster? My goodness, they would be screaming how dare you have the gall to do something like that?

I know the Senator from Rhode Island said: Well, I would hope we would consider this. Oh, please. Please. Look at the nominations they are blocking now, “out of the mainstream” nominations they are blocking now.

Janice Rogers Brown: 76 percent of the vote in California. Out of the mainstream.

Priscilla Owen: 84 percent of the vote in Texas. Out of the mainstream.
block by using the filibuster. Never before. Now that is a precedent-setter, folks.

Why? Why? Why is it so important? What has changed that would not lead George Mitchell to do that? That would not lead Mike Mansfield to do that? That would not lead Everett Dirksen to do that? That would not lead Senator Taft or Senator Vandenberg or Senator Johnson to do that?

Let’s go back through history. All of these—men—the giants of the Senate—the giants of the Senate never once employed this tactic. Do you think that Lyndon Johnson, as majority leader, ever had a nominee he did not want? I assure you, having read some of the history of Lyndon Johnson, and Caro’s book—the Senator from Arkansas talked about it—there were people the Senator from Texas did not like. There were people the Senator from Ohio, Mr. Taft, did not like.

Of course throughout history, but did they ever apply a higher standard? Did they ever do that? The answer through history is no. Could they have? Well, obviously from what is happening right now, the answer is, yes, they could. They did. No?

Were there issues of great importance during those times? Well, I would suggest if you were living through those times of war and depression and communism and segregation, and in prior centuries, slavery, reconstruction, and trust busting, and human rights, I would argue those are pretty big issues. Never before used.

So I am going to go back to what the Senator from Kansas was talking about in the last hour. What are the issues—or what is the issue—that is so important that the Senator from South Dakota and the leadership of the Democratic Party would seek to change the way the Senate does business, would seek to render precedent of the Senate and potentially forever change the judiciary of this country?

Let’s make no mistake about it, you are going to dramatically affect who is going to be applying for these judges, who is going to be confirmed, and what their point of view is going to be—I would argue what their competence is. The issue is clear, it all centers around this issue called the right to privacy—the right to privacy.

Now here is a copy of the U.S. Constitution. I am holding it up in my hand. I challenge any person in this country, in the world, to find the words “right to privacy” in this document. It does not exist. It does not exist. Wait a minute, I always thought—I ask students all the time: What section of the Constitution is the right to privacy? Will you please read the section that the Founders, or through constitutional amendment, established the right to privacy? Can you please find that?

Well, oh, yes, it is in the—let me see. Is it in the 14th amendment? Is that where it is? No. I am sitting here reading: “All persons born in the United States subject to jurisdiction...” — no, no, I don’t see the words “right to privacy” in there. Maybe I was wrong. Maybe it is the 10th amendment: “No powers delegated by the United States Constitution to the States by any means or for any purpose shall be so reserved as to preclude their exercise.” — no. Oh, it has to be the first amendment. Good. “Congress shall make no law respecting the establishment of religion, prohibiting free speech or free exercise thereof, or abridging the freedom of speech or the right to peaceably assemble.” — no, it is not there.

Where is this right to privacy? Well, it was created by whom? It was created by judges. Was it amended because there is a provision in the Constitution, we can find that, that says how you amend this document. Is that the way it happened? No, it did not happen that way.

We amended the Constitution because we put in place a power of authority, people on the highest court of the land who decided it was their responsibility to change the Constitution, that it was their responsibility to find new meaning in these words that we have been around for a couple of centuries.

I have always thought we were a government of laws and not of men, but that is not the case anymore. That is fundamentally what this debate is about, because we look at the written words of the Constitution that says a majority vote is necessary do not mean anything anymore because the Constitution is a dusty old document we can manipulate and change for what ever purpose because we have advances in society; we know more than they did then; we are enlightened. Come on, folks, 240 years ago, they didn’t have the level of sophistication and knowledge of our culture today, and so these words that have meaning to us, if they are to be revised; it is so complicated to go through the amendment process of the Constitution; it is so cumbersome; we, the enlightened, will change it as, of course, the culture demands us to do, to free us from the bonds and shackles of these now long departed Founders of our country who couldn’t possibly understand the complexity of the world today and the advancements today that have made this document so unnecessary. So we don’t need to find anything in this document need to be revised; if we can’t find it, that is fine; we will simply create it.

Who does this creating? It is the very judges we are debating today. The Senator from Kansas talked at length in the last hour about the line of cases that is taking an eraser to the word “God,” religion, erasing it from our public consciousness. It is as if the first amendment was never written: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

“Free exercise thereof.” I asked a group of students yesterday what were the first words in the Constitution, separation of church and state or exercise of free religion. Half said separation of church and state. Of course, if you listened to the judges and what popular culture says, you would believe that.

Can you imagine, half the people I talked with yesterday did not think free exercise of religion was in the Constitution? Can you imagine? Why would they think that? Because in most of that is the public culture sends about the Constitution. It is not about freedom of religion. If it were about freedom of religion, we wouldn’t be erasing God from everything that is public in our culture.

Who is doing the erasing? Is it Congress? Did Congress pass a law that says you can’t have prayer before a football game? Did Congress pass a law that says we will scrap “under God” from the Pledge of Allegiance? Did the people speak out? We don’t want the mention of any faith in the public square? Is that what Congress did? No.

So people ask: What are the consequences of what we are doing here today? The consequences are clear. We have elected people who are erasing from the public consciousness some of the most important and fundamental rights and, I would argue, some of the most important and fundamental principles that keep our country moral, safe, free, and prosperous.

Mr. BROWNBACK. Mr. President, will the Senator from Pennsylvania yield for a question?

Mr. SANTORUM. I will be happy to yield to the Senator from Kansas.

Mr. BROWNBACK. Mr. President, I have been listening, and I think the Senator from Pennsylvania puts forward a brilliant and eloquent argument, and it gets to the nub of what we are talking about instead of the areas. It is in this last 4-year time period that a constitutional right to privacy has been uncovered and uncovered a series of cases. This is done by the Court. The Court has discovered this, and the Court has done this.

Let me ask a simple question: Has the U.S. Supreme Court ever been wrong?

Mr. SANTORUM. You would think from the debate here that this right to privacy, that has now been established as this incredibly well thought out and documented thing, is wholly supported by this document. But this document has nothing on my side of the aisle—I always think of the former Senator from Washington, Slade Gorton, who is for abortion rights who thought Roe v. Wade was one of the worst legal decisions he had ever seen. So many people are for abortion rights, who would have voted as a legislator to allow the legalization of abortion, saw this judicial construction or deconstruction of the Constitution as an abomination to our legal system.

Has that ever happened before? Obviously, the Senator from Pennsylvania is referring to some of the cases such as...
Plessy v. Ferguson where the Court looked at this Constitution and said: You know, equality really doesn't mean equality. The words here aren't exactly what we think they are, and you can be separate and equal. Or we can go back to Dred Scott. They looked at this Constitution and said: You know, equality really doesn't mean equal. This rash of cases we have seen where the courts have just decided to take these halloved words and twist them into the court of the day, this is not a new thing in America; unfortunately, it is a very old thing in America.

The Court in Dred Scott said: Yes, people have rights and people should be treated equally, but— I think of “Animal Farm”— some people are more equal than others. Some people have more rights than others. In the case of the slave, they really don't have much in the way of rights at all.

We ask, what would we do now with disgust, but judges found in this incredible document the right to do incredible harm to this country—incredible harm—and, in many cases, with complicity from the Senate, for it is we who confirm these. This is what we do because we put these judges in these places. So it is an important responsibility.

That is why this debate is so important. That is why we shouldn't be watching The Bachelor. We should be watching out for the future of this country.

In my next block of time in the next hour, the Senator from Kansas and I are going to talk about this right to privacy, this line of cases that has tried to erase God from the public memory and consciousness, all instigated by judges who would find wide praise and admiration on the other side of this aisle, who would be called mainstream judges—mainstream judges who are striking at the heart of this document.

What is a mainstream judge? Let's understand it. A mainstream judge says we have a place in the public square. That is a mainstream judge.

A mainstream judge says you have the right as an individual to have dominion over somebody else and terminate their life if you want to. That is a mainstream judge.

A mainstream judge says we are going to take the institution of marriage and corrupt it, deconstruct it, tear it apart, put it back together to mean nothing. It means any two people for all intents and purposes want to get together should be recognized as married, irrespective of who they are. It has nothing to do with fathers and mothers and having children. What does that have to do with marriage? That is a mainstream judge.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. SANTORUM. It is an extreme judge, not a mainstream judge.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. JOHNSON. Mr. President, reference has been made at this early hour this morning about debasing the values of this institution and this country. If any American sadly wants to see debasing of the institution, they have only to look at the strategy that has been foisted upon this body and on the American people by the Republican leadership of this Senate in their fabrication of a “crisis” relative to the nomination and approval of Federal judges.

There is no crisis. The fabricated crisis the media has talked about is a political way of saying the phony crisis, the fake crisis.

The reality of the situation is that this Senate has approved 168 Federal judges nominated by President Bush. The Senate has blocked the approval of 4 Federal judges, a remarkable 98 percent success rate.

The ratio of unfilled judgeships is now at its lowest point in some 13 years. The pace of approval of judges is at a higher rate than that of past Presidents of either political party, and I think it is fair to say that of these 168 judges, most of whom I voted for, virtually all, if not all, were conservative Republican judges. That is to be anticipated, because they were all nominated by President Bush.

The question is not whether we should approve conservative Republican judges. We have, overwhelmingly.

The question is, Should there be some shred of bipartisanship in this institution relative to these judges who will serve life terms on the bench? These are not Cabinet officers. These are not people who come and go with whatever President happens to be in office. These are people who will serve virtually their entire lives on the Federal bench. So this body has a constitutional obligation of advice and consent.

Apparently, the other side believes unless there is 100 percent approval of Federal judges, if somehow we haven't done our job, I would say the opposite, that if all we do is rubberstamp the nominations of any President, Republican or Democrat, this body has fallen down in its obligations, constitutionally and ethically.

One of the great things about the Senate and the great traditions of the Senate—and there are great traditions in this body—is that unlike the House—I served in the other body, as many of you know—I served in the House of Representatives with its majoritarian philosophy, set up that way by the Founders, where if you have a majority of one vote, that is sufficient to ram through almost anything. The Senate was devised by the Founders of our Republic to be a moderating, cooling institution. That is why we have 6-year terms—because Senators are invited to take a longer term view of what is good for our Nation and what is not.

The Senate is designed to be a body that doesn't jump every time a whim is expressed by the public or in the political whims of the day. Our role is to take a longer term view and to moderate what is oftentimes the hot politics of the House of Representatives.

It is very difficult, because of the rules of this body, to jam through legislation for the approval of virtually any other position without some bipartisanship. That is the course of action we are seeing here today.

While we have approved 168 of President Bush's judicial nominations, the minority party, a 51-to-49 minority, has said there are such important positions, let's make sure there is a general consensus about the support of these nominees. That is what the 60-vote rule requires.

The other side is very frustrated because they like to jam things through the Senate with 51 votes, but that is not the way the Senate works on this or many other issues.

I have to say President Bush's nominees have received prompt hearings compared to virtually any other standard. That contrasts greatly with President Clinton's experience. President Clinton was told: Don't bring us a nominee who is liberal; they will not receive a hearing. And, indeed, they did not.

We had people nominated, closed up their law practices and put their family on hold for years upon years, and could not get a hearing under the Republican leadership during the Clinton years.

That doesn't happen anymore. Now people who are nominated do receive timely consideration. They do get votes. They get votes on the floor of the Senate. But the Senate has chosen to use its prerogative to require bipartisanship on some of the judges who many in this body believe fall outside the mainstream of conservative thought in terms of their politics, in terms of their legal interpretations.

There is no crisis in terms of judges. For over a decade, judges of both parties and the ratio of judgeships filled as we have today. President Bush has an enormous winning record in terms of the nominations that have been approved. Again, virtually all of them are conservative Republican judges. That is his prerogative. The Senate has gone along with that. There is no problem there. This is not as though somehow the President is getting jammed.

What is happening here, I think, is that there has been a strategy concocted by the leadership of the other side to try to gin up political support among a faction of their supporters. What we have here is politics, an effort to play to the radical right. It is costing $100,000 or more of the taxpayers' money for this debate, and yet what we have here is a phony, fake, fabricated crisis. This is no crisis. The Senate is dealing with judges in a timely and responsible fashion.

President Bush, obviously, could have the approval not of 98 percent but 100 percent of his nominees if he were to send to us mainstream conservative Republican judges, as he largely has...
done. Clearly, it is part of the political strategy to look around the country and find a handful who fall far outside the mainstream of Republican or Democratic judicial thinking and nominate them, knowing there will be resistance to this clearly in the Senate. The thought is that by nominating these individuals, they can energize the radical right-wing political faction within the Republican Party. They will contribute money then if they see all this effort put into it, and this is a very cynical strategy. This has nothing to do with the interpretation of the Constitution. We are approving conservative Republican judges. It does have to do with able people who are in the mainstream, broadly thought.

I think it is regrettable that we find this Senate and our work hijacked by those who want to push aside timely consideration in the Senate of issues pertaining to jobs, education, health care, energy, environment, our veterans and our military. And one that truly does not have votes in this body, with which this body ought to be dealing.

The Federal fiscal year began Oct. 1. Yet the Federal budget is not concluded. So the time is so much that needs to be done, that all that are doing the 60-vote requirement votes in committee and cloture votes have been held. This has nothing to do with the interpretation of the Constitution. We are approving conservative Republican judges. It does have to do with able people who are in the mainstream, broadly thought.

I note that 95 percent of the Federal judicial seats are now filled. That is the lowest vacancy rate in 13 years. Last year, this Senate, led by my colleague Senator LEAHY as chairman. Part of that time the Republicans controlled the Judiciary Committee. So the track record is truly extraordinary. What an irony that in the face of that reality, we find ourselves through the wee hours of the night, through the day yesterday, through the day today, being prevented from dealing with the real legislative issues while we talk about this political gnat that we have before us.

Some say, well, what about the appellate court judges? That is the highest Federal court next to the Supreme Court itself, and one that truly does write law. Well, even there the Senate has confirmed 29 President Bush's appellate court nominees to date, more than Bush circuit court nominees than—at this point in his administration. Yet here we are, the other side posing as though there is some sort of terrible crisis going on when, in fact, it is just the opposite. Conservative Republican judges have not been approved at a record pace by this body.

What the other side seems to find unacceptable is that the Democratic Party is insisting that one should not go to a lifetime Federal bench, unless there is a generally broad consensus, bipartisan consensus, not unanimous but a broad consensus, of at least 60 votes that that person deserves to sit on the bench dealing with legal issues that are of monumental importance to every American citizen for the rest of their lives. That is one of the great strengths of this body. That is one of the great strengths of the United States Senate, that we cannot be stampeded into the radical actions of a few but that we take a longer term view of the future of this nation, what is consistent with American values, what is consistent with American priorities, for all of our people. That is what is happening in this body this year, and that is why a few on the other side are feeling thumped politically. Now, other judges have been filibustered; cloture votes have been held. Other judges have been held up in committee, which has been the favorite mechanism of keeping people from having a vote at all. That is to be said even for these four. They have been allowed votes in committee and cloture votes on the floor. They cannot get the 60-vote requirement and so they are not going to the Federal bench because they do not have that broad-based consensus of support in this body.

That is what this body is all about. It is not just judges. This same 60-vote rule prevails on virtually everything we do in the Senate, from the passage of health care, to education, to appropriations legislation. Virtually everything is subject to that consensus requirement. I think it reflects the best of our values in America and, in fact, it represents America coming together in this great legislation that is good for us all. It is not ideologically driven. It is not the product of the far left or the far right. The product of the far left or the far right does not do well in this body because of the nature of the rules that have been the rules since our Republic began. It is one of the geniuses of the Founders of this Nation, that this is the profoundly important role of the Senate to moderate the radical winds that occasionally blow politically through this country and through Washington, DC. So it is a bulwark of individual freedom and of American values and priorities that we have a body like this that mandates that there be greater thoughtfulness, greater moderation, greater reflection than would otherwise be the case.

There are other issues that we rightfully ought to be moving on to. Recently Senator DASCHLE and I visited the Walter Reed Army Hospital in Washington, DC. One of my constituents, a soldier injured in Iraq, was there. Senator DASCHLE and I and a contingent of other Senators visited wounded war veterans. We can take great pride in the quality of these young men and women and what they have done for America, what they are doing for America. They are extraordinary people with great courage, and they are getting on with their lives as best as they can.

It was heartbreaking to go from room to room at Walter Reed and see our Iraq military veterans. In one room, a soldier has lost an arm. The next room, a 20-year-old young man has lost both legs. In the next room, a young man has lost his leg all the way to the hip. In another room, there was a young man with brain damage. In another room, a man has lost his hand. Another room, a man has lost his hand. In another room, a man has lost his hand. It was heartbreaking.

One has been a lot of reference to those who have lost their lives and made the ultimate sacrifice in Iraq. Our hearts and prayers go out to them and their families, but we should not forget those as well who are alive and with us but whose bodies are shattered, whose lives are forever changed because of what they were willing to do for the United States of America in their military service.

Their families were there. Young wives were there yesterday, many of them with very small babies, some pregnant. Now they have a husband who has no arms, who has no legs, who has been in an explosion. We should not forget those as well who are alive and with us but whose bodies are shattered, whose lives are forever changed because of what they were willing to do for the United States of America.

We can take great pride in our Iraq military veterans. In one room, a young man with brain damage. In another room, someone with great courage, and they are getting on with their lives as best as they can.

I visited Walter Reed, and I did not ordinarily make partisan references lightly. I am a Democrat. I am elected in a State that is overwhelmingly Republican, and I am proud of the Republican support that has been
I believe that fighting to bridge this gap by increasing Federal aid to the States and raising public awareness of the school public crisis is essential. I think it is important to recognize that money alone is not the solution to improving our schools, but we need also to cognizant of public schools need the financial resources necessary to successfully implement No Child Left Behind. The National Education Association’s State-by-State report on layoffs and cuts affecting schools and students, parents, and communities, NEA collected anecdotal data from 2003 through the end of September and finds the school district stress all across this country.

In my home State of South Dakota, our Native-American community is struggling badly—high unemployment, lack of health care, high infant mortality, lack of jobs. Again, that is another area that deserves the attention of this body. These are the real crises that face America, not a 98-percent approval of conservative Republican judges, which this body has done.

President has been served very well by the Senate on the timely approval of 98 percent of these judicial nominations. I submit that the four who have been rejected were selected with the thought in mind that they would be rejected because that was the hope of the President, and I think what the President wants, is a fight. They know that a fight will energize the radical right wing of the Republican Party and will energize political contributions. Sadly, that is what this debate is all about. That is why the taxpayers are having to fund $100,000 or more for the cost of this.

That is why we are not able to get on to the other issues that truly we ought to be addressing right now.

Mr. President, I rise today to dissent. I dissent to the majority of this body’s unwillfulness to focus and deliver on healthcare and education. I dissent to this body’s inability to provide for our veterans. I dissent to the President’s blatant disregard for treaty and trust responsibilities to Indians. And most of all, I dissent this political charade.

Instead of talking about judges, as a body, we should be addressing the unmet needs across this country.

Our generation’s sacrifices in service to our Nation. They have answered the call to defend our freedom and served our country at the time of its greatest need. We are trying to provide our veterans with the full benefits they have earned. While the White House can find money for tax cuts for America’s wealthiest families and a $20 billion lavish grant for Iraq, too often poverty is paled when it comes time to providing our veterans the benefits they deserve. Right now, 60,000 veterans are 6 months or longer for an appointment at VA hospitals. I think it is important to fully fund VA health care so that veterans of Operation Iraqi Freedom can get the care they need when they return home. My own son served with the 101st Airborne in Iraq. He is home now. He is safe. He did not suffer one of these horrific injuries. We are grateful for that, but we know tens of thousands of others are still there, have suffered horribly, have lost their lives, and their families have gone through enormous painful stress.

In contrast, Republican leadership in the Senate has broken their promise to provide an additional $1.8 billion for veterans health care this year and even proposed an increase in prescription drug copayments that impose a $250 annual membership fee for veterans seeking health care. Should we not be talking about these kind of priorities? It is astonishing to me that the Republican leadership of the Senate, having only days from now, November 21, and has scheduled 39 straight hours of executive session to discuss this phony issue; not 39 straight hours to discuss critical legislation such as lack of prescription drug coverage for millions of American beneficiaries in this country. Do not the 40 million Medicare beneficiaries deserve as much attention as this phony issue is receiving?

We are at an impasse. We do not have a final Medicare bill. At this rate, spending hours and hours discussing nominations which have overwhelmingly been approved, instead of debating important Medicare legislation, we never see the priorities of the majority party in this body. They are dedicating nearly 10 hours each of discussion for four individual judges, but we cannot spend 1 hour each for every million individuals on Medicare. What is wrong with that picture? High drug spending is placing a heavy burden on American families, and many businesses are responding to rising drug spending by increasing the amount that employees must pay for prescription drug coverage. Public programs such as Medicaid and the Veterans Health Administration are also struggling to respond to soaring drug spending. Finding a solution to the prescription drug crisis in this country is a priority for me, for many in this body. It should be a priority for the entire body.

