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

PRAYER

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

Let us pray.

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

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

PLEDGE OF ALLEGIANCE

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

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

RESERVATION OF LEADER TIME

The President pro tempore, under the previous order, the leadership time is reserved.

EXECUTIVE SESSION

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

The President pro tempore, under the previous order, the Senate will proceed to executive session for the consideration of calendar No. 71, which the clerk will report.

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

RECOGNITION OF THE MAJORITY LEADER

Mr. FRIST. Mr. President, today we will resume consideration for the Fifth Circuit. The majority leader is recognized.

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

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

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

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

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

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

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

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

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

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

That is a mainstream record.

In her judicial decisions, some on the floor over the last day, and actually last week as well, have criticized her as a judicial activist in cases, and the focus has always been on these cases involving a parental notification law.
The letter is interesting. It is a letter dated May 16, and it is a letter that was sent to Senator SPECTER, of the Judiciary Committee, and Senator LEAHY. The letter is indeed quite powerful. I would like to read just a couple sections from the letter.

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

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

(See Exhibit 1.)

Mr. FRIST. The letter reads pretty clearly, "Dear Chairman SPECTER," and there was a copy sent to Senator LEAHY.

This is from the author of the legislation of which these accusations of judicial activism have been floating around on the floor. These are the authors, the one who wrote the legislation. I quote from the letter:

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

The letter continues:

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

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

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

This is the final sentence of the letter:

In short, Justice Owen’s academic and professional qualifications are beyond question.

We strongly urge Senators to vote positively on her nomination.

Very truly yours,

Sen. Florence Shapiro, a President Pro Tempore.


Honorable minority leader,

The PRESIDENT pro tempore. The Democratic leader is recognized.

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

The PRESIDENT pro tempore. We are on debate now.

Mr. REID. I ask unanimous consent that the time of the two leaders not
take away from the debate that will begin at 9:45. What I am saying is, whatever time we use, the debate should start immediately after our time, the incremental time.

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

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

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

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

(Mr. VITTER assumed the Chair.)

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

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

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

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

The first sentence:

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

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

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

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

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

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

But, sadly, now the President of the United States has joined the fray and become the latest to rewrite the Constitution. And when he spoke in the Senate yesterday against a motion to call up the nomination of Justice Abe Fortas for Chief Justice of the United States.
That check on his power is the right to extended debate. Every Senator can stand on behalf of the people who have sent them here and say their piece. In the Senate’s 200-plus years of history, this has been done hundreds and hundreds of times to stand up to popular Presidents to unpopular Presidents, arrogant with power, to block legislation harmful to American workers in the eyes of the Senator, and, yes, even to reject Presidential nominations, even judicial nominations.

Who are the nominees now before this Senate?

Priscilla Owen is a Texas Supreme Court justice nominated to the Fifth Circuit. She sides with big business and corporate interests against workers and consumers in case after case regardless of what the law is. Her colleagues on the conservative Texas court have written that she legislates from the bench. Her own colleagues have called her opinions “nothing more than rhetorical.”

Conceptions,“ and those are quotes, and even rebuked her for second-guessing the legislature on vital pieces of legislation. If she wanted to legislate, she could do it in Congress. She wants to interpret and uphold the law, she should be a judge. She cannot do both. And I might note that the Attorney General of the United States has called her activism unconscionable.

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

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

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

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

Mr. SCHUMER. I thank my colleague. I think my colleague was in the Chamber yesterday when Senator FRIST first rose to speak and talked about the 214 years of tradition of not doing filibusters of judges. I asked him about the filibuster. Earlier this morning, 5:51 p.m. He voted to filibuster Judge Paez. In fact, it was clearly a filibuster. The statement of the leader of that filibuster, who was Senator Smith, our former colleague from New Hampshire, is one of the classic filibusters against the nomination of Richard Paez.” You may remember that Senator FRIST said he would return to the floor yesterday and answer how he could distinguish between sayings—

You may remember that word means. Unconscionable. It, Mr. President, means that her acts are unconscionable.” and threatens civilization.

At the end of the day, this is about the separation of church and state or the establishment of a war between religious people and the rest of America. Imagine that. Is this someone we want protecting the constitutional doctrine of the separation of church and state or freedom for all Americans to practice religion?

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

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

The Senate is a body of moderation. While the House is the voice of a single man, single woman, and the House of Representatives is a voice of the majority, the Senate is the forum of the States. It is the saucer that cools the steam of the majority. It is the world’s greatest deliberative body. How will we call this the world’s greatest deliberative body after the majority breaks the rules to silence the minority? Breaking the rules to change the rules. This is a violation of our founding—President Bush and the Republicans in the Senate. They don’t want consensus or compromise. They don’t want advice and consent. They don’t want absolute power. To get it, the President and majority leader will do all they can to silence the minority in the Senate and remove the last check we have in Washington against this abuse of power. The White House is trying to grab power over two branches of government—Congress and the judiciary. They are enlisting the help of the Republican Senate leadership to do it. Republicans are demanding a power no President has ever had, and they are willing to break the rules to do it.

Make no mistake. This is about more than breaking the rules of the Senate or the future of seven radical judges. At the end of day, this is about the rights and freedoms of millions of Americans. The attempt to do away with the filibuster is nothing short of clearing the trees for the confirmation of an unacceptable nominee to the Supreme Court. If the majority gets its way, President Bush and the far, far right will have the sole power to put whoever they want on the Supreme Court—Pat Robertson, Phyllis Schlafly. They don’t want someone who represents the values of all Americans, someone who can win bipartisan consensus. They want someone who will fight every time the Republican majority, someone whose beliefs are on the fringes of our society. Nobody will be able to stop them from
placing these people on the highest court of the land—extremist judges who won’t protect our rights and who hold values far outside the mainstream of America. Here is what is really at stake: The civil rights of millions of Americans; the right to clean water to drink and safe air to breathe for millions of Americans; the right to free speech and religious beliefs for millions of Americans; the right to equality, opportunity, and justice for millions of Americans; nothing less than the individual rights and liberties of all Americans.

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

The debate all comes down to this: Will we let George Bush turn the Senate into a rubber stamp to fill the Supreme Court with people from the extreme right’s wish list, or will we uphold the Constitution’s use of advice and consent powers to free the President and his judicial nominees from political control? They accuse each other of judicial activism. In fact, every member of the court accuses each other of judicial activism.

Let’s get to the heart of the matter. One of the major criticisms of Justice Owen is her effort to interpret a 1999 law passed by the Texas State legislature. The law required parental notification before a minor can obtain an abortion. Most of the groups opposing Justice Owen strenuously opposed passage of that law in the first place. But the Texas legislature did approve a parental notification bill. The law requires parental notification with strong bipartisan majorities. But Justice Owen focused on the legislative history and rejected the law. She took a different approach to analyze the law than that of the majority. She also voted to allow the law to be reviewed by the Texas Supreme Court.

The law did not provide clear direction to the justices on several key points. We are talking about 13 cases that came to the Supreme Court for review. As sometimes occurs, the court divided in how to interpret the law, particularly the portion allowing a minor to bypass parental notification by going to court. Some justices—a majority, I should add—looked to the Texas Supreme Court’s rulings in the previous cases, they would have required greater restrictions on the use of the judicial bypass. Other justices—including the dissenting justice—looked to the law’s legislative history to interpret their parental notification statutes. Even though they had different laws and different legislative histories.

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

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

In the group was Linda Eads, chair of the Texas Supreme Court. Early in her career, the Supreme Court was visited by a group of six Texans. They represent diverse views, but they came to Washington to support Justice Owen and asked for fair treatment of her. They included Tom Phillips, who was chief justice of the Texas Supreme Court for most of the time Justice Owen served. It included Elizabeth Whitaker, past president of the State Bar of Texas—one of 15 past State bar presidents, Republicans and Democrats, who are supporting Justice Owen’s nomination.

In the group was Linda Eads, a former assistant State attorney general, who is now a professor at the Southern Methodist University School of Law. She specializes in constitutional law. Linda Eads described herself as strongly pro-choice. She also said she disagreed with Justice Owen on parental bypass. But she emphasized that Justice Owen’s judicial approach to
these cases was thoughtful and rational. She said it was easily within the respectable judicial mainstream on interpreting legislation. She ended by saying she strongly supports the confirmation of Priscilla Owen.

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

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

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

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

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

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

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

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

Justice Owen is the kind of judge that the people of the 5th Circuit need on the bench—an experienced jurist who follows the law and understands that they are entitled to the Constitution. She has kept our country strong and has been the anchor for our democracy.

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

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

I thank the Chair, and I yield the floor.

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

Mr. VITTER. I thank the Chair.

Mr. President, in recent weeks, the American people, including the citizens of Louisiana, have heard a lot about Senate rules, about historical precedent, about something very confusing called the filibuster. Priscilla Owen has kept our country strong and has been the anchor for our democracy.

But there are issues at the heart of this which are important to those citizens, including my constituents in Louisiana. And those issues are: Is the Senate going to do its job? Are we as the American people, as citizens, are we going to do our job and do the people’s business, address important issues of the day to build up our country and make it better?
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Also, there is the fundamental issue of fairness. Are we going to be fair in this process to all concerned?

Those are themes, those are issues to which Americans all across the country, certainly my citizens in Louisiana relate. Are we going to do the people’s business? Are we going to act in a way that is fair to all?

Those are issues directly at the heart of this debate—doing the people’s business.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Owen has been a justice in the State fringe, out of the mainstream? Are 84 percent of Texas voters fringe and out of the mainstream? Obviously not.

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

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

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

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

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

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

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

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

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

As I noted before, during Justice Brown’s 9-year-tenure on the California Supreme Court, she has acquired a reputation as a fair and intelligent justice
who is committed to the rule of law. Justice Brown has served on the California Supreme Court since May 1996. Her appointment to that court was historic: Justice Brown is the first African-American woman ever to have served on an associate justice on the California Supreme Court.

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

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

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

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

This nominee’s judicial opinions suggest that she fully appreciates the importance of having Government play an active role in certain areas, including efforts to protect the public’s health and safety. That is why she voted to uphold a state law that placed leading brands of drinking water, under the Government’s Safe Drinking Water Program. And that is why she agreed that her State’s regulations regarding overtime pay should be liberally interpreted to provide California workers with more protection than they would have had under Federal law.

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. Is there objection?

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

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

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

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

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

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

Today’s objections will shut down our meetings on the Energy bill, a closed CIA briefing on terrorism and proliferation of weapons in Iran, the Foreign Relations Committee, on strengthening America’s workforce over at the Labor Committee, another Intelligence Committee shutdown by this action and, of course, the Judiciary Committee would continue its markup of the asbestos bill.

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

I yield the floor.

The PRESIDING OFFICER. The Senator yields back.

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

The Senator from Iowa.

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

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

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

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

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

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

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

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

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

This is exactly why the Republican leadership’s plan to resort to the nuclear option is so dangerous. Since 1790, the filibuster has been used in the Senate countless times, and nearly 100 years ago the Senate passed rule XXII, codifying the right of extended debate.

We know what that rule says. It says that it takes 67 votes to change the Senate rules and 60 votes to cut off debate. Those are the rules. They are deeply conservative rules, rules that have been respected and honored for nearly a century, until now.

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

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

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

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

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

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

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

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

For example, once the Chair can make a determination about the rules and have that ruling upheld by 51 votes of the Senate, what is to say of the time-honored tradition we have in the Senate of a Senator being able to have the right of the floor and being able to speak for as long as he or she wants? That has been our right since the
founding of the Senate. Once a Senator is recognized, that Senator can speak until they drop. I think the record is 24 or 25 hours, by former Senator Strom Thurmond.

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

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

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

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

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

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

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

As a well-known minister once said: Democracy exists not just when the majority rules, but when the minority is absolutely safe. The rules of the Senate and the rule of extended debate give the minority that absolute safety. You take that away and you take away the heart in the Senate. Most Americans understand that checks and balances are the key to preserving our liberty.

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

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

In debate in the Constitutional Convention in Philadelphia, James Madison said the Senate would have two roles: first, to protect the people against their rulers, secondly, to protect the people against the transient impressions into which they themselves might be led.

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

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

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

Jefferson said, To cool it.

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

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

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

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

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

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

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

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

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

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

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

That is the difference between what Senator HARKIN did many years ago and what the Republican majority does today. It is historic. That is why so many people are following this debate. People are concerned about the nuclear option are following this debate. They understand something historic is about to take place: changing a tradition, changing something in the Senate, a rule that has been in place for 200 years. With the wave of his hand, Vice President CHENEY will take away a rule that has applied for 200 years.

Some argue this should be viewed as another routine day in the Senate. I have never seen a debate and one on which I hope the American people are focusing. Changing the rules in the middle of the game is not accepted in most conduct in America. It shouldn’t be accepted in the Senate. Changing the constitutional balance of the Senate and the White House is historic and should be followed closely by every single American.

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

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

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

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

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

I ask unanimous consent we move to the nomination of Thomas B. Griffith of Utah to be U.S. circuit judge for the District of Columbia and that Mr. Griffith’s nomination be considered with 1 hour of debate equally divided, and then have a rollover vote. I make that unanimous consent request to expedite the order of matters to be considered in the Senate. That is the prerogative of the majority leader.
I am certainly pleased to hear of the enthusiastic support of my good friend from Illinois for the nominee, Griffith. Nevertheless, the majority leader, Senator Frist, is charged with the responsibility of determining the order in the Senate. We are on a nomination that enjoys bipartisan support, and that is Texas Supreme Court Judge Priscilla Owen.

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

All of these efforts to delay activity in the Senate, to shut down the Senate are not. It is routine for the Senate for committees to be doing work while we have debate on the floor. Nothing extraordinary is happening on the floor. We are following regular order. The majority leader, as is his right, had called up a nomination, stating it. We will get around to Mr. Griffith, and I am certainly pleased to hear that the assistant minority leader is in favor of him. That is good news. That is one, when we turn to him. I look forward to confirming with not a great deal of debate.

With regard to the current consent agreement, I object.

The PRESIDING OFFICER. The objection is by the majority leader.

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

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

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

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

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

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

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

Mr. President, I object.

Mr. DURBIN. Let me close briefly and say if the argument is being made by the Republican side that there is no room for bipartisan support, a majority of the Senate supports the Senate’s role in the confirmation process.

Again, let me say that it is very unfortunate that the majority leader said this is not about moving judges, and I am pleased to hear they have been moved forward. It is about the fact that the Senate is not being meeting with the administration in terms of bipartisanship, the majority leader objected to moving forward on the three Michigan nominees and immediately went to a press conference with House Republicans from Michigan to criticize us for not being willing to compromise and move forward on Sixth Circuit nominees.

This kind of politics is very disturbing and very unfortunate when we are trying very much to move forward and to break this gridlock and create an atmosphere where we can continue to work together on the issue of judges. Again, let me say that it is very unfortunate that the majority leader said this is not about moving judges was not enough. There is an objection, a concern on both sides of the aisle, of one of the nominees, but we have been willing in good faith to move forward with three of the nominees and have for 4½ years. Now when we come forward and say, let’s move to three of those judges in the interest of the larger picture in terms of what is happening in the attempt to eliminate checks and balances in our constitutional process, we, once again, are hearing “no.”

I find that very unfortunate. But I think it points to the fact that what we are seeing is a fundamental debate, not that there are four judges that the Senate is not willing to confirm, but that we are seeing a fundamental debate, as to whether Senate minority leaders should be allowed to use our constitutional right to object to a nomination. This is a very fundamental, very important issue in terms of our constitutional process, and we have been willing to move to three of the nominees, and I hope that we can continue to do so.

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I yield the floor.

The PRESIDING OFFICER. The Senate from Michigan.

Ms. STABENOW. Mr. President, I rise today to speak about both the pending nomination and also the overall process involved in the debate on free speech and checks and balances. I would like to thank and support the efforts of our Democrat minority leader from Illinois and thank him for his eloquence on this issue and indicate that despite concerns about the process now and the lack of bipartisan support in the Sixth Circuit for the last 4½ years and the lack of ability to come together in a way to jointly support nominees given the context of this debate right now, the critical importance of maintaining the minority views in the Senate and our ability to fight for our States and what is important for us both, Senator Levin and I have agreed to allow us to move forward with a show of cooperation, a show of good faith with our colleagues on the other side of the aisle, to move forward with three nominees for the Sixth Circuit.

It is very disappointing to once again see that motion has an objection rather than moving ahead. In fact, last week, when our leader, Senator REID, made that motion to move forward on three judges in order to be able to get 200,000 judges in order to be able to get 206 judges confirmed, the majority leader objected to moving forward on the three Michigan nominees and immediately went to a press conference with House Republicans from Michigan to criticize us for not being willing to compromise and move forward on Sixth Circuit nominees.

This kind of politics is very disturbing and very unfortunate when we are trying very much to move forward and to break this gridlock and create an atmosphere where we can continue to work together on the issue of judges. Again, let me say that it is very unfortunate that the majority leader said this is not about moving judges was not enough. There is an objection, a concern on both sides of the aisle, of one of the nominees, but we have been willing in good faith to move forward with three of the nominees and have for 4½ years. Now when we come forward and say, let’s move to three of those judges in the interest of the larger picture in terms of what is happening in the attempt to eliminate checks and balances in our constitutional process, we, once again, are hearing “no.”

I find that very unfortunate. But I think it points to the fact that what we are seeing is a fundamental debate, not that there are four judges that the Senate is not willing to confirm, but that we are seeing a fundamental debate, as to whether Senate minority leaders should be allowed to use our constitutional right to object to a nomination. This is a very fundamental, very important issue in terms of our constitutional process, and we have been willing to move to three of the nominees, and I hope that we can continue to do so.

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

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

So it is important to remember that in putting together our Constitution and our Bill of Rights, our Founders, were very wise. I think we are very fortunate that our Founders understood the importance of checks and balances in putting together not only a House of Representatives, that reflects the instant will of the people, but also a Senate, with a longer term—instead of a 2-year term, a 6-year term—that is charged with carefully evaluating the impact of legislation in a longer term view. In other words, the House is the “gas pedal,” and the Senate was designed as the “brake.” So we can have the important debates occurring in the House, and in the Senate as well, but allow minority views to be represented in a different kind of way.

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

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

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

It is the minority view—not the minority party view. It may be a single person’s view, but the minority view can be heard. And because a Senator or thirty or thirty-five believe so passionately about something, the rules then require you have to get a few more people to agree, you have to get 60 votes, rather than 51, because of the strong concerns raised by individual Members. Now, what does that mean for us in Michigan? This is not just about judges. In Michigan, we are very proud of our Great Lakes. We are proud of the fact that we not only have our Great Lakes for drinking water, but for boating and tourism and economic activity. But one of the things we are concerned about in Michigan is the fact that someday the States in the West and the South that do not have a lot of water may decide they might want our water. Well, we do not like that very much.

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

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

The whole point of checks and balances, the whole point of allowing extended debate and forcing compromise and people coming together, is to bring people with calmer minds to be able to listen to each other and to be able to forge a bipartisan compromise. For Senators, whether it is their view as a Democrat or Republican or their view as one of the pending nominees, a Republican, said about filibusters and checks and balances.

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

That is not what is happening today. We are being told: It is all or nothing. In the Sixth Circuit it is all or nothing. Three out of four judges is not good enough. We are being told: It is all or nothing. It is about complete and absolute power, no checks and balances. In other countries they call that a dictatorship. We have a democracy. We respect and allow other views to be heard. We do not have to agree with them, but we allow them to be heard in our country’s democracy. And it is important to note that Senator Griffin, on the floor, in his debate, in his speech about why it is appropriate for Senators to be able to stand up and object and to filibuster on judiciary nominations, said:

It is important to realize that it has not been unusual. This is 1968. It has not been unusual for the Senate to indicate its lack of approval for a nomination by just making sure that it never came to a vote on the merits. And so, for example, 21 nominations to the court have failed to win Senate approval.

This is Senator Griffin in 1968:

But only nine of that number have been rejected on a direct up-or-down vote. In other words, Senator Griffin acknowledged, back in 1968, that it was not unusual for this Senate to filibuster judicial nominees. I think there is a lesson here. If the Republicans are currently concerned about filibusters, they should listen to what the father of modern filibusters, a Republican, said about filibusters and checks and balances.

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

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

That is what we are talking about. We ask the people of the United States: Ninety-five percent is a great record. Two hundred eight is a great record. But, Mr. President, these 10 go too far. These 10 will turn us back in terms of protecting the rights of Americans, and we are asking you to work with us on the 10.

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

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

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

The PRESIDING OFFICER. The Senator from Oregon.

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

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

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

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

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

I remember Senator HATCH got them out her name to me because he had a particular, the work of the committee on conservative minds need no longer be defeated.

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

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

As Senator DURBIN, the assistant minority leader, would probably like to know, this is one Republican who does not see him and I being to him last night when he spoke about Priscilla Owen. I heard his comments earlier when she had come up for confirmation in the 106th Congress, and among the many things held against her, was she a member of the Federalist Society. The Federalist Society is something I have never belonged to. When I was in law school, I did not know about it. But it is an organization that believes apparently the judicial branch of Government should stand on construing the Constitution in a way that is not so politicized that it is not an organization that believes apparently the judicial branch of Government should stand on construing the Constitution in a way that is not so politicized that it should be defeated.

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

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

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

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

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

No one here is proposing a limitation of filibusters on the legislative ca-
ledar. Nevertheless, in former years, our colleagues made many modifications to the filibuster rule. It began in 1917. There was no limit to filibusters until then. The standard was then set at 67 votes to invoke cloture, end debate, and go to a vote. But still, this was not a standard applied to the Executive Calendar.

Further on, many changes have been made to the filibuster rights of a Sen-
ator. There are, in fact, 26 laws on our books today abrogating the right of a Senator to filibuster. For example, you cannot filibuster a Federal budget reso-
lution. It was known as the Congres-
sional Budget and Impoundment Con-
trol Act of 1974. The Budget Act of 1974 restricted debate on a budget resolution and all amendments thereto and debat-
able motions and appeals in connection therewith to not more than 50 hours. That is a very significant restriction on the right of a Senator to filibuster. And so, if you cannot filibuster, you cannot filibuster a reconciliation bill. Like the budget amendment, a re-
conciliation bill cannot be filibustered on the Senate floor, so it can pass by a majority vote. So you cannot filibuster anything connected with a resolution or reconciliation, such as an amend-
ment or a conference report.

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

Another instance: You cannot fili-
buster a resolution authorizing the use of force—the War Powers Resolution. You cannot filibuster international trade agreements, and that is called the Bipartisan Trade Promotion Au-
thority. You cannot filibuster legisla-

Time and again, our colleagues be-
fore have recognized that to move the business of the United States, there had to be some kind of limits. When I speak of the filibuster, I speak of it respect-
fully; I also understand its import-
ance to slow down debate and to give Senators all the opportunity they need for debate. But I also understand that the country’s business has to move for-
ward. So colleagues, in former decades, have narrowed the right of the fili-
buster.

One of the Senators in this Chamber who preceded me here from Oregon is a man much esteemed in Oregon lore. His name was Wayne Morse, known as the “tiger of the Senate.” He is the third place recordholder for a filibuster, ex-
ceeded only by Strom Thurmond and Al D’Amato. As I recollect, he spoke for 22 hours and 26 minutes on the tide-
lands oil bill in 1983. I suspect, if you check the record, former Senator Morse used the filibuster more than Wayne Morse. He used to come here late at night and speak well into the night almost on a daily basis when the Senate was in ses-
sion.

But listen to what Wayne Morse said about the filibuster:

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

What Senator Morse was referring to is that the U.S. Constitution makes ex-
plicit those instances in which super-
majorities are required. Advising and consent-
ing on treaties is not among those. It is required for amending the Con-
stitution, it is required to override a President’s veto, it is required for the ratification of treaties, and in a couple more instances. But this issue is not among those expressed in the Constitu-
tion.

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

I am one liberal who admits that he file-
busters.

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

He went on to say:

It is one thing to filibuster to stop what is called a “steamroller” in the Senate, to stop majority from taking a par-
liamentary minority. It is quite another thing to filibuster in the Senate under a pro-
gram which is aimed to defeat the right of the majority to express itself by way of the passage of legislation, which in turn will be subject to the checks which our constitu-
tional system provides.

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

Well, again, Mr. President, I do fear the impact of this new standard if we do not do something. I believe this new standard will cause par-
distinguished jurists, would make their con-
firmation impossible. I believe Oliver Wendell Holmes was revolutionary in
his thinking about law. Felix Frankfurter, a Roosevelt appointee, was certainly revolutionary in his thinking. Thurgood Marshall or William Rehnquist or Justice Scalia—these men, I believe, today, under this new 60-vote standard, would likely be unconfirmed.

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

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

This is a principle too important to get in the way of the efficient management of our business, our responsibility of advising and consenting, and having back in place the 200-year tradition of giving up-or-down votes to those who have majority support. Why, that, I urge my colleagues to support the majority leader, and I urge the restoration of a majority vote on judges.

I yield the floor.

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

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

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

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

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

Until the last Congress—the 108th Congress—it had been standard procedure not to filibuster judicial nominees. That changed on February 11, 2003. On that day, Senator HATCH, chairman of the Judiciary Committee, sought consent to consider Miguel Estrada's nomination to the DC Circuit Court. My friend, Senator DODD, refused. Senator HATCH offered to increase the amount of time for debate by 10 hours and was refused again. He offered 20 hours. He offered 40 hours. He offered 100 hours. He offered 200 hours. He offered 300 hours. An unprecedented amount of time. Senator DODD said as follows:

"This is not about the amount of time."

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

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

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

Senator REID responded:

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

"There is no number in the universe that would be sufficient." Clearly, it must not have been about getting enough time. Our Democratic friends went on to block several more reasonable requests to consider circuit court nominations.

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

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

Let's take, for example, Justice Priscilla Owen, who is the pending business of the Senate. She was nominated, as I just indicated, by the President 4 years ago to sit on the Fifth Circuit. Justice Owen has served with honor for 10 years on the Texas Supreme Court. She won reelection with a whopping 84 percent of the vote, far more than most of our colleagues who oppose her. She has the support of both Democrats and Republicans from Texas who know her best. She has endured 4 years of slanderous attacks from partisan groups with grace and patience. All of that meant nothing once she landed in the crosshairs of the Senate's obstructionist minority. We devoted 17 legislative days to discuss her qualifications—17 days—and we have held four cloture votes on Justice Owen's nomination in order to allow the entire Senate to pronounce its collective judgment on her qualifications. But a minority of Senators is determined to deny the Senate the exercise of its constitutional duty. All four cloture votes have failed.

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

Justice Owen is not the only person they have obstructed. In the 108th Congress, an obstructionist minority blocked the Senate's advice and consent a record 20 times. Twenty votes on judicial nominees were held, and 20 times a minority of Senators refused to let the Senate discharge its constitutional duty to render advice and consent. Twenty times, Mr. President, in the 108th Congress they stopped a judicial nominee who clearly had majority bipartisan support from receiving the courtesy of an up-or-down vote. They filibustered for weeks or months, even on circuit court nominees, within 16 months. This is completely without precedent, and it is also not fair. Any President's judicial nominees should receive careful consideration,
but after that debate, they deserve a simple up-or-down vote. Despite the Democrats’ power grab, we offered them several compromises that allowed for extended debate but still gave nominees the courtesy of an up-or-down vote. For instance, in May 2003, the majority leader, along with Senator Zell Miller of Georgia, a Democrat, proposed S. Res. 138, the Frist-Miller cloture reform proposal.