States and local communities are struggling with the worst budget shortfalls since World War II and many have cut back on education funding, in instruction time, have laid off quality teachers and school staff. School district after school district in my home State of South Dakota are having problems among other things to try to make sure that children in our communities have the resources they need to learn. Parents and students are holding bake sales and auctions to save their schools, having to do with our children, having to do with our schools, having to do with our seniors, having to do with our veterans, having to do with health care costs. That has been handled by both the White House to talk about the four judges who were selected, I think, by a process where the President and the leadership of the other side knew very well that these congressional committee, has been one of accelerated consideration of judicial nominees, that is not the case with 68 percent of these judicial nominations. I submit that the four who have been rejected were selected with the thought in mind that they would be rejected because that was the hope of the President, and I think what the President wants, is a fight. They know that a fight will energize the radical right wing of the Republican Party and will energize political contributions. Sadly, that is what this debate is all about. That is why the taxpayers are having to fund $100,000 or more for the cost of this. That is why we are not able to get on to the other issues that truly we ought to be addressing right now.

Mr. President, I rise today to dissent. I dissent to the majority of this body’s unwillfulness to focus and deliver on healthcare and education. I dissent to this body’s inability to provide for our veterans. I dissent to the President’s blatant disregard for treaty and trust responsibilities to Indians. And most of all, I dissent this political charade. Instead of talking about judges, as a body, we should be addressing the unmet needs across this country. Our generation’s sacrifices in service to our Nation. They have answered the call to defend our freedom and served our country at the time of its greatest need. We are trying to provide our veterans with the full benefits they have earned. While the White House can find money for tax cuts for America’s wealthiest families and a $20 billion lavish grant for Iraq, too often poverty is paled when it comes time to providing our veterans the benefits they deserve. Right now, 60,000 veterans are 6 months or longer for an appointment at VA hospitals. I think it is important to fully fund VA health care so that veterans of Operation Iraqi Freedom can get the care they need when they return home. My own son served with the 101st Airborne in Iraq. He is home now. He is safe. He did not suffer one of these horrific injuries. We are grateful for that, but we know tens of thousands of others are still there, have suffered horribly, have lost their lives, and their families have gone through enormous painful stress.

In contrast, Republican leadership in the Senate has broken their promise to provide an additional $1.8 billion for veterans health care this year and even proposed an increase in prescription drug copayments that impose a $250 annual membership fee for veterans seeking health care. Should we not be talking about these kind of priorities? It is astonishing to me that the Republican leadership of the Senate, having only days from now, November 21, and has scheduled 39 straight hours of executive session to discuss this phony issue; not 39 straight hours to discuss critical legislation such as lack of prescription drug coverage for millions of American beneficiaries in this country. Do not the 40 million Medicare beneficiaries deserve as much attention as this phony issue is receiving?

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would be lightening rod candidates, that they do not fall within the same mainstream body as the other 168 conservative Republican judges.

That has led to this dispute, and the dispute, I think, is not about principle. It is about politics. Let me give you two examples. The National Right to Life, their Web site, going to task on Charles Pickering; others on the left, pushing this hard for fundraising and organizational purposes. I don’t think that is at the root of what we are talking about. Why are we spending this time and why are we being tied up on something that has been without precedent, a blockage of Federal judges. This is really about a big issue, and that is why we are here at 6 in the morning on Friday, because we are talking about a big issue and we need to talk about other issues as well—which I agree with; we need to talk about other items, but we need to talk about this one, too.

When you get a judiciary that is blocked, do they need to talk about it? Why would these folks be blocked? These are highly qualified. They get painted different ways, but we have been through ad nauseam the qualifications. They are highly qualified judges in the States. They are on the highest courts in Texas and California—I guess Texas and California are mainstream—they are on the highest courts. One is on the Federal bench in Mississippi, approved by this body previously.

What this comes back to—and the Senator from Pennsylvania was hitting it when we last had the floor—was a discovered right by the Supreme Court, the right to privacy. If we blow away the smoke and we are stating why we are here at this point in time and why would such qualified judges be blocked, it is because of the court that has been writing laws and about the right of privacy, or this constitutional right, discovery. It is in this document, as the Senator from Pennsylvania pointed out, the right to privacy.

I find it interesting that others have mentioned that the appellate court writes laws and that is why the judges are important. The lower court, the Federal district trial court, does not write laws, but the appellate court does. There is the issue and the problem. The appellate court does not write laws. The Supreme Court does not write laws. They interpret the Constitution. They do not write it.

Unfortunately, people in this body look at it differently. Some are saying, yes, the court can write laws at the appellate and the Supreme Court. If that is the case, we have a second legislative body in Washington: We have three units of government, but two happen to be legislative and one executive. Yes, one legislative also has a court of judicial judges, well, but we have a second legislative body. And we are seeing this stream develop further with some people on the other side of the aisle saying we should examine the political opinions of people we are appointing to the bench.

If they are going to be a judge and they are going to interpret the law, why should a political opinion be of significance in the consideration? That is the issue. I think that is the case, we have a second legislative body in the Senate. I am a legislator; you are a legislator; people in this body are legislators, but those on the Supreme Court or court of appeals are not legislators. One say, OK, what we need to examine the political ideology of the people coming forward for the bench even though they are saying we will follow the law and that leads to writing laws on the bench. I hold to the opinion—most people on this side do—which you want in a judge is someone who interprets the law and interprets the Constitution and does not write it. There would be times I would have actually liked a judge to interpret something to the right of this view, because if the court would be able to interpret the law. I find it interesting that others have mentioned that the appellate court writes laws and that is why the judges are important. The lower court, the Federal district trial court, does not write laws, but the appellate court does. There is the issue and the problem. The appellate court does not write laws. The Supreme Court does not write laws. They interpret the Constitution. They do not write it.

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join in blocking of a nominee to require a supermajority? Why has it never happened prior to this session?

I think the Senator landed on it when the Senator said for the first time we are seeing people come to the courts, but to be legislators, to make law instead of decide constitutional interpretation and to settle disputes. So we have entered into a time when political considerations now become much more important than the quality of the judge, the temperament of the judge, the qualifications of the judge, the experience. Those are now important, but they are almost secondary issues to the political philosophy of the judge because the courts now are fundamentally different than they were 50 years ago or 60 years ago.

Is that what the Senator from Kansas is saying?

Mr. BROWNBACK. It is what I am saying. It is that we are going down this route taking place. This is going to lead us down a bad road. We are already started down the road.

Now we appoint legislators for life with superpowers, and we are unable to pull the plug on that. We are unable to moral turpitude. You have people who become—in essence, they can almost be dictatorial or tyrannical, and they are appointed for life. That is why so many people are so passionate about what takes place. That is where this is a problem because now you have a superlegislator who does not answer to the public. It starts to get irritating to a lot of people.

This is not the way we should be going. We should be backing up and saying these are three coequal branches of government with different jobs—not legislators each, but a legislative and executive and a judicial branch. This is the problem.

If we keep going down this trail, and you try to examine the political philosophy because judges can write laws or you can discover rights, including rights of privacy in the Constitution, and what other rights can you discover in the Constitution, and it will be important to know the political philosophy. Say we get one or two Supreme Court nominees to come up. Now we have somebody such that we are looking at a superlegislator for life in the highest court of the land who can, with a couple of other people, rewrite this document—not just legislate but rewrite the constitutional document. That is why we have the huge fights on this floor.

We used to say in the past—thanks to the question my colleague raised, we say, I disagree with the philosophy of Ruth Bader Ginsburg, I disagree with the philosophy of someone else, but they said they would uphold the law. They are confused, as I am as a legislator, with power and authority. I do not agree philosophically, but they are qualified and will do a good job and I don’t have a good reason to vote against them.

Mr. SANTORUM. This gets to the heart of this 168-to-4 number. The vast majority of the 168 are at the district court level, trial court level. What the Senator from Kansas is saying—and I want to make it clear—the court, judges, by and large, do not make it. They are trying in cases. Appellate court judges, we have seen in recent years, have begun to take on the mantle of legislator in making law, and therefore all of the nominees who are being blocked on that, these quasi-legislative-type judges.

The Senator is suggesting the super-legislator is the Supreme Court. So if we in for filibusters for appellate courts, can anyone imagine what a Supreme Court nominee fight will look like in the Senate now versus 20 or 30 years ago?

Mr. BROWNBACK. Absolutely. That is the point. We will be in such a mammoth fight and engaging the entire country. Who will you ever get that person through?

It does go to this constitutional case that is being considered by the Supreme Court now on the flag salute, the salute. This is a declaration of the discovered set of laws that somehow discovered that our Constitution was not about the flag salute. “One Nation Under God.” Ninety percent of the public is for the flag salute. I am a faithful, that percentage. If you are a Catholic, that you will have a Supreme Court position that turns by anyone. And you get people saying, no, this is about the judiciary? Where is the balance of the judiciary? Where is the majority of the 168-to-4 number. Have you ever heard of that before? That is not me. It is not Republicans saying this. You have protestations on the other side. This has all the time. Come on, no big deal. The Senator from Illinois will show a chart, look at all these filibusters. Come on, no big deal. We do this all the time. Unprecedented. Their words, not mine.

To whom? To their people? Guys, this is what we are really doing. We are not going to say this on the floor of the Senate, but this is what we are really doing. It is unprecedented.

So what is going on? An unprecedented filibuster to raise the bar for nominees. Try to get people. Not my words, the words of the Senator from New Jersey to the people he relies upon to support their party.

Let’s look at the facts. Is it unprecedented? Since the filibuster rule was passed in the Senate, 2,372 to zero. That is unprecedented.

I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 169, the nomination of Carolyn Kuhl to be a United States District Judge for the District of Pennsylvania.
Mr. DURBIN. Mr. President, object. The President is not going to consider the nomination of Janice Rogers Brown to be United States Circuit Judge for the District of Columbia.

Mr. DURBIN. Mr. President, I object. The PRESIDING OFFICER. Objection is heard.

Mr. SANTORUM. Mr. President, I object. Now that the chart the Senator from Illinois is going to show is 168 to 6. And I would project that 168 to 6 will soon be 168 to 7 and then 8 and then 9 and then 10, and that number is going to act, looking forward into the future of the Senate, be a good percentage. I might agree with him looking forward because we will have set a precedent tonight. We will have set a precedent in this session of Congress that will go to haunt both sides forever. If we maintain it, it will. I guarantee it.

What we are doing here is playing with real bullets. I tell you there are folks on our side of the aisle who are loving what you are doing. They are loving what you are doing as a man. They just think, go, baby, go. Do this because we can’t wait to get our arms around the next Democratic President who wants to stack the court with a bunch of people who believe God does not belong in the Pledge of Allegiance. We can’t wait—by the way, got confirmed by the Clinton administration and by this Senate. We can’t wait to get our arms around people who find in this Constitution things that are not in the Constitution. We can’t wait to be the super Senator, the super legislator, the super President. We can’t wait to block those nominees because, do you know what? You did it first. You did it first. You can say, oh, no, we didn’t do it first. You did it first. You crossed the line. Oh, it has been threatened. It has been talked about around here. I will not deny that. I talked about it. Richard Paez, by the way, who tried to stop the California election a few days before the election, found somehow that he cannot hold this election,” that, to the people wanting to recall the Governor, “you can’t do that because, of course, I know more than the people.” Richard Paez, Ninth Circuit, overturned more than any other circuit in the history of the United States. Clinton nominees, liberal, activist judges, out of step with the mainstream, the Senator from New York and maybe other Senators call mainstream, who says “under God” means something. And the Senate, the Judge of Allegiance, who said “three strikes and you’re out,” that the people of California voted for, is unconstitutional. The Supreme Court overturned that.

That is the mainstream. Can’t wait to get at the next Marsha Berzon. Go on down the list of folks. Did I want to filibuster them? Did I want to filibuster Richard Paez because he was a district court judge? And he was awful. He expressed values and views that do not belong in the Pledge of Allegiance. He expressed values and views that are unconstitutional. We are the people who have lost their jobs and we are going to protect them. We are the people who have been good stewards. We have allowed the Richard Paezs of this world to come and undermine our Constitution. We have allowed the left to seed into the court system those who would destroy this Constitution.

Are there not Members of our side who, after listening to the Senator from Kansas and listening to the judges who have been put at the top of the list, say “no”? Is it not possible that we can protect the courts in a way that is effective? Are we not going to let these people just do it? And the next day we are going to get up and say, “well, we have to do that? We have to do that? Here is the language that is gone. And therefore we will have a tool to protect this document. And therefore we will have a higher calling than to respond to the NARAL ads or the People for the American Way ads. We have a higher calling. We are Senators. We look out for the long-term interest.

How do you preserve the long-term interest? You do it by following the laws and the precedent. You do it by using what has been established over 214 years to protect rights, and we are throwing it away. We are throwing it away, and understand the stakes of the day. We are the people who have lost our jobs and we are going to protect them. We are the people who have been good stewards. We have allowed the Richard Paezs of this world to come and undermine our Constitution. We have allowed the left to seed into the court system those who would destroy this Constitution.

I would ask the Senator from South Carolina: Do you believe there are some on our side who, after listening to the Senator from Kansas and listening to the judges who have been put at the top of the list, say “no”? Is it not possible that we can protect the courts in a way that is effective? Are we not going to let these people just do it? And the next day we are going to get up and say, “well, we have to do that? We have to do that? Here is the language that is gone. And therefore we will have a tool to protect this document. And therefore we will have a higher calling than to respond to the NARAL ads or the People for the American Way ads. We have a higher calling. We are Senators. We look out for the long-term interest. We will not deny that. I talked about it. Richard Paez, by the way, who tried to stop the California election a few days before the election, found somehow that he cannot hold this election,” that, to the people wanting to recall the Governor, “you can’t do that because, of course, I know more than the people.” Richard Paez, Ninth Circuit, overturned more than any other circuit in the history of the United States. Clinton nominees, liberal, activist judges, out of step with the mainstream, the Senator from New York and maybe other Senators call mainstream, who says “under God” means something. And the Senate, the Judge of Allegiance, who said “three strikes and you’re out,” that the people of California voted for, is unconstitutional. The Supreme Court overturned that.

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I assure them—maybe I should not assure them—maybe I will ask the Senator from South Carolina, what do you think will happen now?

Mr. GRAHAM of South Carolina. Well, to the best I can, to the Senator from Pennsylvania for the last year—this is my first year—I have seen a trend that seems to be getting worse and worse. I can assure you, as the Senator from Pennsylvania has indicated, that for every liberal special interest group there is a conservative special interest group that feels just as passionately as the People for the American Way.

The Senator is absolutely right. I have been trying to say this all night. We are in political quicksand. You have put us in a place we have never gone before, and the more we fight and the more we fuss, the quicksand takes you deeper and deeper, quicker and quicker.

The truth is, the Senate will never be the same if this stands because the Senator from Pennsylvania is exactly right. There will be so much pressure on people on our side to stand up against anybody who is perceived to be liberal—not just whether or not they can follow the law, but they may have written an article when they were in law school. They may have made a speech somewhere about the philosophy of life. And it will be seized upon, it will be touted, and it will be shouted, and 41 of us may buy into that.

The advise and consent clause has stood the test of time. But the formula that you are imposing upon the Senate is a formula for disaster, and a big loser. Who loses? It is average, everybody. The real big loser is the Constitution to decide cases and basically the position to decide the outcome of people’s lives.

They do not believe in that. Frankly, they are arguing that this Constitution, that they have sworn to uphold, which provides for the advice and consent of the Senate, what if a President appoints a Supreme Court nominee to the bench, should be tossed out.

Those of us on the Democratic side disagree. I think, frankly, in their heart of hearts a lot of the moderate Republicans disagree. They understand that no President gets everything he wants 100 percent. No President should, Democrat or Republican. But they are loyalist, and their partisan loyalty is showing. It has shown for 36 hours.

Let me show you the judicial confirmation scorecard so you will understand what has happened to nominees sent by Presidents to the Senate.

President Clinton’s nominees: 248 confirmed; 96 percent of the nominees, one out of five sent to the Senate by President Clinton, were blocked by the Republicans, Senator Orrin Hatch, and the Senate Judiciary Committee.

President Bush’s nominees: 2 percent have been blocked.

I listened to the Senator from Pennsylvania tell us, warning us that, frankly, stopping four judges will be remembered, and they will revisit this if the Democrats ever take control of the White House again.

Well, let me remind my colleague from Pennsylvania, those 63 Clinton nominees who were blocked, most of them were never even given the courtesy of a Senate hearing. Three judges from Illinois, three good people seeking Federal appointments, were stopped because one Republican Senator—in the case of one of my nominees, former Republican Senator John Ashcroft of Missouri—personally stopped this nominee. This nominee, a good person, who would have been an excellent judge, was stopped because Senator Ashcroft objected to him. In objecting to him, he never got a hearing.

So for the Senator from Pennsylvania to come and warn us that, if there is ever a Democratic President, you can count on nominees being stopped, we learned that lesson. We learned it when President Clinton offered nominees who were quality people, moderate people, and stopped because of some perceived slight, stopped because of some perceived position on issues that the right wing did not agree with.

Let me show you some of the photographs of some of these nominees. You can see that even this small gathering of nominees here represent a rich diversity of people across America. The Republicans would have us believe these people sent to the Senate by the Judiciary Committee by President Clinton were somehow radical people, people who did not share the views and opinions of America.

Well, count on this: Within those people are excellent judges, people with the highest ratings from the American Bar Association, people who were rejected. It gets back to this, as shown on the next chart: The final score here is 168 to 4. So 168 of President Bush’s nominees have been approved; only 4 have been held back. Ninety-eight percent have been approved.

I listened to the speech just given by the Senator from Kansas. I hope that those who are following this debate, even though I cannot imagine at 3 o’clock in the morning on the west coast a lot of people are tuned in, but if those who are following this debate heard what the Senator from Kansas said, I think it was chilling and troubling. It is a clear indication of what is at stake here in this debate. The Senator from Pennsylvania joined in the chorus because the Senator from Kansas said they were opposed to judges who were “discovering or creating law outside of Constitution.” Those were his words, “discovering the right of privacy in the Constitution.”

Well, the Senator from Kansas is correct. The word “privacy” does not appear in the Constitution. But those who have interpreted this document have come to the conclusion that Americans have a basic right of privacy. I suppose from what the Senator from Kansas said, that is judicial activism in his eyes.

But let’s remember how that right of privacy first came to the Supreme Court and the decision made, the landmark decision of Griswold v. Connecticut, a Connecticut statute which said that the State could not prevent married couples to buy birth control devices, contraception, an archaic statute from the 19th century that said that married couples could not buy birth control devices. We are talking about the ones most commonly known.

The Supreme Court said that is wrong. We believe that the people of Connecticut, the people of America, have the basic right of privacy and that married couples should be allowed to make that decision. It is not the role of the Federal Government to prohibit them from making that decision.

So in this case, the Supreme Court “discovered” the right of privacy in the Constitution. The Senator from Kansas believes, I suppose, that this is judicial activism, that the court went too far. How many people in America believe that? How many people in America believe that States or the Federal Government should prohibit the right of couples or even individuals to buy birth control pills? Is that this discovered right of privacy at work? The same right of privacy, I might add,
that was at the core of the Roe v. Wade decision.

So there we have it. They are looking for judges who even question the right of privacy in the Constitution. You wonder why we would even stop four judges when we know in the past, I am afraid that my Republican friends would turn the clock back, turn the calendar back to the 19th century, questioning the right of privacy of Americans.

I thought conservatives, by their nature, were opposed to the overreach of government. But what we hear this morning from the most conservative members of the Republican caucus is that we have to question the right of privacy. That is hard to believe.

They also went on to say, the Senator from Kansas agreed with the Senator from Pennsylvania that we need a check and balance on the courts. Think about that for a moment. Oh, it is a nice-sounding phrase. But think about the check and balance on the courts and then think about the principle of an independent judiciary. Those two are inconsistent.

The check and balance on courts comes as a result of opposition to a certain nominee. The President nominates a judge, and when we review that judge's credentials and decide whether that judge receives a lifetime appointment. Then there is the correct belief that short of impeachment, judges in America are independent, not accountable to the Senate. That is one of the bedrocks of our democracy. That has been challenged on the floor of the Senate today by the most conservative members of the Republican caucus.

You wonder why we are here for 36 hours? You wonder why we are taking all this time. It is because of the views just expressed this morning by two members of the Republican caucus which indicate the extreme position they are prepared to take, indicate why 168 of President Clinton's nominees were approved and 4 being stopped is unacceptable, and indicate that they want to change the profile and complexion of the judiciary across America in profound ways.

The Senator from Pennsylvania has political amnesia. He comes to the floor this morning and forgets that 63 of President Clinton's nominees never even received a hearing, not even a hearing, not even a cursory look. That was a sad outcome for those nominees and their families. To think we are not going to stop this process at this point in time, that we are going to continue on for another 3 hours or 4, frankly, I think, unfortunately, I am afraid.
going to have a couple of steps to this process. I am glad they did. In fact, they almost decided the President should not be involved in the process. That was part of the discussion because they didn’t want to give that much power to the President in this country, but they finally made a compromise with respect to judges. They said the President will nominate and the Congress will have a role of advising and consenting. That is, the President will nominate and the Congress will say yes or no.

We have been extraordinarily cooperative with respect to this President. In almost all cases, we have said yes. In four, we have said no. For that, we now have a 30- or 39-hour extravaganza in which, when I was driving in this morning, I heard my colleagues talk about corruption and all the code words they have developed especially for this debate, especially for their political friends so the word will mean something, and it becomes much more than actually exists. This is all a manufactured debate.

They say there has never been a filibuster. That is not true. But if you say it eight times an hour for 39 hours, maybe some people will believe it. I don’t know.

This is the oft-repeated old story about the man who comes home at 2 a.m. in the morning, having been drinking and with lipstick on his collar. And his spouse, a firing line, confronts him and says: Where have you been?

He says: Riding my bicycle.

She says: That can’t be true, I took your bicycle to the shop yesterday.

He says: That’s my story, and I’m going to stick to it.

That is what is happening here: It is my story, patently untrue, obviously false, but they stick to it. They say there has never been a filibuster. The fact is, when the Republicans were in the minority, they filibustered 16 nominations in 1 Congress alone. So if they say it eight times the next half hour, just understand, it is not true. They can say it, say it, and say it, but it is not true.

I guess debate is an opportunity to exchange views. It does not require someone to tell you the facts. The facts are, as my colleague from Illinois indicated, many of the nominees in the previous administration never even got a hearing, not even a hearing. And in addition to that, there have been numerous filibusters, and some of my colleagues, in fact, who are here this morning voted against cloture to sustain a filibuster, some of the same ones who are making this claim.

I don’t understand, I guess, how they think it sticks just to stand up here and say something they believe to be the case when they know it is simply not true.

Let me get to the couple of minutes I have remaining, talk about some of the issues I wish they had passion to address. This, in many ways, relates to the right to privacy.

The President and my colleagues on the other side of the aisle have decided in recent days that this young lady—her name is Joni Scott, who went to Cuba to distribute free Bibles—will be fined $10,000 by the U.S. Department of the Treasury. Why? Because she exercised her right to travel and distributed free Bibles to the poor people of Cuba.

She now is subject to a $10,000 fine. I tried to change that the other night. I couldn’t do it. The majority in this morning, Mr. President, said: Absolutely not, we are going to maintain these travel restrictions that restrict the right of the American people to travel.

By the way, this woman is going to get no relief. A $10,000 fine for an American citizen who distributes free Bibles in Cuba—maybe we could be talking about that this morning and see if we can agree that it is a perversion to do this. It seems to me this morning, Mr. President, many of us have the right to travel, perhaps the right to privacy, the right to distribute free Bibles. But the majority party says: No, she has no such right, none at all.

Let me ask if we might not want to talk about another subject during these 39 hours. We have lost 3 million jobs in the last couple of years with a failed economic policy.

This is a picture of a Huffy bicycle. They used to be made in the United States. In fact, right here under the handlebar they used to have a decal that was the American flag decal. Mr. President, 850 workers in Ohio were fired because they were making $11 an hour, and they moved this bicycle manufacturing plant to China where they can pay 33 cents an hour, and they took this flag decal off the handlebar and put on a decal of the globe. Not an American flag, a globe. Why? Because they decided $11 an hour is an egregious amount of money to pay people when you can make it for $33 cents an hour in China, working 16 hours a day, 7 days a week. So we lost 850 jobs. These 850 people went home and had to tell their families: I lost my job. I am a good worker. I tried hard, but I couldn’t compete with 33 cents an hour.

I wonder maybe we wouldn’t have the same passion on this floor to talk about jobs that Americans had but don’t have any longer. Colleagues, I don’t have a, few of our friends start up and join us to have a 39-hour debate about jobs the American people need, want, and deserve but don’t have because these jobs are moved to parts of the world where people are paid 33 cents an hour.

I could hold up another chart to show you—20-year-old kids working 12 hours a day, being paid 12 cents an hour, and they get the jobs and those jobs leave this country. Is there a passion on this floor to talk about that? Oh, no, we do the other—some rights. Yes, the right to travel, perhaps the right to privacy.

The passion is to stand up here and say with respect to the four nominees to the court who have not advanced that we are engaged in a filibuster that has never before been done. That is absolutely, patently false, and the people who make that charge know it.

My hope is we can stop some of this and get on to the things that really matter to the American people and the economy and the future of this country.

My colleague from Illinois I know has additional comments.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I thank my colleague from North Dakota for reminding us that there are issues out there about which the American people really care. I dare say if you go to Missouri, Illinois, North Dakota, South Carolina, Georgia, or Minnesota and take the average person on the street and ask them: “Where in the list of priorities in your life is the fact that 4 judges out of 172 nominated by President Bush have not been approved?” My guess is they are going to say: I didn’t even know that. Is that a big problem?

In fact, this morning’s Washington Post has an interesting story about what we are doing here, this made-for-TV filibuster. That was part of the discussion because the Post has an interesting story about what we are doing here, this made-for-TV filibuster. That was part of the discussion because the Senator from Illinois I know has additional comments.

The greatest deliberative body shows what it does best—talk itself silly.

That is the Washington Post this morning. They refer to filibuster buttons—we have them on both sides of the aisle—filibuster T-shirts, and filibuster bingo games.

I am glad they didn’t disclose the identity of this man, but they went out and asked one of our Capitol Police officers what he thought about this marathon debate. He probably would lose his job if his name were disclosed because of the Republican majority. Here is what this man said, a Capitol police officer who has been standing guard over the Capitol through the wee hours of the morning while we gassed on here. On the floor about our favorite political issue: the lack of confirmation of four judges.

Incidentally, for those who are keeping score, I believe it cost us about a quarter of a million dollars in taxpayer money for additional pages to be printed in the CONGRESSIONAL RECORD and for additional Capitol Hill Police overtime protection because of this 39-hour marathon—a quarter of a million dollars.

Let me get to the quote from this Capitol policeman. They asked about the made-for-TV filibuster. He said:

I can see it if it was something important, like the budget or Iraq, but who cares about judicial appointments. They should get a life.

There is a lot of wisdom out there standing in the hallways and in the streets in the cold wondering what in the world we are doing here. The Senator from North Dakota, doesn’t he know full well if you go to his State or my State and talk about 3 million jobs lost under the Bush administration, those are the numbers they care about, not 168 to 4.
The Republican majority is out of touch. They just don’t get it. They don’t understand what real families and real businesses across America care about.

The cost of health insurance—for good Lord’s sake, how much time have we spent in the Senate talking about the cost of health insurance this year? Nada, zero, rien, not at all. No time to discuss the cost of health insurance, the biggest single issue facing families and businesses across America, but, boy, we are prepared to stand on this floor for 36 hours and grind red meat for Fox TV News and the right-wing radio boys. We will spend night and day. We will bring in our props such as cots and suitcases, and we will pretend this is a really serious filibuster and ignore the really serious issues that America really cares about.

You wonder why fewer and fewer people take the Senate seriously? You wonder why fewer and fewer people care about. It is because of this kind of charade.

Mr. DORGAN. Mr. President, will the Senator from Illinois yield?

Mr. DURBIN. I yield for a question.

Mr. DORGAN. In the previous administration, over 50 nominations were sent to the Congress in which there wasn’t even 1 day of hearing—not even the courtesy of allowing someone to come to the Capitol for a hearing. Were the courtesy of allowing someone to be on the floor for the Congress in which there was an up-or-down vote on 50 nominations from the President’s Administration, over 50 nominations were sent to the Congress in which there was not even 1 day of hearing. And we are prepared to stand on this floor for 36 hours and grind red meat for Fox TV News and the right-wing radio boys. We will spend night and day. We will bring in our props such as cots and suitcases, and we will pretend this is a really serious filibuster and ignore the really serious issues that America really cares about.

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Mr. DURBIN. I say to the Senator from North Dakota, their passion for justice did not apply to a Democratic Justice. Their passion for justice did not apply to 63 nominees who were not given a chance to come to the Senate floor. Their passion for justice did not apply to those men and women whose lives were changed forever. But when it comes to these four, we take up the time of the Senate, take up the money of the taxpayers to divert us from issues that people really care about. It tells us what it is all about.

When the Senators from Kansas and Pennsylvania come to the floor and say, We want judges who don’t discover the right to privacy in the Constitution, that is a conservative value, is that a family value—to reject the right of privacy? That is what they said, and I don’t get it. If that is what they are for, they are clearly out of the mainstream, and we ought to take a closer look at every job.

I even think Robert Bork, when he was trying to get on the Supreme Court, said he agreed with Griswold v. Connecticut, a right to privacy case. What is wrong with the most extreme members of the Republican caucus is they will not even acknowledge a right of privacy for individuals and families across America.

That is a sad outcome and one I think, frankly, should be challenged because if that is really the standard we are going to play to, I am going to look a lot harder on the Senate Judiciary Committee to make sure we don’t have nominees given lifetime appointments to the Federal Courts, a Federal Government raiding the bedrooms and private lives of Americans. That is what it is all about. It should not be allowable.

I see the majority leader on the floor and I respect him very much, but this is wrong. What we are doing is wrong. This made-for-TV filibuster over 4 judges after the President had 168 approved—why aren’t we talking about issues people really care about, such as the cost of health care, the loss of jobs, the poor soldiers coming back injured who need help in veterans hospitals?

The President is chairman of the Veterans’ Administration and HUD subcommittee on the Appropriations Committee. Could this bill come to the floor the other day. We did not have time to finish the bill, the 2 hours it would take to finish that bill—$92 billion, if I am not mistaken, or $68 billion for the Veterans’ Administration. Could we just go through this made-for-TV filibuster. That is sad. We should do the people’s business. We should focus on things that Americans really care about.

I yield the floor.

The PRESIDING OFFICER (Mr. COLEMAN). The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, to be referred to as an extreme Member of the other side of the aisle, I would like to suggest that this extreme Member on the other side of the aisle never voted against cloture on a judicial nomination. How extreme is this Member versus the Member who just spoke, who has voted repeatedly and repeatedly and repeatedly and repeatedly against cloture? Who is the extremist?

I will posit that to the American people. Who is the extremist? The Senator from Pennsylvania, who never in his career voted, ever, against a cloture petition for a judicial nomination or the Senator from Illinois, who has led the effort, organized the posse, to filibuster, for the first time in American history, nominations for the Court?

It is only 168 to 4. When the rules are changed, upon changing the rules you have to start with one. Then you do two. Then you do three. Then you do four. And today we do five. Today we do six. Next month it will be seven. Then it will be eight. Years from now, it will be 127 and then 3,455. It starts with one. It starts with the change.

There have been 2,372 nominations since the filibuster rule was put in place; zero blocked on the Senate floor. It has not happened. Oh, it is only four, just a few. We are doing great. “We just started,” is what they are saying—we have only just begun. We just started this, folks. Not the Senator from Pennsylvania, not the Senator from South Carolina, not the Senator from Missouri. The Senator from Missouri opposed a judge. He said, look, have an up-or-down vote and then I will vote no. That has been the way it has been done here. This idea that we have filibustered these nominations by folks not getting a vote in committee, let us look at the record.

Fifty-four Bush nominees under the Democratic Senate got no hearing, did not get confirmed. Have we complained that they were filibustered, because they were not. Every President at the end of his term has judicial nominations in committee who have not gotten through, for a variety of reasons. It is just the flow of the Senate. In this case, 54 Bush nominations.

How many Clinton nominations, after 8 years? Forty-one.

Let me repeat this again because we are saying this is different; Clinton was treated so unfairly. There were 377 Clinton nominees; 34 were filibustered. We are going to play to, I am going to look a lot harder on the Senator from Missouri, Mr. LOTT, and the chairman, Senator HATCH, said: Do not set this precedent. Do not change the rules. It is going to come back and bite us. We cannot do this. It is too important to the future of the Senate. It is going to undermine the judiciary. The Ruth Bader Ginsburgs of this world, the Antonin Scalia of this world will not have a prayer getting through this place. The best and the brightest are going to get knocked away or scared away if we raise this bar, if we allow the extreme elements of either party to start to run the Senate. We cannot let this happen.

As much as we may want to, as much as we did not want Richard Paez to be a Ninth Circuit Court judge, you have to hold back. You cannot let the passion of the moment completely destroy the precedent that has served this body and this country so well. Do not succumb to the special interest groups who are pleading with you. Come on.

The Senator from South Carolina said just in the last hour that for every one liberal special interest group there is a conservative special interest group. I do not know what to think. Guess what. When the shoe is on the other foot, do you think we are going to say, oh, well, we are going to go back to the way it was; we are going to let you have all of your liberal judges; we are only going to require 51 votes? Fat chance. Fat chance.

Mr. GRAHAM of South Carolina. Will the Senator yield for a question?

Mr. SANTORUM. I yield the floor to the Senator from South Carolina.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM of South Carolina. For something that is a waste of time, it
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I am willing to do the past. We are worried about the future during a lot of these problems of body about what the future will be from Pennsylvania has tried to tell the important thing to how important this is to people.

I am very proud of what the Senator from Pennsylvania has tried to tell the body about what the future will be like. The Senator from Minnesota and the Senator from Georgia, my two good friends, my classmates, we were not here during a lot of these problems of the past. We are worried about the future.

I want to very quickly respond to my good friend from Illinois. Here is what I am willing to do—and I do not know who the Capitol Hill policeman was, God bless him for serving—I am willing to stand by a poll of all the cops in America and see whether they think appointing a judge is a big deal. It is my belief that most cops in America have had experiences in court that they really would like us to pick judges wisely. As a prosecutor, I can assure my colleagues who the judge is matters. I can assure my colleagues that most cops do watch how the court operates, and they are concerned about the quality of judges because many of them have made cases risking their lives only to see it bounces.

So I totally disagree that this police officer is speaking for the mainstream of cops. Cops care about judges.

The Washington Post—I am not a great fan of the editorial page, but I read the Washington Post about what they think is going on here today. On February 5, 2003, the Washington Post said this filibustering of judges—Miguel Estrada—is really not a good thing. A world in which filibusters serve as an active instrument of nomination politics is not one either party should welcome.

Well, the extreme Senator from Pennsylvania shares the same views as the Washington Post, which begins to bother me a little bit. Maybe he should be a little more extreme. But what he is saying is what the Post said back in February. You do not have to be a rocket scientist to figure this out because I figured it out. I am not a rocket scientist.

This is about manufactured controversies. Judge Pickering, oh, this is no big deal. Why are the Senate Democrats sending out urgent e-mails saying send us money, my God, the country is about to blow up because the Bush administration is devoted to using the courts to its political advantage? If that does not get your blood boiling, what would? It would scare me if I got a memo from somebody who is a responsible member of the Senate Democratic leadership saying, send money quickly. The Bush administration is taking over the courts and they are going to put a guy on the court named Charles Pickering. While he was in law school, he wrote an article about making sure the ban on interracial marriage in Mississippi was not stricken down.

As a State senator in the 1970s, Pickering worked to repeal the important provisions of the Voter Rights Act. That ought to scare you to death if you believe in what I believe in—full participation in our democracy. This e-mail is totally in contradiction of what has been said on the Senate floor. The e-mail says that Senate Democrats have launched an unprecedented effort. If you have listened to me for the last hour this is just business as usual. The e-mail is the best evidence of what is going on over there. They have picked a few judges, for whatever reason. They have manufactured controversies about who these people are, and they are ruining their lives.

Judge Pickering was approved by this body 12 years ago. I would daresay this body would not have unanimously put him on the district court as a Federal judge if he was writing articles supporting interracial marriage bans and that while he was a State senator he actively undermined the rights of African Americans in Mississippi. That makes no sense. That means this place is totally asleep and not worth trying.

I am not a rock-est scientist. No matter where I go, in the rural areas, in the big cities, in the suburbs—my colleagues on the other side ask, who cares? Well, people in my State that is. We understand that the important controversy is about the judiciary. They know that appellate courts, the courts that oversee district courts usually in many States, make decisions that affect our everyday lives. They say what is this all about? I am risking my life, I am out there getting shot at, trying to bring somebody in, and an appellate court judge misuses the law to set him free. Our police officers, our law enforcement officers understand the constitutional rights. They know. They have to abide by the standard. They have to respect the rights of all citizens. But when they do that, when they go through all of the steps and do it right and then a criminal is turned loose, they, who have risked their lives, know how important these judges are.

My Democratic colleagues complain that we are taking time. Well, I have been listening to my colleagues today because this is something we need to talk about. We have listened to them all year long delay, filibuster. They bragged about they finally passed the Healthy Forests bill to stop the wildfires that have burned in California and threaten many States, and do my colleagues know what they are doing? They are filibustering the ability to take that bill to the conference so we can get it passed. They are filibustering that.

Judge Pickering from Illinois was talking about how long it took us to get to the VA-HUD bill, a bill I am responsible for. Well, something may have
interfered with taking up that bill when the minority whip spent 8½ hours on the Senate floor on Monday complaining about filibusters. Excuse me, but what is that when he will not release the floor beginning at 1:30? I gave up. If it was 9½ hours, it was 9½ hours. I decided to turn on the ball game after that. But we were blocked from doing anything. We were blocked by the same Democrats who complained, after they filibustered all year long, that we are talking too much.

There is a lot to be said, but the most important thing I can say is that the President has nominated 46 people to serve on the Federal circuit court, and the Senate has confirmed only 63 percent. This is what we are talking about, unprecedented. The President has made four nominations to the Court of Appeals for the DC Circuit, the second highest court in the land, and only one has been confirmed.

Deep congratulations of the Democrats who say they have confirmed 168, they have not confirmed 37 percent of the circuit judges. What nominee has withdrawn his name? One of the most qualified people ever nominated today. Three nominees have been filibustered. Three more are being threatened with that fate. Numerous others are being blocked or delayed by the minority. The reason most cited is that these nominees are out of the mainstream.

The mainstream, it appears, is defined by a few of my colleagues and some of the most liberal interest groups in the country. I know the liberal interest groups, the Hollywood group, put in a lot of money, and they have strange ideas of what the mainstream is. When you talk about some of their mainstream Hollywood people or People for the American Way ideas, I tell my colleagues, that dog does not hunt. I imagine it does not hunt in South Carolina, Georgia, and Pennsylvania either.

If that is the litmus test, let us talk about who is in the mainstream. For the Ninth Circuit, Judge Carolyn Kuhl, the American Bar Association says she is well qualified for the position. Oh, earlier on, that was going to be the gold standard. The Democrats said: We cannot appoint anybody who is not rated at least qualified by the American Bar Association.

She is rated well qualified, a distinguished career as an attorney with the Department of Justice, U.S. Solicitor General, a clerk for the United States Supreme Court. Twenty-three women judges on the Superior Court of Los Angeles, and nearly 100 judges who serve with her have spoken out on her outstanding abilities and professionalism. The litigation section of the L.A. County bar has also. Are those people out of the mainstream? Are they somehow different? Are they somehow unworthy?

Then Judge Janice Rogers Brown, she is the first African-American woman to serve on the State's highest court. She was retained by the support of 76 percent of the voters in her last election. That is in California. Is 76 percent of the California voters out of the mainstream? Academics from colleges across the State have written in to support her retention and evenhandedness. Sounds like mainstream to me.

They like to think that the panel of the Ninth Circuit, which is the most important court outside of the Supreme Court. This panel of Ninth Circuit judges tried to stay the recall election in California. The Ninth Circuit judges declared that the words ‘under God’ in the Pledge of Allegiance are unconstitutional. Is that the mainstream? Two Democrats appointed to the Ninth Circuit ruled that convicted felons serving a life sentence have a fundamental right to procreate by artificial insemination. Are they in the mainstream? Where is that in the Constitution?

Mr. President, I have many colleagues who need to speak. I have a whole lot more to say. I will be sharing it with you. But most of all, I am hearing people referring to the filibuster as the main reason they killed the Susan B. Anthony Act. They may have a different name, but the reason they killed that act was to prevent the public from giving $250 million in Medicaid and Medicare to the elderly, because they thought that was giving too much to the elderly. That was the reason they filibustered. That was the reason they killed getting behind this flimsy argument about being in the mainstream.

It is too late for Miguel Estrada, his nomination was withdrawn after 848 days and 7 cloture votes, unanimous rating of well qualified by the ABA, but it is time to give Justice Priscilla Owen a vote, her nomination has been pending for 917 days and has been three cloture votes, unanimous rating of well qualified by the ABA, it is time to give Judge Charles Pickering a vote, his nomination has been pending for 901 days and he has an ABA rating of well qualified, it is time to give Attorney General William Poyry a vote, his nomination has been pending for 217 days, he has an ABA rating of well qualified, it is time to give Judge Owen a vote, her nomination has been pending for 873 days and the ABA has given her a well qualified rating, it is time to give Justice Janice Brown a vote. It is time to give Judge Carolyn Kuhl a vote, her nomination has been pending for 734 days.
Mr. President, it is time for the body to give these candidates an up-or-down vote.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLS. Just like the Senator, I want to talk about a second about who cares about these judicial nominations because obviously the folks on the other side of the aisle who have been obstructionists in not allowing circuit court judges to come to a vote do not think the American public does not care about our Federal judicial system. Sure, our supporters understands it and they care. Sure, every Rotary Club I go to understands it and they care because they ask me about it. Every church where I go speak, they care, they understand it and they care because they ask me about it. I have been walking down the street in my hometown and some stranger will come up to me. He understands it and he can care.

Obviously, the Senator from Illinois is totally insensitive to these kinds of people.

Let me tell you who else cares. That criminal defendant who is sitting in jail and who is having to wait longer than he or she cares. That defendant or defendant in a civil lawsuit who has to sit and wait for justice, whatever that justice may be, on either side of the appellate case, he or she cares. That plaintiff or defendant that thinks every single one of the other 42 Presidents of the United States has had a score of 100 percent when it comes to the issue of not having their judges filibustered.

I repeat, if 98 percent is OK and they are smiling and happy about it, I would like to hear how many of them go home this afternoon and think they would get a good reception from their spouse if they said: You know, honey, I have good news. I have good news for you 98 percent of the time. Or I wonder how many of them would feel good as they get on an airplane this afternoon and head home smiling and thinking, boy, we have done great work defending our judges and defending our filibuster of the judges but the airplane had a safety record of landing 98 percent of the time.

There is a difference. We live under this document that has served us so well for so many years and 100 percent of the judges who are nominated have been confirmed by every other Senate for every other President prior to this one as per the language of this great document.

I close by reading some comments out of a book written by a man of which I am a big fan. The Democrats in this Senate are not particularly a fan of his right now, but let me tell you, he is a great American. He is a great American who speaks the truth, and he is speaking the truth about what is going on in this body right now. "The National Party No More, the Conscience of a Conservative Democrat."