The Frist-Miller proposal was narrowly tailored after a much broader Democratic proposal from 10 years ago that would have completely eliminated the filibuster in its entirety. The Democratic proposal would have eliminated the filibuster from legislation, to which it has been historically confined, as well as for judicial nominations, where it had not been used until the last Congress. I voted for it, all Republicans, every single one, voted against the Democratic proposal because it would have eliminated the legislative filibuster. In fact, it was the first vote that Majority Leader Frist cast in the Senate. The only Senate nominees voted for that proposal were our friends on the other side of the aisle, nine of whom are still serving in this body today, singing a different tune, I might add.

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

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

So back to the Frist-Miller proposal which was a narrowed and focused version of the Democratic—I stress “Democratic”—bill to eliminate the filibuster altogether. The Frist-Miller proposal was much more moderate, much more measured. It would have allowed Senators after 12 hours of debate to file successive cloture motions with declining requirements to achieve cloture. The final cloture threshold would be a majority of Senators present and voting.

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

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

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

As I indicated, these timetables would apply whether Democrats or Republicans were in charge of the Senate, whether the same party controlled the White House and the Senate, or whether the two parties split the control. I bet to the vast majority of people listening sounds like an extremely fair, bipartisan solution. I agree with them. Again, unfortunately, our Democratic friends have not embraced it.

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

We Republicans redoubled our efforts and patiently tried again. In the interim, though, we had an election. President Bush and several candidates for the Senate, many of whom serve here today, met thousands of mainstream ordinary Americans who were bright eyes, open ears, and who did not want to see the filibuster disfigured. Thousands of Americans told President Bush and their Republican candidates for the Senate that they do not believe the President’s nominees are out of the mainstream. They do not like a minority of the Senate preventing the Senate from discharging its constitutional duty.

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

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

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

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

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

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

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

Once again, our Democratic colleagues quickly rejected this proposal. To recap, the majority in the Senate has had weeks of debate. We have tried multiple and generous time agreements. We have offered the Frist-Miller proposal. We have suggested the Specter protocols. We have offered the Frist
fairness rule. Unfortunately, our Democratic colleagues have rejected all of these efforts at accommodation.

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

More recently, the Republican minority did not filibuster the judicial nominees of Presidents Carter and Clinton because the Senate was controlled by a collapsing minority for all four years under President Clinton and all 4 years under President Carter, even though several of these nominees were extremely controversial and did not enjoy supermajority support.

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

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

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

The Senate has never merely empowered to give advice and consent, but our Democratic colleagues want to change the rules. They want to reinterpret the Constitution to require a supermajority for confirmation.

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

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

I yield the floor.

The PRESIDING OFFICER. The Senator from Mississippi.

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

Most of my colleagues in the Senate know over the years I have been a believer that we should get things done for the American people; that we should not try to reverse the decision that we should vote on these judges up or down and move on; that we need to be working as we did earlier this week to report a highway bill, to get energy legislation, to deal with the very critical and difficult issue of immigration reform, pass appropriations bills, take up other critical issues for the future in our country, the creation of jobs, to promote the continued development in critical high-tech areas such as telecommunications. We have a lot of work to do and yet here we are, stalled out, in my opinion, unnecessarily.

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

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

I worked with Senator FRIST and Senator Zell Miller to get a bill out of the Rules Committee some 2 years ago that would set up a process that would get us to a final vote on these nominees. The first bill would be the required 60 votes and then the second vote 57 and so on down until eventually after about a month we would get a direct vote that I think would have been fair.

But, no, the Democrats would not accept that.

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

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

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

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

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

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

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

I know we have a lot of people who come to the Senate floor and talk
about the Constitution, pontificating about the forefathers, and that the language is this. I have read the Constitution, I have read the Federalist Papers, I have looked at the history, and clearly these judges should be getting an up-or-down vote.

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

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

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

Oh, people will be surprised at that. You mean we have never had it since the great days of Clay, Webster, and Calhoun? It began, I am sorry to say, with a minority of Senators blocked efforts to have an up-or-down vote on a proposal to arm merchant ships during World War I, the Senate adopted its first cloture rule. The cloture rule was later changed on five separate occasions, most recently in 1986.

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

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

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

I could not believe this institution would besmirch, denigrate, and harass these nominees, turning the Senate not into an August, hallowed body of great deliberation but into a torture chamber, and yet here we are. I have tried to find a way to get out of this. I have tried to delay it. I do not remember why, and I am embarrassed. I should not have. An indefinite postponement is the same as a filibuster. That was wrong. We should not have done it. He was later approved that very day 59 to 38.

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

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

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

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

Maybe you could analyze the seven and say, that one has a little problem or that one has a little problem. I don’t say they are perfect. None of us are. But I am telling you, you can’t get much closer to perfect than this nominee. Would any of our party say why we could never agree to any deal that did anything but allow this lady to have an up-or-down vote on her nomination.
She is from Texas. Maybe that is part of the problem, I don’t know. She serves on the Texas Supreme Court. It seems like a good training ground before you move to the Federal judiciary. She graduated cum laude from Baylor University and received her law degree from Baylor Law School. She was a member of the Baylor Law Review. She was honored as the Baylor Young Lawyer of the Year, Baylor University Outstanding Young Alumna. After graduating from law school, she scored the highest score in the State when she took the Texas bar exam in 1977.

She practiced law with one of the most prestigious law firms in the State of Texas, mostly commercial litigation, for 17 years. She has been on the Supreme Court of Texas for 10 1/2 years, and the last time she ran she was endorsed by every major newspaper in the State and she received 84 percent of the vote.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. President, I yield the floor.

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

Mr. BOND. Mr. President, I think the facts are clear. You have heard this for some time now. As has been said, but not everybody has said it. I want to go over some of the facts I think are very important.

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

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

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

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

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

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

One of the facts the White House is their obligation to check the President—and our very system of checks and balances gives them authority and
demands action. But the Senate has the ability to check the President, not a minority of the Senate willing to pervert the rules of this body. The majority, therefore, the Senate as a body, and representing a separate branch of Government on these nominations. These nominees enjoy the support of the majority body’s Members. The President has made his nominations and made his case for the nominations. Supporters and opponents of the nominees made their cases before the Senate on these nominations. From the votes we have taken we have seen that a majority of the Senate agrees with the President and supports his nominations. Under the system to check the President, as laid out clearly in the Constitution, the President has carried the case and won the support of the body that has the authority to register its disapproval.

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

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

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

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

Look at what they have said. Back in 1975 in the Congressional Record of February 12, 1975, the filibuster has been the shame of the Senate and the last resort of special interest groups. Too often, it has enabled a small minority of the Senate to prevent a strong majority from exercising its will and serving the public interest.

So spoke the senior Senator from Massachusetts.

Then, in 1998, June 18, a statement from the Congressional Record:

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

That was the senior Senator from Vermont.

He also said:

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

CONGRESSIONAL RECORD, September 16, 1999.

Another quote:

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

Same Senator from Vermont, June 18, 1998.

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

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

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

Here is another good quote:

The Chief Justice of the United States Supreme Court said: “The Senate is surely not by accident. We know two days before it reached the Senate. They plan was not to argue for judges in the mainstream or to defeat district court nominees. Their objective was to defeat any majority court nominees of President Bush.

Yesterday we saw this outline in the Washington Times. These groups, in
Democrats embarking on this path, the way business has been conducted by tradition. Nearly one of all judgeships are not created equal. The Senate Democrats, however, cleared judges have been confirmed. I respect congratulations for the fact that near-
did not like her. major leading newspapers, the Bar As-
ingury and choice issues, and a broad range of

I ask unanimous consent that be printed in the RECORD after my re-
ditions as "good," "bad" or "ugly." None of those deemed "good" by the outside groups was filibus-
ted. Among those listed as "ugly," was Texas Supreme Court Justice Priscilla Owen, whose nomination was brought to the floor today by Majority Leader Bill Frist, Tennessee Republican.

In a June 4, 2002, memo to Mr. Kennedy, staffers advised him that Justice Owen would be "our next big fight." "We agree that she is the right choice—she has had a bad record on labor, personal in-

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The President is exercising his con-
stitutional role to appoint members of the Federal judiciary, and he is doing so following his decisive victory last fall. He is winning more than any other president in history, promising to appoint good, well-qualified, highly qualified, highly respected judges and attorneys to the courts of appeal. Who is and who is not in the mainstream of American thought?

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

EXHIBIT 1
[From the Washington Times, May 19, 2005]
MEMOS REVEAL STRATEGY BEHIND JUDGE
FILIBUSTERS
(By Charles Hurt)

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

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

The internal Democratic memos, downloaded from Democratic computer servers in the Judiciary Committee by Republican aides, indicate that Democrats were checking with the gay rights community between Democrats and the outside groups are ready to oppose her, the aides wrote.

Another nominee discussed often in the memos is Miguel Estrada, a Washington lawyer who became the first filibustered nominee and who withdrew his nomination to the U.S. Court of Appeals for the D.C. Circuit after waiting two years for a final vote. In a June 4, 2002, memo to Mr. Kennedy, aides advised him that Justice Owen would be ‘‘our next big fight.’’

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

Another nominee discussed often in the memos is Miguel Estrada, a Washington lawyer who became the first filibustered nominee and who withdrew his nomination to the U.S. Court of Appeals for the D.C. Circuit after waiting two years for a final vote. In the 2001 memo to Mr. Durbin, the staffer explained the concerns held by outside groups about Justice Owen’s ‘‘hostile’’ position toward abortion and her ‘‘pro-business’’ attitude.

In a June 4, 2002, memo to Mr. Kennedy, aides wrote. ‘‘They also agreed to attempt a filibuster against Mr. Estrada, to be chief justice. I would not be elected a senator for a few more months, but followed the news surrounding this nomination closely.

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

For example, it emerged Fortas had taken more than $15,000 in outside income from sources with interests before the federal courts, on top of his $150,000 salary. He also had more than $15,000 in outside income from sources with interests before the federal courts, on top of his $150,000 salary. chickens.

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The memos also reveal the close relationship between Democrats and the outside groups. In a June 21, 2002, memo to Democrats Mr. Kennedy, Mr. Durbin, Sen. Charles E. Schumer of New York and Sen. Maria Cantwell of Washington, a staffer urged delaying a hearing for Mr. Estrada to ‘‘give the groups time to complete their research and the committee time to collect additional information.’’

One nominee who wasn’t filibustered was Judge Timothy Tymkovich, who now sits on the U.S. Court of Appeals for the 10th Circuit. But Democrats opposed moving him to the circuit. But Democrats opposed moving him to the circuit because of the concerns held by outside groups about Justice Owen’s ‘‘hostile’’ position toward abortion and her ‘‘pro-business’’ attitude.

‘‘[I]t appears that the groups are willing to let Tymkovich go through (the core of the By creating a new 60-vote threshold for confirming judicial nominees, today’s Senate Democrats have abandoned more than 200 years of Senate tradition.

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

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, will the Senate yield for a question? He quoted that wonderful and very important editorial by former majority leader, Bob Dole, saying, without any doubt, this is an act of libel to filibuster. I notice that Senator HATCH, one of our most distinguished Members, the former chairman of the Judiciary Committee, has just joined us on the floor.

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

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

Mr. SESSIONS. I友情 of the Senator from Missouri, I will say. I did not hear all of his remarks, but I heard a good portion of them, and if anyone would like an accurate summary of the status of our situation, I suggest they read his remarks. So far as I can tell, every-
President Clinton was appointing two ultra-liberal activists to the court. But what happened to those two judges? We have heard the democrats complain about on occasion: Judges Paez and Berzon. The Republican majority was the majority on the committee—Trent Lott, called those nominees up and asked for an up-or-down vote by cloture motion. Those of us who opposed them—I certainly was one of them—voted for cloture, voted to give them an up-or-down vote, and we intently opposed them. They were given an up-or-down vote, and they were confirmed. President Clinton’s nominees, when the majority was in the hands of the Republicans, were moved, after full debate and an opportunity to make their case. They brought them up, and they were given that up-or-down vote. That is the principle under which the Senate has operated.

Some say, well, we might want to filibuster in the future. Well, we have not filibustered in the past, not for 200 years. Now, how did this situation that we are facing happen? There is no mystery if you look at the history of it. Senator Bond made a number of the points. But back when the Clinton administration was submitting judges, he said: Cass Sunstein—met with them in a retreat. According to a New York Times article that reported on it, three very liberal, capable law professors—Laurence Tribe, Marcia Greenberger, Cass Sunstein—met with them in a retreat. And they returned from that retreat with the conclusion that they were going to change the ground rules of confirmations.

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

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

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

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

I yield the floor.

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

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

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. Hatch. Mr. President, I appreciate my colleague from Alabama. He knows about as much as anybody who sits on this bench.

He has the sting of having been rejected by the Judiciary Committee Democrats when he was nominated for a Federal Circuit, which is the most activist circuit in America. It has been reversed by the U.S. Supreme Court in 27 out of 28 cases. It was out of step. The New York Times said in an article that a majority of the Supreme Court considered the Ninth Circuit a rogue circuit. Yet
judgeship years ago. I think that is pretty ironic. They knew he was good and that he could do the job. Now he is sitting a Senator who can no longer be ignored, and he has stood up and triumphant for so many good people that for years I think it was kind of a God-given thing that he was rejected back then, so he could sit in the Senate and tell people the important aspects of the Federal judiciary we have been discussing. I personally love and admire him. He has been a great member of the Judiciary Committee and I have a lot of respect for him.

I have also been told that at the beginning of the session today, one of the leaders offered to discharge a number of judges from the committee, or judgeship nominees. I find that pretty ironic because at the end of the 106th Congress, when I attempted to discharge three nominees to the floor, Tom Daschle, who was then the former chairman of the Judiciary Committee and the Senate majority leader at the time, objected back then, so he could sit in the Senate and tell people the important aspects of the Federal judiciary we have been discussing. I personally love and admire him. He has been a great member of the Judiciary Committee and I have a lot of respect for him.

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In October 1997, for example, he said on the Senate floor: “I have also been told that at the beginning of the session today, one of the leaders offered to discharge a number of judges from the committee, or judgeship nominees. I find that pretty ironic because at the end of the 106th Congress, when I attempted to discharge three nominees to the floor, Tom Daschle, who was then the former chairman of the Judiciary Committee and the Senate majority leader at the time, objected back then, so he could sit in the Senate and tell people the important aspects of the Federal judiciary we have been discussing. I personally love and admire him. He has been a great member of the Judiciary Committee and I have a lot of respect for him.”

Last week when the Judiciary Committee considered the asbestos bill, one of our Democratic colleagues referred to proposed amendments to that bill and said something very important: “Let’s debate them up or down. We have prevented me from discharging the three nominees, America would better understand why we need judges who will interpret, not make, the law. Americans will see how qualified judicial nominees meet that standard, and America will see that these nominees, every one of them, have a bipartisan majority support.”

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

Some are so desperate to claim even one single solitary precedent for what they are doing that they stretch, twist, and morph the word “filibuster” beyond all recognition. They want the word “filibuster” to mean so many things that it ultimately means virtually nothing at all. Unfortunately, these mischaracterizations of Senate history, tradition, and rules cynically exploit the fact that many of our fellow citizens have not mastered the particulars of Senate history, the peculiarities of Senate procedure, or the idiosyncrasies of the confirmation process. Misleading, confusing, patently false claims can easily take on a life of their own, echoed and repeated throughout the media, cyber-space, and even here on the Senate floor.

We all know it can take a long time for what is true to catch up with what is false. Judicial filibuster defenders who claimed that when the Senate voted to end debate on past judicial nominations, we were actually filibustering those nominations; that when we voted down debate and confirmed them, we were actually filibustering—denied me my right to vote up, vote them down. Bring the nomination. It was in 1990—of course, Clinton was President: ‘I find it simply baffling that a Senator would vote against even voting on a judicial nomination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Let me repeat that.

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

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

On November 10, 1999, the majority leader at the time, Senator Lott, promised that he would bring these controversial nominations up for a con­ﬁrmation vote no later than March 15, 2000, and that was at my request. He correctly said that I agreed with using the cloture vote to ensure that a con­firmation vote occurred. In other words, it was used to get to a vote.
On March 8, 2000, that is exactly what we did. It was of a procedural floor management device. The first two names on the petition for the cloture vote happened to be Senator LOTT and myself. We took that cloture vote to prevent a filibuster and to ensure an up-or-down vote. We prevented a filibuster. That vote occurred, and the Senate confirmed both nominees. They are today sitting Federal judges. Otherwise we would have kept going on and on on the Senate floor. We decided that is the way to get to a vote, and we did.

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

In 1990, for example, then-Majority Leader BYRD wanted to prohibit filibusters with a motion to proceed to nominations, and they could do that back then, just as a confirmation vote cannot happen if debate does not end. Debate cannot start if the Senate cannot vote to proceed to that debate.

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

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

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

Then he said this:

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

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

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

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

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

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

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

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

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

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

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

Let me offer a few pointers, a few tips, for the road ahead. Politics is often about results, about winners and losers, and involves politicians asserting their will. Law is about preserving that difference. So if you hear critics of judicial nominees talking only in the language of politics, you know something is wrong.

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

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

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

Senator LEVIN, said that the Constitution each of us has sworn to protect and defend requires that we debate and vote on judicial nominations reaching the floor.

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

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

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

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

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

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

We should return to that principle and practice.

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

We must turn back from that path. Once a judicial nomination reaches us here, our course should be clear. Let us debate and then let us vote. I yield the floor.
The PRESIDING OFFICER (Mr. Alexander). The Senator from Massachusetts.

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

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

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

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

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

There were three different occasions during the Constitutional Convention when our Founding Fathers considered who should appoint the judges who were going to serve on the courts of this country. The first two times the Founding Fathers debated this and discussed this, they made a unanimous recommendation that it would be solely the right of the United States that would be the sole judge for nominating and approving judges who were going to serve on the courts. Then, as the Constitutional Convention came to an end, 8 days before the end of the Constitutional Convention, about how our Founding Fathers wanted the selection of judges for the courts of this country to be done.

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

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

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

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

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

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

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

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

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

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

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

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

But what have we been doing? Waiting for the nuclear option. What means what? Tear up the rules and we can alter and change them. Is that what the President, 95 percent of approval of this President’s nominees has been achieved.

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

My colleague, Senator Kerry, certainly voiced that. What happened? The ballots are barely cast and the votes are hardly counted, and this President sends up the nominees that were debated and described in the Constitution for the Senate. That is why people are feeling so strongly about this, many of us feel so strongly about this—because basically we are undermining what our Founding Fathers wanted.

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

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

So these are not people that are in the mainstream. We have expressed that. We ought to be able to express it. But this belongs to the administration. No, no. They want to change the rules. That is what this will be all about. They are effectively saying: Look we have nominated, and you are good to go, and we are not going to talk about it. That does not count, and for us it recognizes that a Member of the Senate. We need to hear it, and that does not matter.

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

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

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

As many of us have said, if Republicans persist in the course they have set, Senator Sessions, the “compact of comity” that enables the Senate to fulfill its constitutional responsibilities.

Outside the Capitol, the gravity of that danger may not be self-evident. “Comity” may be an unused word today, but for 200 years it has been the lifeblood of daily life in the Senate.

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

They certainly knew what comity was: they came from totally different views of government. They labored ceaselessly, in the heat of a Philadelphia summer, in the ultimate American Government Seminar, until they created a government that was reliable, resilient—resistant to attack from within and without.

Comity among the Framers—their overriding agreement—despite their deep differences—inform and nourish their efforts. They worked especially hard to design the Senate.

Their debates were all about great challenges:

What size would be right to enable the Senate or the Executive?

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

Fortunately for us today, their debates were not just theoretical. They were very real and very practical. The Framers understood they were creating this institution for a very large government as they worked to combine their diverse views into a single concise blueprint.

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

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

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

They would clearly have counseled respect and moderation.

It is not respectful or moderate to suggest, as one of our colleagues did, that judges may have it coming to them if their decisions outrage some people. It is not respectful or moderate to suggest, as the majority leader did yesterday, that the senators are equivalent to the assassins of judges because they strongly criticize the political or ideological views of judicial nominees. As part of its advice and consent function, the Senate has done that since 1785, when it rejected George Washington’s nomination of John Rutledge to be Chief Justice.

The majority leader’s use of the word “assassinate” was especially unfortunate, coming in the very day that John Lekawsky of Wisconsin testified to our Judiciary Committee about the brutal murders of her family members.

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

The Framers would also have told us to minimize the distortions and respect the truth. Again, and again, we are told that there was no Republican-led filibuster of the Fortas nomination to be Chief Justice in 1968. There are still some of us in the Senate today, who were in the Senate then, and who know the truth firsthand. It demeans the Senate and discredits the debater when
someone parrots the bizarre erroneous White House talking points denying such a filibuster, without having the grace to check the facts.

The Founders would also have told us to take extremely seriously what James Madison, the Federalist No. 62, called “the senatorial trust,” which requires “a greater extent of information and stability of character.”

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

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

Finally, the Framers would say that our endangered senatorial trust needs comity more than ever in our day-to-day activities and relationships. As Madison stated, the comity the Framers had in mind was—“the result, not of the spirit of anxiety, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable.”

That is what we must aspire to. That is what we must accomplish if we are not only to solve our present dilemma but leave this place as least as fine an institution as we found it.

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

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

Janice Rogers Brown fails this basic test. Her record on the California Supreme Court makes clear that she’s a judicial activist who will roll back basic rights. Her record shows a deep hostility to civil rights, to workers’ rights, to consumer protection, and to a wide variety of governmental actions in maintaining and improving the quality of life that predominate in the DC Circuit.

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

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

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

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

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

On workers’ rights, she rejected a binding EEOC opinion limiting an employer’s ability to require workers to submit to drug tests.

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

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

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

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

We have seen it in Priscilla Owen’s opinions twisting the law in an attempt to deny the insurance claim of a heart surgery patient and campaign contributors from environmental regulations. We have seen it in Janice Rogers Brown’s twisting the Constitution to claim job discrimination laws can’t protect Latino workers from ethnic slurs in the workplace. We have seen it in William Pryor’s opposition to basic protections for the disabled, voting rights, and family and medical leave—views rejected by the Supreme Court.

And we’ve seen it in William Myers’ opinion that cleared the way for an open-pit mine on land sacred to Native Americans—an opinion that a Federal court later said ignored “well-established canons of statutory construction.”

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

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

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

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

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

What we are witnessing in this debate is an arrogant power grab by the Republican right. This is what happens when the rightwing of the Republican Party calls the tune for the Republican Party as a whole. We are spending days and weeks debating five rightwing judges, but not 5 minutes on what counts most in people’s lives—not 5 minutes on secure jobs, or healthy families, or educational opportunity. Those are not the values and priorities we see today from this White House and this Republican Congress.
To them, history doesn’t matter. Mainstream values don’t matter. Our commitment to working families doesn’t matter. What the Republican Party cares about today is putting a rightwing agenda ahead of mainstream values. Corruption. But the five right wing judicial nominees at stake in the nuclear option have no business making life-or-death, make-or-break decisions that affect our lives. They are anti-worker, anti-civil rights, anti-disability, anti-senior, anti-consumer, and anti-environment.

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

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

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

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

First, they will have to see that the Vice President himself is presiding over the Senate, so that no real Senator need be present to ensure the enforcement of publicly violating the Senate’s rules and precedents and overriding the Senate Parliamentarian, the way our Presiding Officer will have to do.

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

Then they will have to break paragraph 1 of rule V, which provides that the Senate rules remain in force from Congress to Congress, unless they are changed in accordance with the existing rules:

Then they will have to break paragraph 1 of rule XXII, which requires a motion signed by 16 Senators, a 2-day wait and a 3⁄5 vote to close debate on the nomination itself:

They will also have to break rule XXII’s requirement of a petition, a wait, and a 3⁄5 vote to stop debate on a rules change:

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

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

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

By this time, all pretense of comity, all sense of mutual respect and fairness, all good faith and in accordance with the norms and mutuality of the Senate, try to ignore the minority leader and other Senators who are seeking recognition to make lawful motions or pose legitimate inquiries or make proper objections.

By this time, all pretense of comity, all sense of mutual respect and fairness, all of the normal courtesies that are the Senate compact of comity, and will have launched a preemptive nuclear war. The battle begins when the perpetrators openly, intentionally and repeatedly, break clear rules and precedents of the Senate, refuse to follow the advice of the Parliamentarian, and commit the unpardonable sin of refusing to recognize the minority leader. Their hollow defenses to all these points demonstrate the weakness of their case.

The PRESIDING OFFICER. The Senator from West Virginia.

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

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

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

Mr. President, today I wish to speak about the assault on a vital check against tyranny. And so I wish to speak about the vital check against tyranny". If the Framers had intended the Senate simply to endorse the President’s selections, the Senate could have been left out of the process altogether. Clearly, the men who met at Philadelphia, nearly 219 years ago, had in mind I’d be able to choose his Cabinet. And there is considerable weight to be given to that point of view. But I do not think that any of us should maintain that the President is entitled to have his own court. That is the point.

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

The men who met in Philadelphia in that hot summer of 1787 were practical statesmen. They were experienced in politics, statesmen who viewed the principle of separation of powers as a vital check against tyranny. And so I wish to speak about the assault on a vital check against tyranny’’. If the Framers had intended the Senate simply to endorse the President’s selections, the Senate could have been left out of the process altogether. Clearly, the men who met at Philadelphia, nearly 219 years ago, had in mind I’d be able to choose his Cabinet. And there is considerable weight to be given to that point of view. But I do not think that any of us should maintain that the President is entitled to have his own court. That is the point.

The Constitution establishes a Supreme Court and gives Congress the power, in its discretion, to constitute inferior tribunals; nowhere in the blueprint of our Government is it hinted—nor even hinted—that the high Court or any other Federal court is the President’s court.

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

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

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

The men who met in Philadelphia in that hot summer of 1787 were practical statesmen. They were experienced in politics, statesmen who viewed the principle of separation of powers as a vital check against tyranny. And so I wish to speak about the assault on a vital check against tyranny. If the Framers had intended the Senate simply to endorse the President’s selections, the Senate could have been left out of the process altogether. Clearly, the men who met at Philadelphia, nearly 219 years ago, had in mind I’d be able to choose his Cabinet. And there is considerable weight to be given to that point of view. But I do not think that any of us should maintain that the President is entitled to have his own court. That is the point.
the other body, the House of Representatives. It has been the subject of numerous articles, books, novels, and even motion pictures.

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

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

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

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

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

Senator Thomas Hart Benton reported that “nominations and rejections flew backwards and forwards in a game of shuttlecock.” In all—in all—the Senate turned down four of President Tyler’s Cabinet nominees: in addition to Cushing, David Henshaw as Secretary of the Treasury. And that’s all. The Senate turned down four of President Tyler’s Cabinet nominees: in addition to Cushing, David Henshaw as Secretary of the Treasury, which was also indebted to colonial and English experience. Two had served in the Continental Congress, two were also indebted to colonial and English precedents, and three had participated in the Constitutional Convention, whose members had created the Senate.

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

The sun went down. That ended the debate.

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

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

That sounds like a filibuster, doesn’t it? Well, long speeches and other obstructionist tactics were more characteristic of the House than of the Senate in the early years. So it started here. But the Senate, February 27, 1811, “decided . . . that after previous question was decided in the affirmative, the main question should not be debated.” So there you have it. They moved the previous question.