It is written by my colleague, my good friend from the State of Georgia, Senator Zell Miller.

I ask unanimous consent that the entire chapter, chapter & entitled "41 Beats 59—that Strange Senate Math," be printed in the Record.

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

41 Beats 59—that Strange Senate Math

The United States Senate is the only place on the planet where 99 votes out of 100 can defeat a motion that 98 percent of the Senate can defeat it. Try explaining that at your local Rotary Club or to someone in the Walmart parking lot or, for that matter, to the college freshman Political Science 101. You can't, because this strange Senate math stands democracy on its head.

By name, this incongruous, obstructionist procedure is known as a filibuster. The word filibuster comes from a Spanish word for "pirate," and that is exactly what this procedure does. It hijacks the process. Filibusters first caught the fancy of the nation after James Stewart, in Frank Capra's classic movie Mr. Smith Goes to Washington, made Mr. Smith a hero standing up to the Senate bosses on behalf of the people.

But now, however, most Americans understand that old comics-page blowhard Senator Claghorn, has unfortunately become, in the minds of many, just another caricature of the Senate, just another thing to laugh at, just more hot air from the Cave of the Winds.

Realizing that with the scrutiny of television, the people would not stand for such nonsense, the "Old Bulls" of the Senate fuzzed it up. They made it subtler. These verbal bullets are designed to keep the floor open, and the process and the Senate move along until a vote if sixty members remove the cotton from their ears and vote for cloture to shut down the debate but isn't because it takes two sides talking to constitute a debate. If this sounds confusing, it is meant to be. That is precisely the objective.

The short version of this debacle is that the way filibuster is being used in the Senate gives the minority an absolute veto on just about everything. In fact, the U.S. Senate has become similar to the Security Council of the United Nations where one country can veto a clear majority and castrate the entire process.

Winston Churchill once said, "Democracy is based on reason and fair play." Well, there is nothing reasonable about what's happening in this august body. It's not just that it's an expensive waste of time and taxpayer money, but it's also a flagrant abuse or majority rule, the principle that democracy operates on everywhere. Everywhere, that is, except in the U.S. Senate. Just all of the colleagues who filibustered. And in 2003, for the first time, it was used to prevent a vote on the presidential judicial nominees.

The longest filibuster in congressional history was waged against the Civil Rights Act in August 1957 by Senator Strom Thurmond of South Carolina, who had blocked his proposal to arm our merchant ships against German submarines. Sixteen senators could file a petition against a bill, and an amendment or bills approved it within two days, debate was to be limited to one hour per member or one hundred hours. Later, it was modified to sixty votes, not two-thirds, necessary to halt a filibuster. And in 2003, for the first time, it was used to prevent a vote on the presidential judicial nominees.

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just this way. He warned in Federalist Paper #58 that when it happened, "The Fundamental principle of free government would be reversed. It would be no longer the majority that ruled, but the minority that would be transformed to the minority." I'm sure the man who wrote the Constitution is spinning in his grave.

Alfred Hamilton may be taking a couple of revolutions as well, because he agreed with Madison. He pointed out in his Federalist essay, "The vice president is given a tie-breaking vote for securing at all times the possibility of a definite resolution of that body." A "definite resolution"; how well passed, it was bad. Madison wrote: "The Vice President, Henry Cabot Lodge in 1893, when obstructionism was not nearly as bad as it is today: "To vote without debating is perjury, but to vote is imbecility." Years ago, when I was teaching freshman political science at Young Harris College, I always repeated the old story about the origin of the Senate. Thomas Jefferson was in France when the Constitutional Convention was being held. Later, he asked his friend George Washington, who presided over the convention, about the purpose of this upper chamber. The Senate, Washington, so the anecdote goes, then asked Jefferson, "Why do you think that your senator can cool it?" Jefferson replied, Washington responded, "Even so, we pour legislation into the senatorial saucer to cool it." Cool it freezing it into an ice cube. Truth is, there is nothing at all said in the Constitution about protecting Senate minorities. Jefferson's Father's Day thought the smaller size, longer and staggered terms, as well as state legislation on the selection of senators, would provide more wisdom.

Some constitutional lawyers have argued that any kind of super-majority vote is unconstitutional, other than for the five areas specifically listed in the Constitution: impeachment, override of a presidential veto, constitutional amendments, and expelling a member of Congress. As I write this, judicialWATCH is doing just that. They have filed a lawsuit arguing that confirmation of judges is not specified in the Constitution and, hence, does not require a super-majority.

That's one possible remedy. There are others. We could abolish Rule XXII that protects the filibuster and the Senate operate under rules like every other democratic legislative body in the world where a simple majority rules. That's about as likely as a dog swimming in Washington without ten fund-raisers.

Or we could modify what I call the "two-track trick" or filibuster by stealth adopted a few years ago, where another piece of legislation is considered at the same time a filibuster goes its windy way, I call it "filibuster-lite." It's a way to avoid the inconvenience and pain of a real filibuster as if we are using powder-puff, 16-ounce gloves instead of bare knuckles. I'd much rather just duking it out, debate and grapple rather than try to deceive the public that no blood is being spilled. Many veterans of the Senate—no newcomer like myself—have expressed this process. Historically, generally recognized as one of our greatest senators, condemned the first organized filibuster when it occurred in 1857. Even back then, it was needed as a workable limitation for endless debate. If only he could see what happened late in the twentieth century, that way would be a grave-spinner. In the nineteenth century, there were twenty-five filibusters. In the last thirty years of the twentieth century, there were two-hundred.

Two pieces of crucial legislation that filibusters have stymied over the years include the anti-lynching bill of the 1920s and abolishing the poll tax that was held up for twenty-two years from 1942-1964. The Civil Rights Act of 1964 was filibustered for ninety-three calendar days.

With Georgia's Senator Richard Russell as their leader and unlimited debate as their weapon of choice, a couple of senators for years had managed to defeat or drastically weaken any civil rights legislation that came before the Senate. But it was President Ford who changed and President Johnson was pushing it with all his considerable power. He told the nation that passing the legislation would be the greatest and most critical test yet that recently assassinated John F. Kennedy could be given. He also managed to peel off Minority Leader Everett Dirksen who often sided with Thurmond, Russell and Nixon and the bill went on to pass by an overwhelming margin.

Obviously, both parties have used filibusters time and time again, one just as guilty at the other. In 1996, Democrats blocked a vote on a constitutional amendment on term limits and the Republicans blocked a vote to reform campaign finance. Many conservatives would disagree with me, but I happen to think the political process would have been improved if both those measures had passed. Conservatives have greatly weakened the current death-grip of the well-heeled special interest groups because electing their pet incumbents over and over with little or no opposition gives both the tremendous power they have. I call it "the dance," and it's nothing like that Garth Brooks song by the same name. After the music of election year stops, it's the public that gets screwed.

In the mid-1990s there was a bipartisan group of 138 senators called "Ask Not, Gridlock" that came together with great ballyhoo, intent on reform and majority rule. Republican Barry Goldwater was among them. Then in 1995, Democratic Senators Tom Harkin and Joe Lieberman introduced a rule change that I believe is the best that's been proposed.

Two years earlier, Harkin had let a committee hearing have it with both barrels: "There comes a time when tradition has to meet the realities of the modern age. The majority's right to legislate. The minority should not be able to run roughshod over them, but neither should a vexatious minority be able to thwart the will of the majority and prevented from using legislation to come up for a meaningful vote." The Harkin-Lieberman plan called for a four-step process that kept sixty votes on the initial cloture vote, but decreased it by three votes with each of the next three closure attempts until finally it got down to the majority's say-so. They argued, logically, that this would preserve the Senate tradition while giving the minority plenty of time to plead its case without blocking the majority forever. So we end up with that in March 2003, I introduced an identical bill. In May I joined with Majority Leader Bill Frist in a modified version applying the process only to judicial nominees. It seems to have the best chance for any kind of change and I'm afraid that's not much. Both Harkin and Lieberman now oppose what they so eloquently promoted a few years earlier.

As far as the fate of the Harkin-Lieberman rule change, the New York Times celebrated New York Times celebrated the editorial beginning, "The U.S. Senate likes to call itself the world's greatest deliberative body. The greatest obstructive body is more like it. It's a rare scene rarely used tactic reserved for issues on which senators help passionate convictions, the filibuster has become the tool of the sore loser, dooming any measure that cannot command the sixty required votes."

All of this came to naught, however, after the Republicans solidified the amendment and Democratic Senator Robert Byrd who, like that mythical, hell-guarding, ferocious three-headed dog Cerberus, punctuated the Senate with a continual veto of the Harkin-Lieberman rule change. In 1999, in 60BC, got the floor in the Roman Senate at midday and vauntingly spoke until sundown, the time of adjournment, to thwart one of Julius Caesar's proposals. That story marked the end of the Harkin-Lieberman filibuster reform bill. Never mind that Byrd didn't tell any of the story of the Roman senator who thwarted and fourteen years later Cato committed suicide while Caesar was at the height of his power and still going strong.

Now, I must admit I greatly admire and respect this man, Cato the Younger. He was one of Rome's greatest statesmen, not at all like his great grandfather Cato the Elder, who exemplified the corruption and hypocrisy that later undermined the traditions of republican liberty. Cato the Younger was different. He was a moral man and a great defender of the Constitution and the dominant role of the Senate. That was his role and he always played it to the hilt. His reputation was such that our Founding Fathers admired him as a symbol of liberty. In fact, George Washington ordered a play about Cato performed to inspire his soldiers at Valley Forge.

But, truth be told, Cato met an ignoble end. His reputation was greater than his ability. After he was defeated by Caesar at the Battle of Thapsus, rather than accept the generous offer of clemency from his old antagonist, he committed suicide. And he botched that; he didn't fall directly on his sword and it didn't kill him swiftly so he tore out his own intestines with his bare hands. It gave "spilling your guts" a new meaning and was a messy end for the First Filibusterer. While today we can find many good books on Caesar, I have yet to find one on Cato. So, lovers of the filibuster, I say that is a history lesson worth thinking about.

For all the good stories that have come down through the centuries inspired by the filibuster, in the end, it has nothing to do with eminent history.

The filibuster has nothing to do with the British Parliament.

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The filibuster has nothing to do with the Constitution.

The filibuster has nothing to do with protecting minority rights.

The filibuster has everything to do with personal political power. It's about Alpha dogs defending their turf in that great big kennel under the dome.

Mr. CHAMBLISS: Here is what he says:

The United States Senate is the only place on the planet where 59 votes out of 100 cannot pass anything because 41 votes out of 100 do not want it. If you do not want it, you can go to your local Rotary Club or to someone in the Wal-Mart parking lot or, for that matter, to the college freshman in Political Science 101. You have enough voting strength in your head that day to head in the Senate. That is democracy on its head.

He then talks about "Mr. Smith Goes To Washington" and the perception about a filibuster. And he continues:
Realizing that with the scrutiny of television, the people would not stand for such nonsense, the “Old Bulls” of the Senate fuzzed it up. They made it subtler. These verbal filibusters can now be forced to shut up, and the process and the Senate move along toward a vote if sixty members remove the cotton from their ears and vote for cloture. If cloture is not voted on, it becomes a debate and isn’t because it takes two sides talking to constitute a debate. If this sounds confusing, it is meant to be. That is precisely the object.

The short version of this debacle is that the way filibuster is being used in the Senate gives the minority an absolute veto on just about anything. In fact, the U.S. Senate has become similar to the Security Council of the United Nations where one country can veto the will of a clear majority and castrate the entire process.

He goes on and gives several anecdotes about the Constitution and what a great document it has been and cites Jefferson’s comment to Washington about the function of the Senate and Washington’s statement that has been mentioned several times about the function of the upper Chamber, the Senate. The story is told with Washington asking: Why do you pour coffee into your saucer? To cool it, Jefferson replied. And Washington said: Even as we pour legislation into the senatorial cup to cool it.

Here is what Senator MILLER says about that: Cool it, yes. But not freeze it into an ice cube.

There is a significant difference.

Again, he goes on talking about the history of the filibuster. In the history of Democratic Senators, Democratic Senators who are serving in this body today who in recent years have asked that this filibuster rule be changed so that we would not go through the process that we are experiencing today. All of a sudden those Democratic Senators have amnesia and are voting not to invoke cloture.

This is the way Senator MILLER winds up:

For all the good stories that have come down through the centuries inspired by the filibuster, in the end, it has nothing to do with ancient history. The filibuster has nothing to do with the British Parliament. The filibuster has nothing to do with coffee cooling in a saucer. The filibuster has nothing to do with freedom of speech. The filibuster has nothing to do with tradition. The filibuster has nothing to do with the Constitution. The filibuster has nothing to do with protecting minority rights. The filibuster has everything to do with personal political power. It’s about Alpha dogs defending their turf in that great big kennel under the dome.

I agree with Senator MILLER.

The PRESIDING OFFICER. The Senator’s time has expired.

The Senator from Louisiana.

Mr. BREAUX. Good morning, Mr. President. And colleagues.

I want to talk about one of the things that I have been interested in listening to the distinguished Senator from Georgia and the Senator from Pennsylvania. I am trying to keep track of what he was quoting from. We decided he was quoting from Miller, chapter 1, verses 6 through 12. I am sure it is considered a holy document. And of course, as most documents, there are two sides to every story. Indeed, on that I imagine you have already heard Senator Miller, chapter 1, verses 6 through 12.

I arrived in this institution over 30 years ago and remember quite well driving up from Washington 35 years ago in a U-Haul with two small children and my wife. I was in absolute awe of the Capitol. In fact, the first time I ever had an opportunity to visit Washington was when I came here to work as a very young aide to a then-sitting Member of Congress on the House side.

Over those 35 years, I have come to love and respect and appreciate all of the good things that this institution, including the other body, as well as the Senate, stands for. It is a wonderful opportunity to engage in serious debate and consider the problems of the day and to address the important issues and problems facing the people of this Nation. That is what this institution does best.

Unfortunately, every now and then the institution tends to break down and we spend an inordinate amount of time doing things that do not address the great issues of the day or contribute anything to solving the great problems of the day. That is one of those times. I have not lost my respect for this institution, and particularly the Senate, even though as in most things in the real world, sometimes things did not run quite as they should. We have now engaged in a couple of days of exhibiting how this institution does not work very well, although on very rare occasions. I still have the utmost respect for this institution and will continue to have that respect for as long as I live despite the fact that every now and then things break down.

The issue it has broken down on—I imagine most people in this country are probably watching the morning news show; some are probably watching cartoons with their children. I imagine most people in this country are probably watching the morning news show; some are probably watching cartoons with their children. I imagine most people in this country are probably watching the morning news show; some are probably watching cartoons with their children.

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I have approved 168 judges while only 4 have stopped. I was trying to say, how does that relate to the average American? If the Washington Redskins had a 98 percent win-loss record, people would think that is absolutely astounding, and yet, if they had stopped giving a big raise to 98 percent of the coaches? I don’t think anyone would be capable of winning 98 percent of the time, I cannot imagine what the State of Louisiana would do.

But that is, in fact, the record the President of the United States, President Bush, has established with regard to the judges he has submitted for confirmation. It is truly a remarkable record of having almost every person he has submitted to the Congress be considered by appropriate committees and considered on the floor and approved. A 98 percent record is truly a remarkable achievement by any measure, whether it is a sports metaphor or a metaphor that we can imagine. I will bring it closer to home. Imagine any Member of this body getting 98 percent of the vote. Maybe the distinguished Senator from Georgia who is in the Senate chamber is capable of doing that (but I don’t know if any of us would ever get 98 percent of the vote. Some have been fortunate to get over 50 percent every now and then, but no one ever gets 98 percent of the vote. Teams do not win 98 percent of their games, golfers do not win 98 percent of the tournaments, and neither do tennis players. It is unheard of.

If the average person starts looking at a record where 98 percent of the nominees have, in fact, been approved and are sitting on the bench and doing their duty, by any measure of any standard of operation in this country, people would say that is a pretty outstanding record. Yet the Senate has spent the last several days complaining about a 98 percent achievement record by the President of the United States, saying somehow that is not enough; somehow it should be 100 percent every time with every nominee.

Most American people would say: What are they talking about? Why are they spending so much time saying 98 percent achievement is not enough? That is where we are. That is what we are talking about.

Enough said about that. After 2 days of talking 24 hours a day, we have heard enough about the 98 percent record. Some I voted for cloture and some I decided not. But the record speaks for itself. It is an outstanding record.

Let me talk about one of the things we ought to be doing if we are going to be the greatest deliberative body in the history of the world, which is that I think the Senate truly is, something I have been working on for over 5 years as former chairman of the National Commission on Medicare Reform and now a member of the Finance Committee working with our colleagues, trying, in a bipartisan fashion, to address one of the really important issues of this Nation.
We are at a health care crisis in America. We haveliterally millions andmillions of Americans with no health insurance at all. They have to go to emergency rooms. They are in the poorhouse and get services under the State of Minnesota. Many of these people work hard every day. Yet the companies they work for no longer provide health insurance. It is truly a national problem of monumental proportions, yet we are not talking about that in the Senate today.

Another somber fact is that we have something over 40 million American citizens who have a health insurance plan that is inadequate, outdated, and in desperate need of reform in terms of how much money we spend on the program. The current program we have for seniors is unsustainable in terms of the money we spend and where it will come from.

All of the Members in this Chamber and all of our employees have health insurance that is significantly better than every single one of the 40 million Americans who do not have health insurance. Our health insurance covers hospitalization, our health insurance covers doctors, our health insurance covers and our health insurance covers prescription drugs. Yet we have not been able to do for seniors what we have done for ourselves. That is something that challenges this institution and something to which we must pay close attention.

The simple fact is that Medicare today does not cover 47 percent of an average senior’s health care costs. It is embarrassing that we, arguably the strongest nation in the history of the world, have a system where the seniors of this country who have worked, earned, and paid into a fund to provide health insurance when they are old, now are covered by a policy that only covers 53 percent of the average senior’s medical costs, and leaving 47 percent nowhere.

We have been working very hard for a long period of time to reform Medicare. The groups that have been working together have reached an agreement that is a tentative agreement, and no one is bound by it until we see the final product, and that includes me.

The interesting thing about this is that if anything should not be political, it is health care. But I can think of no subject that has become more political than health care, and no subject that has become more political in health care than how we treat the Nation’s seniors.

Republicans continue to talk about why Democrats will not do what is needed and necessary to pass a reform bill. And Democrats continue to say Republicans want to privatize it and end Medicare as we know it.

There are Republican political pundits in this city who have said we should pass a Republican-only bill in the House of Representatives and send it to the Senate so the Senate Democrats can kill it; it will be a terrific political issue for us. On the other hand, there are Democratic political pundits in this city who will say there is no way we can support and pass a Medicare bill. Why? Because it would give President Bush the opportunity to sign a bill in the Rose Garden and he might get credit doing so.

So we continue to play what I would call the political blame game. We are more concerned about ourselves and our political parties than we are about the 40 million seniors who desperately need the help in order to get prescription drugs under a reformed Medicare plan.

If we go along those lines, what will we have done is to say, once again: It is their fault it did not get done. And they will say: No, it is your fault it did not get done. But once again what we will give to America’s seniors is a basket of excuses. And I have suggested many times that seniors cannot take the basket of excuses coming out of Washington as to why we have not completed the job. There will be things in this bill that both sides will be able to pick and find and say, I can’t be for it because of this. But I would just ask my colleagues to look at the package and say: When we have an opportunity, perhaps once in several decades, or once in a lifetime, to truly get something done to put in place a system that can be improved upon in the future and utilize that unique opportunity and come together in a bipartisan fashion. And the American people will be able to say: Yes, they did it, and they did a good job.

I think that is what this body should be dealing with. That is one of the critical important issues of this day. And I would suggest we get on to it just as soon as we possibly can.

With that, Mr. President, I yield to the distinguished Senator from New Mexico.

The PRESIDING OFFICER. The Senator from New Mexico.

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

Let me, first of all, commend my colleague from Louisiana, Senator Breaux, for the hard work he has been trying to get us to a prescription drug bill for Medicare beneficiaries that will, in fact, preserve the Medicare system but will also meet this very real need that most seniors and all of us have, to be able to afford prescription drugs.

Let me say a few words about the issue of judicial appointments before I then talk about a couple of other issues I want to briefly visit as well.

As I approach this whole question about judicial nominations, I guess my starting point is to ask, how is this system supposed to work? Is this system of choosing and nominating and confirming of judges supposed to work when it involves Federal judges? I think it is supposed to work the way it generally has worked with this President; and that is, it is supposed to work the way it has worked with regard to these 168 judges who have been confirmed. The truth is, these judges who were confirmed, they were nominated by the President, were confirmed by the Senate. Those who are judges are conservative in their legal philosophy, in their legal philosophy. That is sort of a given with this President. We understand that. Everyone understands...
that. Democrats understand it. Republicans understand it. I have no problem with that.

This President was elected as our President. He has the right to choose judges who have a conservative perspective. That is what he has done, and clearly that is the reason the system is supposed to work. But as I think about how the process should work, it seems to me that the first step the President should take—and the President assistants, his general council have taken with regard to most of those 168 judges, maybe all of them, at least the ones I am familiar with—the first step is to go to the Senators from the State involved and ask those Senators if these are acceptable persons to be nominated.

That is exactly what has happened in the case of judicial nominations from my home State of New Mexico. And I am very appreciative of the President and his council for including me in the decision and in that decisionmaking. Essentially, what has happened is that my colleague, Senator Domenici, and the White House have identified a person—and in the case of each vacancy we have had in New Mexico—they have identified a person who they thought should be nominated for that position, and they have asked me to talk to that person and give them a response as to whether that was someone I would support as well.