Was a bill is discussed in the other body. The practice of limiting debate dates back to 1604—my, that is over 400 years; that is 401 years—when Sir Henry Vane first introduced the idea in the British Parliament. Known in parliamentary procedure as the “previous question,” it is described in section XXXIV of Jefferson’s Manual of Parliamentary Practice, as follows. Here is the way Thomas Jefferson explained the previous question:

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

That is the way it is done over in the House. Mr. President: Mr. Speaker, I move the previous question—whether that question (called the main question) shall now be put. Mr. Speaker, they say in the House: I move the previous question.

Jefferson went on to say: It pass in the affirmative, then the main question to be put immediately, and no man may speak anything further to it, either to add or alter.

That is Thomas Jefferson speaking through his writing. The journals of the Continental Congress record that the previous question was used in 1778. Get that. This is the Continental Congress. When did it first meet? It first
met in 1774, the First Continental Congress. So the journals of the Continental Congress record that the previous question was used in 1778. Section 10 of the rules of the Continental Congress read:

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

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

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

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

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

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

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

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

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

On February 26, President Wilson—I was born during one of the administrations of Woodrow Wilson—President Wilson appeared before a joint session of Congress to request legislation authorizing the arming of merchant ships. The President announced that the rules of the Senate would have to be revised—now get this—the rules of the Senate would have to be revised before he would call a special session of the entire Congress to deal with the war emergency. And so, Mr. President, the fate of the unlimited debate was sealed.

The principal responsibility for the cloture resolution rested with the new Democratic majority leader, Thomas Martin of Virginia. Under his guidance, a bipartisan committee of the Senate’s leaders drew up a proposal providing that a vote—get this—by two-thirds of those present and voting could invoke cloture on a pending measure. Two-thirds of those voting.

By a vote of 76 to 3 on March 8, 1917, after only 6 hours of debate, the Senate adopted its first cloture rule. Mr. President, 1917, that was the year in which I was born.

In 1949 now, President Harry S. Truman sought to clear the way for a broad civil rights program, and his first step was to push for liberalization of the cloture rule. His efforts produced a bitter battle at the beginning of the 81st Congress.

The Senate adopted a compromise measure that proved to be less usable than the one it replaced. It required that two-thirds of the Senate vote for cloture rather than two-thirds of those present and voting. That was 1949. The new rule differed from the old in that it allowed cloture to operate on any pending business or motion, with the exception of debate on rules change. This meant that future efforts to change the cloture rule would themselves be subject to extended debate without benefit of the cloture provision.

Now we are getting down into my time. At the beginning of the 86th Congress—I came to Congress during the 83rd Congress when Harry Truman was getting close to the end of his tenure—at the beginning of the 86th Congress, Senate majority leader, Lyndon B. Johnson, offered and the Senate adopted by a 72-to-22 rollcall vote, a resolution to amend Senate rule XXII. Approved on January 12, 1959, after 4 days of debate, the resolution permitted two-thirds of the Senators present and voting—going back to the very beginning of the cloture rule—two-thirds of the Senators present and voting to close debate, even on proposals for rules change. It also added to rule XXII:

The rules of the Senate shall continue from one Congress to the next Congress unless they are changed and provided in these rules.

These rules, these rules in this book, the “Senate Manual.”

On February 28, 1975, I submitted a resolution providing that debate in the Senate be closed by a vote of three-fifths of the Senators duly chosen and sworn, except in the case of a measure or motion to change the rules of the Senate, when a two-thirds vote of Senators present and voting would be required to close debate.

The Senate adopted my substitute providing that three-fifths of all Senators chosen and sworn could invoke cloture. This provision applied to all measures except those amending the rules of the Senate which still required a two-thirds vote of Senators present and voting.

Four years later on February 22, 1979, the Senate agreed to a resolution that I submitted establishing a cap of 100 hours of consideration once cloture had been invoked on a measure.

Under my resolution, each Senator would be entitled to 1 hour of time. Senators could yield their time to the majority or minority floor managers of the bill or to the majority or minority leaders. Except by unanimous consent, none of the designated four Senators could have more than three additional hours yielded to him or to her. These Senators in turn could yield their time to other Senators. If all available time expired, a Senator who had not yielded time and who had not yet spoken on the matter on which cloture had been invoked could be recognized for 10 minutes for the sole purpose of debate.

The 1979 resolution made in order only those first-degree amendments submitted by 1 p.m. the day following submission of a cloture motion, with second-degree amendments in order only if submitted in writing 1 hour prior to the beginning of the cloture vote.

The substitute amendment contained the current overall limitation of 30 hours of consideration after cloture has been invoked.

So that brings us up to the present day rules with reference to debate and limitation of debate in the Senate, the current cloture rule. That puts us where we are now, and I thought it was well just to review briefly the history of unlimited debate in the Senate and then the cloture rule limiting debate—the cloture rule as initially adopted requiring two-thirds of those present and voting; and then in 1949, two-thirds of those elected and sworn; and then again in 1975, two-thirds of those Members present and voting, that is where we are—so that we might have this basis for a better understanding of where we go from here.

I thank you, Mr. President. I thank all Senators, and I yield the floor.

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

Mr. KERRY. Mr. President, I thank the Chair, and I thank the distinguished Senator from Virginia for his extraordinary analysis and understanding of the Constitution which he has constantly been the keeper of in the Senate.
We are in a remarkable moment of confrontation. This is a great institution, or at least it always has been, and it is looked up to by people all over the world. Caught up as we are now in this moment of partisan ideological division of a raw reach for power, the Congress is dropping in its regard by the American people. Rather than reaching across the aisle to grapple with the real crises that face our Nation, the Republican leadership keeps moving unilaterally to change the way this institution has worked, and not for the better.

Those of us who have had the privilege of being here for some period of time—I have been here for 22 years; Senator BYRD has been here almost 50; Senator KENNEDY, Senator STEVENS, and others have also served for a significant period of time—but brief as my stay has been, I find myself now I think No. 18 in seniority, which means 82 Senators have come and gone during the time I have been here. In fact, I had a chance to know many of them going back to the time of Barry Goldwater, John Stennis, Russell Long, and others. Never in that whole period of time I have served have I ever seen this institution behaving the way it does today.

Colleagues who came to do the same good as colleagues on the other side of the aisle, locked out of conference committees, hearings that do not take place, hearings that are not held; oversight that does not occur as it used to. This institution is being damaged daily by the partisanship, the bitter ideological divide that is preventing good people on both sides of the aisle from doing good business for the American people; from finding real solutions to the real problems of real concern to average families all across our country, who cannot pay their health care bills, who are losing jobs abroad, who worry about the twin deficits of the budget of our country, the trade deficit, all the extraordinary threats to community as kids do not get the education they ought to. All this time we have been spending weeks, if not months, caught up discussing a nuclear option, discussing a few judges out of the two hundred, 208 or so, who have been nominated and approved by this President.

The Senate is now watching this struggle take place, countless hours consumed by an effort to change the rules by breaking the rules. If my colleagues want to change the rules, use the rules to change the rules. Do not subvert the system. Do not play a cute parliamentary game that has been untouched over 200 years.

This is a defining moment. The problem is that words spoken in this Chamber do not even fully convey the importance of this moment. This is, in fact, one of those times the Founding Fathers and countless other statesmen of history have faced us.

Henry Clay said: The arts of power and its minions are the same in all countries and in all ages. It marks its victim, denounces it and excites the public odium and the public hatred to conceal its own abuses and encroachments.

James Madison said: Where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and held under circumstances so as to be a barrier for a brief period, at the pleasure or elective, may justly be pronounced the very definition of tyranny.

What are we going to see if this happens? The judiciary of the United States entirely put into the hands of the Presidency, period. The advice and consent will be wiped out, barring displays of courage that we have not seen recently, because people will come, as they did in our committee most recently, to say, well, we just had an election and the President won and the President has the right to his appointments, that is it, end of issue. Gone, the divisions; gone, the test; gone, the judgment we were supposed to apply as a separate and coequal branch of Government.

That is what the Founding Fathers wrote. They did not give the President the ability to have whoever that President wants. That is what is written into the Constitution, that every single individual is supposed to be appointed to the body raised our hands and swore to uphold.

We did not swear to uphold the majority leader. We did not swear to uphold the President. We did not swear to uphold the President. We did not swear to uphold our party. We swore to uphold the Constitution of the United States, and that is our duty.

Lord Acton said it maybe best: All power corrupts. Absolute power corrupts absolutely.

Thomas Jefferson said: I hope our wisdom will grow with our power and teach us that the less we use our power the greater it will be.

If my colleagues want to use the power of ending a filibuster, just have the filibuster for week after week and let people stand up and make their arguments. If the arguments have no currency, believe me, between the press, public opinion, the bloggers, and C-SPAN, this country will rise up and they will get their 60 votes if they deserve them. That is an up-or-down vote of its own kind.

If it were compelling enough, as it was with the Civil Rights Act, or compelling enough as it has been in other great confrontations in this body, we have always found our way to make it happen. We have always done it without the rules. We are a Nation that has listened to some remarkable men and women in remarkable debates about how we as a Nation are different in balance of power. We have concluded that the people and the institutions that we set up to protect the people. We are not here as an institution to protect an ideology. We are not here as an institution to protect a party. We are here to protect collectively the Government of the United States of America that is made up of those brilliant words that were fought over so diligently and remarkably in Philadelphia and which have stood for over a century and a half.

Now all of a sudden in 2005, feeling the flush of victory in an election that was close, controlling two branches of Government, elected officials, people who serve at the grace of that Constitution, rather than at the sufferance of the people who vote for us, those people are choosing to serve the moment, not to serve history, not to serve precedent, not to serve common sense, not to serve even the real interests of the American people, but to serve a narrowly defined, elected, official, leadership-determined ideological purpose.

I believe the real interests of Americans are best served by remembering what the greatest virtue of our democracy is not that it gives power to the majority, which is easy to exercise, easy to understand, easy to abuse; the great virtue of the American system of Government and of our democracy is the protection it provides to the minority. That is what is special about America. That is what makes us different from everybody else. That is what lives are being lost for, to tell people in Iraq and Afghanistan, this is what you ought to embrace—the full measure of democracy, not some limited tricky little measure where, in the flush of victory, you change the rules.

What would we say about this if it was another country that we had helped to be the country they are, embracing our democracy, but they started to play those kinds of games and there was suddenly an abuse of rules that had been set up that everybody understood there were to make the democracy work effectively?

It is precisely the protection of the minority that makes our democracy so respected and so awesome to people all over this planet.

This is a dangerous time for our democracy. What is at stake here is something far greater than the confirmation of a few judges. Let there be no doubt that line was drawn clearly here this morning because the deputy leader offered to have four judges confirmed. We could have confirmed four judges right here, today, this morning. No, no, no. This is a division. This is a moment of confrontation being sought by the leadership on the other side of the aisle. What is at stake is something far greater than any of the individual judges. It is defined by the refusal to accept the offer to do those judges today. We could have gotten the President’s percentage up from 95 to whatever, 98 percent. But, no, we do not want that. That will change the focus.

No matter how much time is spent on the life story of Priscilla Owen, we all
know the choice of this particular judgeship and of just staying on this judgeship and not trying to have other judgeships represents, in fact, a choice. It is a smoke screen for what this fight is really all about. It is not about these few judgeships that could have confirmed those judges. But the Republican leadership is fundamentally determined to deny the minority the right to hold the Executive accountable for such judgments as we might make about the lifetime appointment of those judges.

I have heard here and elsewhere Members of our side did call for up-or-down votes when that was the argument that best served them. But, guess what, when they didn't get it, they didn't call for a change in the rules, and they did not try to break the rules to change the rules. They used their best argument, but they respected the institution.

That is not what is happening today. So we can forget about who said what when it is real fight is about the Senator. The real fight is about the Constitution. The real fight is about who we are and what kind of country we are going to be and how we behave and what kind of example we set to young kids in school today who read the history books and dream someday of being a Senator and perhaps joining the world's greatest deliberative body.

This is about George Bush and Karl Rove and the Republican leadership and the absolute control over who gets to the Supreme Court and to the judgeships across this country. This is about carrying, beyond this branch of Government, power into another branch of Government that is supposed to be separate. This is about the gratification of immediate ideological goals and the pursuit of power, regardless of the long-term consequences to the Senate, the Congress, or the Constitution of the country. To get what they want, the leadership has acquiesced in these rules. Not the precedents and history and quality of this institution are guiding them. It is an outside hand.

As John Danforth, with whom many of us had the privilege of serving here, a greatly respected former Republican Senator—he was George Bush's choice as a special envoy to Darfur. He was George Bush's choice to go to the United Nations. He is, above all, as all of us know, a man of enormous faith, a respected minister, and a leader in his church. Here is what he wrote a few weeks ago:

The problem is not with people or churches that are politically active. It is with a party that has gone so far in adopting a sectarian agenda that it has adopted the political extension of a religious movement.

So spoke Senator John Danforth, Republican.

Yet, despite Senator Danforth's warning, most of my colleagues stay right on script, right on this fight for history, this fight for principle, and this fight for rights. On script, they allow our cherished principles to be abused and glossed over as the debate sort of develops or drops down into a competition of hollow sound bites. But script and sound bite are not what should dictate what happens here, not in the Senate. Conscience and principle ought to dictate what happens here. There have to be Senators who stand up and do their duty as U.S. Senators, not Senators of their party.

My distinguished colleague, Senator VoNAMOVIČE, recently showed courage in the Foreign Relations Committee when he stood up and opposed the proceedings of the committee and he said: I am not comfortable with what is happening here. My conscience tells me we ought to stop and take a better look. Guess what happened. He was vilified on talk radio and in certain partisan circles for having gone off script.

Senators CHAFFEE of Rhode Island, 4 years here, stands up and says: Wow, that is the first time in 4 years I have ever seen anybody do that. What? When was the last time in 4 years a Senator saw another Senator stop and think for himself and exercise conscience and go off script? What kind of statement is that about what has happened here? It is not controversial, my friends, about what has happened here, and it underscores what is happening here now.

Independence and conscience and principle are really what is at stake here, the independence of the Senate, the separation of the judiciary from an administration that is just hell-bent for leather determined to get its way. Heaven knows what leverage will be exerted in these next hours as we see so much on the table, with military bases closing and other issues—who knows? Independence of the Senate, a special institution in our Government, a place where things purposefully slow down, where they find their balance—that is what the Senate was created for.

It is surprising that members of the Republican leadership know what is at stake, but they have actually worked with the Republican administration to spread things that aren't true. I don't know what happened to truth around here. I don't know what happened to truth in the discussion of great issues before this country.

But the truth is, in the end, none of the constitutional issues that have been put forward by the Republican leadership—none of them stand up. They do not stand scrutiny. They are hollow, tortured, poll-tested statements. The whole argument about the Constitution and up-or-down votes or "unprecedented"—the word "unprecedented" has been used. They sound good, but they are not true, and we know it. Yet Senators continue to fall in line, turning out the script, turning out the phases that have to be repeated. It is not a true representation of the Constitution of history, or the rights of Senators.

Personally, I believe there would be a lot more outrage in the Nation and in the media if the value of truth had not been so diminished over the last years. We have a budget that comes trillions of dollars short of counting every dollar we plan to spend, but, oh no, there is no accountability. We have a budget that has not even counted on the debt. Find me an accountant in a business in America who doesn't put the interest on the debt that they owe in the accounting, and they would be fired. We do not do it. No accountability.

We have had a Medicare actuary who was forced at risk of losing his job to lie about what the costs would be of a prescription drug bill and lie to the Congress. No accountability. We have had falsified numbers in Iraq, on everything from the cost of the war to the number of troops that have been trained to the slam dunk on intelligence—no accountability. We have an administration who want to fund fake newscasts paid for by the American people, without disclaimer, and mislead people across America.

In fact, the administration's willingness to consistently abandon the truth I think has done great damage to the American people's willingness to believe anything of us say. They are less willing to listen. They are less willing to trust or take anything said seriously.

Now we find ourselves in a struggle between a great political tradition in the United States that seeks to find the common ground, do the common good, and we have a new ethic on any given issue, where no one symbolizes the ends of victory no matter what. It is a new view that says, if you don't like the facts, just change them. If you can't win by playing by the rules, just rewrite them. Witness what happened with Tom DeLay. The new view says if you can't win a debate on the strength of your arguments, then go ahead and demonize your opponents regardless of whether it is true. The new view says it is okay to ignore the overwhelming public interest as long as you can get away with it.

This time the Republican leadership has gone the farthest to get away with it, hoping to convince Americans that by breaking the Senate rules, they are actually acting to defend the Constitution, honor the words of our Founding Fathers, and avert a judicial crisis.

This debate is not fueled by an effort to protect the Constitution. It is fueled by the absence of any accountability. It is the shortage of judges on the bench because, as the ranking member of the Judiciary Committee has made clear, we have the best record of appointing them and the lowest vacancies in years.

The facts have been repeatedly cleared up, again and again, and repeatedly they are brushed aside with the old adage that if you throw enough mud and you repeat something that is not true enough, enough people may come to believe it. Over 95 percent of all judges already approved. I have been here since 1985 and I have probably voted for a thousand judges. I
have not counted them all. For Ronald Reagan, for George Herbert Walker Bush, for President George Bush. What have we got? Ten who have not been confirmed?

The Bush administration and their allies hope to get rid of this by selling words to the public on a “team” the public would never buy if there was a referee who put real facts in front of the American people. Unfortunately, words with great meaning—Constitution, Founding Fathers, history—are being twisted and cheated of their full meaning and of their full import in the process.

In the end, the American people are being underestimating by this administration. They may work their will here; I don’t know yet. We do not know. Certainly they have a lot of cards to play. But in the end, Americans value the Constitution, and over time this will be felt. In the end, Americans understand that the strength of our democracy is best judged by the enduring strength of our minority and its ability to be heard. And Americans cherish the ability of the minority to be heard.

When Americans first heard the term “nuclear option,” they kind of recoiled—appropriately. They were confident that dismantling the filibuster and silencing the minority would have as catastrophic an effect on our democracy as nuclear blast would on our security. But the majority’s action was not to back off and to say, okay, we will play by the rules. The majority’s reaction was to change the slogan. So in an act of transparent hypocrisy, the minority changed the slogan from “nuclear option” to “constitutional option.” George Orwell would be pleased. They embarked on a series of hollow arguments based on mythical constitutional provisions confident that if you just say it, somebody will believe it.

You can change the slogan, but you cannot change the fact that diminishing the rights of the minority diminishes the spirit and the substance of our Constitution and the foundation of our Government. Argument after argument put forward by the Bush Republican leadership is just plain false. I have heard it argued that our Constitution mandates specific protocol of voting for judges. No. They have used their new catchphrase, up or down votes, hundreds of times in recent days. But those words do not appear once in our Constitution. They are not even subliminally in the Constitution in the advice and consent and separation of power given to the Senate and the right of the Senate to make its own rules.

No one should be fooled. Those phrases do not mean constitutional. They do not mean democratic. They do not mean fair. They are phrases that are code for dissent-proof, minority-proof, and filibuster-proof. There is nothing in our Constitution or our history to suggest that the nominee of any President is so special as to be excused from the scrutiny of the minority or granted immunity from the tools of democracy that protect that minority.

I didn’t win, but I can guarantee this: Had I been President, I would not have considered our nomintion winner, based on a request to change what I have viewed as something of value in the entire time I have been here in the Senate. Never would have occurred to me. It would have occurred to me to send people to a supermajority vote to support people on both sides. It would have occurred to me to bring the members of the Judiciary Committee together and sit them down and work together to come to a common understanding of what sort of standard we ought to apply and let the American people share that standard.

There is nothing in our Constitution or in history to suggest the President ought to be granted immunity from the tools of democracy. And that is what will happen.

My colleagues are well aware that the power of advice and consent is granted to the Senate and the Constitution says absolutely nothing about how the Senate will proceed to provide advice and consent. And the words advice and consent are there in their duality because advice is one thing and consent is another. You can withhold your consent or you can give your consent. You can say yes, or you can say nothing if you do not vote. And if you do not vote, you have withheld your consent.

It didn’t take long before the new Congress exercised its constitutional powers in 1795. Senators who were friends and colleagues of the Founders themselves, who surely knew their intent, turned around and defeated George Washington’s nomination of George Rutledge to be the Chief Justice of the Supreme Court. In 1968, Republican Senator Robert Griffin captured the spirit of that event when he said:

That action in 1795 said to the President then in office and to future presidents, don’t expect the Senate to be a rubber stamp. We have an independent and coequal responsibility in the appointing process and we intend to exercise that responsibility as those who drafted the Constitution so clearly intended.

The Constitution did not mandate a rubberstamp for George Washington and the Constitution doesn’t mandate a rubberstamp for George Bush today.

In 1795, the rejection of Washington’s nominee was heralded as the Constitution working as intended. There is no doubt that an active, coequal partnership was intended. That resounding rejection of George Washington, our revolutionary leader, helped to seal the death of the monarchy in this country. The genius of empowering the Senate and the Constitution working as intended, the executive, the Senate legitimized the executive. So when I hear my colleagues come to the Senate arguing that the Constitution mandates the will of the majority always trumps the minority, I don’t hear the wisdom of our Founding Fathers. I don’t see or hear a respect for what happened in 1795. I don’t hear the same blind activism that characterizes today’s judges they are supposed to enforce the Constitution.

The actions of some Senators, in fact, today come closer to rewriting the Constitution than defending it.

Another argument we have heard is that the filibuster itself is unconstitutionally. I have heard it argued that our publican leadership is just plain false. Over the past 200 years, our predecessors in the Senate have taken the role of “consent” very seriously. They have created time-tested rules to assure the rights of the minorities and to balance the power of government. With a hold, a so-called hold, a single Senator can delay a Presidential nominee. A single committee chairman can block a nomination by simply refusing to hold hearings.

I saw Senator Helms do that any number of times. I tried to get a hearing. We tried to get the possibility of a Governor of the United States of America, the Governor of Massachusetts, Bill Weld, nominated to be the Ambassador to go to Mexico. Senator Helms: no hearing. Wouldn’t hear of it. It could not happen. Nomination killed.

What is this game that is being played? Quick and fast, they said what, when? We all know how this place has worked all these years. These rules were not created by the Democratic Party when George Bush was elected President. The filibuster was used as early as 1790. Senators from Virginia and South Carolina who filibustered against a bill to locate the first Congress in Philadelphia. That was a filibuster of one because in 1790, as Senator BYRD has pointed out, you needed unanimous consent to end the debate. But today, they changed that rule by using the rules of the Senate, not by breaking them.
Think about it. Those legislators and friends even the Founders themselves permitted a filibuster of one. Knowing that, today's activist arguments buckle under the weight of history. The unfortunate truth is that some Senators have now fashioned themselves activist legislators using a false reading of the Constitution to paint their opponents as obstructionists while pursuing their political agenda at the expense of our democracy.

I think some of my colleagues forget that the Senate was designed specifically to be the moderating check on a President. And guess what. We have done unbelievably well as a nation these 200 years. We are the envy of people all across this planet. There is not one of us whose heart does not fill with pride, who is not astounded at what we can do and have done, and what we can achieve in America, and the stories of individual Senators in this Chamber who have risen from adverse circumstances, and nothing, to be able to represent people in their States. It is a stunning story. It is a story based on respect for the law and based on the mutual respect that has always guided this great institution. I think some of my colleagues have lost track of that.

My colleagues also forget, as they demonize the filibuster, it has been a force for the good. Farmers don't forget that they are a lot of farmers in the Midwest in our country. They don't forget when Senators from rural States used the filibuster to force Congress to respond to a crisis that left thousands of farmers on the brink of bankruptcy in 1985. The big oil companies don't forget that. It don't forget when Senators used the filibuster to defeat massive tax giveaways that they were lobbying for in 1981. And I don't forget it, when, 10 years ago, I came to the floor and filibustered to prevent a bill that would have gutted public health, safety and consumer and environmental protections. That bill never passed, and we know the country is better for it.

Some Senators come to the floor with a practical argument about our courts. They claim that because we have not rubberstamped each and every one of George Bush's nominees, the Nation faces a crisis because of a shortage of judges on the bench. It is not true. How can you keep coming to the floor of the Senate saying things that are just plain not true?

Over 95 percent of the President's nominees have been confirmed. Our courts today have the lowest vacancy nominees have been confirmed. Our democracy is threatened when we accept the dangerous precedent that minority rights will be silenced at the convenience of the majority. I believe our courts and the justice this rule is meant to deliver are threatened, in the end, by some of these judges who have been nominated.

As I said, that is not what this is fundamentally, in the end, about. It is about getting everything you want when you want it.

I will wrap up in a moment, Mr. President.

Some of my colleagues have argued that Democrats filibuster these judges because we simply dislike them or disagree with them, there may be some disagreement on things they have said or the way they have approached their courts. We saw what Attorney General Gonzales has said about Priscilla Owen, that her dissent in In re Endowment unconscionable act of judicial activism.” But the point is, we have confirmed countless judges with whom we disagree on countless issues. If we have confirmed over 200 judges of the President of the United States, you know we do not agree with them on many of the issues that they brought to the bench, but they brought a fundamental fairness or they brought a record that we did not believe ought to be disputed.

I think we have shown our good faith on the approach to the confirmation of judges. We have confirmed countless judges because we believed they were impartial and responsible arbiters of the law. It is an activist judge, it is a judge with a particular—many of the arguments have been made; I am not going to go through them now—but those arguments have been eloquently made with specificity as to these few judges. It is judges who want to rewrite our laws from the bench whom we believe act unqualified for a lifetime appointment. And we stand against them, Mr. President, not as a threat to the Constitution, but in defense of the Constitution.

We have also been accused of unprecedented acts with respect to these nominations. Well, I am not going to go back into all that history. A lot of my colleagues have talked about it in the last days. But you just cannot come out here with a straight face, on either side—both sides have engaged in delay tactics, some of whom many of them were not even allowed out of the committee when President Clinton was in. Waited years; never got out. That does not make it all right, but it is the way it works as we fight this process of finding people who meet the consensus of the Senate.

Did you hear the minority then hide behind a mythical constitutional value? No. Did you hear the minority filibuster required the protection of the rights of the Senate to be changed? No. The majority leader himself has voted to filibuster a nominee. It does not matter whether it is 1, 2, or 10 filibusters, a filibuster is a filibuster.

President Johnson’s nominee to be Chief Justice of the Supreme Court, Abe Fortas, was defeated with a filibuster.

Tennessee Republican Howard Baker articulated the minority’s position saying:

The majority is not always right all of the time. And it is clear and predictable that the people of America, in their compassionate hearts, require the protection of the rights of the minority as well as the implementation of the will of the majority.

Throughout our history, Presidents and majorities have always had to govern a nation where minority rights are protected. Until this century, it was the job of the majority to respect that tradition. They were hobbled by it. They were inspired by it, by the lessons of history that colleagues seem to have forgotten today.

In 1997, President Roosevelt attempted to court pack and assert his influence. His own party said no. Thomas Jefferson once attempted to impeach a Supreme Court Justice who disagreed with his political agenda. His own party said no.

When my colleagues complain of lack of precedent, remember those precedents. They were fair, and they were just. They respected the Constitution and they defended the judiciary. Our predecessors stood up to their own party leaders because they valued the real strength of our democracy more than the short-term success of a political agenda of the moment. And the question for all of us here is: Are we going to live up to that test?

Recent predecessors of Senate Republicans have repeatedly urged respect for this—their own party Members, Members of the Republican Party, people of extraordinary respect and even reverence. Former Republican Majority Leader Howard Baker permission to destroy the right to the filibuster; would topple one of the pillars of American democracy, the protection of minority rights from majority rule.

Former Senator Chuck Mathias said: The Senate is not a parliamentary speedway, nor should it be.