In each case, I had been very pleased to support those nominees. In each case, I have had the chance to sit with those people, talk to them, acquaint myself with their qualifications. And, as I say, I have been very pleased to support those nominations.

That is the way the system, in my opinion, is supposed to work. But once the President has determined that the Senators from a particular State—at least one of the Senators, but preferably both Senators from a particular State—will support the nomination of a judge or judicial candidate from that State, then, of course, it is much easier to get the full Senate to go along with that. Frankly, that is the way the system ought to work.

I have had circumstances where individual Senators have come to me, Democratic Senators have come to me and asked: Are you sure you want us to support this nominee for a judicial position in your State? Because my staff tells me there are questions—and this and that. I am pleased at that point to be able to respond, yes, that I have checked out these nominees, I have determined that they are people I support, and I urge that the full Senate support them.

In this case, I had been very pleased to support those nominees. In each case, I had had circumstances where individual Senators have come to me, Democratic Senators have come to me and asked: Are you sure you want us to support this nominee for a judicial position in your State? Because my staff tells me there are questions—and this and that. I am pleased at that point to be able to respond, yes, that I have checked out these nominees, I have determined that they are people I support, and I urge that the full Senate support them.

Now, we have two judicial nominations coming before us today that are coming up for a vote on cloture that have not come up before, but in both cases, my understanding is they are being presented as nominees over the strenuous objection of both Senators from the State from which the judges come.

I have difficulty understanding why I should want to support a judicial nominee from a State if the Senators from that State oppose that nominee. I try to understand how I would feel if I were presented with a nomination from my State and the President and a majority of the Senate are urging me to confirm that nomination over my strenuous objection.

I think we have some obligation to our colleagues to defer to their own understanding and their own knowledge and their own opinion on these issues, particularly as it affects their State. Now, not exclusively; we do not have to defer. But I am just saying that as a precondition for going forward and considering a judicial nominee, we ought to begin by asking: Do the Senators from the State the judge comes from support the nomination? That seems to me to be a threshold question.

In the case of Carolyn Kuhl, on whom we have a cloture vote later today, and in the case of Janice Rogers Brown, about whom we are also having a cloture vote later today, I am informed that the Senators from California have determined they do not support these nominations. As I understand it, and in the case of Carolyn Kuhl, on whom we have a cloture vote later today, I am informed that the Senators from California have determined they do not support these nominations. They urge that the Judiciary Committee not report these nominations. And in spite of all of that, the President says we are going to do it any way.

We are doing this over the objection of the Senators from California. That, to me, is a cause for concern. We are talking about a breakdown in the traditions and a breakdown in the system that is supposed to be functioning. To me, that is a clear breakdown in the system for choosing and nominating and confirming Federal judges.

So I hope we can get back to a policy with regard to all the nominations that are being considered by this President that is consistent with the experience I have had in my home State of New Mexico; and that is, that before a nomination is sent to the Senate for confirmation, Senators will be asked to give their opinion as to the appropriateness of the nominee.

One good thing about this country—it is certainly true in my State; I am sure it is true in every State in this country—we have a wealth of very able and distinguished members of the bar who would love to serve on the Federal courts. There is no shortage of good people for these positions. Accordingly, it is not difficult to find a person to serve in these key positions who has the strong support of Senators, Congressmen, and public officials in these States.

The list of organizations and public officials, and both California organizations and national organizations, that oppose the two nominees I have referred to is not extensive, and I have been given that list.

Twenty-two members of the California congressional delegation have indicated their opposition to our going forward with the nomination of Janice Rogers Brown. We have members of the Judiciary Committee of the California Assembly who have come out in opposition to our going forward with Carolyn Kuhl’s nomination to the Ninth Circuit Court of Appeals. This is a long list of individuals and organizations.

I know neither of these nominees personally myself, but, clearly, I have to give deference and some consideration to the opinions of those who have worked with them.

Mr. LEAHY. Will the Senator yield to a question?

Mr. BINGAMAN. I am very pleased to yield to my colleague.

Mr. LEAHY. Mr. President, the distinguished Senator from New Mexico had an exemplary career as attorney general of New Mexico and, obviously, is in a position probably to know more about the bar of New Mexico than any one else in his State; and his service replicates that of other Senators on both sides of the aisle from their representing their States.

My question is this: The traditions of the Senate mean so much, and most of them there for the tradition of having to get clearance from home State Senators—and, of course, every State is equal in the Senate. But Federal judges have an enormous impact on the States. The tradition has always been that the Senators have the best idea who the Federal judge is who is going to be making decisions that affect the men and women of that State. This has not always been perfect, but has it been the experience—I ask this of my friend and former attorney general of his State, a Senator of great respect and competence—has it been his experience that in the main, very much in the main, this has worked extremely well?

Mr. BINGAMAN. Mr. President, in response to the question, I certainly would say it has been my experience that this does work. In fact, when the name of someone is being considered for appointment to a Federal judgeship in my State of New Mexico, I have been getting calls. I get calls from lawyers who have worked with these individuals. I get calls from people who have tried cases against these individuals. Some of them, frankly, are favorable and some may not be as favorable. But I think the great deal of feedback on these individuals who are being considered by us for nomination. And, of course, I have the ability, as a Senator from New Mexico, to call people whose opinions I respect and to say: You have spent your lifetime practicing law in the courts in New Mexico. What do you think about the qualifications and the temperament and the appropriateness of this person for this kind of a judicial position? Based on that kind of feedback, I am in a position to advise the President, advise my colleagues, advise anyone in the Senate that, in my opinion, this person would be well qualified.
This is not a game. This is not a charade. This is important. The past 11 Presidents’ judicial nominees confirmed v. filibustered: 2,372 confirmed, 0 successfully filibustered until now—the traditions of the Senate, the traditions of this great institution.

We have a lot of conversation, a lot of debate. My colleagues across the aisle said it is absolutely, patently false to say we haven’t successfully filibustered circuit court nominees. Read my source and you will find you are wrong. We understand that the history of the Senate is one in which this body, up to now has not used a partisan filibuster to block judicial nominees. We see that happening today. We see the record of that.

They talk about 168 to 4 and talk about all the judges. Clearly, when we talk about appellate judges, we have 29 confirmed and 6 who have been blocked and 6 who are threatened to be blocked. Now we are talking about 29 and 12. That is 33 percent. Not only is that nothing to be proud of, but it is in contravention to the constitutional direction the Framers and the Founders gave us.

The consequence of this are ones about which we should all be concerned. We are talking about our judicial system. This is not a game. This one of the fundamental underpinnings of this constitutional democracy, and we have a solemn obligation and responsibility to choose men and women of good judgment and character who bring a willingness to apply the law to the table and to make judgments.

The reality is that those candidates before us are folks whose peers have said are of the highest quality. The American Bar Association, the gold standard that my colleagues on the other side talked about so many times, say they are highly qualified. In some cases, the voters, those who have run for office—Priscilla Owen, Janice Rogers Brown—have received overwhelming shows of support. That tells you something about the mainstream, the bipartisan nature of the support.

Judge Carolyn Kuhl: A bipartisan group of nearly 100 of her colleagues said:

We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and the Senate that confirms her. As an appellate judge, she will serve the people of this country with distinction, as she has done as a trial judge.

A bipartisan group of 23 women judges of the superior court who served with Judge Kuhl wrote:

As sitting judges, we, more than anyone, appreciate the importance of an independent, fairminded, and principled judiciary. We believe Carolyn Kuhl represents the best values of such a judiciary.

The fact is, these judges hold strong opinions, but there is no question about that, but to a person they said they will do what a judge needs to do and put those personal opinions aside and apply the law. Their colleagues who
know them have raised their hands and said: Yes, that is what they have done; that is what they will do. The voters who know them reaffirmed their positions by reflecting them by overwhelming majorities. That is what we should do. That is mainstream. That is not extreme.

In the end, we are grasping for something simple: for every Senator on this floor to do what every Senator has the right to do—to be heard, to give your advice to the President of the United States, and if you don't agree with his nominees, do what has been done through the entire history of this country, for 214 years: Give your advice, give a vote; vote them up, vote them down, but give them a vote. It is what the Constitution requires. It is what I believe the future of this institution requires.

Let's get beyond the partisan politics. Let's put it aside. Let's do the right thing. Let's come together. Let's focus on getting things done. That is our opportunity, and I hope we don't squander it.

I yield to my colleague from South Carolina. The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM of South Carolina. Mr. President, I thank the Senator for yielding. It has been a real pleasure to talk with him throughout the night. It has been a great debate. For something considered a waste of time, so many Senators have participated. It has not been a waste of your time or the country's time. It is a good record the people can look upon and make a decision about what we are doing here in this Senate.

If I had to boil it down to what all this means to me, which I have to do between now and a quarter after, here is what I think is the down side of what we are doing in the Senate: Special interest politics is being given a green light to go after people they may disagree with. They think the nominee doesn't share their philosophy or political persuasion.

You are giving them a green light to manufacture controversies, to go after people in a personal way, and we are going to rue the day we did that. The left is doing it today. The right will do it tomorrow. We are unleashing special interest forces. We should be deterring them. Right now we are emboldening them, and the country will be worse for the wear.

There are people at the end of the process. We are talking about individuals. Miguel Estrada has claimed to be outside the mainstream. All I can tell you is that the Washington Post on February 5, 2003, not exactly a right-wing rag, said:

Estrada is well qualified for the bench. This should not be a tough case for confirmation. Democrats who disagree should vote against his nomination.

I think that pretty well sums up the idea that he can't be that far out of the mainstream or the Washington Post would not have said that about him.

If you disagree with me and think he is out of the mainstream, vote against him. Please don't continue the process of filibustering people because we are going to change the Senate forever, for the worst, and the future nominees to come, whatever they said in law school, may have written to their wife, whatever decision they made about going on a trip, if they said something that offends the left or offends the right, people are going to come after them like gangsters back on the headstaff, and you are going to keep good men and women from wanting to serve. That is going to happen, sure as I am standing here. It will be a great tragedy. Please let's turn this around.

Judge Brown will be No. 5. She sits on the Supreme Court of California. She is objected to. She is out of the mainstream allegedly. I would argue that 76 percent of the voters in California are not right-wing zealots, and that 76 percent of the vote in California has to have some sort of moderation about them. She has written the majority of the court's opinions. She is respected by her peers. You wouldn't get 76 percent of the vote in California if you were out of the mainstream in any real way.

Justice Owen from Texas, No. 1 in everything. She serves on the State supreme court. She received 84 percent of the vote. The only people left who didn't vote for her are probably the extreme people. I would argue that 84 percent of the people who chose to vote in Texas is probably our best evidence about who she is and the way she conducts herself.

Pryor: If you read in the paper today, the attorney general of Alabama has just successfully removed the chief justice of Alabama. It was his job to bring the case to the grievance committee in the State of Alabama, and the reason the chief justice was removed was that he refused to present the case to the 10 Commandments out of a courtroom in Alabama. Whatever you want to say about Attorney General Pryor, being out of the mainstream, let me tell you that the Ten Commandments are popular in Alabama. He chose the less traveled route for a politician. He chose to enforce the law against a rogue judge who is pandering to the political moment. He followed his constitutional duty, and I can't believe the Ten Commandments have a right to be displayed, but he said: It is not about me; it is about the law.

Mr. SESSIONS, Mr. President, will the Senator yield?

Mr. GRAHAM of South Carolina. Yes. Mr. SESSIONS. With regard to that matter, Attorney General Pryor did file a brief on behalf of Judge Moore and argued that the Ten Commandments are not legitimate because there are three depictions of the Ten Commandments in the Supreme Court. And right on this wall are the words "In God We Trust." He defended that.

When the case was lost, the judicial inquiry commission brought a charge against the chief justice because he did not comply with the court order, and it was the duty of the attorney general to bring that case under Alabama law. So he was required to present the case that had been brought by something akin to a grand jury.

Mr. SANTORUM. Will the Senator from Alabama say that is following the law?

The PRESIDING OFFICER. Mr. SESSIONS, it is absolutely following the law. There are a host of other examples to a degree I have never seen before in America. Bill Pryor always does what he believes the law compels him to do. Many times it is something he does not personally like to do.

Mr. GRAHAM of South Carolina. Senator LEAHY said in 1998:

If we don't like somebody the President nominates, vote him or her down or up.

He was right then. I am very afraid that we are opening a chapter in the history of the Senate when it comes to judges. I don't want to be a part of it. I reject the past. I embrace a better future. Please, for God's sake, let's not continue to do this because we will all regret it.

The PRESIDING OFFICER. The majority has 30 seconds remaining.

Mr. SANTORUM. Maybe what we are finding out here is the minority doesn't want someone who is going to follow the law. This is a new chapter in the history of the Senate when it comes to judges. I don't want to be a part of it. I reject the past. I embrace a better future. Please, for God's sake, let's not continue to do this because we will all regret it.

The Senator from Vermont.

Mr. LEAHY. Mr. President, I am glad to see my friend from South Carolina used a tiny part of a quote of mine. I am always glad when somebody quotes me, even when they don't do it accurately.

What I was referring to, if you look at the quote, was the one-person filibuster of 63 of Clinton's nominees, where one person, one Republican, usually anonymously, would object to President Clinton's nominees and then those nominees would never get a vote at all. Those were filibusters by one person done anonymously, not in the open.

Here, of course, unlike what was done to President Clinton, the Democrats have cooperated to make sure that 168 of President Bush's nominees to the bench finally have gone through and only 4 have not. We can only see 4 have been blocked. We have confirmed 168 and only blocked 4. That contrasts to the 63 anonymous filibusters done
by the Republicans—63 done by the Republicans when they were in charge.

As I walked over this morning, I thought: Finally, the Republican leadership is bringing to a conclusion three really "Alice in Wonderland" kind of days. The Senate wasted days in the history of the Senate. During those days, as much as the Republican leadership wanted to waste the Senate's time, at a cost of hundreds of thousands of tax dollars, one of our Democratic Senators who had to endure endless criticism for objecting to a handful of the President's most extreme, controversial, and divisive nominees.

What they have tried to do is get the Senate's attention back on the unfinished legislative business of this session that is of such concern to the lives of so many Americans. As I said, we have cooperated in the confirmation of 168 of this President's judicial nominees in 17 months. I was chairman and confirmed another 68 in the 17 months my distinguished colleague from Utah was chair.

I am not going to criticize him that he didn't get as many confirmed as I did. I left the Senate November 12. I was chairman and confirmed 168 of this President's judicial nominees.

President Bush's term, where a million new jobs were created every year, in the 3 years of President Bush's term, 3 million jobs have been lost, but they do not want to talk about that.

The White House has already overshot the Senate's adjournment date by more than a month. We have already had to enact three continuing resolutions just to keep the Federal Government going because we have no appropriations bills. The law says we have to enact 13 appropriations bills by the end of September. The Republican Congress has enacted only 5 of the total 13. They ignore the law on that, but then they waste this time and hundreds of thousands of taxpayer dollars to have a campaign talkathon.

They do not want to vote on the appropriations bills and, instead, they want to waste time on this? They want to waste time giving lifetime jobs to three or four people but they do not want to do anything about the 3 million Americans who are out of jobs.

Here is what they are not talking about, here are the issues that are not being voted on, here are the bills that the Republican Party will not bring up Funds that go to improve our schools. Funds that NIH uses to advance our medical knowledge in fighting disease and illness. The resources used by EPA to enforce our clean air and water laws. Not going to bring up: Funds that to improve our schools. Funds that NIH uses to advance our medical knowledge in fighting disease and illness. The resources used by EPA to enforce our clean air and water laws.

In one of their many press conferences of the Senate this week, the Senator from West Virginia urged the Senate to complete its work. But they are not going to do it. We do not have 2 hours for the Senate to complete its work. The Senate has, instead, insisting on spending the last three days of this session on a handful of highly controversial judicial nominations that divide the Senate and the American people and ignoring the needs of the 10 million Americans who are out of work, including those more than three million Americans who have lost their jobs since President Bush took office.

Instead of working together on such important matters, we are being forced to repeat another cloture vote on the nomination of Priscilla Owen. The Senate has voted three times on this nomination, and three times, the Senate has decided against granting consent. Her nomination had been fairly and thoroughly considered by the Judiciary Committee last year, and her nomination was rejected by a vote of 37 to 63. Never before has a President renominated a judicial nominee who was rejected on the merits by the Judiciary Committee.

She has shown herself to be a judicial activist and an extremist even on the very conservative Texas Supreme Court where her conservative colleagues have criticized her judging. All that has occurred since the cloture votes during the spring and summer is the Republican leadership has ratcheted up their name calling and Justice Owen has been made to serve as a political prop for the White House.

In fact, I commend to my colleagues an insightful article by David Margolick that appeared recently in Vanity Fair magazine entitled "Bush Scored Advantage." The second in this series of votes is to nominations of American families with disabled veterans. He said, Can we take 2 more hours to finish the bill that will affect millions of America's veterans?

He said we could do it in 2 hours. The Republican leadership objected. Those few minutes at the beginning of this debate may be the most telling of this entire so-called debate. Republicans chose to sacrifice the work of the Senate, the priorities of the American people and the interests of American veterans so they could pull a partisan political stunt.

In one of their many press conferences on this diversion, on November 6, the Republican leader committed to "complete the appropriations process" before beginning this charade. Even the junior Senator from Pennsylvania agreed with him and said: "The leader's right. What we are about to embark in next week, after the appropriations bills have been voted on, is to enter into a debate . . ."

Well, given the chance to honor that commitment, the Republican caucus chose partisan theater over the work of the Senate.

Question: Can you not take 2 hours out of these 40 hours to at least do the appropriations bill for our veterans? I mean, you are not going to do the appropriations bills for our law enforcement. You are not going to do it for veterans. You are not going to do it for anything else. If you could just take 2 hours out of this, at a time when we are creating a lot more veterans, many of them horribly disabled and disfigured from the war in Iraq, we could do it. No, we do not have 2 hours for that.

There is the unfinished business of the Nation's unemployment and lack of job opportunities that confound so many millions of Americans having lost their jobs in the last three years, the Republican Senate has, instead, insisting on spending these final days of this session on a handful of highly controversial judicial nominations that divide the Senate and the American people and ignoring the needs of the 10 million Americans who are out of work, including those more than three million Americans who have lost their jobs since President Bush took office.

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federal policy and provide tax breaks to Bob Jones University, to her efforts to overturn Roe v. Wade, to her recent decisions seeking to excuse the invasions of the privacy of Ms. Sanchez-Scott, a breast cancer survivor, Carolyn K. Johnson, this is not an example of someone who has served in the United States Senate, or the judicial community such as she has. I am the only African American woman to have served in the United States Senate, or the judicial community such as she has. I am not only an appreciation for the gravity of the Senate's role and responsibility in regards to the appointment process, but also I have been appreciated for their gravity and understanding of other African Americans. Not all black people think alike, and I have no doubt that there is a constituency that would be happy to see an African American political persuasion confirmed for such an important position as the D.C. Circuit Court of Appeals. However, it does both the black community as well as the courts a great disservice to confirm to such a position an individual who has so clearly demonstrated a disregard for the balance and impartiality required of the members of the bench.

I appeal to our President to exercise great respect for the traditions of the judiciary in making future nominations. Justice Brown should be given an opportunity to mature in her demeanor and her judicial conduct, but not as a member of the Circuit Court. As such, I ask that the Committee to reject this nomination.

Sincerely,

CAROL MOSELEY-BRAUN.
or 18 percent, and only 8 women to circuit courts out of 32 circuit court nominees, or 25 percent. Well, this year, Democrats have supported the confirmation of 12 additional women nominated to the Federal bench, including our own Courts of Appeal. The thirty-three women judges confirmed represent 20 percent of the 168 judges confirmed so far.

Perhaps, though, they are a little nervous about this. President Bush has nominated far fewer women to the Federal bench than President Clinton did. This President’s nominees have included only one woman in each five judicial nominees. By contrast, nearly one of every three of President Clinton’s judges are women. Of course, the Republicans who controlled the Senate and the Judiciary Committee during the Clinton administration also blocked 18 women nominated to Federal courts out of 32 circuit court nominees. They did it by their one-person anonymous filibuster. Do not give me this baloney that, oh, it is so terrible that we are standing out here in open session blocking four judges. They blocked three anonymous filibusters of 18 of them women. The women who were blocked from getting Senate action on their judicial nominations by the Republicans include Kathleen McCree, Helene White, Christine Arguello, Bonnie Campbell—all of whom were nominated to the circuit courts. Now, these six outstanding women lawyers and judges were not extreme or ideologues. They were blocked unanimously by Republican Senators. This was done without any explanation. This was done without a vote of any kind. We never had a debate on them.

These other judges, the 4 out of 168 of President Clinton’s who have been confirmed, at least there was a debate on them. We discussed the merits of their nominations. The 63 of President Clinton’s nominees who were blocked by the Republican majority would have liked to have had a hearing or a debate on the merits of their nominations. There was no debate. Nobody wanted to come to the floor and talk about them, not when they could do a one-person filibuster, and do it anonymously so the press in their hometown would never know who was holding them up, including some of the Senators from the States where they were nominated. They could do this anonymously, and they could do it in a way that they would never have their fingerprints on it.

Now, I have heard more crocodile tears shed on this Senate floor this week than I have heard in my 29 years. Why is it that a judge of President Bush’s were stopped, out of 168 who were confirmed. He has had less nominees stopped than any President I can remember since I have served in the Senate.

I yield the floor.

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

• **MR. EDWARDS.** Mr. President, my Republican colleagues are calling this 30-plus-hour marathon “Justice for Judges.” Now, I’m all for justice for judges. And that’s exactly what every single one of President Bush’s judicial nominees has gotten.

But I ask my colleagues, where is Justice for the American people? They see more concerned about Justice for a handful of judges—the 2 percent of those Bush’s nominee who haven’t been confirmed—than justice, fair play and opportunities for the American people.

The Republican majority claims that we’re facing a vacancy crisis in our Federal courts. Ninety eight percent of Bush’s judges have been confirmed and this is a crisis? Two percent of Bush’s judges have not been given lifetime appointments and we’re in a crisis?

Under George W. Bush, the unemployment has risen to 6 percent the poverty rate has increased to 12.1 percent the percentage of Americans with no health coverage, but it got down to 4.5 percent its lowest point in over 13 years. In fact, there are more full-time Federal judges on the Federal courts than at any other time in U.S. history? The vacancy rate is now below the number that Senator HATCH called “full-employment” in the Federal judiciary during the Clinton administration.

Where is the concern for the 6 percent of the American people who can’t find jobs? The same people who claim that 45 percent vacancy is a crisis think that 6 percent unemployment is great news, that a “jobless recovery” is a good thing. Why aren’t they at least as concerned about Justice for the jobless, Justice for Working People, Justice for the Poor, Justice for Families?

So, what does this marathon debate tell us about the priorities of the Republican majority? It makes it tell us when they are more concerned about securing lifetime jobs for three sitting judges and a State attorney general than in securing jobs for the 9 million Americans who are out of work?

Why are they more interested in fighting for three judges and an attorney general—all of whom have received full and fair consideration—than fighting to bring hope back to the American people?

Why aren’t we spending 30 hours debating how to help the 9 million Americans who no longer have the dignity and self-respect that comes from completing a hard day’s work? Why doesn’t the Republican majority schedule 30 hours of debate to figure out how to provide health care to the American people and prescription drug benefits to the elderly?

We should be figuring out how to bring back the 3 million jobs we’ve lost on George W. We shouldn’t lose a job lost for every minute he has been in office. We should be addressing the anxiety of families who fear that by sundown they will be without a safe home. We should be working to find a way to lift the tax burdens on working families and provide real economic opportunities so they can provide food, clothing, and shelter for their families. We should be debating about the best way to close the education gap and support and fund our public schools. We should be working together to lift Americans out of poverty.

And we should be coming together, not fighting for justice for judges but to fight to end the injustice that still tugs on the soul of America.

In other words, we should be fighting for Justice for the American People.

Instead, my colleagues have virtually shut down the Senate to force lifetime appointments for three judges and an attorney general.

This political stunt is getting lots of coverage, but it’s not doing a thing to improve the life of one single American—except three sitting judges and an attorney general.

We have confirmed 168 of President Bush’s nominees. It’s the vast majority of these judges, even though many of these judges have held conservative ideologies with which I strongly differ, because I believed they would ultimately enforce the Constitution and the law.

But I cannot and will not vote for these four nominees, for good reason. These nominees not only do not represent the mainstream, but they have demonstrated an unwillingness to set aside their personal views to uphold the law and protect civil rights. We have good reason to oppose these nominees. And we not only have the right, we have a constitutional obligation to stand up to the President when he makes unacceptable nominations to the bench.

Our Founding Fathers did not give the President unilateral or unfettered power to select Article III judges. They wanted to ensure that the people—their elected representatives—have a say in who will be appointed to the Federal bench. So they created a partnership between the President and the Senate by requiring the President to obtain the advice and consent of the Senate in nominating judges.

Every President—whether Republican or Democrat—must consult in a meaningful way with the Senate to appoint highly qualified judges to the Federal bench. The give and take that results makes it far more likely that we will have a judiciary that is not skewed too far to the right or too far to the left, a balanced judiciary that reflects the people it serves.

Meaningful consultation does not mean that the White House just sends us who they want and we rubberstamp them, without careful examination and consideration. Meaningful consultation often involves compromise and concessions.

This approach has worked reasonably well—with some exceptions—over the years. But now we find ourselves dealing with a White House that disdains
President for consulting with us and making an excellent nomination. And I told him that if he takes this approach to future judicial nominations we have a real opportunity to find common ground in the search for excellence on the federal bench. When we work together, we find outstanding nominees like Allyson Duncan, who represents the best of North Carolina and America.

In light of our efforts to cooperate with the President on nominations, I’m puzzled and troubled by the Republican attacks on us, the accusations that we are anti-women, anti-black, anti-Hispanic, anti-Southern, anti-Catholic. They’re running attack ads against us that represent the worst forms of religious and racial McCarthyism. They’re doing this even though the record shows that Democrats have voted to confirm 13 of President Bush’s African-American nominees while Republicans blocked 12 of Clinton’s African-American nominees. We have confirmed 33 of Bush’s woman nominees. Nearly 40 percent of the Bush judges confirmed have been from southern States. So, not only has the President been flat-out wrong, they are outrageous and I must speak out against such demagoguery and race baiting.

We have gone the extra mile. We have demonstrated that we are willing to work with the White House to move forward on nominees who provide balance to the courts. We have confirmed 168 of President Bush’s judicial nominees—98 percent. We have been more than cooperative.

It’s really a shame that the majority doesn’t spend a fraction of the time they’ve spent on the full employment program for judges on finding ways to improve the lives of the American people.

The American people deserve better than this. We owe it to them to call a halt to this marathon madness and get down to work to address the problems they sent us here to solve. It is time to fight for the opportunity for the American people.

Mr. DODD. Mr. President, the majority has indicated that as part of this debate to invoke cloture on these three nominees to the Federal judiciary, they may move to consider S. Res. 138, a resolution introduced by the majority leader, Senator Frist, which would amend the Senate rules to treat debate on Executive Calendar items differently than other matters on the Legislative Calendar.

Nothing is more fundamental to the ability of the Senate to fully exercise its constitutional responsibility to provide advice and consent to the President than subject such nominees to full and deliberative debate. And any move to amend the Senate rules to place additional limitations on that debate is tantamount to a ceding of legislative branch powers to the executive.

I appreciate the opportunity to speak on the issue of proposed changes to Senate rule XXII.

The filibuster is widely viewed as one of the Senate’s most characteristic procedural rules. I believe we can all agree that the best way to consider a change to Senate rules is to do so in accordance with existing Senate rules. I submit this to my colleagues that the Senate will follow Senate rules and precedent.

Any attempt to change Senate rules, particularly cloture rule XXII, should be in keeping with the deliberative rules, precedents and practices that have been part of the bicameral institution since it was conceived during a steamy summer in Philadelphia over 217 years ago.

Senate rules have endured the age-old test of time, people, places, and events. Senate rules delineate the constitutional responsibilities of the body and define the character of the institution. Making changes to the rules and the precedent of the Senate is not an act that should be taken lightly or for partisan purposes.

In the history of the institution, the rules of the Senate have been through general revision just seven times: 1806, 1820, 1828, 1866, 1877, 1984, and 1979. The justification of this Senate rule is built on the foundation of the right to debate and amend, the two basic principles that make the Senate the upper House in all of the legislative bodies of the world. If you chip and change this cornerstone, then you chip and change the Senate as an institution.

Herein lies the central paradox and towering majesty of the Senate. What makes this institution unique is what can simultaneously gall us the most: the practice of extended debate.

But the Founders insulated the Senate from sanction for debate and extended debate. They left it to “determine the rules of its proceedings.”

The rules of the Senate reflect the intent of the Framers that the Senate be the “saucer into which the nation’s passions may be poured to cool.” The ability to fully examine and debate any matter of national importance is the hallmark of the Senate. Nowhere more than in the advice and consent responsibility of the Senate do we see the Framers’ intent to balance the fear of a resulting tyranny of a majority against the principle of majority rule.

As Alexis de Toqueville observed: “... the main evil of the present democratic institutions of the United States arises from inadequate securities against tyranny... if ever the free institutions of America are destroyed, that event may be attributed to the unlimited authority of the majorities, which at some future time may be in the hands of the minorities to desperation.”

The President nominates, but his power is balanced, and checked, by the power of the Senate to provide advice and consent. The Senate rules and precedent empower the Senate to do this work. And in the case of the judiciary, the creation of the third, separate and equal, branch of Government, the powers are deliberately counterposed.
This is not the first controversy over Senate rules, precedents and practices of the right to extended debate. Through our history, the right of extended debate has never been seriously questioned as other than a vital foundation of our Republic. This right has been a catalyst for achieving the most remarkable feature of our civilization: the degree to which we have been able to provide our citizens with, at one and the same time, both great freedom and great stability.

As Robert Caro, author of “The Master of the Senate,” for which he was awarded his second Pulitzer prize, has observed, and I quote him, “in creating the new nation, its founding fathers, the framers of its constitution, gave its legislature not only its own powers specified and sweeping, but also powers designed to make the Congress independent of the President, and to restrain and to act as a check on his authority, including power to approve his appointments, the appointments he made within his own administration. And the most potent of these restraining powers the framers gave to the Senate.”

The power to approve Presidential appointments was given to the Senate alone. A President could nominate and appoint Ambassadors, Supreme Court justices, and other officers of the United States, but only with the advice and consent of the United States Senate. This is the American way and it must remain the American way. While the Founding Fathers recognized the inherent dangers in granting a minority of Senators a veto over the will of the majority, the Constitution did just that.

But proposals to limit debate would change that.

S. Res. 138, a proposal by Majority Leader Frist, would amend Senate rule XXII to provide for a declining number of votes that would be required to invoke cloture on Executive Calendar items, such as judicial nominations.

I have deep reservations about Majority Leader Frist’s resolution to amend Senate rule XXII. I fully appreciate the majority leader’s desire to expedite the business of the Senate. I fully understand the frustration with respect to the deep desire to invoke cloture on Executive Calendar items, including executive nominations such as judicial nominations.

But there is simply no crisis facing our judiciary today that necessitates the damage to the very fiber of this institution that such a rules change would render. The vacancy for the Federal judiciary is at its lowest level in 13 years.

Since President Bush came into office, the Senate has confirmed 168 of his nominees and has decided not to proceed with only 4. That is a 98 percent success rate for the President. In my view, this is a great success rate.

The Senate must not act to change its rules. To do so now would amount to a “hijacking” of the Senate’s constitutional duty to provide advice and consent to the President’s nomination authority. The supermajority requirement is consistent with the intent, spirit and language of the Constitution.

S. Res. 138 presents the question of whether rule XXII should be revised to accommodate a targeted remedy for filibusters of judicial nominations. The real question should be whether S. Res. 138 strikes the most appropriate balance between existing Senate rules and the remainder of the Senate debate as enacted pursuant to authority under the Constitution, article I, section 5.

The Constitution expressly authorizes such procedural rules and sets no standard to limit the Senate’s discretion in formulating such rules. Further, the Constitution does not compel the answering of the question, much less a final vote, on any matter, legislative or executive.

There is no argument to the fact that the Senate has plenary authority to devise its own rules. Nor is there any argument that there is no right to mandatory majority rule. Most importantly, the Senate tradition on filibuster offends no constitutional edict. In the words of Chief Justice Burger, “there is nothing in the language of the Constitution or history of our cases that require a majority always prevail on every issue.”

At its most fundamental core, the Senate is a testament to the coexisting rights of the majority and the minority. Small states have an equal say in the Senate’s tradition, and rules protect debate no matter whether it is a principled stand of one Senator or a chorus of the convinced. The Senate rules balance majority rule with minority will.

As a Senator in this body, I recall watching the Senate as a very determined minority insisted on their right to be heard on the issue of civil rights. Their position on civil rights was unfair, unpopular, and illegal. Yet the majority of Senators did not question the right of the minority Senators to assert their right under Senate rules and precedent to debate, delay, diminish or defeat civil rights legislation. And, the minority prevailed.

Ultimately, both the noble principles of racial equality and extended debate prevailed in the Senate. But the Senate rule that had been long thwarted was left essentially unchanged.

Prior to 1917, there was only a century old rule that required unanimous consent to cut off debate. This means that for 111 years, the Senate practice of extended debate was absolute in its scope. All Senators had to consent in order to bring up a consideration of a matter that required a vote. For the subsequent period of 58 years, two-thirds of the Senate were required to end debate.

Currently, three-fifths are required. Until 1949, there was no procedure for limiting debate on nominations in the Senate. For the past 212 years, there has never been Senate rule that permits a simple majority to force a vote on any matter up for consideration, including judicial nominations.

This history of S. Res. 138 would be without precedent to require a simple majority to invoke cloture, in my view. S. Res. 138 would reduce to a majority vote that Senate procedural rule which girds the independence of the judicial branch.

There is an irony to S. Res. 138 that cannot go unstated or unexamined. It would reform the cloture process only for nominations and leave cloture for the remainder of the Senate debate as it is. Arguably, it is precisely in the area of nominations, particularly judicial nominations, that the Framers intended these powers to be utilized.

S. Res. 138 would fundamentally alter the nature of the Senate and the balance of powers created by the framers of the Constitution. It would undermine the Senate’s role in our constitutional democracy, cede enormous power to the Executive and upset the deliberate system of checks and balances intended by the Framers.

S. Res. 138 would fundamentally diminish the Senate’s power in relation to that of the Executive. And if the Senate cedes such power to the Executive, then I do not think the Senate will ever get that power back. Of all the issues that the Senate faces now and in future Congresses—such as war, the economy, health, education, election reform, jobs—none is more important than this one on Senate rule changes.

Instead, S. Res. 138 would shift the balance of power on advise and consent to the executive branch. To accommodate this proposal means a profound change in the Senate as an institution and the character of the Senate as a body itself.

It reduces the constitutional advice and consent authority, indeed duty, to a mere rubber stamp of the President’s prerogatives. We must always attempt to find the right checks and balances between a rubber stamp and a deliberative body on both legislation and nominations. This is what makes the Senate, as an institution, so powerful, so special, so unique.

We must remember that during the Constitutional Convention, or after the lengthy debate, was the power to appoint judges committed to the President as well as to the Senate. Why?”

John Rutledge of South Carolina said
it best: "the people will think we are leaning too much toward monarchy" if the President is given free rein to appoint judges. The final compromise was characterized by Governor Morris of Pennsylvania as giving the Senate the power to appoint judges nominated to them by the President. In Federalist 76, Hamilton explained, "the Senate's review would prevent the President from appointing judges to be the obsequious instruments of his pleasure."

Agreement has been found. I find it quite troubling that Majority Leader Frist now suggests that we narrow deliberation, debate, and the rights of the minority with respect to the nomination process and thereby enhance the ability of the majority to turn the Senate into a rubber stamp of a President's nominee.

What is at stake in this debate is nothing less than the integrity of the Senate and the independence of the judicial branch—the deliberate intentions of the Framers to ensure against the excess of the Executive.

In describing the role of the Senate to provide advice and consent to executive nominations, Roger Sherman noted: "The protection of this Constitution, thought it would tend to secure the liberties of the people, if they prohibited the President from the sole appointment of all offices. They knew that the crown of Great Britain, by having that prerogative of rule and traditions. We have a responsibility to the President, the people, and the institution. This is a moment for Senators, as Senators, to stand up for the Senate.

Those of us fortunate to serve in this body are but its temporary custodians. We are stewards of an institution governed by rules and practices that have withstood the test of more than two centuries of time. Now is not the time to retool the rules to achieve goals that are, in essence, transient and partial in nature, no matter how deeply felt.

When in history has the will of a minority—through extended debate been able to stop anything that this Nation desired or that had the broad support of its people? The Senate works its will, extended debate and all, as it was intended to—"in the words of James Madison—"... to consist in its proceedings with more coolness, with more system, and with more wisdom, than the popular branch."

The disappointment that we have over judicial appointments, and over some legislation, will likely be long forgotten, and of limited consequence, in years to come. But to change the rules and practices of the U.S. Senate in the manner that is here proposed, in my view, would do permanent and lasting damage, not only to this institution but to our democracy that has served us so long and so well.

I oppose cloture. It would preclude that the majority leader will not bring up S. Res. 138 to amend the rules of the Senate.

But if that happens, I urge my colleagues, as Senators, to uphold the traditions that our colleagues have deprecated to give equal voice to all States, indeed to all people, and to forego the political expedience of the moment in order to ensure the integrity of the Senate, and the functioning of this Republic, for generations to come.

Mr. LIEBERMAN. Mr. President, in the course of this debate, I have been deeply disturbed to hear the characterization my Republican colleagues have given to a filibuster reform proposal Senator HARKIN and I offered nearly a year ago. Those comments have referred to our proposal, and our statements in support of it, as precedent for their efforts here today. As I have said in the past, I believe that is deeply wrong.

To make clear both what our proposal did, and why our Republican colleagues’ characterizations of it are wrong, I thought it would be worthwhile to make sure the record included testimony I offered to the Senate Rules Committee this past June. I ask unanimous consent that the full text of that testimony be reprinted in the RECORD.

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

STATEMENT OF SENATOR JOE LIEBERMAN, SENATE RULES AND ADMINISTRATION COMMITTEE, JUNE 5, 2003

Chairman Lott, Senator Dodd and Members of the Committee, I greatly appreciate the opportunity to submit this statement for your hearing record, so that I can share with the Committee my thoughts on filibuster reform and my previous efforts on the topic. In late January 1995, Senator Harkin and I launched an effort to encourage Senate discussion of reforming the Senate’s cloture rule. Like Senator Harkin, I have become increasingly frustrated at the way the Senate’s cloture rule repeatedly allowed a minority of Members to prevent the Senate’s majority from enacting legislation. I felt—and continue to feel—that the Senate rules should be changed to prevent a small minority of Senators from bringing legislation to a halt simply by saying that they will never end debate.

In early January 1995, we offered our proposal under which an initial cloture vote would require 60 votes, but the requisite number to reach cloture would decline by three with each of the next three cloture attempts on the same matter. As of the fourth cloture vote, 51 votes—a simple majority—would suffice to invoke cloture.

This was not a pathway we had carved out for ourselves. Indeed, Senator Harkin and I offered our proposal after the Democrats lost their majority status and at a time we therefore fully understood that we would more often than not—in the short term, at least—be among our party’s detriment. Let me say that again: our proposal was not an effort to push through legislation of our own party. Nor was it a proposal aimed at carving out special rules for one type of legislation or Senate action in order to ease enactment or Senate approval of one particular agenda.

In early January 1995, we offered our proposal on the Senate floor. After a good debate, the Senate voted on it and, unfortunately, we lost by a landslide. 76-19. Among the minority winners were every Member of this Committee who was in the Senate at the time, including the current Majority Leader, whose proposal the Committee is considering.

But that is not what the Majority Leader’s proposal seeks to do. Indeed, although I expect some will seek to characterize the proposal the Committee is considering as akin to the Harkin-Lieberman one, it most assuredly is not. Our proposal applied across the board—to legislation and nominations alike. As I already mentioned, it was the legislative gridlock that motivated us back then, and that continues to be the real problem on the Table.

But my Republican colleagues don’t want an across-the-board reform. As they would have no choice but to acknowledge, they don’t want to give up their filibuster leverage, even while they are in the Majority. That’s because, whether it’s the patients’ bill of rights, campaign finance reform, or a plethora of other issues, they have launched their own filibusters while in the Majority, and they just don’t want to give up their ability to continue to do so. Majority rule apparently should only go so far in their view.

What the Majority Leader’s proposal amounts to is a demand for unilateral disarmament. It is an effort to force the current minority party to swallow a rules change that allows this President and his party to carve an exception from the Senate rules for their out-of-the-mainstream judicial nominees, while keeping the parts of the cloture rule that they want to continue taking advantage of. But the issue of how the Senate operates should not be subjected to such one-sided demands. We all must work with the rules we have and seek to apply them fairly and impartially. That is what I think it appropriate.

In short, in contrast to the serious reform effort we made, this proposal amounts to one party’s effort to turn a Senate rule into a tool—to change the nature of an issue in the name of democracy, while leaving themselves free to filibuster away on legislative proposals they don’t like. I would urge my colleagues to engage in serious reform of the cloture rules so that we all—Republicans, Democrats and Independents alike—can make the Senate a better place for the American people. But this unfortunately is not that effort.

Mr. SANTORUM. Mr. President, this is a very historic time for our country. Until this Congress there had never been a filibuster against a Supreme Court nominee in the history of this country. Thus far we have had four filibusters of highly qualified judicial nominees this year and may have two more by the
end of this week. It is not the intent of the Constitution to confirm a nominee with 60 votes but to confirm with a simple majority. Whether we vote a nominee up or we vote them down, it is our duty to bring them for a vote and to respect the Constitution and in- troduce a constitutional amendment to do so—and build the necessary support for it around the Nation—rather than through this backdoor assault. The precedent that is being set through this abuse of the filibuster is a dan- gerous and destructive one for future Presidents, future nominees, and most importantly the future of the J udici- ary.

As we look at the nominees that have faced obstruction, I ask what makes these nominees ripe for such unprecedented obstruction in our country’s history? The most recent judicial nominee to experience this assault is California Supreme Court Justice An- ice Rogers Brown. I spoke on the floor several weeks ago of the cruel treatment that Justice Brown has had to endure. Ms. Brown was recently degraded by a stereotypical cartoon on blackcommentator.com. The cartoon has President Bush and Justice Brown walking into a room and the President saying, “Welcome to the Federal bench, Ms. Clarence—I mean Ms. Rog- ers Brown, you’ll fit right in.” In the background are Justice Thomas, Colin Powell, and Condoleezza Rice. The bot- tom says, “News Item: Bush nominates Clarence-like conservative to the bench.” Left oriented groups opposing the President’s nominees did not con- demn this distortion.