Former Republican Senator Bill Armstrong said:

Having served in the majority and in the minority, I know it’s worthwhile to have the minority empowered. As a conservative, I think there is a value to having a constraint on the majority.

My colleagues should defend their judges, but do it without tearing down
the Nation was engaged in the Cold War with the Soviet Union. But now, 22 years later, this Senate is experiencing its own cold war. It is a cold war across the aisle that separates the two parties, and it has escalated with the threat of this nuclear option.

As the name suggests, the result of this threat is nuclear, but in many ways it is also a time bomb. It is a time bomb because, while the action will be visible now, it will do irreversible damage to the future of this country.

Its potential effects on the operations of the United States are well known. But here I want to address my comments to the American people because they are going to pay the price for the change if it takes place here.

The majority leader insists on breaking the rules in order to give several people, some of whom deserve far greater review, lifetime appointments as high-ranking Federal judges. They will sit on the bench for 30 or 40 years, and they will make decisions about your lives, your families, your rights, and the future of your children. They will make decisions about our lives, such as: Will clean air rules be enforced against polluters? I hope so. I would like to know my grandchildren can breathe the air and not be harmed by it. I have one granddaughter who is asthmatic. My daughter, when he goes to school, has to carry an inhaler.

So do we want to leave our kids with air that is polluted, with drinking water that is contaminated? Will we have health care? Will we still have strong constitutional rights? That is what this is about. We got lost in how long the filibuster rule has been in effect and how devastating it will be on the process. But it goes much deeper than that. These are critical questions, and these are the judges who will be answering those questions. They might even one day be asked to help elect a President.

When I was a soldier 60 years ago and we dropped the earliest version of the nuclear bomb, called the atom bomb, we celebrated. We knew we could save thousands of Americans from dying in the flight to vanquish our then enemy, Japan.

With this nuclear option, the majority leader is threatening to annihilate over two centuries of American tradition in the Senate by getting rid of the right that challenges decisions made by a slim majority over a minority of over 140 million people's representatives here in the Senate.

Extended debate, filibuster, is an American tradition that goes back to the earliest days of the Senate. While the written rules establishing the Senate filibuster were not adopted until 1806, the practice existed even in the first Congress. Historical records indicate that in 1790, Senators from Virginia and South Carolina engaged in a filibuster, and it has continued since then.

The first well-documented filibuster was conducted in 1825 by Senator John Randolph of Virginia. For several days, Senator Randolph filibustered President John Quincy Adams' economic agenda. That was in 1825. During the 19th century, there wasn't even an option of a cloture to end the filibuster. It continued as long as people had the breath and stamina to continue. There was no way to stop determined Senators from engaging in an unlimited debate. Then, in 1917, the cloture rule was adopted, which established a procedure to end debate only upon a vote of a supermajority. Through all of these years, through every crisis, the American tradition of the filibuster has endured. It endured through the War of 1812, the Civil War, Reconstruction, two world wars, the Great Depression, the civil rights movement. Yet because of a few of President Bush's judicial nominees, we are being asked to throw out the filibuster safeguards of the huge minority. It makes no sense.

We have heard claims that it is unprecedented to mount a filibuster on a judicial nominee. It can be said, but it is wrong, and the evidence is on the Senate's own Web site.

I quote from a statement made earlier by the senior Senator from Missouri. Mr. BOND said:

Mr. President, I think the facts are clear. You have heard this many times. Almost everything has been said but not everybody has said it, so I want to go over some of the facts that I think are very, very important. For 214 years, judicial nominations have come to the Senate floor and have been considered without filibuster.

I ask unanimous consent that a table that shows there were 14 judges whose nominations were filibustered since 1968 be printed in the RECORD. There being no objection, the material was ordered to be printed in the RECORD, as follows:

<table>
<thead>
<tr>
<th>Congress and year</th>
<th>Nominee</th>
<th>Position</th>
<th>Cloture motions filed</th>
<th>Outcome of cloture attempt</th>
<th>Disposition of nomination</th>
</tr>
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<tr>
<td>90th, 1967</td>
<td>Abe Fortas</td>
<td>Chief Justice</td>
<td>3 rejected</td>
<td>Withdrawn</td>
<td>Confirmed</td>
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<tr>
<td>91st, 1969</td>
<td>William H. Rehnquist</td>
<td>Associate Justice</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
</tr>
<tr>
<td>91st, 1969</td>
<td>William A. Brennan</td>
<td>General Counsel, National Labor Relations Board</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
</tr>
<tr>
<td>92nd, 1971</td>
<td>William H. Rehnquist</td>
<td>Circuit Judge</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
</tr>
<tr>
<td>96th, 1980</td>
<td>Daniel A. Manion</td>
<td>Circuit Judge</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
</tr>
<tr>
<td>96th, 1980</td>
<td>Joseph A. Mindlin</td>
<td>Circuit Judge</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
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<tr>
<td>98th, 1983</td>
<td>William H. Rehnquist</td>
<td>Chief Justice</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
</tr>
<tr>
<td>100th, 1987</td>
<td>Daniel A. Manion</td>
<td>Circuit Judge</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
</tr>
<tr>
<td>100th, 1987</td>
<td>Stephen G. Breyer</td>
<td>Circuit Judge</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
</tr>
<tr>
<td>100th, 1987</td>
<td>William H. Rehnquist</td>
<td>Chief Justice</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
</tr>
<tr>
<td>100th, 1987</td>
<td>William J. Brennan</td>
<td>Associate Justice</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
</tr>
<tr>
<td>100th, 1987</td>
<td>William J. Brennan</td>
<td>Judge, U.S. Tax Court</td>
<td>1 rejected</td>
<td>Confirmed</td>
<td>Confirmed</td>
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<td>100th, 1987</td>
<td>William H. Rehnquist</td>
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</table>
Mr. LAUTENBERG. Mr. President, the Senate Web site points to one incident in 1917 as the present time. October 1, 1968: “Filibuster Derails Supreme Court Appointment.” Why don’t our colleagues on the other side take their heads out of the sand, open their eyes, read the record, and tell the public the truth?

In 1968, Abe Fortas, Supreme Court Justice, was filibustered. The Senate failed to invoke cloture on Fortas. There were only 45 votes for cloture. Some say this is proof that a majority of the Senators did not support Fortas. But President Johnson thought otherwise, noting that 12 Senators were absent for the cloture vote. And here in 1968 is a page 1, first-page headline in the Washington Post. It says: “Filibuster Derails Supreme Court Appointment.”

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

The public ought to know what is being said. Unfortunately, in the urgency to get this done, they are not being accurate in the things that are said about the Republican majority.

So in 1968—not this, people across the country—on a nomination to be the most influential judge in the country, there was a filibuster. I am not a lawyer, but it seems to me that those who say this has not happened before are guilty of factual negligence. The right to filibuster is fundamental to the Senate because the Senate was created by our Constitution to protect the rights of the minority.

Just this weekend, one of the most distinguished Members of the Senate, our colleague from Arizona, Senator McCAIN, explained it very well. Senator McCAIN said:

“The Senate was designed to protect the minority that is being drowned out by two votes, and that’s why California has two votes. That’s why Rhode Island—

Another small state—had two votes among the original 13, and New York and Massachusetts and Virginia had two votes.

The modern Senate reflects the same types of disparities in population as the original Senate. My home state, for instance, New Jersey, has a population that is greater than Alaska, Wyoming, Kansas, North Dakota, South Dakota, and Mississippi combined. But New Jersey only gets two votes in this body, and each one of those states I mentioned also gets two votes. So it is not surprising that when you do the math on the current Senate, you find that the majority is actually in the minority, and the minority is the majority.

Here is what I mean very simply put. The Republican caucus with 55 Senators and with each Senator getting half of the vote in that State represents 144 million people. The Democratic caucus with 45 Senators represents 148 million people. The first one, 144 million; the second one, 148 million—that does not look like much of a minority to me. That is what we are looking at.

Mr. President, what you find is the minority in this body, the Democratic caucus, represents more than the majority, and it is exactly what the Founding Fathers wanted to protect—minority rights in the Senate—because a minority of Senators may actually represent a majority of the people. So it is corrected by a process we have here. The Democratic caucus on this side of the aisle represents many more Americans than the Republican side. That is why we have a filibuster rule. That is why we generally operate by unanimous consent.

The right to filibuster is not just some obscure rule in the Senate. It is part of our American heritage, and it has been celebrated by our culture and our folklore. As many Americans know, the filibuster was immortalized in the film “Mr. Smith Goes to Washington.” Here we see a picture of Jimmy Stewart as he played Senator Smith. He used the filibuster to protect the interests of his constituents back home. This image shows Senator Smith in the midst of his filibuster.

From some of the things we have heard from the majority leader, you might think Mr. Smith was the bad guy in that film. No, Mr. Smith, as a filibustering Senator, is not only the good guy, but he is the hero of that film. That film is a celebration of our American democracy. It is a celebration of this Senate, the world’s greatest deliberative body. But if the majority leader is successful in ending the filibuster, in ending representation that the huge minority deserves, we will move from the world’s greatest deliberative body to a rubberstamp factotum.

The Constitution gives us an active role in the nomination process. The Senate is not a mere formality under the Constitution. The Founding Fathers intended the Senate to be a check on the President’s power. We hear our colleagues on the other side pleading for a majority vote; let the Senate act as it should.

The Senate is responsible for the quality of people we put on the courts, and if there is a challenge, so be it. Let the majority party make the case, convince us that these people are not what we think they are in terms of their activist views. Is it an inconvenience to the President to contend with the Senate? Perhaps. But direct your complaints to Thomas Jefferson, James Madison, and our Founding Fathers. You will find they had their hands full, and they knew how to deal with it.

I know our majority leader has said: We can keep the filibuster for legislation, just not on nominations.

But the American people know you cannot sort of end the filibuster. If this...
nuclear option goes into place, citizens across our country understand that their rights will be taken away in large part by those who have expressed themselves before they were nominated in matters dealing with gender, dealing with marriage, dealing with all kinds of issues. American people have a right to have a view.

No, this now says we are just going to do it for the judges. Beware, once that barn door opens, we are going to see all kinds of changes. You cannot sort of mend the filibuster. You either have to keep the filibuster or you end it.

Would the majority leader like to rename the Jimmy Stewart film, “Mr. Smith Goes to Washington Except for Judges”?

Speaking of popular culture, the biggest film of the year is opening this week, “Star Wars: Revenge of the Sith.” This is one of the characters in that film portrayed here on this chart. He is the leader of the Senate in a far-off universe. In this film, this leader of the Senate breaks rules to give himself and his supporters more power, and after this move from the Senate leader, another Senator states: This is how liberty dies.

One film critic described this film as a story of “how a republic dismantles its own Democratic principles.”

As millions of Americans go to see this film this week and in the weeks ahead, I sincerely hope it does not mirror actions being contemplated in the Senate. I say to my colleagues, do not let liberty die. I urge my colleagues, on behalf of the American people—and I ask the American people to express themselves on this—do you want to give up your rights to protect your children against a foul environment? Do you want to give up your rights to be able to work in a safe environment?

Do you want to give up your rights to decide such as war and peace? I urge do not let it happen. I urge my colleagues to oppose any attempt to break the Senate rules and destroy over 200 years of American tradition. We must save the United States and the interests of our country as a whole. I yield the floor.

The PRESIDING OFFICER (Mr. Burr). The Senator from Delaware.

Mr. CARPER. Mr. President, I have heard a lot about Senate rules and the filibuster. I came to try to make sure we preserve jobs and bring in new ones, to make sure kids get a new education, to make sure we brought down the costs of health care and made it affordable and extended to a whole lot more people, that we ran a fiscally sound ship of state, and that we provided for the security of our Nation. I came for all of those things. I never imagined I would be standing in a food fight on how we are going to approve these judges, how many confirmations are enough and what constitutes a short-fall.

In Delaware, we are proud of being the first State. We were the first State to ratify the Constitution. We did it December 7, 1787. The Constitution that the Ben Franklin Tavern in Dover, DE, had been hammered out about 75 miles north up the road in Philadelphia. The last part of the Constitution that was hammered out, maybe one of the more difficult aspects of the Constitution, was not only—and of course to be President, how long are we going to pick the President, how long will their terms be. That was worked out. They did not get caught up in how old does one have to be to be a Senator or how old does one have to be to be a Representative, how long are the terms going to be. That was worked out. What was hardest to work out in the Constitutional Convention, almost harder than anything else, was how we are going to pick judges. There was at the Constitutional Convention, led by Ben Franklin, who were fearful we would end up in this country with a king. We may not call him a king or we may not call her a queen, but we would end up in this country with a king. What was determined to make sure we did not do that.

If we read through the Constitution, it is an intricate set of checks and balances that are designed to make sure that we have a President but we do not have a king. With those sets of checks and balances, the Constitution has served us extraordinarily well.

The Constitution also said, in addition to having a House and a Senate and how one gets elected to serve and how long they serve, it also said the House and Senate could each set out their rules. The Constitution does not say what the rules of the Senate are. It says we can write our own, and we have done that.

We heard earlier this afternoon about how the rules have been changed. The Senator from Delaware. I am told we can change rules as long as we have a two-thirds supermajority to be able to end debate. Before 1917, Senators could not invoke cloture. Another Senator could talk literally as long as they could stand. From about 1917 to 1975 or so, the rule was that there had to be roughly a two-thirds supermajority to be able to end debate. Using the rules of the Senate to effect change, the rules were changed to say, no, a three-fifths majority, 60 Senators, is needed to bring debate to an end.

It is interesting how we confirm our judges in Delaware. Governors nominate with the advice and consent of the Senate. We do not nominate people to lifetime terms on the bench. We nominate them for 12-year terms. The remarkable thing in Delaware is for every—and I served 8 years as Governor—Democratic I nominated to the bench I had to nominate a Republican. We are equally balanced Democrat and Republican.

In survey after survey, the Delaware legal environment, including our judiciary, is regarded maybe as the best in the country. We do not have those food fights in Delaware. We have the best judiciary. We have Democrats and we have Republicans who serve on the bench. They are nominated by Republican and by Democratic Governors.

I ran into a friend of mine not long ago who has joined this debate on judicial nominations. He asked: Why do you not confirm more of the President’s judicial nominees? And I said: How many do you think we have confirmed, or what percentage do you think we have confirmed?

He said: Maybe half.

And I said: No, my friend, 95 percent.

He said: Really? Do you not have a lot of vacancies on the Federal judiciary bench?

I said: No. We have one of the lowest vacancy rates we have had in years.

I asked him in return: While we have confirmed over the last 4 years 95 percent of President Clinton’s nominees to the bench, what percentage of President Clinton’s nominees do you think were confirmed during his first 4 years?

Well, I do not have a chart here that says what the answer to that question is, but just to remind us all, from 2001 to the beginning of this year, 95 percent of President Clinton’s nominees have been confirmed.

I had a magic marker I would make a big yellow line through this and write in 81 percent because that is the percentage of President Clinton’s nominees that were confirmed in his first 4 years.

There is a great irony. I am told we never heard a peep or a squeak from our friends on the other side of the aisle during the first Clinton administration when his nominees were denied a vote on the floor. It was not because of a filibuster. They were denied a vote on the floor because somebody on the other side of the aisle in the Senate Judiciary Committee would not let a hearing be held, not on one or two judges nominated by Bill Clinton but on scores of them. They would not have a hearing. They would not let a nominee out of committee. They did not have to kill them on the floor in a filibuster. They did it in committee, quietly, out of the view of the public.

Now, why just a few years ago was it okay to deny 19 percent of President Clinton’s nominees an up-or-down vote on the floor? Why was that okay? And why is it with this President—he received 95 percent of what he wants and actually in the end he will get more than that. There are a couple from Michigan that we are going to confirm. Some of the 10 have basically withdrawn their names or retired from the bench.

The figure of 95 percent actually understates what ultimately this President will realize in confirmation victories.

The other number I want to share, talking about advice and consent, is 2,703. This number is 1. What do they refer to? During the first 4 years of
President Bush’s presidency, he nominated over 200 judges. Republicans and Democrats voted on those judges. There were 2,703 aye votes from the Republican side of the aisle on President Bush’s judicial nominees. In those 4 years, we have had over 2,704 no votes from the Republican side of the aisle on a judicial nominee of this President.

We can argue forever what advice and consent really meant to be when the Constitution was written. But if we are in a situation where the White House or the Senate, and if you look at the last 4 years and only 1 person out of 2,704 votes was no, does that give you any kind of confidence that we are going to see any sort of checks and balances going forward? It doesn’t give me much.

I do not care if you are a Democrat or Republican, it should not matter. It should not matter who is in the White House or the House and Senate. But when you get a situation where you have one party that controls the White House and one party controls the Senate, and you have, out of 2,704 votes for judicial nominees, only 1 Republican Senator who ever voted no, and it was for somebody initially nominated by Bill Clinton, that is something we ought to worry about.

So today, someday we are going to have a Democratic President. Someday we are going to have a Democratic majority in this body. We have sayings in Delaware. I bet they have in Minnesota, too. Maybe in Vermont. Among those sayings are these: Chickens do come home to roost; the beds that we make are some days the beds that we get to sleep in; what goes around comes around.

I promise you, I promise you my friends, a resolution is made to pull this trigger, this nuclear option, and we end up with a situation where the rights of the minority really are, in my view, ignored, maybe even trampled on, the Republicans who do this will come to rue the day.

Let me close with this. I came here to get things done. As I look around this floor, the other Senators who are here whom I respect, I know you came here to get things done as well. I mentioned, someday the kinds of things I wanted to see us accomplish. I describe myself as a recovering Governor. We have a recovering mayor who is presiding here today. We like to work together. We would like to work across the aisle. We are even happy to work with the Democratic or Republican. My fear is here is what is going to happen. If this action succeeds, if we do change the rules of the Senate to lower to 51 the votes that are needed to end a filibuster on judicial nominations, that is a slippery slope. If we can do it on judges, we can do it on other nominees to other posts, we can do it on amendments, we can do it on bills. It is a slippery slope. But there is an even greater concern to me, as a guy who wants to get things done.

I see Senator LEAHY is here. He is working with Senator SPECTER on asbestos litigation reform. We need to pass that litigation. We need to right a wrong. My fear is, if we take this step, trying to work out a very difficult compromise on that legislation will be made more difficult, not easier. We need to address the rising cost of health care and all the folks who do not have it and cannot afford it, and employers are stopping providing it. We need a comprehensive energy policy in this country. It is tough in the best of times to hammer that out.

Mr. LEAHY. Will the Senator from Delaware yield? Mr. CARPER. I am happy to yield. Mr. LEAHY. I absolutely agree with the Senator from Delaware. We have a lot of bipartisan legislation that is not even being looked at. The NOPEC bill is one, with Senator DEWINE, Senator KOHL, myself, and others. We looked at the fact that we have gone up nearly 50 percent in the last 5 years alone, and yet we have no constraints on artificial prices being set by the NOPEC countries here in the United States. It takes more than holding hands with Saudi princes to bring down prices. We have to ask for real efforts. This is legislation that could pass. Put some teeth in it. Instead of holding hands, we could hold court actions, and we could get somewhere ahead. That is just one area.

The Senator from Delaware mentioned the asbestos bill. Senator SPECTER and I have worked on it on a totally bipartisan fashion with Senators on both sides of the aisle. We have a bill that could pass. It would take some effort on the floor. It would take a week or so, but it could pass. Victims of asbestosis would be helped. Companies would have some idea what their costs are and would dramatically improve. That bill is going to die if the nuclear option goes through because we will lose the ability to move bipartisan legislation.

We have law enforcement legislation at a time when most of the law enforcement grants, such as the COPS grants and whatnot, are being cut by the administration. A lot of Members on both sides of the aisle are trying to find a way to get that money back to our police officers, the money being cut. We cannot have a debate on it.

This is going to take up—you confirmed 208 judges; blocked, actually, 5. I have been here 31 years. I don’t believe that under the Constitution that is good. Certainly no baseball team ever made more difficult, not easier. We should not matter who is in the White House or the House and Senate. But when you get a situation where you have one party that controls the White House and one party controls the Senate, and you have, out of 2,704 votes for judicial nominees, only 1 Republican Senator who ever voted no, and it was for somebody initially nominated by Bill Clinton, that is something we ought to worry about.

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partisanship” and to work to reduce gas prices, make health care more affordable, create new and better jobs and give our veterans and their families the support they need and deserve.

Among the matters being neglected in order to promote this political exercise is consideration and passage of the NOPEC bill, S. 555. This is bipartisan legislation. Our lead sponsors are Senator DE WINE and Senator KONI. With the increase of gasoline prices by almost $2 a gallon during the Bush Presidency, with Americans having to pay so much more each week to get to work, drive their kids to school and just to get around, the Republican leadership of the Senate is ignoring a substantial burden on American working families.

This week, the national average price for a gallon of regular gasoline was $2.18. In Vermont, gas is slightly less expensive, but still a hefty $2.15 per gallon. Just a year ago the price was $1.92, and when Bush took office it was $1.46 a gallon.

The artificial pricing scheme enforced by OPEC affects all of us, and it is especially tough on our hard-working Vermont farmers. Rising energy expenses are an annual trillion-dollar addition to the costs of operating a 100-head dairy operation, a price that could mean the difference between keeping the family business open for another generation or shutting it down.

With summer coming, many families are going to find that OPEC has put an expensive crimp in their vacation plans. Some are likely to stay home; others will pay more to drive or to fly so that they can visit their families or take their well-deserved vacations.

Americans deserve better, and if the White House will not act to abate this crisis, it is time for Congress to act. It is past the time to hold hands and exchange excuses with Saudi princes to artificially inflate the price of gasoline. The President’s “jawboning” with his Saudi friends has proven unsuccessful. It is now time to act, and the Senate, under the Republican majority leader, is choosing instead to revisit a bipartisan NOPEC bill. Why the Republican leadership is delaying Senate consideration of the Defense Authorization bill I do not understand. At a time when we have 25,000 young men and women in combat zones and when the home front is being affected by recently recommended base closures, I would have thought the Defense Authorization bill would be a priority.

Let me mention just one other set of legislative issues. Last week was Police Week. On Sunday I was privileged to attend the National Peace Officers’ Memorial Service commemorating the service and sacrifice of 354 public safety officers killed in the line of duty over the last year. I worked in a bipartisan way with Senators SPECTER, BIDEN, HATCH, BROWNBACK, CORNYN, DE WINE, DURBIN, FEINGOLD, FEINSTEIN, KENNEDY, KOHL, KYL, SCHUMER, SALAZAR and COLLINS to introduce and pass S. Res. 131, which recognized May 15 as Peace Officers Memorial Day and called upon the entire Nation to join in honoring our law enforcement officers. The President and I presided at the ceremony held here on Capitol Hill on that day of remembrance.

This week we should honor our law enforcement officers with supportive legislative action. In the past we have worked in a bipartisan way to improve the Public Safety Officers Benefit Program and to provide educational benefits for the families of State and Federal officers who have been killed in the line of duty. Sadly, the administration has not yet implemented the latter provision of the Public Safety Officers Benefit Program that we enacted last year. I have urged a Judiciary Committee hearing on this delay, as well as on the general state of police officer safety. The Fraternal Order of Police, the International Association of Chiefs of Police, the National Association of Police Organizations, the National Sheriffs’ Foundation and other law enforcement organizations are all working with us to ensure that the Justice Department produces comprehensive regulations that effectively create a more user-friendly PSOB Program.

I will conclude by considering the Social Security Fairness Act, S. 619, the bill that Senators COLLINS, BOXER, FEINSTEIN and a number of us have cosponsored over the years to protect the Social Security and retirement of police officers. Those on the front lines protecting all of us from crime and violence should not see their Social Security benefits reduced because they have historically participated in separate retirement benefit programs. That needs fixing and this bill would be an appropriate one to take that Senate action.

These are merely examples of some of the business matters the Republican majority of the Senate has laid aside.

Mr. CARPER. Mr. President, what I want to do today in close-up discussion is get our attention focused on our first fear. Our first fear is that we end up with this partisan battle. Those of us who fervently want to accomplish asbestos litigation reform, a comprehensive energy bill, determining what the business model for the Postal Service ought to be in the 21st century or the passenger rail service in the 21st century—what should our next steps be in welfare reform? How are we going to provide health care coverage, reduce the costs, and extend coverage to all kinds of people? There is a ton of stuff, so many issues we need to address.

The postal bill alone—the Presiding Officer serves on the Homeland Security and Governmental Affairs Committee with me; Senator COLLINS, myself, and others, to determine what should the Postal Service look like in the 21st century. What should the business model be? We unanimously passed the bill last year out of committee. Over in the House of Representatives, almost the very same bill was negotiated, debated, and passed unanimously by our counterpart committee. There was not a single “no” vote. We could not get either bill to the floor for debate. And that is what we agree.

I remind my friends, if it is that hard to get legislation through the House and Senate to the President for his signature when we agree, God help us on difficult issues such as asbestos or comprehensive energy policy or health care or the like.

Finally, I have a whole lot of quotes here. I was trying to figure who to close my remarks by quoting. I looked for something for the Senator from Minnesota, the Presiding Officer, which might seem appropriate. I couldn’t find anything, at least on this subject, so I turned to another source. I think it is
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actually pretty good. It is not a Senator, but he probably wouldn’t be a bad one, a fellow who has thought a lot and written a lot and I think is generally regarded more favorably on the other side of the aisle than this one, and he made a point that I think is worth mentioning. I will close my comments today with a quote from George Will. Here is what he said about the filibuster:

The filibuster is an important defense of minority rights, enabling democratic government to measure and respect not merely numbers but also intensity in public controversy. Filibusters enable intense minorities to slow the governmental juggernaut. Conservatives, who do not think government is sufficiently inhibited, should cherish this blocking mechanism. And someone should puncture Republicans’ current triumphalism by reminding them that someday they will again be in the minority.

Will goes on to conclude:

The promiscuous use of filibusters, against policies as well as nominees, has trivialized the tactic, but filibusters do not forever deflect the path of democratic government. Try to name anything significant that an American majority has desired, strongly and protractedly, but has not received because of a filibuster.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from North Carolina.

Mr. BURR. Madam President, I rise to urge my colleagues to support an up-or-down vote on these judicial nominees. I have a great respect for my colleague from Delaware, and I do not stand on my party charts or big numbers. I am not a recovering State legislator or recovering mayor, and I hope I am never a recovering parent or father.

I stand up as a parent today, as a father of two kids, with the full knowledge and understanding that the work we do up here in large measure dictates the America that is going to be there for them. That if we are to follow the strategies on that side, the chart that my “can’t majority” desired, would never change because we would never vote. That bipartisanship that is needed for legislation—whether it is health care or whether it is energy policy or whether it is asbestos reform—would not be achievable because we would never come here to register a yeas or nays on behalf of the people who sent us here.

We are faced with difficult votes, but we take those difficult votes. We do not shy away from responsibility. We do not look to those people elected us to come here and to make a judgment call and, more importantly, to be held responsible for it. The only thing I can think of relative to not taking a vote is that there are some who believe they will not be held responsible. In fact, they force this body not to vote, that eventually people will wear down and that if we happen to seat someone that is not the best, the most qualified, that is OK because it saved this institution a fight. I will tell my colleagues I cannot think of anything more important if there is going to be a fight that that fight be on who we put on the bench.

Now, today’s debate, though we have a nominee up, I don’t think is about one particular person because clearly we have not heard arguments that this is an unqualified individual. As a matter of fact, in seeking compromise for being on the bench, and ultimately seeking a nomination by the President to a Federal court or to the Supreme Court? If you want to do it, understand you will go through personal character assassination; that in some cases you may have to wait 4-plus years to get there.

In 1995, Senator LAUTENBERG stood on this same floor, in this same building, as a Member of the Senate, and he said this then when talking about fairness of the system and how it is equitable for a minority to restrict the majority view:

Why can we not have a straight up-or-down vote on this without threats of filibuster. Without threats of nuke. Whether it was Robert Bork and John Tower or Clarence Thomas, even though there was strong opposition, many Senators opposed them. The fact is, the votes are held up or down.

June 21, 1995, Senator LAUTENBERG.

Today, he denies this Senate a vote on a judicial nominee and threatens a filibuster on all the nominees.

The Senator from South Carolina, Mr. KERRY claimed it is dangerous for the Senate to limit filibusters on judicial nominees. Senator KENNEDY and Senator LAUTENBERG joined Senator KERRY in defending judicial filibusters. But on January 5, 1995, just shortly before, Senator LAUTENBERG was on the Senate floor making the statement I read, all three of those Senators voted to change the Senate rules to eliminate all filibusters on nominations, motion fo平 any day in January 1995, we would have an up-or-down vote on these judicial candidates, but we also wouldn’t have the ability of the filibuster as a tool in the legislative process.

Some claim this is the start down a road to doom. It is not down the road to doom. Senator KERRY, Senator LAUTENBERG, and Senator KENNEDY voted for it and were joined by Senator FEINSTEIN, Senator BURKIN, Senator SARASANS, Senator HARKIN, Senator LIBMAN, and Senator BINGMAN. We are not plowing ground that hasn’t been plowed.

If anything, what we are saying, for 214 years this institution, the Senate, had a gentleman’s agreement, and that agreement was that the filibuster would never be used for judicial nominees. For 214 years they showed restraint, even though the rule allowed them to do it because they understood that to do that would make sure the best and the brightest found their way to the bench. For 214 years a handshake was all it took.

Something changed in the last Congress. For the first time it was actually used. Now, in an effort to have an up-or-down vote, to have a process like I described in the last election to the people who voted for this process, if anything, I would commend and try to achieve if needed to maintain that the constitutional option of eliminating the filibuster only as it exists for judicial nominees is removed, some suggest that would be disastrous for the Senate.

Some of those same people in 1995 voted to eliminate the filibuster for judicial nominees, for the legislative process, for everything, and they are the same ones who claim this would be disastrous for the Senate today.

So much has been said, so many accusations, so many claims, so many revisionists of history. The reality is in a conversation I had with a high school student just this week, as she looked at me: Can you explain these actions on this side? I talked to her for years that the gentleman’s agreement allowed a nominee to get an up-or-down vote with no filibuster and the fear that we were reaching a point where we might have to make a decision, and the decision that existed in this Senate and around the country that it might be disastrous. She looked at me after I explained it to her and she said: Senator, with 214 years of experience, it is not going to be disastrous. Why would you want to give up something?

The reality is that sometimes it takes years to understand what we have a hard time understanding up here. For 214 years the filibuster was not used, and we picked the best and brightest and got them on the bench and they guided this country and we have been headed in the right direction.

If the choice is made and we have to choose to eliminate this tool, this is not dangerous. It is a dangerous thing to the institution. We have 214 years of experience. We will be just fine. And the challenge will be to protect that filibuster as it relates to the legislative process.

I am here as a new member, as a father, as a citizen, who deeply believes I was sent to the Senate to get work done. That work I do on behalf of North Carolina and for the citizens across this country. There is no doubt in my mind that I was sent here to do this. I was not sent here to do nothing. North Carolina and the people of North Carolina, I heard me say that I would do, and that was to work hard and to accomplish solutions to real problems. There is no doubt in my mind the task includes ensuring that the Senate provides judicial nominees on up-or-down votes. I am not going to let my colleagues which way to vote, but isn’t it common courtesy to allow these nominees to have some finality to this process? The judge that is up today, Priscilla Owen, has been in this process for 4 years. I have asked myself, even though I am not a lawyer by profession, would I stick with it 4 years? Would I put myself and my family, my
friends, my career through the types of delays that she has faced? The answer is, I do not know.

The question is, What are future nominees going to say when they get that call, when the President of the United States asks him if he is a Republican or Democrat—calls in the future, and says, I need your service to this country, and they look at the precedent of 4 years, or 3 years, of 1 years, of 18 months, of the harassment, of the claims? Are they going to say, yes, sir, or yes, ma'am, and say, I am an appointee of the United States? They might. But we might lose the opportunity at the best and the brightest.

One month ago, I joined my freshman colleagues in urging the Senate leadership to get in a room, to break the current impasse regarding judicial nominees, and to develop a process that was respectful of both parties, where judicial nominees, at the end of the day, receive an up-or-down vote. I then stated the Democrat’s offer was: We will vote on five but chuck two of them over the side, and you pick which two. I cannot think of anything worse for the future of this country than for us to treat the best and the brightest with the disregard that prof- fer would suggest.

I remain hopeful still today that a resolution can be reached. Many of us have worked toward a fair process where all judicial nominees with major- ity support, regardless of party, receive an up-or-down vote. Let me say that again: regardless of party, receive an up-or-down vote.

What happened for 214 years? This debate is about principle. It is about allowing judicial nominees an up-or-down vote. It is very clear, though. I believe if we ever had a tie in the Senate, our highest court, the Court we look to to be the best and brightest to interpret law and the Constitution, is insignificant in the process. It means that whatever that court of appeals was—whether it is the Ninth Circuit—whatever decision they came up with that somebody believed was wrong, and they appealed it to the Supreme Court, and the Supreme Court, on the merits of the case, heard it, would become the law of the land. My colleagues on the other side argue that the reason this is so important is because a Federal judgeship is for life. Let me say to them today, if you were a senator and you were appointed to the Supreme Court of the United States, and you jeopardize that there may be a 4-to-4 tie, the result is not for the life-time of the judge, but it is for the lifetime of this country because whatever that court of appeals does is not changed by the Supreme Court, our highest court, the Court we continue to serve as an illustration of effective democracy around the world.

The integrity of our judicial system is so very important, and it will certainly suffer as a result of inaction.

Obstructing votes on Presidential nominees threatens the future of our judicial system and the nature of the Supreme Court. You see, I am not sure that many Americans have stopped to think: Well, what happens if this is ex- ercised for Supreme Court Justices? Because in the next several years we will have one or two or possibly more Supreme Court nominees to consider.

Well, the Court still meets. If we are not able to produce a Justice out of this fine Hall, then they will meet with eight Justices. I have to believe there is an odd number of Justices for a very logical reason. It was so there would not be a tie.

On a 4-to-4 tie, what happens? Seldom have we asked the question. On a 4-to-4 tie in the Supreme Court, the lower court’s decision stands. That is how the Supreme Court, our highest court, the Court we look to to be the best and brightest to interpret law and the Constitution, is insignificant in the process. It means that whatever that court of appeals was—all the decisions will stand.

I urge my colleagues to consider the nomination of Priscilla Owen and all the Federal judges who enjoy the support of a majority of the Members of this Senate. I am reminded, as I stand here, that so much has been said that suggests this process has not been fair. I have looked back at some of my colleagues who have been here for years and who have—they have had one day to have in this fine institution.

Senator BOXER, in 1997, said:

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

What has changed since 1997? I read this statement four or five times. There are no exceptions. There is no “shall be” or “case of.” It is very clear, “given the opportunity for a vote on the Senate floor.”

And Senator DURBIN, who has been a regular in this debate, in 1998, said:

I think that responsibility requires us to act in a timely fashion on nominees sent be- fore us.

He went on to say:

If after 150 days languishing on the Execu- tive Calendar that name has not been called for a vote, it should be. Vote the person up or down. They are either qualified or they are not.

One hundred fifty days should be an automatic trigger that a judicial nomi-
Association, having served as a supreme court justice in one of the largest States, having been elected in that State with over 80 percent of the vote, having accolades from Democrats and Republicans alike who have served with and against him, as well as from the legal officials in Texas—I don’t think she could have possibly imagined she would be involved as one of the focal points of this maelstrom we see pouring out here over the last few days and, unfortunately, over the last couple years on the floor of the Senate.

These nominees have my respect. They have my respect for their courage and for their perseverance. It has been an act of perseverance on the part of many of them. All of them could have easily walked away—not that they don’t have good jobs and great careers, and if not universally respected in the legal community, they are certainly highly respected. They don’t get nominated for these positions unless they are highly respected within the community.

So I think it would have been very easy for many to walk away, but they have not. They certainly have earned my respect, no matter what happens here. I am very sad of course when we take highly qualified people who are willing to serve, and who have served in the judicial capacity, and treat them this way. We hear so much from the other side about many of our colleagues as judges, and as being critical of judges, and how it is a security threat to judges. Well, I suggest what we have been seeing over the last couple of years in the way these judges and their records have been distorted, they have added to the sense of frustration of the American public as to our judiciary and our system of justice in this country.

We have an opportunity to correct that. We have an opportunity to step away from the mistakes of the past in the next few days and to allow up-or-down votes on the floor of the Senate again. For 214 years, 214 years—in this Chamber and the Chamber just down the hall, and once in a couple other places—in Washington, and other places, such as Philadelphia—we had votes by Senators who were elected at very difficult times in our Nation’s history, at contentious times, where judges had major roles to play on the issues. Think back to the time of the Dred Scott decision, and times of slavery, during the early 1800s, when judges played a huge role in this issue that eventually fractured this country. I am sure there were times when either side, depending on who was the President and who controlled the Senate, felt it would have been unfair to their cause, the Northern cause or the Southern cause, to have a person on the Supreme Court who would vote against their interests. I am confident many felt very much tempted to vote and join a filibuster to block a nomination to require a supermajority vote.

But if you think about it, it is remarkable they withheld from doing that and chose instead something most people would say is much more dramatic, and that is to secede from the Union. But Senators, enduring that very contentious time when there were fights on the floor of the Senate, understanding the importance of the role of the Senate in the process by which we govern ourselves; that the process protects our rights; the process protects the system of Government. They chose to withhold their votes from the passage of the amendment for the issue of the day—for the right and controversy to do what was best for the institution of the Senate, the greatest deliberative body in the history of the world, potentially.

And now we have seen this infection that entered into the bloodstream of the Senate. Whether you want to call it a partisan infection or an ideological infection, there certainly is a sickness. I think it is a sickness that, candidly, both sides of the aisle feel. I don’t believe there is any law that I know of very good about what we are going through on either side. It is making us all weaker, sicker, and it is so doing to this institution. We need a cure. We had a pretty healthy institution when we were here 214 years. I think we can look to the prescription that we had for 214 years for a cure to what ails us in this body today.

The Senator from North Carolina accurately said we had an agreement—he used the term “gentlemen’s agreement”—a handshake, that was the way we were going to proceed. I argue those in the 1850s had the right to filibuster judges. Those in 2003 had the right to filibuster judges. Those in 2005 had the right to filibuster judges. I had the right, during the Clinton administration, to filibuster his appointments. There were those whom I wanted to filibuster and those whom I desperately didn’t want to see on the court, and we stood down because in spite of the passion of a particular issue, I thought it was a mistake to put a particular person on a particular court, there was something lasting, something more important, something certainly not eternal, but certainly eternal for as long as the United States shall survive, and that is this institution. We should not go mucking around in this institution and changing the way we do things, particularly when it comes to the balance of powers and the independence of one of the branches of our Government, the judiciary.

We must tread very carefully before we go radically changing the way we do business here, which has served this country well. We have radically changed the way we do business here. Some are saying “we are trying to change the law, we are trying to break the rules.” Remarkable hubris. Imagine, the rule that this is the way we confirm judges has been in place for 214 years, broken by the other side 2 years ago, and the audacity of some Members to stand up and say, How dare you break this rule, it is the equivalent of Adolf Hitler in 1942 saying: I’m in Paris, how dare you invade me, how dare you bomb my city. It’s mine. This is no more the rule of the Senate than it was the rule of the Senate before not to filibuster. It was an understanding, an agreement, and it has been abused. The right to filibuster judges. That right on the floor of the Senate is a reflection of what we often see in our society. What we often see in our society is a government that increasingly is passing laws. I get this from some of my constituents sometimes. They say: You guys are always passing more and more laws. We have more and more laws, and ultimately when you are passing laws, in many cases what you are doing is restricting people’s freedom.

The more laws we have on the books, the more laws there are to obey, the more laws you have the ability to break. So why do we do this? Because we respond to problems in society that come about certainly, in many cases, because what we once thought we did pass as law, people from doing, we now have laws in place to punish people who heretofore understood it simply was not a good thing to do.

We did this recently with the corporate scandals. What did we do? We passed a huge law, Sarbanes-Oxley, in response to what? Activities by a group of people who simply forgot about the handshake, forgot about the duty we have to each other, and pushed the law to the limit. So now, instead of people from doing, we have laws in place to punish the people who had not even thought about breaking the law or doing the things that were done by Enron and Tyco and all those people. So we had to pass laws on everybody.

Was it a good thing to do? We had to pass the law because there were some who could not live by the law, could not live civilly, could not live with not just the letter of the law, but the spirit of the law.

So we had to pass legislation that restricted freedom, that put burdens on people. That is why I have said many times I am not crazy about having to vote to eliminate the possibility of filibusters on judges. I am not anxious to do this anymore than I was anxious to pass some of the corporate responsibility provisions. One would like to think, particularly here, where we are supposed to be a reflection of what is best in our society to understand what we are doing here is wrong and just step back from the ledge and let civility reign, let the tradition of the Senate be upheld.

I do not want to have a law. I want to have a Supreme Court that can agree to act civilly, to respect tradition in the process of running this place that has worked well for 214 years. That is what I want.

So I have encouraged many to sit down, and try to negotiate. I encouraged our leaders to do so. I know our leader has tried diligently. I just spoke with him on the phone a few minutes
ago, and he continues to work to avoid what no one—at least I hope no one in this Chamber—wants to see happen. I certainly do not. But we can no longer live—just like we cannot live with the opportunity of those to cheat shareholders and employees—we cannot no longer live with the minority trying to cheat those nominated by the President of the United States from a fair up-or-down vote in the Senate. We cannot tolerate that. That is behavior beyond the pale. That is behavior that the Senate, prior to the last one, tolerated. None.

I have repeatedly asked and I know other people have asked repeatedly. Name one judge whom the leadership of the Senate who had majority support who was not confirmed. Name one, prior to 2 years ago. Never happened. Never happened in the entire history of the Senate. Never happened. We have 10, potentially 16 who would have that privilege because of this new precedent.

I cannot understand how Members of the Senate can come here and say what we are doing is breaking the rules. Breaking the rules? I do not know how you can possibly contort the facts of this case around to where the Senate Republicans, by returning to the tradition of the Senate of 214 years, is somehow breaking the rules.

This is truly a sad day. It has been a sad week. If you look and listen to my constituents—and I am sure all of our constituents—they are not happy about this debate. They are not happy a group of 100 leaders—54 senators—and the Senate cannot negotiate and find some way of acting civilly, of reflecting to our children and our grandchildren that we know how to play nice and we know how to play by the rules.

But the passions of the moment, the passions of the moment have swept over us, and those groups out there that are fomenting this because of their own ideological agenda are the culprits, or at least the motivation, but the votes are here. The votes are here. I am hopeful there are enough on the other side of the aisle who will come to the realization this is not good for them, this is not good for their ideology. It is not good for our partnership, this is not good for the institution, and this is not good for the country to continue down this path.

When I came to the Senate, I came from Georgia, from the legislature, like the Presiding Officer. I had never dealt with executive nominations before. So one of the things I looked into is how do I determine what a good judge is. We did a little looking around and determined evaluating the qualifications. First, are they qualified? Do they have the educational skills, the experience to do the job? Second, are they ethical, not just did they break any laws, but are they ethical individuals and is there the reputation for high ethics? And three, do they have an understanding of the role of a judge? Those are the three things.

You did not hear me say, do I agree with them on this issue, this issue, or that issue, because my feeling is whoever is elected President will appoint people who agree with their philosophy. That is how it works, just as when you appoint a Secretary of Veterans Affairs, you appoint someone who intellectually agrees with your philosophy.

When President Clinton was elected, I came here, and I supported almost every Clinton nominee. Did I agree with his thinking? Did I agree with most of them would be damaging to the court? Absolutely. Did I vote for them? Yes. There are a couple of exceptions. One in particular, I have to tell you, who caused me a lot of heartburn was Judge Richard Paez from California who showed a record of activism on the court that was upsetting to me and showed that he was not someone who understood the role of a judge.

So under that he certainly was qualified, and he raised questions about his ethics, but I did have a question as to whether he understood the role of a judge. From his experience it showed me he did not.

There were many who wanted to filibuster Judge Paez because of that very fact. In my mind, certainly from the standpoint of not wanting someone on the court, it would have been a justifiable filibuster, except for the fact that is not the way we do things in the Senate, because for President Clinton, he won the election, and he can nominate who he wants. And we in the Senate have had a tradition saying if you can get a majority of votes in the Senate, you get confirmed. It is about majorities. And by the way, I voted for cloture on Judge Paez and voted against him on the floor when an up-or-down vote came. He did not get 60 votes. Had we filibustered, he would not be on the Ninth Circuit today. It was not the right thing to do. It was absolutely not the right thing to do.

I suggest that we have changed the qualifications from highly ethical, highly qualified and understanding the role of a judge to someone who is “in the mainstream.” That seems to be the idea now. So we are talking about ideology, in the ideological mainstream.

There were probably—well, Richard Paez, certainly from my view, I would argue, is probably not in the ideological mainstream of America but they all supported Judge Paez.

Probably Justice Harlan, who was the lone dissenter in 1896 in Plessy v. Ferguson, was not in the mainstream. Probably Justice Reagan was not in the mainstream. There are a lot of judges who are not “in the mainstream” depending on what stream one happens to be swimming in.

Elections have consequences. In 1961, John F. Kennedy was the President. He won the election, and he got the benefit of the doubt on the Senate floor. He got an up-or-down vote. Majorities matter. I do not think my colleagues will hear the Senator from Georgia or the Senator from Vermont, or the Senator from the other side of the aisle complain because for 18 months Priscilla Owen was held in the Senate Judiciary Committee during the chairmanship of Senator Leahy. I certainly will not complain. It was his right not to support her nomination to the Senate floor. Why? Because they were in the majority. If a majority of that committee did not support her nomination, fine, hold it in committee. Defeat her in committee. That is fine. No problem. If someone happens to be reported out and a majority defeats, fine, majority rules. This idea that 60, 80 whatever Clinton nominees were held in committee by Republicans during the last few years of the Clinton administration they were held because the majority opposed them. The majority rules, up-or-down vote on majority vote. That is the 214-year tradition of the Senate.

This idea now is the minority rules. One can lose the presidency, lose four seats in the House and control who is going to be the next circuit and Supreme Court judges in the United States? Very interesting. I guess elections do not matter. I guess who people appoint does not matter. Does that fit into the argument we are hearing that something happened to the minority in the Senate. They are the ones who should dictate who the nominees of this President should be. They are the ones who should dictate who comes to the floor and whether they get a vote or not.

That is not the precedent of 214 years. It has been an up-or-down vote. This is an outrage. This is an abuse of power.

It is interesting we are in the Senate, and we are talking about the minority rules, abusing power. Yes, the minority can abuse power in this case, and in my opinion they certainly have.

One final comment, and I apologize to the Senator from Georgia and I appreciate his patience. I just want to make a comment on one case. Yesterday I heard the Senator from California make a statement with respect to Janice Rogers Brown, one I am particularly concerned about because it deals with the issue of Charities. I heard the Senator from California in describing Justice Janice Rogers Brown’s decision in that case and she used the following words in describing her dissent: She, meaning Justice Brown, was the only member of the court who voted to strike down a State antidiscrimination law that provided a contraceptive drug benefit to women. That is her comment.

Now, she did not go into the fact why this law said. What was this law? Well, it was a law that said that if an employer provided health insurance they must provide contraceptive coverage—must. Now most folks who have
dealt in this area before would say: Is there not an exemption for those religious organizations who do not believe in contraception? The answer is the California legislature did provide such an exception. Let me read the exception. It said that we will exclude from coverage any contraceptive procedures that are contrary to their religious tenets. Sounds reasonable. We do that all the time. If it is contrary to religious tenets of a religious organization, they do not have to offer this particular kind of coverage.

As a Catholic, the tenets of the Catholic Church are that contraceptives are wrong, and therefore they do not want to, according to their religious tenets, offer that service to their employees. Well, this is the California exception for a religious employer: One, the entity whose purpose is the inculation of religious values. Well, this is Catholic Charities, is it Catholic Charities' role to inculcate religious values? Of course it is. The key roles of the Catholic Church is to care for the poor, to care for those who are less fortunate. It is a basic and core value of the church. We hear it repeatedly offered by Members on the other side.

We have discussions about the church and its theology, how core and central helping the poor is. So they do not qualify under that.

Two, that primarily employs persons who share its religious tenets. Well, Catholic Charities does not primarily employ people. They employ people who want to serve the needs of the poor, and they do not ask whether you want to go to church or not at a Catholic Church.

Three, that serves primarily persons who share those religious tenets—in other words, only Catholics. Obviously not. They serve everyone. Mother Teresa is the classic example of a Catholic out on the front lines serving the needs of the poor irrespective of who they are.

Four, and qualifies as a church under a particular section of Federal law. Obviously, Catholic Charities is not a church. Under the religious exception of the California statute, Catholic charities is an arm directly under the control of the bishop, a mission of the church, not a religious organization.

What Justice Brown said was that is an outrage, that is unconstitutional, it is against the Constitution. I want to hypothesize and suggest that a Catholic organization, Catholic Charities, under that construct, has to offer services in their health care plan. I will agree she was the sole person but that is hardly striking down the rights of women to have contraceptive services. This was an infringement upon the Religious Liberty Protection Act.

I find it very interesting a lot of folks come in here with their scorecards. Well, she voted against contraception this many times; she voted against women this many times, she voted against this, as if judges are supposed to keep a scorecard as to who they vote for and against as opposed to following what the law says.

So if a consumer comes before a judge, they are supposed to be pro-consumer? If a business person comes before a judge, they are supposed to be pro-business? What if my colleague wants judges to do, have a scorecard and make sure they are 50–50 on all of these things?

These litmus tests that are being spewed from the other side are a complete undermining of what the rule of law is to be about, about what justice is to be about. They are infusing politics, policy, and partisanship in this process.

We must stop this. We must have up-or-down votes. I hope we do it in a way that does not force us to vote to do that.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. ISAKSON. Madam President, I comment this morning from Pennsylvania on his remarks. For the moment that he is here, I want him to hear me say something.

I make the remarks I am about to make with a full understanding, were I in the minority party and this another minority, I would need to make exactly the same speech and take exactly the same position. You see, I am new here, but I have learned something very quickly. The words you say today will be the words repeated to you tomorrow. I learned that out in the bottle in the 108th Congress. Whether it was Democrats or Republicans, one day somebody would ultimately have to decide: Was the filibuster intended to be used on advice and consent?

With all due respect to everybody I have heard, it is just incorrect to say that to do away with the filibuster is going to make us a rubberstamped body. Go ask Clarence Thomas if this place was a rubberstamped body, or Justice Bork. Think about the confirmations, most contentious in the last 20 years. Nobody invoked a filibuster. One of those justices was confirmed. One was not.

There are many responsibilities of the Senate that are designated in the Constitution. Impeachment is one. Whoever heard anybody filibustering an impeachment? Did you? The Constitution says the Senate will conduct the trial, as it says the Senate will advise and consent on treaties—by two-thirds majority. And on justices of the court—simple. It doesn't say maybe. It doesn't say if you feel like it. It is not even confusing. I have it in my pocket. I read it right before I came over here just to make sure I hadn't mistyped something because I heard twice today people say this document, the Constitution, doesn't say things that it does say.

I rise also, understanding how important the words are, because the second speech I made in the Senate, the first week of February this year, there was nobody in the Chamber. I've got a bigger crowd with the Senator from Pennsylvania than I had. It was early in the morning. It wasn't much of a gallery. I figured nobody was listening. The distinguished Democratic leader quoted me seven times since I made that speech.

I want to address that quote for a second.

You see, I told the story of being in Baghdad and talking to a Sunni, a Shiite, and a Kurd and asking the Kurd: Who knows that you are a minority, aren't you scared the Shites are going to run over you? And he said: Oh, no, we will use filibuster.

I thought that was a great remark. Here was a Kurd from the north of Iraq, in a place that had just won its liberty thanks to the blood, sweat, and tears of the United States of America, and he was reading Adams and Jefferson and studying us.

The next thing I know, the distinguished Mr. Reid from Nevada says I don't blame him. But just so the record is set straight, he is quoting a Kurd who read about America, who is in the minority party and this another minority, they would need to make exactly the same speech and take exactly the same position which, I presume when it is finished, will provide for a filibuster over issues but not a filibuster to be used to obstruct the justice of the new democratic nation of Iraq.

I know my time is short. But I want to make some observations. I want to make my remarks in the context of Justice Brown. I know that Mrs. Owen is the current topic of discussion, about which at some point in time we hope there will be a vote, but Janice Rogers Brown is around the corner, and I felt like, after listening to all these debates, nobody is really talking about anybody's qualifications. Have you noticed that?

One of the deals that was offered was: tell you what, we will approve any five, you just give us two we are not going to approve. Does that tell you they care anything about qualifications? Why, if you thought there was an unqualified judge, would you let the other side pick five and not pick two? I don't think qualifications are the issue. I understand that. That is another reason why I say this is not a superfluous argument. We are not talking about the Constitution which was still being decided, and had the roles been on the other side. And it is important that we decide it today.

Janice Rogers Brown was born in 1949 in the Deep South. I was born in 1944 in the Deep South.

When Janice Rogers Brown was born, I don't know that her parents ever envisioned that she would be a supreme court justice in the State of California. When I was born, I doubt my parents envisioned that I would be a Senator. However, in 1944, for a male white child born in the South, it was possible to be a Senator. In 1949, in the South, in Alabama or Georgia, it would not have
been possible for a parent to dream that for a female black child.

In my lifetime of studying this body, the most prevalent use of the filibuster was by southerners in the debates over the civil rights laws in the 1960s. The filibuster was used to portray the ultimate purpose of those laws. It finally failed. Our country did what was right and those laws were passed.

I would hope that today the filibuster would not be used to deny an up-or-down vote. I was put on this Chamber because every parent deserves to dream for every child that they will have the chance—not the guarantee—but the chance. These justices who have been nominated by our President deserve an up-or-down vote. No one in here has challenged anybody’s right to vote yes or no. But they have challenged the fact that, yes, every one of them deserves a vote, and that is what this debate is all about.

So, as one new to this Chamber but understands how important this debate is, I rise to repeat that I will vote to support a vote, up or down, on every nominee. Understanding that, were I in the minority party and the issues reversed, I would take exactly the same stand because this document, our Constitution, does not equivocate. It designates that responsibility to the Senate. I repeat, we are not breaking an old rule, we are addressing an issue that was raised in the last 6 years. In the absence of the filibuster, we would apply. It must be decided, and we must be diligent in our debate, respectful of the differences of opinions but, in the end, understanding of our responsibility as Members of the Senate and those elected to represent those who brought us here.

Madam President, I see my time is about up. If the Chair will inform me, I believe I have 2 minutes.

Mr. ISAKSON. I will close by going to a quote I heard earlier today by the distinguished Senator from Massachusetts, who talked about the history of judicial confirmation, and my understanding of history is the same as his.