In Justice Brown’s Judiciary Com- mittee hearing, she responded to this卡通 by saying, “Well, you know, it’s not personal, it’s just politics, it’s not per- sonal. And I just want to say to you that it is personal, it’s very personal— to the nominee, and to the people who care about them.” It doesn’t get more personal than this. Brown is a very in- telligent woman who is a Supreme Court Justice in our Nation’s largest State, was re-elected to her seat with 76 percent of the vote, has accu- mulated a stellar educational record and has a great judicial reputation. However, in order to fulfill her dream and the President’s wishes, she must subject herself to unfair personal attacks and embarrassing degradation.

Carolyn Kuhl, another female judi- cial nominee, also faces harsh and un- warranted criticism in her nomination for the Ninth Circuit Court of Appeals, a circuit court that even Senator Schu- nier admits, “is the most liberal circuit in the most overtaxed circuit of the 13 circuits. The judicial Conference of the United States has declared this vacant seat a “judicial emergency.” But this is not even the main crisis for this court. This court gave us the notorious Pledge of Allegiance decision that Democrats joined Republicans in dis- avowing. Our friends on the other side of the aisle stress the importance of ap- proving Judge Pickering this week. This court has 17 judges appointed by a Democratic President and 8 appointed by a Republican President. It seems ap- parent that Judge Kuhl would be a per- fect candidate to balance a court that is tilted extremely to the left. Judge Kuhl, like the overwhelming majority of President Bush’s nominees, has received a “Well Qualified” rating from the ABA, the “Gold Standard,” previously deferred to by Democrats in the J udiciary Committee. However, Judge Kuhl has been receiving unfair treatment from leftist special interest groups seeking to control the nomina- tions process through the historically unprecedented misuse of the filibuster. They criticize Kuhl’s role in a 1986 case in which she filed a brief stating President Reagan’s position that Roe v. Wade was wrongly decided. Rather than be criticized, Judge Kuhl should be praised for fulfilling her eth- ical duty to the public. Here she was represent the President’s position be- fore the Supreme Court. Rule 1.2.b of the Model Rules of Professional Con- duct states that “[a] lawyer’s representa- tion of a client, including representa- tion by appointment, does not con- stitute endorsement of the political, social, or moral views or activities.” The hypocrisy of those opposing her nomination lies in the fact that they have not objected to past nominees who were attorneys on the same gov- ernment brief. Furthermore, Judge Kuhl is supported by a wide range of pro-choice supporters who strongly be- lieve that she will uphold the law. So, as I have asked before, what makes Judge Kuhl so special that warrants obstruction of her appointment?

Then, there is Priscilla Owen. Justice Owen was nominated for the Fifth Cir- cuit Court of Appeals by President Bush in May of 2001. Justice Owen was elected by 84 percent of the voters of Texas to the Texas Supreme Court. This vacancy has been declared a “judi- cial emergency” by the Judicial Con- ference of the United States. She has yet to have an up-or-down vote. She has significant bipartisan support, in- cluding 81 percent of the judges of the Texas Supreme Court and a bipartisan group of 15 past Presidents of the State Bar of Texas. Owen is yet another nominee who has received a unanimous “Well Qualified Rating” from the ABA. Critics argue that she has strong views on abortion, but she has always interpreted the law fa- ithfully by applying statutes enacted by the Texas Legislature.

Abortion-rights activists claim that Owen’s decision to the left that stat- ute that requires girls under the age of 18 to notify their parents of an abort- ion is an example of judicial activism. Never mentioned by these organiza-
My grave concern is tempered only by my hope and confidence that we will arrive, the Senate will begin thirty hours of debate: the cost of opportunities lost to the American people. The media coverage and analysis are likely to be comprehensive and focused intensely down to the minute details. Like a ravenous beast, this spectacle will devour our time, attention, and energy, until eventually, it consumes itself.

Are we to believe that documents the administration is unwilling to share from the Solicitor General’s Office are what blocked his nomination, when all previous living Solicitors General, Republican and Democrat, signed a letter saying such work products should not be required to be provided? To do so would only undermine the ability of the office to represent the Federal Government and the President and would negate the ability to extract quality lawyers to the office. We have also discussed time and again the appropriateness of Estrada’s reluctance to pre-judge cases at committee hearings. Opponents knew that they had no basis to oppose his nomination so they chose to place the burden on the nominee to prove a negative or else to have the Office of the Solicitor General underwrite its independence and effectiveness.

What is involved here is whether or not we are going to abide by the Constitution because the Constitution is pretty clear on this subject of advice and consent. This link here contains the Constitution of the United States. In article II, section 2, clause 2, speaking of the President, it says this: He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur, and he shall nominate, and by and with the Advice and Consent of the Senate it goes on to say appoint judges. Now, that is what the Constitution says. The Founding Fathers knew what a supermajority vote was. They put that requirement in here, where it was necessary for treaties. It is very clear to anybody who reads it, I think any constitutional scholar, that advice and consent means a vote up or down, a majority vote up or down.

During the Clinton years, when Democrats were afraid the Republicans were going to filibuster their nominees, Democrat after Democrat got up and said we would not filibuster one way or another. If my colleagues do not like a judge, vote against him or her. A lot of those
quote has been put in the record during this 40-hour debate. The fact is, when push comes to shove, when it becomes to their political advantage to stop people on the floor of the Senate, they start filibustering.

This is another one-man filibusters, that is pure bunk. The fact is, everybody who came to the floor got a vote or down. Now, there were a few on our side who wanted to filibuster some of those judges because they were so liberal, but I personally stood, wrote letters, and in our caucuses, as did Senator LOTT, who was then the majority leader, and said that is not going to happen because that is constitutionally unsound. Plus, it is not right.

But it has happened, as our colleagues on the other side have not been able to stop themselves from taking political advantage.

Why are they doing this against these six people? I get a kick out of the use of the filibuster. Why is it 6? What will it be tomorrow? I can tell my colleagues the number is going to go up continuously because they do not want anybody on these circuit courts of appeals who may be pro-life. That is what this is all about. It is about abortion. Other people could anybody find one fault with Priscilla Owen? I do not even know what her position is on abortion. I know that question is not asked by the White House or by us. I do not know what her position is.

What I say to my colleagues find with a woman who was No. 1 on the bar exam in that State and who broke through the glass ceiling for women? Now, women are partners in law firms, where before they could not get secretarial jobs half the time. It was terrible what women went through. She was one of the people who broke through that problem. She won 84 percent of the vote in Texas, which is not particularly a Republican State, although it is fast becoming a Republican State. Looking at what is going on up here, just like Alabama is becoming a Republican State when they see the injustice and unfairness going on here.

Priscilla Owen won 84 percent of the vote; every newspaper in that State ran editorial supporting her, and yet she is being treated like dirt here. Why? Because in a dissent she would have upheld the rights of a parent to have notification that those parents or children have an abortion. Eighty-two percent of the American people believe that is the right thing to do. She was merely evaluating whether the lower court finder of fact in that parental notification case had made an error, and he hadn't, so she thought that the factfinding judge ought to be upheld. What is wrong with that?

Going to Janice Rogers Brown, Janice Rogers Brown won 76 percent of the vote in her reelection, more than the leading candidate on the California Supreme Court, Stanley Mosk. Mosk was a liberal voice on the court. He got 68 percent. Janice Brown got 76 percent. Now, I know if this was reversed and Mosk was the one who was nominated by a Democrat President, the Democrats would be arguing that he got 68 percent of the vote and that we should just confirm him. And we, as Republicans, probably would if we considered that he was competent, had good temperament, was intelligent enough to do the job, was honest and a person of integrity, even though we disagree with him on many issues.

My contention is that the fact that a person is pro-life is irrelevant, or the fact that a person is pro-choice is irrelevant if that person is otherwise qualified for these Federal judgeships. If we get to the point where we stop people because of one litmus test issue, Katie bar the door, it is going to politicize the Federal judiciary in a way that never should happen.

Janice Rogers Brown is the justice who wrote a majority of the majority opinions last year in the California Supreme Court. She also joined in unani- mous decisions 17 times. There is no question she is in the mainstream. That just has become a bad redefining of terms by our friends on the other side. Since they do not have any real arguments against these people, otherwise, so they are outside the mainstream of American jurisprudence. Well, that, just is pure bunk and everybody knows it.

What about Carolyn Kuhl? Carolyn Kuhl has 100 percent of her law judges on the California Supreme Court, Democrats and Republicans, vociferously supporting her as somebody who would make an excellent judge on the Ninth Circuit Court of Appeals, which has a tremendous imbalance. Senator SCHUMER is constantly talking about imbalance, that we should balance up the courts, liberals and conservatives being equal. Well, there are 17 Clinton and Carter nominees and judges on the Ninth Circuit Court of Appeals. I believe there may be eight judges on that court nominated by Republican Presidents.

If that is the case, if they really want balance, why oppose even voting on Carolyn Kuhl, one of the leading scholars in America? What do they hold against her? When she was a 28-year-old, a junior lawyer in the Department of Justice, doing the bidding of the then-President, Ronald Reagan, she actually helped write some of the briefs which she would do in the normal course of events—anyone would do, even if you do not agree, because that is your job—on some issues that our friends on the other side do not appreciate. Again, it comes down to abortion.

I was talking to one of the leading civil rights ministers who during the 1960s was threatened every day. He was head of the ACLU in Mississippi, a liberal Democrat who has been in some of the shallowest situations, who have not plotted their own confirmation, the President’s nominees. He said to me: Senator HATCH, you are absolutely right—he is pro-choice, by the way, but he sees the injustice of this as he came out in support of the judge. He said: Senator HATCH, you are absolutely right, this is all about abortion.

We do not know where these nominees stand on abortion, at least I don’t. I had had discussions with all three of them, but never asked the question. Whether pro-choice or pro-life is irrelevant if they are otherwise qualified to serve on the courts.

What is being done to these three women? Are we going to vote on today? We are not voting on their right to be a judge, we are voting on cloture, on the right to go forward and have a vote up and down on these judges. For the first time in history, the absolute first time in history, we now have filibusters against six incredibly qualified, well qualified candidates.

During the 8 years of the Clinton administration, time after time, the Democrats would say: We have a person who is qualified by the American Bar Association, the gold standard, the American gold standard. The imprimatur of the American Bar Association, that is all it takes. 377 Clinton nominees got through; one was rejected by a majority vote on the Senate. 377 Clinton nominees got through; 168—that was a hard fought battle on most of them. It was not at all simple to get them through. Democrats have politicized everything around here with the filibuster. I would like to end that by having votes up and down on all judicial nominees.

I reserve the remainder of my time.

Mr. LEAHY. How much time is available to the Senator from Vermont?

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. I obviously will not take that time.

Again, in 29 years here, I have been accustomed to some hyperbole and some interesting changes of statistics and even quotes. I have great respect for my dear friend from Utah, but, man, he has hit the trifecta of the hyperbole in the out-of-context quotes.

Of course, what he does not point out, when I spoke of filibusters on this floor, I was talking about the one-person filibusters. It is the filibuster of Sonia Sotomayor. It was only after a public outcry that she was allowed a vote and she had overwhelming support in this body—not somebody who was almost 50-50 or 52-48, she had overwhelming support. But she was not allowed to get a vote. And even that took 2 years of putting her life on hold. Editorial writers from the right to the left said: Give this woman a vote. This was a consensus candidate. Why was it all the ones who got votes? For some reason, there seems to be a reluctance by my friends on the other side to talk about the 63 who were never allowed votes. They were
blocked because one Republican would anonymously say no.

I don’t find the record of cooperation during the Clinton years to be anything to brag about. Sixty-three fine men and women were blocked and never given a vote. In fact, when President Bush took office, there was an unprecedented number of vacancies in a lot of the circuits. Why? As testimony before our committee showed, because the nominees were told by Republican Senators: We think you are great. We allowed to give you a hearing because you were not allowed to give you a vote. We are not going to stop you from voting. We are not going to stop two of these candidates being approved. You may have a very strong position as a top Democrat, you have to do is bring those out. They would be dangerous. They would tell them no, do not even send him on. He would do his job; be a rubberstamp. We are not going down that path.

And I would like to ask through the Chair if the Senate from California could reflect on the right to privacy, particularly as it relates to one anomaly from her State, Carolyn Kuhl.

Mrs. BOXER. Absolutely. I will show the number of women’s organizations who oppose Carolyn Kuhl. I am glad the Senator raised this question.

It is particularly interesting that today we have three women before the Senate. I say to my colleagues from both sides of the aisle, as a woman who has been in public life, actually elected to my first office in 1976, making sure that women have an equal opportunity, making sure that women move into positions of leadership has been one of the marks of my career.

Now we hear people on the other side saying anyone who votes against these women is not in favor of women.

Let me state from the bottom of my heart—and I will get to that issue of privacy—the worst thing that can happen to the women of this country—to your daughters, to your nieces, to your aunts, to your grandmothers, for that matter, to your moms—the worst thing is to have a woman in power who rules against the interests of women. Carolyn Kuhl is one such woman. Jantie Brown is one such woman. And Priscilla Owen. And those are the three
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who come before the Senate today in a package. Each of them, if you look at their decisions, has been hostile to women.

I will talk about the Carolyn Kuhl case. Before Carolyn Kuhl, as a sitting State judge, a case in which a woman is explaining that she went to a physician for a followup mastectomy examination, a very humiliating, difficult, painful moment for that woman. That woman has written us and her story is in the Record. I have placed it in the Record.

The woman simply said to Judge Kuhl: My privacy was violated because I went to my doctor and the doctor allowed in the room a drug salesman. The doctor did not ask me, the doctor never told me.

This drug salesman was leaning over the table, was handing this woman with a fan, was involved in this intimate exam.

Every woman in this country knows that if that happened to them, they would be humiliated beyond belief. This woman had the courage to sue. Carolyn Kuhl ruled against the woman, and the excuse is, she allowed the case to go forward. Untrue. That particular case never was before her. The issue was breach of privacy. She ruled against the woman. Carolyn Kuhl had to write an apology to the committee for misstating what actually had happened.

Mr. LEAHY. Will the Senator yield?

Mrs. BOXER. Yes.

Mr. LEAHY. In other words, under this ruling, if the doctor had invited his auto mechanic because he might like to watch breast exams, put him in a white coat, it would be the patient’s fault for saying: By the way, is this another doctor? Is this your auto mechanic?

Mrs. BOXER. My friend is right.

Mr. LEAHY. Frankly, I would hope I could pay to my wife or my daughter, there would be a right of privacy issue here. For those who say there is no privacy in a case such as this, they have never been in a doctor’s office for an examination.

I yield back to the Senator from California.

Mrs. BOXER. Let me say that, fortunately, her decision was overruled unanimously by the State appellate court. This is the State appellate court of lots of Republicans on that court. They saw this as a terrible decision.

Here is the list of women’s groups against the nomination of Carolyn Kuhl. It includes Breast Cancer Action, Breast Cancer Fund—on and on—Women’s Leadership Alliance. And the same list—actually a few different names, for Janice Brown and for Priscilla Owen. These women do not care about women advancing. They have not cared about the equality of women and stand up when we think these nominees are good for the people and oppose them when we know they have been bad for the people and they will do worse yet.

The PRESIDING OFFICER (Mr. SMITH). The Senator’s time has expired.

Who seeks time?

Mr. LEAHY. Mr. President, what is the time remaining?

The PRESIDING OFFICER. The Senator from Vermont has 2 minutes 13 seconds; the Senator from Utah has 8 minutes 12 seconds.

Mr. LEAHY. Well, and there is time reserved for the two leaders.

The PRESIDING OFFICER. There are 10 minutes each for the majority leader and the minority leader.

Mr. LEAHY. President, over these past 24 hours, the American public has heard a lot of what one could generically describe as wishful thinking from the other side of the aisle about the history of the Senate in considering nominations, especially recent history of Republican obstruction when a Democrat was in the White House. Their efforts to re-write American history and the history of this Senate remind me of the old Soviet Union, rewriting its history books to suit the rulers, thenFull of facts that would reveal inconvenient facts. Their misleading and wrong assertions have been made over and over and over again, perhaps in the hope that repetition would turn those falsehoods into fact. I think it important for posterity to set the record straight.

Last night, echoing Republican press conference, Republicans took to the floor to claim that no judicial nominee had ever been filibustered or blocked from getting a confirmation vote in the history of the Senate. They made these assertions repeatedly while pointing to signs with the number zero printed on them. They refused to acknowledge that any judicial nominee has ever been denied a confirmation vote, that any nominee for even a short-term position has ever been filibustered on the floor or filibustered in Committee. The repeated the party line from GOPUSA that “no federal judicial nominee by the past 42 presidents has been filibustered in the history of the U.S. Senate dating back to 1789.” I ask unanimous consent to place the following excerpt from the New York Times from 1968 into the Record about the filibuster in the Rehnquist nomination of Justice Abe Fortas to be Chief Justice of the Supreme Court, a letter signed by more than 60 law professors from across the country in support of the filibuster of judicial nominees. The letter is long—outstanding letter from Professor Michael Gerhardt which thoroughly addresses the specious arguments being made about the use of the filibuster under our Constitution. I hope that this evidence would use some of my colleagues to reconsider some of the false and misleading statements made by my colleagues on the other side of the aisle. One can always hope.

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

[From the New York Times, Sept. 25, 1968]

PRECEDENT FOR JUDICIAL FILIBUSTERS

CRITICS OF FORTAS BEGIN FILIBUSTER, CITING CONSTITUTIONALITY

GRIFFIN ATTACK LASTS 4 HOURS—MANSFIELD BACKS JUSTICE, BUT SCORES VOTE LEE.


Hon. Bill Frist and Tom Daschle, U.S. Capitol, Washington, D.C.

Dear Senators Frist and Daschle: As law professors, we write to express our opinion about the Senate’s use of the filibuster with respect to both legislation and nominations is constitutional. Both the text of the Constitution and historical practices strongly support the constitutionality of the filibuster. Article I, Section 5 expressly provides, “Each House may determine the Rules of its Proceedings.” Article I, Section 5 plainly authorizes the Senate to make procedural rules. It empowers the Senate as well to delegate what is sometimes final authority over the fate of legislation and nominations to committees or chairs. The textual authority for the filibuster is precisely the same as those for these other measures. If these measures are constitutional, so too is it.

The Supreme Court has repeatedly emphasized the relevance of historical practices for determining constitutionality. The filibuster, understood as the practice of debate precluding final Senate consideration of a legislative matter, began early in the history of the Republic. It has been used frequently by members from both parties with respect to nominations as well as legislation. In fact, it has been used effectively to defeat presidential nominations, including the nominations of Abe Fortas to be Chief Justice of the United States in 1968, Sam Brown to be Ambassador in 1994, and Henry Foster to be Surgeon General in 1995. This longstanding historical practice weighs heavily in support of the filibuster’s constitutionality.

The filibuster reflects the Senate’s longstanding respect for minority views and underscores the unique role of the Senate as a part of American democracy. It has the salutary effect of giving an incentive to all sides to seek compromise on issues where points of view are sharply divided, with regard to nominations to an independent branch of government such as the judiciary, the filibuster encourages the President to find common ground with the Senate by nominating individuals who can garner consensus.

For these and other reasons, we conclude the filibuster is constitutional.

Very truly yours,

(Signed by 60 Law Professors).

University of North Carolina School of Law.


Hon. Patrick Leahy, Dirksen Senate Office Building, Washington, DC.

Dear Senator Leahy: I understand that this week the Republican leadership will be coordinating thirty hours of debate about the legitimacy of the recent filibusters against three of President Bush’s judicial nominees. To assist you (and the Senate) in this debate, I have taken the liberty of providing below a revised version of my testimony earlier this summer on behalf of the filibuster. The revised testimony reflects my thinking and research since my testimony in May and June. My continued thinking and research on the filibuster
have clarified further the solid constitutional foundations for filibustering judicial nominations. My hope is that this revised testimony may help to set the record straight on the Senate’s longstanding com-
mittments to allowing the filibuster (against all kinds of nominations) and to amending its rules in accordance with its rules.

The filibuster derives its authority from the Senate’s express power to design its own procedural rules to govern its internal af-
fairs and the Senate’s consistent support for its legality. It is also one of many counter-majoritarian features of the Senate, including the committee system and unani-
mos consent requirements. If these prac-
tices are constitutional, then so too is the filibuster.

While there have been many criticisms di-
rected against the filibuster in recent months, none has merit, in my opinion. First, the most popular arguments against the filibuster are circular, i.e., they simply assume their conclusion. The arguments pre-
sume that some constitutional principle, such as majority rule or anti-entrenchment, trumps the filibuster. Then, operating from this premise, they set out to demonstrate flaws in the basis of the defense of the filibuster. Yet, exposing flaws in the other side’s arguments does not make an affirmative case for a constitutional principle of majority rule or anti-entrenchment; it merely shows imperfections in the defense of the filibuster. The absence of support for the other side does not establish the legitimacy of the filibuster. The senators maintaining that the filibuster is illegiti-
mate must show the constitutional founda-
tions for the principles when they are re-
lying on its existence as a defense against the filibuster—e.g., it violates majority rule—can-
not be squared with the constitutional struc-
ture as it was designed or has evolved. Third, Article I of the Constitution contains no ex-
plicit or implicit anti-entrenchment prin-
ciple that would preclude the Senate from adopting or requiring as a matter of institutional sta-

bility and order, certain procedural rules that carry over from one session to the next and may only be altered with super-major-
ity approval. The Senate’s history is consistent with our constitutional structure than anti-entrenchment is. Entrenchment is much more the rule rather than the excep-
tion in the process. Every one of the prac-
tive bodies such as the House that formally 
reconstitute themselves as the outset of each new session have pre-set agendas in place prior to the new sessions. Therefore, what the Senators need to reconstitute themselves, what they should be able to do once they have formally reconstituted 
themselves, the committees to which members are assigned, how those assign-
ments may take place, the jurisdictions of those committees, and even the rules they may select under which to operate. More-
over, the third of the Senate, or the single 
Senator who is up for re-election at any one time, there is no “new” majority that comes into power at the outset of a session who can credibly claim the right to bring the body to a standstill and prevent the Senate from continuing to operate through out the session.