The distinguished Senator said the first two times our Founding Fathers worried about writing the Constitution, they were going to designate the appointment of judges to the Senate. It was during the third meeting to form the Constitutional Convention, they determined it be a joint responsibility: Nomination by the President, confirmation by the Senate.

The distinguished Senator is absolutely correct. He described it as a dual responsibility. It would be irresponsible for the Senate to avoid expressing itself in advice and consent on the qualification of any nominee. To do anything other than that which the Constitution designates to us would be to abdicate our responsibility. Our Founding Fathers were right over 200 years ago, and our leader, whom I commend, is right today. I hope when this debate ends, whether through negotiations or a vote, the men and women nominated to the Federal bench of the United States of America will know, not that they are guaranteed a judgeship, but that they are guaranteed to know how the Members of the Senate voted on whether or not they would be confirmed.

I yield the floor.

Madam President, I suggest the absence of a quorum.

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

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

Mr. SCHUMER. Madam President, I yield myself 7 minutes and then will yield to the Senator from New Mexico 15 minutes immediately after me.

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

Mr. SCHUMER. Madam President, as most have said, we believe we have been more than fair. We have confirmed 95 percent of the President’s judges, but before I said, if my daughter came home with a 95 on her report card, I would say, great. What some on the other side want to say is this: Only got a 95? Break the rules and get 100.

We do not believe in that and would like to exhibit in the most graphic way how we have supported 208 of the 218 judges by doing something very simple—by reading the names of the 208 judges the President has nominated and gotten approved by this Senate.

1. Callie Granade, SD AL
2. Consuelo Callahan, 9th Cir.
3. David Bunning, ED KY
4. Dora Irizarry, USDC ED NY
5. Gary Sharpe, USDC ND NY
6. Henry Hudson, ED VA
7. James Gritzner, SD IA
8. Jeffrey Howard, 1st Circuit
9. John Roberts, DC Circuit
10. Julia S. Gibbons, 6th Cir.
11. Kurt Engelhardt, ED LA
12. Leonard Davis, ED TX
13. Margaret Rodgers, ND FL
14. Michael McConnell, 10th Cir
15. Paul Cassell, UT
16. Ralph Erickson, ND
17. Richard Holwell, SD NY
18. Robert Conrad, WD NC
19. Rosemary M. Collyer, DDC
20. Thomas Phillips, ED TN
21. Walter Kelley, ED VA
22. William Smith, RI
23. C. Ashley Roeper, MD GA
24. Clay Land, GA
25. Danny Reeves, ED KY
26. Diane S. Sykes; 7th Circuit
27. Frederick Marzone, AZ
28. Henry Floyd, SC
29. James Gardner, ED of PA
30. Jay Zainey, ED LA
31. John Housman, ED CA
32. Judith Herrera USDC D NM
33. Kim Gibson, WD PA
34. Legrome Davis, ED PA
35. Marcia Krighter, CO
36. Michael H. Watson, SD OH
37. Paul A. Crotty, SD NY
38. Ralph Beistline, AK
39. Richard E. Dorr WD MO
40. Robert Clive Jones, NV
41. Ronald White, ED OK
42. Sharon Prost, Federal Circuit
43. Thomas Hardiman, WD PA
44. Virginia H. Covington, MD FLO
45. William Riley, 8th Circuit
46. Christopher Boyko, ND OH
47. D. Michael Fisher, 3rd Circuit
48. David Godbey, ND TX
49. F. Dennis Saylor IV, Mass.
50. Gregory Frost, ND OH
51. J. Ronnie Greer, WD TN
52. James Robart, WD WA
53. Joe Heaton, OK
54. Jose Linares, NJ
55. Kathleen Cardone, WD TX
56. Larry Hicks, NV
57. Louise W. Flanagan, ED NC
58. Micaela Alvarez, SD TX
59. Morrison England, ED CA
60. Ralph M.临, AK
61. Edward F. Case, ED HI
62. Mike Conaway, TX
63. Frank Aiken, SC
64. Julia S. Gibbons, DC Circuit
65. John Roberts, DC Circuit
66. Bibb M. Jenkins, GA
67. Brian Cahill, ED NM
68. Ben Sanders, VT
69. Bengston Anthony, MD
70. Megan Nossiter
71. Hal Marshall, GA
72. Not that they are guaranteed a judgeship, but that they are guaranteed to know how the Members of the Senate voted on whether or not they would be confirmed.

I yield the floor to my friend and colleague from New Mexico, Senator BINGAMAN.

Mr. BINGAMAN. Madam President, I thank my friend from New York and congratulate him on his leadership on this very important issue.

I find it very unfortunate that disagreements about judicial appointments have brought us to the point where the majority is ready to take away the longstanding right of each and every Senator to unlimited debate. That is a very major change in the way business has traditionally and historically been done in the Senate.

This is a confrontation that could easily have been avoided by the President and his legal counsel if they had been willing to follow what I understand to be the normal practice that historically has prevailed and should prevail. Someone asked: What is that normal practice? It is simply the practice of consulting with the Senators most involved in the nominating process before making a final decision on which individuals to nominate.

In the case of judicial nominees for Federal court positions in my State of New Mexico, and also positions that are filled on the Tenth Circuit Court of Appeals that are designated for New Mexico by the Supremes, I have been contacted, and I have been asked if I had objections to perspective nominees in each case before a final decision to nominate has been made. And that is not just in the last year or 2, this is over the 22-plus years I have served in the Senate. As far as I can remember, I have been afforded that courtesy each time. We, the Senate, have confirmed; and Presidents Reagan and Bush, Sr., and Clinton and now George W. Bush have nominated many individuals for the Federal court in my State during that time.

It is also my understanding that more often than not the chair and the
ranking member of the Judiciary Committee have been afforded that same courtesy prior to the nomination of individuals to court of appeals positions or to a Supreme Court position. Much of the current confrontation and ran-cor over the filibuster has been focused on the practice of choosing to make nominations that it knows will be highly controversial, in some cases where it knows that the Senators from the nominee’s State are strongly opposed to that nominee. Where nominations have been blocked during one Congress, the 108th Congress, last Congress, the President has chosen to renominate those same individuals in the succeeding Congress.

Madam President, this is not a strategy favored by either side of the country. This is a strategy to split and to polarize the Senate and the American people, and it is clearly having that exact effect.

Given where we are, I, like most of my colleagues, feel obligated to come to the Senate floor and speak on this so-called nuclear option. In my view, this is a misguided effort that will not only harm the Senate, it will also have a significant impact on the checks and balances that our Founding Fathers envisioned. I am disappointed that the majority leader has decided to pursue this course of action. I regret that he has repeatedly rejected the minority leader’s offers to compromise on the issue.

There are two distinct issues I want to discuss briefly today. The first is the manner in which the change is being made, the idea that the majority can simply change longstanding Senate rules whenever it believes it would be expedient to do so. I find that notion deeply troubling. We are a nation of laws, and our institutions need to reflect this.

The second issue I want to discuss is the merits of the proposal and the impact of eliminating the ability to filibuster. The use of the filibuster not only ensures that minority views are respected in the Senate, it also plays an important role in checking the power of the executive branch and in ensuring that the judiciary remains independent.

Let me take a moment to briefly describe what this nuclear option entails. I recognize that discussing rules and procedures is not an exciting topic, but it is important that the American public understand precisely what is being done to ensure that whether every nominee should get an up-or-down vote. It is about whether it is acceptable for the majority party to disregard longstanding Senate rules in order to get its way in each and every case that comes before the Senate.

Senate rule V states that:

The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

In accordance with Senate rule XXII, any such change can only be made with the approval of two-thirds of all Senators elected. That is 67 Senators.

The majority leader hasecided to make rules from Congress to Congress, and requiring that changes to the rules meet a threshold vote well above a simple majority, has a very straightforward purpose. It ensures that the rules governing the Senate remain constant, that they are not changed whenever one party believes the rules are hampering their ability to get their way in the short term.

Some in the majority party have complained that it is necessary to change the rules with respect to use of the filibuster on judicial nominees because in their view the current 60-vote requirement to end debate is too high. I have no objection to debating that issue and bringing it to a vote. Indeed, throughout the history of the Senate there have been a variety of proposals to modify the rules governing the filibuster.

For example, in 1975, the Senate reduced the number of votes required to end debate from 67 to 60. In 1995, I supported a proposal Senator HARKIN offered which did not pass but would have revised the procedure. So why is not the majority leader bringing this proposal, which he is now threatening to make up, as a simple normal procedure? Simply put, he does not have the votes to pass the measure if we stick by the rules of the Senate, the 67-vote rules of the Senate.

So his proposal is simple: If you do not have the votes to pass the proposal using the rules as they exist, then make up your own rules so you can pass it. Under this procedural maneuver, if the Senate votes to not end debate on one of the disputed nominees, the majority leader can make a point of order requesting that the Presiding Chair, who will likely be the Vice President, rule that only 51 votes are needed to confirm appellate and Supreme Court nominees.

Now, all of us know, and it is very clear to everyone who has studied this issue, that is not what the Parliamentarian would rule. The Parliamentarian has said just the opposite. Democrats will object, but the ruling should conclude that a majority vote. It is my understanding this would be the first time that we have changed the rules of the Senate without following the prescribed procedure for doing so in the rules that we have adopted. This would entail overruling the Senate Parliamentarian.

Madam President, I have to ask, what is the meaning of a rule if it is permissible to break it when one disagrees with the outcome that would result if the rule were followed? If the majority leader wants to try to modify the filibuster, he has the right to attempt that, but he should do so within the parameters of the Senate rules. It is dangerous to set a precedent of ignoring those rules that govern how we go about changing rules.

Indeed, if one rule can be changed this way with a simple majority vote, why not others as well?

Some have also asserted that Demo-crats are charting new ground in filibustering judicial nominees. Frankly, this is just incorrect. It is contrary to the history of the Senate. Republicans did filibuster Abe Fortas in 1968 when he was nominated to be the Chief Justice of the U.S. Supreme Court. The filibuster was successful. He ultimately withdrew his nomination from consideration.

I agree we have an obligation to process the President’s judicial nominees in a fair and judicious manner, and, as the record demonstrates, that is exactly what we have been trying to do.

However, I do understand the general frustration surrounding the processing of judicial nominees. During the Clinton Administration, Republican majority, during several of those years, killed over 60 nominees through a variety of delay tactics, mostly by refusing to give hearings in the Judiciary Committee. As a result, many of those nominees never got a chance to have a fair and open debate about their qualifications, much less a vote on the Senate floor.

I believe we should look for ways to improve the confirmation process so that we conduct, a more bipartisan and constructive manner. But exercising the so-called nuclear option is not a step in the right direction. Let’s be clear on what this is about. It is about setting the stage for the debate over the next Supreme Court Justice. It is about putting in place a procedure that would limit the ability of Democrats and moderate Republicans to influence the debate. There would be little need to consult or to compromise if the nominee could be pushed through the Senate with a straight majority vote.

As I have discussed, I strongly disagree with the tactics that have been
chosen here to make these changes. With regard to the merits of the proposal to eliminate the filibuster for judicial nominees, I would like to take a moment to elaborate on the profound implications of moving forward with this effort. To allow such a change would not only determine the ability of the Senate as an institution but will also result in significant deterioration of the checks and balances that ensure the independence of our judiciary.

Here is a single procedural change that allows 40 Senators to keep a nominee or legislation from being adopted serves many purposes. Most important, it facilitates compromise by guaranteeing the minority a voice in the legislative process. Unlike in the House of Representatives, where legislation can be easily pushed through with a simple majority vote, the Senate is an institution where deliberation and compromise are absolutely essential.

Forcing Senators to achieve common ground and complete the people's work is something that should be encouraged. Bipartisanship has been in short supply in recent years, and we need to be looking for ways to work together to address the challenges we face as a nation.

I have had the privilege of representing the people of New Mexico for over 22 years now in the Senate. I recognize the importance of working across the aisle to achieve results. Earlier this week, we held the first of several hearings on comprehensive energy legislation to try to mark up legislation in that area. I am extremely encouraged by how members of the committee from both parties have been working together. It is my hope that bipartisanship and sense of compromise can be adopted elsewhere in the Senate. This exemplifies how we should be facilitating more compromise between the majority and minority parties.

The not only an important check on the majority power within the Senate, but it is also an essential check on the executive branch. Article II, section 2 of the U.S. Constitution provides the Senate and the President shall share the power to appoint judicial nominees. The President is granted the authority to nominate. The Senate is vested with the authority to provide advice and consent. The President is granted the authority to nominate. The Senate is vested with the authority to provide advice and consent. This is a serious constitutional duty. I do not believe we should delegate the role of the glorified rubberstamp. That is not what the American people want, not what the Founding Fathers envisioned.

The prospect of a filibuster forces the President to submit nominees to the Senate who will be able to garner the support of more than a simple majority of that President's own party. There are plenty of well-qualified, conservative lawyers and judges who would easily be confirmed by this Senate. In fact, many of them since this President has been in office. At the beginning of this Congress, the President chose to resubmit several of the most controversial nominees who lacked widespread support, rather than to heed the concerns that had been raised about their nominations. The Senate has coequal responsibilities in the appointment process. It is important for the administration to recognize that it decides which nominees to send to the Senate for consideration.

Without the filibuster, the President would essentially be free to appoint Federal judges and the judiciary with very little restraint. This would threaten the independence of the judiciary, which is charged with checking the actions of the executive and legislative branches, by allowing a President to stack the courts with individuals willing to advance a particular agenda or ideology.

If the same party controls the Senate and the White House, as is the case today, the ability to filibuster is a primary restraint on the majority party's ability to influence the nomination and confirmation process. As the Framers recognized, it is reasonable to require that a lifetime appointee have the support of a substantial percentage of Senators who have been elected. There is a reason why the Framers granted the Senate and not the House of Representatives the constitutional authority to provide advice and consent. The Senate's procedures ensure extended debate and respect for minority views, which facilitate compromise and moderation. I personally believe that having qualified and reasonable judges in the Federal judiciary, regardless of political party, who interpret the law objectively and in accordance with mainstream legal theory is a good thing. These are lifetime appointments, which deserve rigorous debate and substantial scrutiny. This scrutiny would be significantly diminished if the majority party could appoint whoever it wants with little concern for the views of the minority. And the independence of the judiciary would be threatened if judges approach their work with a particular concern for carrying out the will of the party in power at that moment.

It is not surprising that a President would seek to expand his authority in the appointment process. But it is disapproving to think that the Senate might accede to this and abrogate its own constitutional authority in exercising its obligation to provide advice and consent.

Lastly, the proponents of the nuclear option have said they only want to eliminate the filibuster with regard to nominees, not with regard to legislation. But nothing in the nominating process can be done with regard to executive branch nominees as well. And there is no logic for arguing it cannot be done with regard to legislation.

As I have stated, I have many concerns about employing this tactic and disregarding Senate tradition. I urge my colleagues across the aisle to seriously consider the ramifications of this so-called nuclear option. It is not good for the Senate, it is not good for the delicate checks and balances that govern our Government, and it is not in the interest of the American people.

I yield the floor.

The PRESIDING OFFICER (Mr. CORNYN). The Senator from Maryland is recognized.

Ms. MIKULSKI. Mr. President, I rise to speak against this so-called nuclear option. This is a sad day for the Senate because I believe we are about to fracture 200 years of precedent and tradition. I think we are about to fracture what I had hoped would be a bipartisan approach to solving the compelling problems we face in the United States of America, and the Republicans are about to change the rules in the middle of the game.

One of the hallmarks of the United States of America is always fair play. And fair play means a belief and respect for the rules because we are a nation that believes in the rule of law. Whenever we are in competitive situations, we believe in rules. You don't change the rules in the middle of the game. You don't change the rules in a game you are losing. But typically, we choose to change to change because the Bush administration is not losing. They have had more nominees confirmed than almost any other Administration in recent history.

This is a manufactured crisis. There are those who say we need this crisis in terms of confirming judges. There is no crisis. George Bush is not losing. Right now, right this minute, we have confirmed 208 of the President's nominees for the bench. That is a 55-percent confirmation rate. It would think that getting 95% of what you want would make you declare victory. But, oh, no, that is not good enough. There is a desire to change the rules so that the President gets 100% and we cannot exercise our constitutional responsibility of advise and consent.

Now I know that many of my colleagues on both sides of the aisle don't want to change the Senate rules. They know the ebbs and flows of this institution one day you are in the majority and the next in the minority. And they know its not fair to change the rules in the middle of the game because doing so undermines century of tradition and the very essence of who we are as the world's premier deliberative body.

So I have come to the floor today to urge my colleagues to oppose this so-called nuclear option. I do this because I firmly believe in my heart of hearts that this is not the way to solve the problem in the Senate. I know it is one of my foremost responsibilities as a member of the United States Senate to protect the independence and integrity of our federal courts. Because our courts are charged with safeguarding the very principles on which
our nation was built—justice, equality and individual liberty.

The courthouse door must always stay open. And when someone walks through that door, they must find an independent judiciary. In order to do that, we need a Senate that cannot rubberstamp for any administration. We must not compromise our constitutional checks and balances over 7 highly controversial judges. The American people deserve better and, and the Constitution requires it.

When Alexander Hamilton and others were at the Constitutional Convention inventing America, they wanted checks and balances. They wanted no one to have absolute power, they wanted no individual to have absolute power, and they wanted no institution within our Government to have absolute power. That is why we have the system of checks and balances. That is why the greatest check and balance is the advice and consent role given to the Senate. When the President nominates and the Senate has an important co-equal role to play in the confirmation process.

So the Senate has a very real and critical role to play here. It can't rubber stamp nominees. It can't give consent through examination and it should not support nominees who don't respect basic judicial principles.

When we are talking about this, we say, What does it mean? Who has been nominated? Who has been confirmed? Whom have we opposed? I have given the statistics. Since the President has been in office the Senate has confirmed 208 of his nominees and rejected only 10. That's 95 percent approval and those we have rejected have been among the most controversial and extreme nominees. Nominees who did not represent the mainstream of American legal thought. Nominees hostile to civil rights, women's rights, reproductive rights and working families. Let's talk about the 208. Let's talk about working on a bipartisan basis. Let's talk about Maryland.

There were three openings on the Federal bench in Maryland for the district court. Governor Ehrlich sent forth three names of outstanding people of judicial competency. Senator SARBANES and I moved them straight forward and ahead, even though one had been the chairman of the Republican Party. We did not care about that. We could even run for attorney general. We did not care about that. What we cared about was that the Maryland Bar Association said he was qualified.

No. 2, he had been a U.S. attorney and had done a stunning job, and he had extensive legal background in Maryland. We did not play politics. We moved Judge Bennett, Judge Quarles, and Judge Titus. Then came up the court of appeals. Oh, my god, guess what came out of the Bush administration. They wanted to give us a guy who was not even a member of the Maryland bar. SARBANES and MIKULSKI said no. That is one of the ones that did not even come up. Why? We think if you are going to represent Maryland on the court of appeals, you ought to be a member of the Maryland bar and have some significant ties to Maryland. That meant Joe R�aile.

This is the Maryland seat on the Fourth Circuit Court of Appeals. They wanted to give us someone from Virginia. We like Virginia, Senator WARNER, Senator ALLEN. We like judges from Virginia, but not for the Maryland seat. And Senator SARBANES and I said we would filibuster. So we stopped, prevent our state from losing its seat on the court of appeals because of the Senate rules.

Though some of them never came forth as nominees, we knew we had the rules of the Senate to prevent this injustice to Maryland. We invited the White House to look at the thousands of lawyers in Maryland who are members of the bar, who have judicial competence and commitment to basic constitutional principles. Maryland would recognize them.

But we were ready to use these rules in the Senate to protect the Maryland seat on the court of appeals for the Maryland seat would at least be a member of the Maryland bar or at least be from Maryland and have significant ties there.

Those are the rules. That is how you exercise advice and consent. We gave advice, they ignored it, so they were not going to get our consent. Hey, those are the rules. We do not want those rules changed, and it would be the same if there was a Democrat in the White House.

We could look at the nominees President Bush has given us. Not only do we get people who are not members of a bar, but we get some who are outside the judicial mainstream. Judge Priscilla Owen is an example of someone who would turn our courts in the wrong direction. She has a history of being driven by ideology and not law. Her beliefs are far outside the mainstream of judicial thinking. She has an extreme ideological agenda on civil rights, women's rights and the right to privacy that we severely question and make her unsuitable to sit on this federal court.

She is a judicial activist, that she has a history of putting ideology about the law and ignoring statutory language and substituting her own views. Something about which even officials in this White House have raised concern. Alberto Gonzales, now our Attorney General, who once served with him, castigated in a case “unconvincing . . . judicial activism” and in another case said her dissent would judicially amend the Texas statute. In other words, she was making law rather than interpreting law. Her opinions show a bias against consumer, victims and individuals. She has consistently ruled against workers, accident victims and victims of discrimination. Her decisions impair the rights of ordinary people to have access to the courts. On the Texas Supreme Court she has restricted a woman's right to choose by ignoring statute and creating additional barriers for women seeking to exercise reproductive choices.

We could go through Owen, and we could go through others. Priscilla Owen stands among a handful of nominees who will turn back the clock on protecting important constitutional rights. We know through our examination of these nominees that they are outside the judicial mainstream and we want to exercise our priority and our responsibility on advice and consent. And now Republicans want to focus on the jobs of 7 people who already have jobs when we have 7.7 million Americans who don't.

They want the change the subject away from issue that Americans care about to a handful of extreme judicial nominees. They say there is a crisis but there are more federal judges now than at any other point in our nation's history. This is the lowest vacancy rate on the courts ever. Republicans have the wrong priorities.

I had to explain what this nuclear option means to a head of state. Did you ever have to explain to someone who is a former head of a government in a European country, who himself fought for freedom and was even in prison, what a nuclear option means? He thought we were talking about using nuclear weapons.

I had to explain this to members of my family, the senior citizens in my family. “Barb, what is this nuclear option? Are we thinking about using nuclear weapons?” We use language here very glibly, and I think exaggerated. What I said was we are headed for a meltdown. We cannot let the Senate melt down, and we will melt down if we do not stop these proceedings from going forth. We need a system of checks and balances. It cannot be rubberstamped for any administration.

Some of the happiest and most distinguished accomplishments of my life have been accomplished because of working on a bipartisan basis. In the 1990s, I worked with the Senator from Colorado, Mr. Inouye and we worked to bring Poland, Hungary, and the Czech Republic into NATO. We had to stand up to a Democrat such as Senator Moynihan and a Republican such as Senator Warner to get the Senate to consider it, but we worked on a bipartisan basis, and we extended NATO from old Europe to a new Europe. And right now, the people we brought into NATO are fighting with us side by side in Iraq and are part of the coalition of the willing. Bipartisan relationships did that.

Because of our work in the Senate where the women get together at least once a month to have dinner for friendship and fellowship and to talk about
an agenda, we have done a lot on women’s health. We have increased mammogram funding research by 700 percent. We have increased funding for domestic violence. We have done all this when we worked together.

My fellow Senators, when we work together we work our best. Let us now stop this dangerous course. We should not continue further on this terrible down this path on which we are embarking. The American people want us to be standing up, rather than working on how to be able to face straightforward the health care crisis, and they want to make sure we stabilize the pension crisis in the United States of America. Young people want to be able to afford college. They wonder what are we doing here. Republicans are spending all this time on the nuclear option and debating 7 controversial nominees instead of focusing on our national priorities. When all is said and done, is will be that more gets done?

Let’s put the nuclear arsenal option back into the missile silo. We must do so to preserve the constitutional role of the Senate to advise and consent and protect our freedoms.

Let’s get back to doing the business of the people. The American people deserve that and they deserve a Senate that works for them. A Senate that governs best when it works together, and let’s start putting the people first rather than politics.

I yield the floor.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, last week on Wednesday, we evacuated the Capitol. At the instruction of the Capitol Police, more than a few Senators and staff actually ran from this building and surrounding offices in the very real fear that a plane was carrying a bomb to attack this building, the center of our democracy.

Sadly, Wednesday was not the first time, and Wednesday will likely not be the last. What we guard against is not a threat to our democracy by plane or by bomb.

But there are other threats to our democracy and our freedoms just as menacing, equally as dangerous.

Abraham Lincoln said: "It is not slogans or bullets, but only institutions that can make and keep people free."

And Baron Montesquieu wrote in "The Spirit of the Laws": "There is no liberty, if the judiciary power be not separated from the legislative and the executive."

The effort to break the rules to allow the President more easily to appoint judges that undermine the independence of the Federal judiciary is no less than a threat to our democracy, a threat to our freedoms, and a threat to our liberties.

For two centuries, Democrats and Republicans alike have used the Senate’s rules to protect our democracy, to protect our freedoms, and to protect our liberties. After two centuries, it would be a mistake to change those rules.

Unlimited debate allows Senators to protect more than themselves. Unlimited debate helps to ensure that no one party has absolute power. Unlimited debate helps to give effect to the Founders’ conception of checks and balances.

History will see the actions of this month as what they are: A threat to those checks and balances. History will see the actions of this month as a terrible attempt to diminish the Senate. History will see the actions of this month as an attempt to diminish our democracy.

If those who seek to change the rules succeed, especially by breaking the rules, it will be only a matter of time before the next step comes. It will be only a matter of time before some future Senate decides to once again to break the rules to change the rules, and abolish the filibuster altogether.

And what will the Senate look like then?

Then all our votes will be simple majority votes. Then lost will be a centuries-old check and balance. And then what will be left will be a vastly different Senate from the one to which I came in 1978.

The majority leader has proposed that debate on important judges be limited to a fixed number of hours, to 100 hours. That might sound like a lot of time.

But the point is not the number of hours. The point is that at the end of a set amount of time, no Member of the minority party need participate. At the end of a set amount of time, only the majority party will rule. At the end of that set amount of time, there would be no more check and balance.

If one wants to see what the Senate will look like then, look at budget resolutions. Like the majority leader’s proposed rule, they allow for a long period of debate. The leader’s proposal calls for 100 hours of debate on judges. The Budget Act calls for 50 hours of debate on budgets.

Look at the results.

Rarely do budget resolutions achieve consensus. Since 1992, only one budget resolution has received more than 55 votes on final passage.

This year, the vote on the budget resolution was 52-to-47.

Last year, the disagreements on the budget were so partisan that the majority was not able to bring the conference report on the budget resolution to the floor in the Senate.

In 2003, the vote was as close as it could get: 51-to-50. The Vice President had to break the tie vote.

In 2002, once again, the divisions were so partisan that the majority was not able to secure a majority in the Senate.

In 2001, the vote was 53-to-47.

In 2000, the vote was 50-to-48.

In 1999, the vote was 54-to-44.

In 1998, the majority was once again unable to adopt a budget resolution. And 1997 was the exception that proved the rule. That year, the budget resolution achieved a broad consensus, receiving a vote of 76-to-22.

But in 1996, the vote was 53-to-46.

In 1995, the vote was 54-to-46.

In 1994, the vote was 53-to-46.

In 1993, the vote was 55-to-44.

And in 1992, the vote was 52-to-41.

Thus, over 14 years, under Republican Presidents and a Democratic President, over the course of nearly a decade and a half, only one budget resolution has been the product of consensus. Fourteen years, and only one budget with more than 55 votes.

The time limit on debate has not led to working together. The time limit on debate has caused partisanship. And three times in the last decade, the time limit on debate has led to complete failure.

That is what would happen to the Senate if we head down this road. Votes would become more partisan, if that is possible, but it would happen.

And the products of those votes would become more extreme.

If we head down this road for the confirmation of judges, then judges will be more partisan. Judges will be more likely to uphold the powers of the President who appointed them. And judges will be less likely to defend individual freedoms and liberties against the powerful executive.

Just think about that for a moment. Under this rule change, judges will be less likely to defend individual freedoms and liberties against the powerful executive. Why? Because of the partisan nature under which a partisan President will have appointed them.

The Senate’s role in protecting against extremism is particularly important in the confirmation of the candidates for the lifetime jobs of Federal judges. The Founders wanted the courts to be an independent branch of Government, helping to exercise the Constitution’s intricate system of checks and balances. The Senate’s involvement in the confirmation of judges has helped to ensure that the judiciary can be that more independent branch. And that independence of the judiciary, in turn, has helped to ensure the protection of our democracy, our freedoms, and our liberties.

In ancient Rome, when the Senate lost its power, and the emperor became a tyrant, it was not because the emperor abolished the Senate. In ancient Rome, when the Senate lost its power, it continued to exist, at least in name. But in ancient Rome, when the Senate lost its power, in the words of the Senate’s historian, Senator Robert Byrd, the Senate became “little more than a name.”

In ancient Rome, when the Senate lost its power, the Roman Senate was complicit in the transfer. The emperor did not have to seize all the honors and
powers. The Roman Senate, one after another, conferred greater powers on Caesar. It was not the abolition of the Senate that made the emperor powerful. It was the Senate's complete deference.

Like the Senate before us, we risk bringing our diminution upon ourselves. We risk bringing upon ourselves a hollow Senate, a mere shadow of its past self. And we risk bringing upon ourselves a loss of the checks and balances that ensure our American democracy.

This change, if it succeeds, will leave Senators, as T.S. Eliot described in his 1925 poem, as “The Hollow Men.” In that poem, Eliot wrote of a place like what the Senate would become. He wrote:

“Our dried voices, when
We whisper together
Are quiet and meaningless
As wind in dry grass
This is the dead land
This is cactus land
In this hollow valley
This broken jaw of our lost kingdoms
In this last of meeting places
We grope together
And avoid speech
Gathered on this beach of the tumid river
And avoid speech.
In this hollow valley
This is cactus land
We whisper together
Our dried voices, when
About the Senate and what it could lead to.

Mr. NELSON of Florida. Mr. President, as the distinguished Senator from Montana departs, I want to thank him for obviously something that has been well thought out and deeply felt. He is a distinguished Senator who has served decades in the Senate and who has risen to the position as chairman of the Finance Committee. He understands the traditions and the comity of this institution in order for it to function. It clearly cannot function unless Senators can get along and trust each other. All Senators can have respect for one another, and where the minority is not run over all the time by the majority.

That is one of the great checks and balances of this constitutional system that we have. The rights of the minority are protected because of extended debate which, at the end of the day, encourages compromise and consensus building.

As the Good Book says: Come, let us reason together.

So I thank the Senator for his comments. I thank him for being a mentor to me, as I have so enjoyed his company and his leadership as well as the company of all these Senators. There is not a Senator here that I don’t like. I like to look at this body and see this body continue to function as it has for 216 years, as the greatest deliberative body in the world. We are about to change that dramatically if this nuclear option is, in fact, employed.

I thank the Senator for his comments.

Mr. President, I want to add in my own little way a plea to the rest of the Senators. I have gotten into some of the discussions that are going on around this Capitol Building right now, to see if we can head off this thing. It doesn’t look like we can. It looks like people are hardening into their positions. I wonder why. Is it worth changing centuries of history and precedent in the Senate for what, in effect, are five judges? Is it worth giving up the traditions and the protection of the minority, under the rules, for over two centuries for five judges? I was simply looking over the record and found out what my voting record has been here. I have voted, under President Bush, for 209 of his judicial nominees; I have voted against 7. That is 97 percent of the President’s nominees for Federal judgeships that I have voted for. Am I not entitled, as the senior Senator from Florida, to exercise my judgment on seven people for a lifetime appointment as judge, when I don’t think they have the judicial temperament in order to live for life? That is what the Senate is all about. That is what the Constitution said it is all about. It says that the judicial process is a two-step process. The President nominates and the Senate decides. In the old language of the constitutional forefathers it was “advise and consent.”

My advice was, on seven, that I didn’t think they had the judicial temperament, that they would look dispositionately at an issue, that they would look at the facts and apply the law. Those seven seemed to me to have their minds already made up.

That is not what I want in a judge. I want a judge who is going to be fair-minded, who is going to listen to all the nuances and make a fair and reasoned judgment.

I gave the President the benefit of the doubt on those 209. I can tell you, some of those were in Florida. On those other seven, I did not have the benefit of the doubt; those were good because in Florida we have a system whereby we have a judicial nominating commission, which is not by law but has been by custom over the years, and that judicial nominating commission receives the applications of people who want to be a Federal district judge, they interview them, and they make a recommendation to the Senators and to the White House. The arrangement that Senator GRAHAM and I had with the //Alberto Gonzalez, then the counsel for the White House, was that we would interview all of those recommended to us—sometimes it was three, sometimes it was six—for the vacancy, and we would tell the White House if we had an objection.

That has worked. On the judges from Florida that are within that 209 that I voted for, I can tell you they are good appointments.

But there is the give and take between the Senate and the White House in the filling of a judicial vacancy. That is not the ramming down your throat a judicial nomination just because the White House wants it.

I have agreed with the White House 97 percent of the time. You can calculate it mathematically, that is 97 percent of the time. So now they want to take away the right, under the rule, to have three judges. If someone comes in, they are going to be approved if they have 50 votes. It could be 50–50, because the tie would be broken with the Vice President sitting as the Presiding Officer of the Senate.

There is another reason that has just come to my attention, as my friend Senator KYL. I do not want the filibuster to be eliminated from this particular set of judges. If it is done for this, what is next? What is next? That the majority leader would stand and take away the filibuster and my right to filibuster as a Senator? Is he going to do that on what the administration is bent on doing, and that is drilling for oil and gas off the coast of Florida—drilling for what 18 million Floridians are deathly afraid of? That the $50 billion a year tourism industry is going to be threatened because of oil lapping up onto our beaches?

Are they going to take away my right to stand out here and hold up such legislation, to drill off the coast of Florida, that would despoil our environment? Are they going to take away my right to protect our military assets, an asset that is so valuable it is called restricted airspace? It is out in the Gulf of Mexico and portions of the Atlantic Ocean off Florida, which is why we have so much training in Florida. The pilots can go out there in that restricted airspace. Are they going to take away my right to utilize the filibuster to protect the interests of Florida?

It is obvious that today they have started trying to drill off the coast of Florida. Two weeks ago, I had a meeting with the Secretary of the Interior, and I pleaded with her, as she had agreed back in 2001, that she would not include within the 5-year plan that there would be drilling rather than what was the agreement back in 2001, to extend an additional 1.5 million acres for oil and gas leasing, and it started to intrude into the eastern Gulf of Mexico. She promised it in the 5-year plan which was from 2002 to 2007. So when I met with her 2 weeks ago I asked her to give me that—

The PRESIDING OFFICER. The Senator’s time has expired.

Mr. NELSON of Florida. I ask for an additional 5 minutes to proceed.

Mr. REID. It is my understanding the majority leader is on his way. I have no problem with the Senator speaking and the same time would be extended to the majority.

Mr. KYL. Reserving the right to object, I was going to speak at 6 o’clock. My understanding is the minority leader wanted to intercede with a brief colloquy or comments. In order for my scheduling purposes, I would like to know what the
Mr. REID. The Republican leader is going to come to the floor and talk about what the schedule will be the next couple of days. It should not take long. I think it shows up that the distinguished Senator from Florida yield to the majority leader.

Mr. NELSON of Florida. Of course.

Mr. REID. We get 5 minutes, they get 5 minutes.

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

The Senator from Florida is recognized for an additional 5 minutes.

Mr. NELSON of Florida. This filibuster issue is so important to me as I project how it can be taken away from me as I try to protect the interests of Florida.

I was about to point out that although the Secretary of the Interior 2 weeks ago, when I requested in the next 5-year plan that she extend the same protections of additional drilling in the Gulf of Mexico off of Florida, would not give me that assurance.

I now see, as the result of a vote today in the House of Representatives, an amendment offered for oil and gas drilling off of the State of Florida. It may have been this amendment, may have been just for gas drilling. That is the proverbial camel’s nose under the tent.

All drilling, happily, in that amendment failed in the House of Representatives, but the Bush administration’s intent is now clear since the Secretary of Interior would not give me that assurance that she gave me back in 2001. It is their intent to start drilling off the coast of Florida in the Gulf of Mexico, which brings me back to the filibuster.

I don’t want to lose this precedent of 216 years in the Senate, to lose this right of a filibuster. If we do it with regard to the amendments, then what is coming next, they will take away our right to stand up here for the interests of our States?

This is a matter of tremendous gravity. It affects all of us.

I yield the floor.

Mr. REID. I suggest the absence of a quorum.

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

The assistant legislative clerk proceeded to call the roll.

Mr. KYL. Mr. President, I ask unanimous consent that the order for the consideration of the nomination of Priscilla Owen for the Fifth Circuit Court be rescinded.

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

Under the previous order, the Senator from Arizona is recognized.

Mr. KYL. Might I inquire of the distinguished minority leader, the majority leader will be here shortly?

Mr. REID. A few minutes ago he said he was on his way.

Let me say, one of the distinguished clerks, without divulging a person’s name, said that when Senator FRIST and I talk about coming to the floor, it is dog time, meaning every minute is 7 minutes, so you never know.

Mr. KYL. Mr. President, I will go ahead and in between the sandwich we will have the meat which will be the confirmation of the nominees by the leaders, but I will proceed with my remarks.

Now I am told the leader is indeed on his way, so I will suspend and yield to the distinguished majority leader.

The PRESIDING OFFICER (Mr. CHAMBLISS). The majority leader is recognized.

Mr. FRIST. Mr. President, many Members have been inquiring about the schedule, but I do want to thank all Senators for their statements today, as well as yesterday. The debate time has been evenly divided. We have heard from a number of people. This is our second day of debate on the nomination of Priscilla Owen for the Fifth Circuit Court. We have not had very much in the way of pauses in the debate. We have used it well. And from both leaders, thank everybody for their participation and cooperation. It has been a constructive debate.

Tomorrow, we will resume debate. We will be continuing debate tonight. It will be a vote on Dr. Sullivan. Tomorrow we will resume debate on Priscilla Owen, and it would be my intent to ask consent for some limitation of time before we vote on the Owen nomination. If we are unable to reach an agreement, I would then file a cloture motion tomorrow, on Friday.

On Monday, we would return to session and continue the debate on Priscilla Owen, much in the same vein it has been yesterday, today, and will be tomorrow. I encourage, once again, our colleagues to take advantage of the opportunity to speak. The reason we are spending the time is to make sure all ideas and thoughts and concerns are expressed.

The Democratic leader and I have discussed this, and we will have a vote on Monday at approximately 5:30. It will be a procedural vote. I anticipate it will be—we will say 5:30 now. Senators should return for debate on this vote. On Monday, Senators will have as much time as they need to debate the pending nomination. We will file cloture tomorrow, and then we would have the cloture vote on Tuesday. And the timing of that vote is something the Democratic leader and I have not talked about, we do so and make our colleagues aware.

With that understanding—and that is the plan—we will have no further votes this evening. And we would have no vote tomorrow as well but continue debate.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, very briefly, before I address the primary subject of my presentation, I would like to do two things. First, I ask unanimous consent to have printed in the RECORD, after my remarks, the Washington Times op-ed piece by a former majority leader of the Senate, Bob Dole, dated Thursday, May 19, 2005.

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

(See exhibit 1.)

Mr. KYL. Secondly, I would like to very briefly remind my colleagues of the fact that when we talk about the numbers of judges President Bush has nominated who have been confirmed, it is important for us to remember that there has never been any controversy with respect to district court judges. Almost all Presidents’ district court judges are confirmed. Those are recommended for nomination usually by Members of the Senate, and it is rare, indeed, that we would object to each other’s recommendations. Instead, for all Presidents there is a very high number of district court judges confirmed. And indeed, that was the case with President Clinton and has been the case so far with President Bush.

So when talking about the numbers of judges confirmed, and wondering what the fuss is all about, our constituents might want to focus on the fact that what the other side usually does not talk about is the fact that the judges that are not being confirmed are circuit court judges, the judges directly below the U.S. Supreme Court. There are not very many of them. They are very important. And these are the judges who are being filibustered by the minority.

How many? Well, in the case of President Bush, in his first term—and none have been confirmed now at the beginning of his second term, so this is the full story—35 of the President’s 52 nominees have been confirmed. That is only a confirmation rate of two-thirds or 67 percent. And that puts that at the lowest percentage of any President in our modern history. This chart says “ever.” And that is what we are talking about here, the 10 filibusters and 6 that were threatened this year of the President’s circuit court judges who have been filibustered and, as a result, have never received an up-or-down vote. That is what is troubling us.

So I want folks to understand that instead of talking about almost 200 judges confirmed, and only a very few rejected, what we are talking about is the circuit court judges. And of those, only 35 of 52 have been confirmed. That is what this is all about. And these are the judges directly at the position of the U.S. Supreme Court.

What I want to talk about today is a very simple and yet a very momentous question. Does the Senate have the power to govern itself? Does the Senate have the power to govern itself? Specifically, can a majority of the Senate establish how we are governed? I have heard a lot of careless talk over the last few months and days. Some have charged the Senate will soon break the rules to change the rules and destroy the Senate as we know it. The Senator from Arizona and others claim the Senate is about to abdicate all constitutional responsibility, is becoming a rubberstamp. Others

""
raise the specter of lawlessness and banana republics. Worst of all, Senators speak figuratively of detonating nuclear bombs and shutting down the Senate’s business.

This kind of hysteria does a tremendous disservice not only to the Senate but to our Nation as a whole. Not only are the claims blatantly false, but they add to the already unacceptable level of incivility in our political affairs. It is often said we should disagree without being disagreeable. That is a sentiment with which I wholeheartedly concur. A good first step would be for my colleagues to stop making outrageous claims that Republicans want to destroy this institution.

The reality is the Senate is now engaged in a historic debate and, I believe, a historic effort to protect constitutional prerogatives and the proper checks and balances between the branches of government.

Republicans seek to right a wrong that has undermined 214 years of tradition—wise, carefully thought out tradition. The fact that the Senate rules theoretically allowed the filibuster of judicial judges, but were never used to that end, is an important indicator of what is right and why the precedent of allowing up-or-down votes is so well established. It is that precedent that has been attacked and which we seek to restore.

Fortunately, the Senate is not powerless to prevent a minority from running roughshod over its traditions. It has the power—indeed, I would say the obligation—to govern itself. As I will demonstrate today, that power to govern itself easily extends to the device that has come to be known as the constitutional option.

The Constitution is clear about the scope of the Senate’s power to govern itself. Article I, section 5, clause 2 of the Constitution states that each House may determine the rules of its proceedings.

The Supreme Court of the United States has rarely interpreted this clause, but one case is important for our purposes, the case of the United States v. Ballin, a case decided in 1892. That case dealt with the power of the majority of the House of Representatives to make rules, and it contains two holdings that bear on our situation today.

First, the Supreme Court held that the powers delegated to the House or the Senate by the Constitution are powers held by a simple majority of the quorum. The Constitution states that a majority of Members constitutes a quorum, and the Supreme Court, therefore, held that “when a majority of the Senate are present the house is in a position to do business.”

The Supreme Court continued:

All that the Constitution requires is the presence of a majority.

That’s a majority is all the Constitution requires for us to make rules, to set precedents, and to operate on a day-to-day basis. The Supreme Court made this clear.

Second, the Supreme Court held that the power to make rules is not one which, once exercised, is exhausted. It is a continuous power, always subject to being exercised by the House. By “House,” the court means the House of Representatives or the Senate. The importance of this holding is crucial for present purposes. The power of the majority of Senators to define Senate procedure is one that exists at all times, whether at the beginning, the middle, or the end of Congress.

The constitutional background is simple and uncomplicated. We can govern ourselves. We can do it by majority vote, and we can do it at any time. Let me repeat: The Supreme Court has held that we have the right to govern ourselves, that we can do it by majority vote, and we can do it any time.

Let’s look at how the Senate employs its constitutional power to govern itself. There are four basic ways that the Senate does so: In standing rules, precedents, standing orders, and rulemaking statutes. I will discuss each briefly in turn.

First, the Senate has adopted standing rules to govern some but not all Senate practices and procedures. I have seen much of the press and even, sadly, in this body about those standing rules. Some argue that the standing rules are the be-all and end-all of Senate practice and procedure. The confusion might be understandable outside the Senate, but Senators know that these rules are but one aspect of the overall set of tools, the broader rules that the Senate uses to govern itself.

That brings us to the second way the Senate exercises its constitutional power: the creation of precedents. Precedents are created whenever the Presiding Officer rules on a point of order, when the Senate sustains and/or rejects an appeal of the Presiding Officer’s ruling on a point of order, or when the Senate itself rules on a question that has been submitted to it by the Presiding Officer.

As former Parliamentarian and Senate procedural expert Floyd Riddick has said:

The precedents of the Senate are just as significant as the rules of the Senate.

Let me repeat what Mr. Riddick said:

The precedents of the Senate are just as significant as the rules of the Senate.

Indeed, as Mr. Riddick has sometimes been created that directly contradict the Standing Rules of the Senate. I will return to that point later, but I want everyone to remember what Mr. Riddick said.

A third way that the Senate exercises its constitutional power is through standing orders which can be adopted by legislation, Senate resolutions, or run-of-the-mill unanimous consent agreements. It is worth pausing to note that the Senate regularly purports that these standing orders and precedents of the Senate through unanimous consent agreements. You saw that a few minutes ago. Our leaders get together and decide, for example, to change the time to hold a cloture vote, even though rule XXII mandates that the vote shall occur 1 hour after the Senate comes into session on the second day after the cloture petition is filed. That allows Senators to vote in direct contradiction of the rules.

Of course, a unanimous consent agreement is formalistically unimportant. But that temporary rule change, should you want to call it a temporary rule change, is completely outside the standing rules.

How can we do this? How can the Senate ignore the Standing Rules of the Senate? The answer is simple. It goes to the essence of the situation before us today. As the Supreme Court held, the Constitution gives the Senate the power to make rules and govern itself on a continuous basis. We are not held hostage to the standing rules, nor are we required to go through the cumbersome process of amending the standing rules when it is necessary to get something done. This has always been true.

A fourth way that the Senate exercises its constitutional power is through rulemaking statutes. For example, for 30 years the Budget Act has been placing severe restrictions on the rights of Senators to debate. Indeed, the Congressional Research Service has identified 26 rulemaking statutes that somehow limit the ability of individual Senators to debate and/or amend legislation. Think about that for a moment. We hear much pontificating on this floor about the supposedly sacred and unbreakable right to debate on an unlimited basis. Yet, arguably, our most important function, that of ensuring that government services are budgeted and receive funding, is subject to carefully crafted restrictions on the rights of Senators to debate. Indeed, the Congressional Research Service has identified 26 rulemaking statutes that somehow limit the ability of individual Senators to debate and/or amend legislation.

But that temporary rule change, should you want to call it a temporary rule change, is completely outside the standing rules.

Parenthetically, no matter how many times a few Senators say otherwise, this controversy before us now has nothing whatsoever to do with free speech, as the minority leader himself has acknowledged. This dispute has never been about the length of debate. It is about blocking judicial nominees. We will have plenty of debate on all of the nominees, as much as anyone wants.

I would like to move to another important aspect of this discussion: The role of tradition and norms of conduct in the day-to-day functioning of the Senate. This is crucial. Although it is frequently said that the unique feature of the Senate is the Senator’s rights to demand and amend, there is another even more central aspect to Senate procedure. As I see it, the overriding feature of the Senate is the mutual self-restraint and respect for the settled norms of this body. I would like to consider a few examples.

Senators limit their speech on an informal basis every day. We cut short
had grave concerns about some of the long-term impact of such tactics. The judiciary, and out of a recognition that nominations used as a minority veto was all counsel. Again, the supermajority to end debate, precisely to adhere to historical norms. We took the steps to ensure those judicial nominees who reach the Senate floor received the fair up-or-down votes to which they were entitled. Any filibuster rules might have permitted such obstruction, but the Senate norms and traditions did not.

To the extent the rules technically permitted such obstruction, the traditions had rendered the power obsolete and inert. In common law, there is a doctrine called desuetude, which means that obsolete or unenforced laws shall not have effect in the future even if not formally repealed. In other words, a law that is de facto unenforced may be treated as if it was all but forgotten.

We faced a similar situation in the Senate. In fact, our tradition was our rule. To minimize the traditions of this body is to display a naive and legalistic misunderstanding of the institution. To say that the traditions are meaningless if we do not acknowledge that our traditions have content and meaning. There can be no question that the filibusters of the last Congress broke that Senate tradition and, therefore, allowed the minority to govern itself. By breaking traditions of the Senate, members of the minority should have known they would force the Senate to react. Tradition should never change without consensus, and a consensus requires, at a minimum, a majority. The question is, what are we to do when norms and traditions are changed by the minority? What do we do when there is no consensus, just a minority with a determination to exploit Senate rules or precedents of the Senate. An amendment to a dilatory or nongermane amendments, but the obstructing Senators could accomplish their objectives in a different way—by rollcall votes. To make matters worse, in 1977, before any point of order could even be made against an amendment, the amendment in question had to be read by the clerk. By objecting to the routine courtesy of waiving the reading of the amendment, the obstructing Senators delayed the business of the Senate even further.

That all may seem complicated, but there is one undeniable truth about what these obstructing Senators were doing. It was all completely permitted under the standing rules and the precedents of the Senate. At the same time, however, these tactics were in violation of settled Senate norms and practices. So what was the Senate to do? The answer can be found in 1977. The Democratic majority leader made the decision these new tactics were dilatory, in violation of the traditional norms, and could no longer prevail. He asked then-Vice President Walter Mondale to sit in the chair in his capacity as President of the Senate. The Democratic majority leader made a point of order that "when the Senate is operating under cloture, the chair is required to take the initiative under Rule XXII to rule out of order all amendments that are dilatory or which on their face are out of order." Mondale sustained the point of order, even though it had no foundation in the rules or precedents of the Senate. And, in doing so, the Senate created a new precedent. But that precedent ran directly contrary to the Senate's longstanding procedures which had required Senators to raise points of order to enforce Senate rules. Under the new precedent established by the Senate, no such point of order would be necessary.

In 1977, two Senators attempted to block a natural gas deregulation bill after cloture had already been invoked. They were succeeding through a stratagem called "filibuster by amendment." Post-cloture debate time had lapsed, but the obstructing Senators could still call up amendments, force quorum calls, and force rollcall votes on the amendments. Rule XXII prohibited dilatory or nongermane amendments, but Senate procedure did not rule these amendments out of order. True, a Senator could raise a point of order against a standing rule. But the amendments, any favorable ruling could be appealed. A rollcall vote could then be demanded on that appeal. And once that rollcall vote began, the obstructing Senators could accomplish their objectives in a different way—by rollcall votes. It was all completely permitted under the standing rules and the precedents of the Senate. At the same time, however, these tactics were in violation of settled Senate norms and practices. So what was the Senate to do? The answer can be found in 1977. The Democratic majority leader made the decision these new tactics were dilatory, in violation of the traditional norms, and could no longer prevail. He asked then-Vice President Walter Mondale to sit in the chair in his capacity as President of the Senate. The Democratic majority leader made a point of order that "when the Senate is operating under cloture, the chair is required to take the initiative under Rule XXII to rule out of order all amendments that are dilatory or which on their face are out of order." Mondale sustained the point of order, even though it had no foundation in the rules or precedents of the Senate. And, in doing so, the Senate created a new precedent. But that precedent ran directly contrary to the Senate's longstanding procedures which had required Senators to raise points of order to enforce Senate rules. Under the new precedent established by the Senate, no such point of order would be necessary.

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explained to the Senate what he had done. He explained:

I asked Mr. Mondale, the Vice President, to go please sit in the chair; I wanted to make some points of order and create new precedents to break the filibusters. And the filibuster was broken—back, neck, legs, and arms. So there should be no confusion about what happened on that day.

That was the constitutional option in action. What Senate factored in a situation where a minority of Senators was frustrating Senate business in an untraditional way. The majority wished to proceed. The majority did not propose any formal rules change, refer the proposal to the Rules Committee, but it never made a majority vote to confirm any judicial nominee. Senators have shown that they are determined to override this constitutional standard. Thus, if the Senate does not act during the 109th Congress, in the Senate's simple-majority standard, it could be plausibly argued that a precedent has been set by the Senate's acquiescence in a 60-vote threshold for nominations.

One way that Senators can restore the Senate's traditional understanding of its advice and consent responsibility to confirm judicial nominees. Majority Leader Robert C. Byrd used the constitutional option in 1977, 1979, 1980, and 1987 to establish precedents changing Senate procedures during the middle of a Congress. And the Senate several times has changed its Standing Rules after the constitutional option had been threatened, beginning with the adoption of the cloture rules and cloture rule.

This constitutional option is well grounded in the U.S. Constitution. The Senate's right to set its rules is not one which once exercised is make rules is not one which once exercised is passed and then cannot be overwhelmed by a supermajority requirement. [Ballin, 144 U.S. 1 (1892)]. First, the Court held that the powers delegated to each body are held by a simple majority of the quorum. A majority can establish a supermajority requirement. [Ballin, 144 U.S. at 6. There is no serious disagreement with the Supreme Court's conclusion in Ballin. In December, Senator Edward W. Brooke warned that only a majority is necessary to change Senate procedures. Congressional Record, Feb. 20, 1975, S3848. Senator Charles Schumer condemned during a Judiciary subcommittee hearing on the constitutionality of the filibuster that Senate rules such as cloture rule could be changed by a majority vote. "S. Br. 22 (2003)."

The Constitution itself sets the quorum for doing business—a majority of the Senate. [U.S. Const., art. I, S. 1.] Second, Senator Brooke concluded that the "power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House." [Ballin, 144 U.S. at 5.]

The Senate majority exercises this constitutional rulemaking power in several ways:

First, it has adopted Standing Rules to govern some Senate practices and procedures. Those rules formally can be changed by a majority vote. Any motion to formally amend Standing Rules, to debate, and Senate Rule XXII creates a special two-thirds cloture threshold to end debate.

Second, the Senate operates according to Senate precedents, i.e., rulings by the Chair or the Senate itself regarding questions of Senate procedure. A precedent is created whenever the Chair rules on a point of order, when the Senate sustains or rejects an appeal of the Chair's ruling on a point of order, or when the Senate rules on a question that has been submitted to it by the Chair. (Floyd M. Riddick, Senator Parliamentarian, Oral History Interviews (November 21, 1978), Senate Historical Office, Washington, D.C., at 429.) As former parliamentarian and Senate procedural expert Floyd M. Riddick has said, "The precedents of the Senate are just as significant as the Standing Rules of the Senate." (Riddick interview at 426.)

Third, the Senate binds itself through rule-making statutes that constrain and channel the consideration of legislation and provide that the Senate can take action on certain matters by majority vote. At least 28 such rule-making statutes govern Senate procedure and limit the right to debate, dating back to the 1939 Reorganization Act and including, most prominently, the 1974 Budget Act. (Martin B. Gold, Senate Procedure and Practice (2004), at 57.) For a complete list of the 26 statutes that limit Senate debate, see John Cornyn, Our Broken Judicial Confirmation Process and the Need for Filibuster Reform, 19 Harv. J. L. Pub. Pol'y 181, 213-214 (2003).