The filibuster is best understood as a clas-
sic example of an unreviewable, extralegal constitutional judgment. It is a practice that has the same claim to legitimacy as many counter-majoritarian practices within the Senate’s committee system and unanimous consent requirements. The Constitution permits all of these practices, but it does not mandate any of them. These practices are the Senate’s unique legal and political institution, particularly its historic commitments to various objectives—respect-
ing the equality of its membership and to minority viewpoints; encouraging com-
promise on especially divisive matters; and facilitating stability, order, and collegiality over time. There are no checks on the legitimacy of these practices, including the filibuster, are political. They include the Senate Rules, the need to maintain collegiality within the in-
stitution, and the political accountability of senators for their support for, or opposition to, the filibuster.

NEITHER THE CONSTITUTION NOR THE SENATE RULES EXPRESSLY BAR A FIBLUSTER. Nevertheless, the best starting place for understanding the authority for the fili-
buster is Article I of the Constitution, which 
governs and defines the powers of the Con-
gress. In Article I, section 5, the Constitu-
tion provides, “Each House [of the Congress] 
may determine the Rules of its Pro-
ceedings.” This section plainly allows the Senate to make procedural rules, includ-
ing but not limited to the length of debate in the Senate. This section further authorizes the Senate to delegate official responsibility to smaller units (and even individual mem-
bers) within the Senate. Many of these dele-

gations allow committees and their Chairs to take on a role of leadership over the Senate’s agenda, including the setting of the Senate’s Order of Business. In other words, senators have used the filibuster to block a floor vote on a wide range of legislation. From 1917 until 2000, cloture on an average of 18 times per year was attempted. During the period from 1927 through 1962, the Senate did not invoke cloture once. In this period, conservative sen-
ators repeatedly used the filibuster to block civil rights legislation, provoking liberal senators to denounce the filibuster as illegit-
imate and conservative senators to defend it. In the late 1960s and early 1970s, conserva-
tives and liberals switched positions on the filibuster: Liberal senators used the fili-
buster to block centerpieces of President Nixon’s social and economic agenda while many conservative senators questioned its legitimacy. After Bill Clinton became presi-
dent, a series of Republican filibusters blocked aspects of his legislative agenda, including a comprehensive bill providing for national health care reform. Nevertheless, none of these recent occurrences involving cloture occurred in 1985 when a super-
majority within the Senate approved an amendment to Rule XXII requiring only two-thirds, rather than two-thirds, of the Senate as the requisite number to invoke cloture.

Throughout the long history of its deploy-
ment, the most common use the filibuster has been restricted to delaying floor votes only on legislation. It has been often used to thwart presidential nominations. The first, recorded instance in which it was clearly and unambiguously employed to defeat a judicial nomination occurred in 1881. At the time, Republicans held a majority of the seats in both Houses of Congress. On October 9, the Senate, without invoking cloture, passed a resolution of disapproval of President Ulysses S. Grant’s nomination of Nathan Clifford as a Federal Judge. The bill also included a similar resolution concerning a second judicial appointment. Though Matthews eventually served as an Associate Justice, it was only because Hayes’ Republican successor, Presi-
dent Rutherford B. Hayes, rejected his appointment. 

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courts. All 21 nominations on which cloture was invoked were eventually confirmed. Of the 14 nominations on which cloture was sought but not invoked, 11 were eventually confirmed. Republican senators filibustered President Clinton’s nominations of Walter Dellinger to head the Office of Legal Counsel in the Justice Department in 1993 to be Under Secretary for Arizona, but eventually the Senate confirmed both nominees—Dellinger after Republican senators relinquished their filibuster. Two other filibusters were nullified after the Senate voted 72-26 on a cloture motion to end the filibuster against her nomination in January 1995. Sam Brown to be Ambassador in 1994, and Dr. Henry Foster to be Surgeon General in 1995. Other nominations have failed without having been formally filibustered, as Senator Jesse Helms’ threat of a filibuster nullified President Clinton’s intention to nominate to Assistant Attorney General Walter Dellinger as Solicitor General. Another dramatic use of the filibuster occurred when Republican senators filibustered five of President Clinton’s nominations to the State Department in order to gain leverage in a dispute over whether the State Department adequately investigated allegations that a former Clinton campaign worker later served in the department had improperly used records of 160 former political appointees and publicly disclosed the contents of two of the files. As John McGinnis and Michael Rappaport concluded in their 1995 study of the Constitution’s super-majority voting requirements, “the continuous use of filibusters since the early Republic provides compelling support for their constitutionality."

The PRESIDING OFFICER. The Senator’s time has expired.

Mr. LEAHY. I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I am highly offended, and I think anybody who is fairminded would be highly offended by this one-sided, partisan attack on Judge Kuhl, and bringing up that particular case because everybody knows that was settled by a woman’s doctor, the one who was at fault. And, frankly, that was hitting below the belt.

Carolyn Kuhl, she is a pioneer for women. cum laude graduate of Princeton University; Duke University Law School; Order of the Coif; law clerk to then-Judge Anthony Kennedy of the Ninth Circuit.

She worked at the Department of Justice on legal matters related to the Attorney General; Deputy Assistant Attorney General; Deputy Solicitor General.

She was 28 years old when she was asked to work on the Bob Jones case. I think it is slanderous to say that Republican senators support Bob Jones University’s attitudes about race. Give me a break. Nobody on this side does, and I think anybody who is fairminded would be highly offended by this.

Now, it is one thing to filibuster, it is another thing to slander these people. I have seen so much of it over the last 2 or 3 years that I am just sick of it. I am just sick of it.

She was a partner in the Los Angeles firm of Munger, Tolles & Olson, one of the best law firms in the country. She is the first female supervising judge of the Civil Department of the Los Angeles County Superior Court. This is a very special ability.

She is the first female supervising judge of the Civil Department of the Los Angeles County Superior Court. This is a very special ability. They pick one case out of the hundreds or thousands she has heard and tried, and then distort that case. It drives you nuts around here.

“Both Democrats and Republicans stepped up to the plate to support [Judge] Kuhl.” This is Vilma Martinez—not for conservative politics, by the way—who is one of the top leaders in the Mexican American Legal Defense and Education Foundation, if I recall it correctly. In the Daily Journal this is what Vilma Martinez had to say:

[Judge Kuhl] stepped up to the plate. She wrote letters, made phone calls and exhorted her fellow Republicans to confirm [Judge] Paez and other Clinton nominees.

Judge Paez was a very controversial nominee. I know. I had to work it through to even give him a chance. But he got a vote up and down. And, unfortunately, some of my colleagues who were against him were right. He has become a very activist judge on the Ninth Circuit Court of Appeals, just stepping right in and becoming a member of the leftist majority on that court.

Vilma Martinez, this Hispanic-American leader, says:郊Judge Kuhl’s efforts are characteristic of her sense of fairness and respect for an independent judiciary.

She goes on to say:郊Many of the groups that support Judge Paez, ironically, have turned their fire on Judge Kuhl, apparently to exact payback against Senate Republicans.

If you listen to those arguments, it is easy to conclude that.

Then, in the bottom paragraph, Vilma Martinez says this—and Vilma Martinez is a Democrat, not a Republican, an independent, fair-minded and principled judicial.

This turnabout is not fair play. It is the continuation of a vicious cycle that punishes worthy judicial candidates in a misguided effort to use the judiciary to further narrow political ends.

That is the type of stuff we are dealing with around here: distortions, distortions of the facts, maligning absolutely qualified people. Look at this. Carolyn Kuhl has the support of pro-choice candidates. She is on the left of the whole Democratic party.

I understand that some have raised concerns about Judge Kuhl’s commitment to gender equality and reproductive rights. I do not share those concerns. I have been a registered Democrat for thirty years, and I have supported—financially and otherwise—[Senator Feinstein, Senator Boxer, and other Democratic candidates. I have no reservations in recommending Judge Carolyn Kuhl . . . for appointment to the Ninth Circuit Court of Appeals.

Take Gretchen Nelson, pro-choice Democrat, pro-choice Democrat.

On February 14 she had this to say:郊I am opposed to the appointment of any judicial nominee who is incapable of ruling based upon a considered and impartial analysis of all of the facts and legal issues presented in any manner. Judge Kuhl is not such a nominee and she is well-deserving of appointment to the Ninth Circuit.

Let’s quote these people. Let’s quote the facts. All because you think they might be pro-life.

My gosh, look at the women judges who support Judge Kuhl’s confirmation. A bipartisan group of 23 women judges at the Los Angeles Superior Court, on February 22, said this:郊Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has always treated women judges. She has helped promote the careers of women, both Republican and Democrat. As sitting judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary.

Let’s get this out of this totally slanderous political debate and start talking about the real facts. Democratic senators have tried to confuse the issue, to pretend that what they are doing is no different than what happened with President Clinton’s nominees. But they are dead wrong. They are comparing apples to oranges. They are different. We did not filibuster a single Clinton nominee who had majority support. Once on the floor, all of them received up or down votes. 377 confirmed for Clinton. Despite the Democrats, not because of them, we have confirmed 168 Bush nominees.

One Senator went so far as to call the four filibustered nominees, as of yesterday, lemons, if you can believe it, when all of them have well qualified ratings from the American Bar Association.

Look at the facts. President Bush has had 29 circuit court of appeals nominees confirmed, but another 12 of them, at least, are facing filibusters. I believe that number is really higher, about 17. It is an amazing, unprecedented series of filibusters of appellate nominees, what we are going through, and there are more to come.

Let me get the last chart up there. The real facts are that since we have had the filibuster rule, since the administration of Franklin Delano Roosevelt, we have had 2,372 judges confirmed and zero filibustered—until now.

Now, it is one thing to filibuster, it is another thing to slander these people. I have seen so much of it over the last 2 or 3 years that I am just sick of it. I am just sick of it.

Let’s give these people votes up and down. The reason they will not is they know there are enough good-thinking people in this Senate on both sides who know there are enough good-thinking people in this Senate on both sides who would—for all of these six people who are being filibustered—confirm them on a bipartisan majority.

So a tyrannical minority—which is the only way, to go by the numbers, to go by the numbers, is preventing votes up and down on judicial nominees for the first time in the history of this country.
Mr. President, how much time do I have left?

The PRESIDING OFFICER. The Senator has 1 minute 15 seconds.

Mr. HATCH. I yield it to the distinguished Senator from Pennsylvania.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, I plead with the Members on the other side of the aisle to stop this. I have folks on our side of the aisle saying: Don’t talk to them. Don’t plead with them. Let them do it. Because we will have our opportunity someday, and we will make sure there is not another liberal judge ever, ever, to get on that—no more Richard Paezoes, no more Ruth Bader Ginsburgs—never, because what is good for the goose is good for the gander. Let them up the ante. We will take all those activist judges they send up and we will shoot them down.

Is that what they want? Anybody who gives a political opinion in America no longer will be eligible for the judiciary. We are going to sanitize the judiciary? We are going to send it to “Mediocrityville”? Is that what we really want here?

Because let me assure you, as I live and breathe, that is what will happen. If we keep this up—it is 4 today; it will be 6. The Senator from Utah said pretty soon it will be 12. Why it is only 4? Because you just started. You always start with 1. The PRESIDING OFFICER. The Senator’s time has expired.

Mr. SANTORUM. Stop now. You have a chance to save this country and this judiciary. Stop now.

The PRESIDING OFFICER. The Democrat leader is recognized.

Mr. DASCHLE. Mr. President, as I understand it, I have 10 minutes.

The PRESIDING OFFICER. The Senator is correct.

Mr. DASCHLE. I would ask the Presiding Officer if he could notify me when I have used all but 3 minutes.

Mr. President, I find it remarkable that our colleagues can continue to come to the floor these past 40 hours and lament the fact that we have had votes on 172 judicial nominees and 4 of them have not been confirmed because they have not attained cloture. With passion and with emotion they scream out. Where is the fairness for those four nominees, they ask. Where is the fairness?

I find it remarkable that some of the very people who lament not getting a vote for those 4 nominees were participants in the effort to deny even a hearing to 63 nominees for the bench during the Clinton administration. Don’t talk to me about the unfairness of a cloture vote on the Senate floor. Don’t talk to me about cloture. Don’t talk to me until you talk about those 63 who waited, in some cases 4 years, and never got a hearing—or at least we pleaded.

Despite consideration of judicial nominees is an ongoing practice that our Republican colleagues have been involved in for as long as they have been in the Senate. So this extraordinary outcry, this emotional fervor that we hear so often on the other side, with their misleading charts, does not bear up to the facts.

You tell those 63 people who have not had even a vote for a seat, who should have been confirmed, how it is right for them now not to have the jobs for which they work were nominated—tell them about the fairness of those four votes.

We have said all we can to work with our colleagues to accommodate all nominees. We have now spent 40 hours talking about this matter. And we have actually spent over 20 days debating judicial nominations since the Bush administration has come to office. 20 days debating and largely confirming the nominees sent to us from the White House.

From the beginning of these last 40 hours, our message was really very simple: We have confirmed 168 of the 172 nominees to date. We have worked with our colleagues on the other side to do as much as we can to ensure that they get a fair debate and ultimately an opportunity on whether it is a cloture vote or an up-or-down vote on this Senate floor—unlike what they did on 63 occasions during the Clinton administration.

What we have said over the course of these 40 hours, though, is that it is very unfortunate that while we are debating these four jobs, we are not debating what the American people care most about. We are not debating the fact that 3 million since the Bush administration has come to office have lost their job. We are not debating the fact that we are not working on the things the American people care most about.

Several times we spoke about the need to pass the highway bill, and our Republican colleagues ignored our concerns. These are not working on the things the American people care most about.

Several times we have asked for an increase in the minimum wage by unanimous consent so those who are working would get the pay they deserve.

Republicans objected. We could have been spending our time a lot more effectively, a lot more in concert with the expectations of the American people, but that has not been the case.

We will continue to work with our colleagues, and in those cases where we can find agreement, we will continue to confirm most of the Bush nominees. But that will not be the case this morning.

We are now debating three justices who continue to insist on putting their own views above the law, to interpret law on their own and without regard to judicial precedent.

As a result, virtually every single women’s organization and every single civil rights organization in the country has urged the Senate, pleaded with all 100 Senators to reject these nominations.

I am very grateful for the effort made by our Democratic colleagues on the Judiciary Committee who have put the time and effort they have into analyzing the record of these nominees and have concluded, as I have, that they do not warrant confirmation.

Mr. President, there will come a day, once again, when we can find nominees for whom there can be agreement. But until that happens, until we have the confidence that we can look upon them with an expectation that they will uphold the law, interpret law and not write the law, we have no other recourse but to oppose their nominations, as we will this morning.

I yield such time as he may require to the distinguished Senator from New York.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Thank you.

Mr. President, I thank my colleague from South Dakota for not being our leader in every way. We are grateful to him, and I think I speak for every Member on this side of the aisle. Mr. President, this debate ends as it began, with this one immutable fact: 168 to 4; 168 judges confirmed, 4 rejected.

The other side has spent 39 hours trying to come up with other signs, trying to come up with other ways. In reality, this debate has actually helped our side because this fact stands out above all others.

Are we being obstructionist when we approve 168 and reject 4? Everyone but the most extreme of Americans say absolutely not. Are we violating what the Founding Fathers wanted when they talked about advise and consent when we merely blocked 4, 2 percent of the 100 percent of the judges brought up? Every seventh grader who studies constitutional law knows that 168 to 4 is not obstructionist.

The bottom line is the other side has spent hours on sophistry, successful filibusters are wrong, but unsuccessful filibusters are OK because they engaged in filibusters on judicial candidates in 2000 and 1994 and previously.

Filibusters of judges are unconstitutional, but filibusters of statutes, of laws, of bills are perfectly OK. What sophistry.

The bottom line is that the other side comes up first with the result and then tries to make the argument backward. I understand why. The small hard-right minority has a scorched earth policy in America. They have to get everything their way and then are pushing, pushing, pushing the other side as they are saying: Do something. But, frankly, because of the wisdom of the Founding Fathers, the Senate still is the cooling saucer, and there is nothing they can do.
This debate has degenerated. To try and get this to be 172 to 0, there is name-calling: anti-Hispanic, anti-Black, anti-Catholic. We know what low and cheap shots those are. We are opposing judges based on their being out of the mainstream, judges who would make law, not interpret law. I don't like judges far left or far right who do that.

Then last night we got from my good friend from Utah, whom I love, he says calling for rollcall votes was obstructionist. That is how absurd and how frustrated and how piqued the other side has been. Calling for rollcall votes on judges is obstructionist? I say to my colleagues, we on this side would have rather spent the time debating how to bring jobs back to America, how to bring health care to America, how to raise the minimum wage.

But at the end of the day, this exercise, come up in the mind of a few, has ended up benefitting us, and the conclusion, I say to my good friend from Pennsylvania, who pleads earnestly — THE PRESIDING OFFICER. The Senator's time has expired.

Mr. SCHUMER. To stop this, and that is come talk to us, work with us in a bipartisan way, nominate judges both sides can support. Don't say my way or the highway and this will stop. But that is the only way to stop it. Thank you, Mr. President.

The PRESIDING OFFICER. The majority leader.

Mr. FRIST. Mr. President, over the past 2 days, the Senate has sustained what has truly been an extraordinary, all-hours debate, a debate on judicial confirmations and on the very nature of each Senator's duty and right to give advice and consent on the nominations sent to us by the President of the United States, just as the Constitution requires.

We have placed our differences over the last 39 hours, to paraphrase Justice Brandeis, in the disinfectant sunshine of public scrutiny. This continued debate has been framed by the bipartisan effort on a very simple principle; and that is, give us an opportunity for an up vote or a down vote, just give us that right to vote.

We have been focused on the Fifth Circuit Court nominee, Justice Priscilla Owen of Texas, who has already been denied that simple up-or-down vote. But America's courts do much more than that. We heard a lot about the economy. We heard a lot about jobs. It is our independent judiciary that provides the anchor for America's economic strength. But there is the confidence that our courts provide that make the United States of America the safest location, the best location for domestic investment, for foreign investment, whether in industry or commerce, and for the overall economy. Why? Because the courts protect those liberties. That is America's courts do much more than that. More jobs. It means more prosperity for all Americans.

Our courts guard the rule of law, and to the extent they are free of results-oriented politics and other forms of corruption, they are the foundation stones that have allowed America's history to unfold differently than our sister republics to the south.

In this past year, Americans have come to understand the influence of the courts over our everyday lives, over our daily lives, over our national culture in ways that our Founding Fathers would have never imagined. One of the real complaints that we are spending too much time on these issues is a little bit strained in that it is they who are filibustering, continuing to debate, denying that opportunity to vote yes or no on these nominees. The filibuster rule, when not abused, is intended to give the minority more time, to allow more time for debate.

Despite the complaints and the charges back and forth, I do give my Democratic colleagues credit for their hard work in this debate over the last 39 hours. I am enormously proud of my Republican colleagues. I believe that both sides should feel a certain degree of satisfaction as to how this historic debate has been conducted.

In the past 2 days, we have debated three nominees who the American Bar Association considers qualified to serve on the appellate court. The appellate court is the last line of defense that is come talk to us, work with us in a bipartisan way, nominate judges both sides can support. Don't say my way or the highway and this will stop. But that is the only way to stop it. Thank you, Mr. President.

The minority has argued effectively or persuasively how Justice Owen, who was elected to the Texas Supreme Court by 83 percent of Texas voters, is out of the mainstream. Out of the mainstream, Justice Brown. Out of the mainstream when she was retained to serve by 76 percent of California voters? Is that out of the mainstream?

They have certainly not convinced any fairminded person how it is that Judge Carolyn Kuhl—who has the support of over 100 California judges and lawyers across the political spectrum, and yes, even trial lawyers—cannot serve on that Ninth Circuit, that really worrisome Ninth Circuit Court that declared the Pledge of Allegiance unconstitutional. We have seen, and the reason this debate is historic is that it underscores and it lets the American people know, as well as restates the importance of the issue, that over the past year, the minority has used the filibuster to deny a bipartisan majority the opportunity to vote up or down, to give advice and consent. Let me say that again.

A minority, for the first time in history—it happened this year—for the first time in history, a minority in this body is using the filibuster to deny a bipartisan majority the opportunity to vote yes or no.

It has come up that while majorities have delayed judges in the past through the majority's delegation to the Judiciary Committee, votes on judges have never before been blocked by a minority. Of course, this debate has been more than about Senate procedure. In effect, what we have seen over the last year is the minority is, in effect, amending the people's Constitution without the people's assent. The reason for this is now well known.

Senate liberals have sought with increasing intensity to politicize not just the confirmation process, but the courts themselves. In pursuing this course, they are threatening the legitimacy of America's courts. That legitimacy comes from much more than just black robes or a high bench. It comes from the people's belief that judges will apply the law or the Constitution without regard to personal politics.

Rather than seeking to determine the judiciousness of a nominee and the merits of a nominee's decision rule without bias, liberal Democrats are out to guarantee that our judges are, in fact, biased against some and in favor of others. In America, with that result,
citizens will have to worry about the personal politics of the judge before whom they come for justice. I say judiciously, why?

Like other Senators this year faced with the question of what is required by the Constitution, I have turned for guidance to the Senate that debate on Executive Calendar No. 86, the nomination of Priscilla Richman Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit. The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 53, nays 42, as follows:

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The PRESIDING OFFICER. On this vote, the yeas are 53, the nays are 42. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is not agreed to.