Finally, the Senate can modify the above procedures through Standing Orders, which can be entered via formal legislation. Senate resolutions, and unanimous consent agreements. senator, I think it is important to emphasize, however, that these rules are the mere background for day-to-day Senate procedure. As any Senator observer knows, the institutions function through custom or consent or express agreements about appropriate behavior. Most business is conducted by unanimous consent, and collective norms have emerged that assist in defining minority rights without unduly hindering the Senate's business.
Consider, for example, the Senate's contrasting norms regarding the exercise of individual Senators' procedural rights. Under the rules and precedents of the Senate, each Senator has the right to object to any pending request and, with sufficient second, to demand roll call votes on customarily routine motions. If Senators routinely exercise those rights, the Senate could come to a standstill. Such wholesale obstruction is rare, but not because the Senate's standing rules, precedents, and rulemaking authorities prohibit a Senator from engaging in that kind of delay. Rather, Senators rarely employ such dilatory tactics because of the potential reaction of other Senators or the possibility that the Senate would respond with a defense of generality. Thus, when the House acted first and added legislative language to an appropriations bill, Senators could respond by forcing a vote on a new amendment. The Senate, however, had already made a point of order that such a vote was out of order.

Majority Leader Byrd used the constitutional option again in 1979 in order to block legislation on appropriations bills. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 285–286.] The constitutional option is the Senate's only way to override the plain text of Rule XVI and strip the Senate of its ability to decide questions of generality in this context. Senator Byrd's move was productive on its face because it was, therefore, the Chair is required to rule on the point of order as to its being legislation on an appropriation bill and cannot submit the question of germaneness to the Senate. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 285 (emphasis added).] The Senate then voted to sustain the point of order, and the Senate rejected the ensuing appeal, 44–44.

The result of Majority Leader Byrd's exercise of the constitutional option was a binding precedent that caused the Senate to operate in a manner directly contrary to the plain language of Rule XVI. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 285.] Moreover, the method was contrary to past Senate practice in order to conserve the constitutional power to set its procedural rules.

The Senate's Executive Calendar has two sections—treaties and nominations. Prior to March 1969, a motion to enter Executive Session, if carried, would move the Senate automatically to the first item on the Calendar. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 286. (footnotes omitted).] This is the Senate's only way to override the plain text of Rule XVI, but since 1975, the rule prohibits the Senate from considering a treaty after cloture. [Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 285.] The Senate then voted to sustain the point of order, and the Senate rejected the ensuing appeal, 44–44.

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point of order that Majority Leader Byrd could only move by a non-debatable motion into Executive Session, not to a particular treaty or nomination. [Gold & Gupta, 28 Harv. J. Pub. Pol’y at 269.] The Presiding Officer upheld the point of order given that it was grounded in Rule XXII and long-standing understandings of Senate practices and standing understandings of Senate procedures. Majority Leader Byrd simply appealed the ruling of the Chair and prevailed, 38-54. Thus, even though there was no basis in the Senate Rules, and even though Senate procedures held the right to debate any motion to proceed to a particular Executive Calendar item, the Senate should have made clear that it intended to press the constitutional option that those negotiations bore fruit. As Senator Clinton Anderson would remark in 1979, some Senators threatened to exercise the constitutional option in order to change the cloture requirements of Rule XXII. Then-Majority Leader Byrd was later nominated and confirmed to the U.S. Supreme Court in 1994. Without Majority Leader Byrd’s exercise of the constitutional option earlier that year, it is almost certain that Justice Breyer would not be on the Supreme Court today.

The constitutional option came in 1987 when Senator Byrd was once again Majority Leader. The controversy in question involved an effort by Majority Leader Byrd to proceed to consider a particular bill, an effort that had been frustrated because a majority of Senators objected each time he moved to proceed. To thwart Majority Leader Byrd’s efforts, a number of Senators sought to use a special feature of the Senate Rules—the Morning Hour (the first two hours of the Legislative Day).

Under Rule VIII, a motion to proceed to an item on the Legislative Calendar that is made during the Morning Hour is non-debatable. This feature of the rules gives the Majority Leader significant power to set the Senate agenda during the Noon Hour. However, a 1987 Senate Journal is approved and Morning Business is thereafter concluded (or the first of the two hours has passed). Meanwhile, the clock stops while Majority Leader Byrd sought to use a special feature of the Senate Rules—the Morning Hour (the first two hours of the Legislative Day).

The Senate also has endorsed (or acted in response to) some version of the constitutional option earlier that year, it is almost certain that Justice Breyer would not be on the Supreme Court today.

A few years later, Majority Leader Byrd threatened to use the constitutional option to bring a bill to the Floor. [Gold, Senate Procedure and Practice, at 68-69.] It was this feature of the Morning Hour that Senator Byrd believed would enable him to proceed to the bill in question.

Majority Leader Byrd’s plan was complicated, however, when objecting Senators forced a vote on the approval of the Morning Journal, as was their right under the procedures and practices of the Senate. Rule XII provides that during a roll call vote, if a Senator declines to vote, he or she must state a reason for being excused. The Presiding Officer then must put a non-debatable question to the Senate as to whether the Senator should be excused from voting. When Majority Leader Byrd moved to approve the Journal, one Senator declined to vote and sought to be excused. Following Rule XII, the Presiding Officer put the question directly to the Senator as to whether the Senator should be excused. The Chair was likewise obliged to put the question to the Senator. At that point, yet another Senator announced he wished to be excused from that vote. There were four roll call votes then unexecuted. Without any votes being taken, Majority Leader Byrd simply called the four roll call votes, allowed the Senators to debate the question of excusing the Senator and allowed the three new procedural votes to be taken. Majority Leader Byrd countered with a point of order to require the Senators to vote whether the Senator should be excused. If Senators persisted in this tactic, the time it took for roll call votes was the only delay the Senate would experience, and the Majority Leader would lose his ability to move to proceed to his bill without debate. All this maneuvering was wholly consistent with the Standing Rules of the Senate.

Majority Leader Byrd countered with a point of order to require the Senators to vote whether the Senator should be excused. If Senators persisted in this tactic, the time it took for roll call votes would be the only delay the Senate would experience, and the Majority Leader would lose his ability to move to proceed to his bill without debate. All this maneuvering was wholly consistent with the Standing Rules of the Senate.

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Majority Leader Byrd was later nominated and confirmed to the U.S. Supreme Court. Judge Breyer was later nominated and confirmed to the U.S. Supreme Court. Judge Breyer was later nominated and confirmed to the U.S. Supreme Court. Judge Breyer was later nominated and confirmed to the U.S. Supreme Court.
The best illustration of this traditional norm is the March 2000 treatment of President Bill Clinton’s nominations of Richard Paez and Marsha Berzon to the U.S. Court of Appeals for the Ninth Circuit. With cloture votes of 60–38 (for Paez) and 60–39 (for Berzon), cloture was easily reached. [For Berzon, compare Record Vote #38 (cloture invoked, 86–13) with #38 (confirmed, 64–34); for Paez, compare Record Vote #67 (cloture invoked, 85–14) with #40 (confirmed, 59–39). All votes on Mar. 8–9, 2000.] Had every Senator who voted against Mr. Paez’s nomination likewise voted against Mr. Berzon, cloture would not have been invoked. Thus, as recently as March 2000, more than 80 Senators were on record opposing the filibuster of judicial nominations. In more than a dozen instances of Senators’ historic opposition to filibusters for judicial nominations, see Senate Republic. or maybe the Clinton Administrators’ Mr. Estrada an Up-or-Down Vote Would Send a Dangerous Precedent” (Feb. 10, 2003). For an extended examination of filibustering Senators’ previous opposition to judicial filibusters, see Cornyn, 27 Harv. J. L. Pub. Pol’y at 207–211.) If the new judicial nomination filibusters are accepted as a norm, then the Senate, not us, is defining this history and charting a new course.

It is not only the Senate norm regarding non-filibustering judicial nominations that risks being transformed, but the effective constitutional standard for the confirmation of judicial nominations. There can be no serious dispute that the Constitution requires only a Senate majority for confirmation. Indeed, many judicial nominees have been confirmed by fewer than 60 votes in the past—including three Clinton nominees and two Carter nominees. [See Record Vote #120 (July 28, 1998) (confirmed 92–6); Record Vote #121 (Dec. 15, 1998) (confirmed 54–46); Record Vote #122 (Jan. 7, 1999) (confirmed 61–38); Record Vote #129 (Jan. 14, 1999) (confirmed 54–46).] Moreover, as a further testament to which the Senate has lost its moorings. These characterizations illustrate the extent to which the Senate has lost its moorings. Without restoration of the majority-vote standard, the new constitutional option would presumably require the constitutional majority-vote supermajority to be confirmed, without any constitutional amendment—or even a Senate consensus supporting that change. Any exercise of the constitutional option would, therefore, be aimed at restoring the Senate’s procedures to conform to its traditional norms and practices in the confirmation of judicial nominations. And it would prevent the Senate from abusing procedures to supermajority requirements. Instead, it would be restorative, and Democrats and Republicans alike would operate in the system that served the nation until March 2000.

CONCLUSION

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The essential character of the Senate will not be destroyed if the constitutional option is exercised. When Majority Leader Byrd repeatedly exercised the constitutional option, the cloture vote, which is merely a procedural rule, is of equal value at all times. [Ballin, 144 U.S. at 5.] The essential character of the Senate will be destroyed if the constitutional option is exercised. When Majority Leader Byrd repeatedly exercised the constitutional option, the cloture vote, which is merely a procedural rule, is of equal value at all times. [Ballin, 144 U.S. at 5.]

The constitutional option would turn the Senate into a “rubber stamp.” Against majority procedural change. The Senate has repeatedly exercised its constitutional power to reject judicial nominations through straightforward denials of “consent” by up-or-down votes. [See Record Vote #124 (Oct. 23, 1987) (defeated 42–58); Record Vote #112 (Apr. 8, 1970) (defeated 45–51); Record Vote #135 (Nov. 21, 1969) (defeated 45–55).] Even in the early 1970s, when cloture was used to overcome the nomination of J. Leon Holmes to a federal district court in Arkansas, fifteen Democrats voted against President Bush’s nominees. Had several Democrats not voted for Mr. Holmes, he would not have been confirmed. (Record Vote #153 (July 6,2004) (confirmed 51–46).) In other words, the Senate still has the ability to work its will in a nonpartisan fashion as long as the minority permits the body to come to up-or-down votes. Members from both parties will ensure that the Senate exercises its constitutional duty by carefully evaluating all nominees.

CONCLUSION

Can the Senate restore order when a minority of its members chooses to upset traditional norms? Can the Senate act so that it need not acquiesce whenever a minority decides that the practices, procedures, and rules should be changed? Can the Senate majority—necessarily a partisan majority, but simply a majority of Senators—act to return the Senate to its previously agreed-upon norms and practices? The answer to all these questions is a clear yes. The Senate would be acting well within its traditions if it were to restore the longstanding procedural norms so that the majority standard—confirmation of the President’s nominees—is preserved and nominees who reach the Senate floor do not fall victim to filibusters.

Mr. KYL. These precedents—in 1977, 1980, and in 1987—depend on the situation the Senate faces today. In those instances, Senate business was being obstructed by dilatory tactics that had not traditionally been employed but which were permitted under the rules. The Senate faced a same same as before. Must the Senate permit rule by the minority, or can it exercise its constitutional power to restore traditional practices? In
each case, the Senate did the latter. It created precedents that altered the practices and procedures and, in some cases, operation of the standing rules themselves in order to ensure that tradition was upheld. What did not happen as a result of these earlier exercises of the constitutional option?

Well, first, the Senate did not collapse or become “like the House of Representatives,” which is the fear of many Senators today. Second, Senators’ speech rights are just as strong as ever. Nor were Americans’ free speech rights injured, as some Senators say will happen. Third, minority rights were not destroyed. The Senate minority is as vibrant as ever and has been remarkably successful in obstructing the business of the Senate, whether we are talking about the Energy bill, medical liability lawsuit reform, asbestos reform, tax relief, or immigration. Before I close, I would like to address concerns that some of my conservative friends have recently expressed. Some are fretting that Republicans are taking a dangerous step by restoring the traditional up-or-down vote standard for judicial nominees. Senator Johnson, the Senator from Texas, made against President Bush’s nominees. To that I say, I do not think so. And even if true, I am willing to give up that tool. It was never a power we thought we lost. It was the past, and it is not one likely to be used in the future, unless that longstanding tradition is abdicated.

I know some insist we will somehow want to block judges by filibuster, but I know my colleagues. I have heard them speak passionately, publicly and privately, about the injustice done to filibustered nominees. I think it highly unlikely that they will shift their views simply because the political worm turns. Again, if we sustain the tradition of the Senate. So I say to my friends what you say that we Republicans are losing is in fact no loss at all.

My friends also argue that the legislative filibuster will be next. I have even seen some media outlets insist that this exercise of the constitutional option for judicial filibusters will automatically apply to the legislative filibuster. This is completely false. Moreover, the Senator from Texas has been deficient to eliminate the legislative filibuster and few, if any, Democrats do. Some once did, but they recently recanted. In fact, the junior Senator from California said she was “wrong . . . totally wrong” ever to have thought otherwise.

Everyone here knows that political fortunes change. It is one thing to give this supposed “right” that had never been used, such as this filibuster of judicial nominees. It is quite another to be so shortsighted as to eliminate this powerful tool. In fact, the first vote I ever cast as a Senator was to preserve the legislative filibuster, and I was in the majority.

But I think it is important to acknowledge, in the interest of intellectual honesty, that if the majority wanted to eliminate the filibuster for all matters, including legislation, it would have certainly had that power. It would be wildly imprudent, contrary to tradition, generally destructive of the institution, but that is what the Constitution provides—the power of the Senate to govern itself.

In closing, I say to my colleagues what we are contemplating doing is in the best traditions of the Senate. We are restoring our consensus practices for managing the judicial confirmation process using a tool that has been repeatedly used and has always been available. I look forward to completing this debate so that we can start voting on individual judicial nominees and turn to the pressing legislative matters of the Senate.

**EXHIBIT 1**

(From the Washington Times, May 19, 2005.)

**A UNIQUE CASE OF OBSTRUCTION**

By Senator Bob Dole, R-Kan.

In the current debate over judicial nominations, some commentators claim Republicans such as myself are misrepresenting history by suggesting the current filibuster tactic is a desire to destroy judicial nominees. This simply is not true.

These commentators cite the 1968 nomination of Abe Fortas to be chief justice of the United States as an example of how Republicans operate a so-called legislative filibuster. Yet, they are off the mark.

These commentators cite the 1968 nomination of Abe Fortas to be chief justice of the United States as an example of how Republicans operate a so-called legislative filibuster. Yet, they are off the mark.

There were problems with the Fortas nomination, but only did he represent the most aggressive judicial activism of the Warren court, but it soon became apparent Justice Fortas had demonstrated lax ethical standards while serving as an associate justice.

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

More fundamentally, Fortas never took off his political hat when he became a judge. While serving as a Supreme Court justice, Fortas continued serving as an informal political adviser and even involved himself in decisional advice and funding of candidates in the United States as an example of how Republicans operate a so-called legislative filibuster.

It later emerged Fortas had discussed pending cases with the president, an obvious violation of professional ethics. In fact, less than a year after his nomination as chief justice was withdrawn by President Johnson. Justice Fortas was forced to resign from the Supreme Court due to ethical breaches.

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

That simply did not happen with Fortas, where the Senate debated the nomination’s merits quite vigorously. Senators explored the ethical issues involved and the widespread belief the vacancy had been manufactured for political purposes. They sought to debate to persuade one another. The opposition to Fortas’s nomination should be defeated.

After less than a week, the Senate leadership tried to shut down debate. At that time, the 43 senators opposed to the nomination, versus the four years some of President Bush’s nominees have been pending. It’s clear the Democrats understand this.

Today, Senate Democrats block up-or-down votes on judicial nominees who are supported by a majority of senators.

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

(3) The Senate debated the Fortas nomination for several months. President Johnson withdrew the nomination, versus the four years some of President Bush’s nominees have been pending. It’s clear the Democrats understand this.

(4) Fortas’s support and opposition were bipartisan, with both Republicans and Democrats on both sides of the question. Today, the controversy is purely partisan—with only Democratic senators, led by their leader Harry Reid, opposing a Fortas nomination.

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

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

For the first time, judicial nominees with clear majority support are denied an up-or-down vote on the Senate floor through an unprecedented use of the filibuster. This is not a misrepresentation of history; it’s a fact. THE PRESIDING OFFICER (Mr. ALLEN): The Senator from Texas.

Mr. CORNYN. Mr. President, at a time when it seems as if the Senate is divided on the question of whether to debate on the President’s nominees have shed more heat than light, it has been a delight for me to sit here, as the Chair has, and listen to the Senator from Arizona present in comprehensive detail the legal and constitutional framework for the Senate’s authority to set its own rules by establishing precedents, passing standing rules, adopting standing orders by unanimous consent, and otherwise. It was an excellent presentation, and, indeed, a powerful one. For example, why leading Senators on the other side of the aisle, including the former Democratic majority leader, the Senator...
from West Virginia, the Senator from Massachusetts, and the junior Senator from New York, have all stated, as recently as 2 years ago, that, of course, a majority of Senators has the power to set rules, precedents, and procedures. Indeed, that is why the power of the Senate majority to set rules, precedents, and procedures is known as the Byrd option or, as some have called it, the constitutional option.

Let me begin my remarks by making one simple point. I would prefer the bipartisan option to the Byrd option every time. America works better, indeed the Senate works better, when we work together in a bipartisan way to try to solve the problems that come before the Congress. I would much prefer to stand up here, after waking each day, and conduct business in a bipartisan manner.

I have done my best to make the most of every opportunity that I have seen and I have been in the Senate. For example, I have enjoyed working with the senior Senator from Vermont on legislation to strengthen the accessibility, accountability, and openness of Federal Government.

I have worked with the junior Senator from Wisconsin and the senior Senator from Connecticut on the important issue of continuity of Government in the wake of a future terrorist attack.

I have worked with the senior Senator from New York on ways that we together can combat modern day slavery and human trafficking.

And I have worked with the senior Senator from Massachusetts on military citizenship and immigration issues.

I would choose collaboration in this kind of bipartisan cooperation any day of the week. But bipartisanship is a two-way street. Both sides must agree on certain fundamental principles and a fair process that applies no matter who is in power, whether we have a Republican or a Democratic President, whether we have a Republican majority or a Democratic majority.

The most fundamental principle of all is fairness. Fairness means that the same rules apply regardless of who is President.

Bipartisanship is difficult, however, when long-held understandings and the willingness to abide by basic agreements and principles has unraveled so badly. I have seen fairness falter, bipartisanship will fail.

So I ask my colleagues, what are we supposed to do when these basic principles, commitments, and understandings have unraveled so badly? What are we to do when nominees are attacked, including being called names, simply for doing their jobs, when they are attacked for following judicial precedents adopted and agreed to by appointees of Presidents Clinton and Carter, when those who have been in the Senate for nearly two centuries, when both sides once for the most part, agreed that nominees would never be filibustered, and then one side simply denies the existence of that very agreement when it suits them, when, upon their interpretation of Senate tradition changes based on an attempt to occupy the Oval Office and who happens to be in the majority in the Senate?

What are we to do when our colleagues boast to their campaign contributors of this "unprecedented" obstruction, and then come to the Senate floor and claim that it is someone else who has changed the rules; when our colleagues justify their obstruction by pointing to Clinton nominees, such as their most prominent example, Judge Richard Paez, who was confirmed by the constitutional option. What are we to do when the Democrats' former majority leader, the Senator from West Virginia, the Senator from West Virginia, claims on 1 day that all they seek is to occupy the Oval Office and who happens to be in the majority in the Senate?

What are we to do when Senate and constitutional traditions are abandoned for the first time in more than two centuries, when both sides once agreed that nominees would never be filibustered, and then one side simply denies the existence of that very agreement when it suits them, when, upon their interpretation of Senate tradition changes based on an attempt to occupy the Oval Office and who happens to be in the majority in the Senate?

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school boards to make.’” She also noted that the majority “misinterpreted the Education Code.”

Another case that Senators, particularly the Senator from Massachusetts, attacked Justice Owen for was Texas Farm Bureau v. Company Corporation. In this case, Justice Owen ruled that neither an arsonist nor his spouse should benefit from his crime by recovering insurance proceeds.

The Senator from Massachusetts says this position puts Justice Owen out of the mainstream. I disagree. Do Justice Owen’s opponents really believe that it is extreme and out of the mainstream to say that arsonists and their spouses should not benefit from their crime?

I also point out that Justice Owen’s ruling in this case followed two unanimous decisions of the Fifth Circuit Court of Appeals, the very court to which she has been nominated. Again, hardly out of the mainstream.

The Senator should check her facts. She is out of the mainstream when her supporters in the Senate criticize her for doing one thing, when other Senators criticize some other nominee for doing something else. They really are arguing both sides against the middle and these nominees cannot win, according to that inconsistent, and surely some might even claim hypocritical test.

The Senator from Illinois has attacked Justice Owen for a ruling in the City of Garland v. Dallas Morning News. In that case Justice Owen followed precedents adopted by three appointees of President Carter to the Federal bench. So Justice Owen is now too conservative and out of the mainstream because she happens to agree with President Jimmy Carter?

The majority opinion in that case said we should not blindly follow the Federal courts. Justice Owen simply said that the courts should follow Federal precedent because Texas open government laws had originally been modeled after the Federal Freedom of Information Act.

One last example. The Senator from Washington mentioned a case that was discussed in a recent op-ed in Roll Call. She claimed that in Read v. Scott Fetzer Company, Judge Owen would not allow a woman who was raped by a vacuum cleaner salesman to sue the company that had hired him without a background check.

The Senator should check her facts because it is simply not true. The Senator must not have seen my letter published in Roll Call a few days later because I pointed out there, as I point out here, that her interpretation of the law made clear no one questions that the company that hired the rapist is, in fact, liable. The justices simply disagreed on whether another company, one that had not hired the rapist and had no knowledge of the rapist, should also have been held liable.

Of course, a number of Senators have spoken about the parental notification cases. That is the attempt by the Texas Supreme Court to interpret a new statute which stands for the proposition which I think most Americans would agree with, that when minor girls seek to get an abortion, they should notify their parents or, failing that, seek a bypass of that requirement from a judge. What the Senator and others are saying is, if you reject the use of this particular legal doctrine, the nondelegation doctrine, you are out of the mainstream. And if you oppose the nondelegation doctrine, you are somehow out of the mainstream.

I ask, should we trust the critics who have misconstrued and mischaracterized and painted a picture of this fine person beyond any recognition by those who know her and have worked most closely with her, the people who actually know her, the people who have worked most closely with her? In fact, it is the very same liberal special interest groups who criticize her today who never wanted the legislature to pass this parental notification law in the first place.

It is these same liberal interest groups who literally make their living trashing nominees of this President who are criticizing Justice Owen today.

As a former justice of the Supreme Court myself, I find these cases moderately interesting reading. Most Senators and most Americans probably do not, and that is fine. But we can surely agree on this. If these cases are anything but a trial balloon, then the truth is yet to be told. If, in fact, as the Senator from Massachusetts says, the author of the opinion, the author of the law she was interpreting who supported Justice Owen? Would it be, perhaps, her former colleagues on the court, including former Justices Alberto Gonzales and Greg Abbott, who support Justice Owen’s nomination. How about now—Attorney General Alberto Gonzales, who swore under oath that the accusations we are hearing are untrue and that he never accused her of being a judicial activist.

I have been one of the advertising that has been done by some of the interest groups attacking Justice Owen unfairly who are claiming that Alberto Gonzales accused her of being a judicial activist. As I pointed out, he swore under oath that is not true. It is clear by any reasonable reading of the opinions that he never referred to her by name or was even, in fact, referring to her by implication.

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If the Senate today were simply to follow more than 200 years of consistent Senate and Constitutional tradition dating back to our Founding Fathers, there would be no question that Justice Owen would be confirmed today. President after president after President after President after President after President after President after President after President after President after President after President after President after President after President after President after President after President after President after President after President after President after President after President after President after President—this fine and decent human being—an outstanding judge has wasted 4 long years for a simple up-or-down vote.

Yes, we need a fair process for selecting fair judges, after full investigation, full questioning, full debate, and then a vote. Throughout our Nation’s more than 200-year history, constitutional rule and Senate tradition for confirming judges has always been a majority vote. And that tradition—broken 4 years ago after this nominee and others were proposed by the President—must be restored. After 4 years of delay, affording Justice Owen a simple up-or-down vote would be an excellent start.

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

EXHIBIT 1
Professor Michael Gerhardt, who advises Senate Democrats about judicial nominations, has written that a supermajority requirement for confirming judges would be “problematic, because it creates a presumption against confirmation that shifts the balance of power to the Senate and enhances the power of the special interests.”

D.C. Circuit Judge Harry Edwards, a respected Carter appointee, has written that the Constitution forbids the Senate from imposing a supermajority rule for confirmations. After all, otherwise, “[t]he Senate, acting unilaterally, could thereby increase its own power at the expense of the President” and “essentially take over the appointment process from the President.”

Edwards thus concludes that “the Framers never intended for Congress to have such unchecked authority to impose supermajority voting requirements that fundamentally change the nature of our democratic processes.”

Georgetown law professor Mark Tushnet has written that “[t]he Democrats’ filibuster is the result of profound, pre-constitutional understanding.” He has also written: “There’s a difference between the use of the filibuster to derail a nomination and the use of other Senate rules—on scheduling, on not having a floor vote without prior committee action, etc.—to do so. All those other rules . . . can be overridden by a majority vote and do not express the Senate’s desire to hold a nominee; it can’t do so with respect to a filibuster."

And Georgetown law professor Susan Low Bloch has condemned supermajority voting requirements for confirmation, arguing that they would allow the Senate to “upset the carefully crafted rules concerning appointment of both executive officials and judges, and to unilaterally exercise power the Constitution gives to the President in the appointment process. This, I believe, would allow the Senate to jeopardize its own role and would unilaterally upset the balance of powers established by the Constitution.”

“Everyone agrees: Senate confirmation requires simply a majority. No one in the Senate or elsewhere disputes that.”

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. CORZINE. Mr. President, I rise today to address the nomination of Justice Owen to the U.S. Court of Appeals and to oppose the majority’s challenge to our Nation’s constitutional framework of checks and balances. I also rise to protect the rights of the minority in our political system.

This debate is historic in the context of American constitutional practice, and it deals with the core of necessary consensus building that has united and strengthened America throughout our political life.

Though I have come to the floor on a number of occasions this year to speak on vital domestic and national security concerns affecting New Jersey’s and America’s citizens, today, with disapproval, I rise to speak—not about issues such as the safety of our children, protecting our citizens at home from terrorist threats, whether it be at chemical plants or ports or airports; ending genocide in Darfur; strengthening Social Security; providing access or cost control to health care; lowering gas prices, combating global warming; or building affordable housing—all vital issues to the American people—in short, because I am here because some in this body think it is their responsibility and right to eliminate minority rights when it comes to approving lifetime appointments to the U.S. Court of Appeals and to the U.S. State supreme court.

I rise to protest this attack on our constitutional system and our Senate traditions. In short, it is an attack that I think supports the view that breaking the rules is the way to change the rules. We are here today because a number of my colleagues, many in good faith, wish to ignore the principles embedded in the U.S. Constitution and allow the will of the majority to reign supreme. Absolute power is often said to corrupt, and limiting the checks and balances of the right to debate on the Senate floor can most certainly facilitate that abuse.

There was a reason our Founders gave two votes to each State. That fundamental principle was debated as the Founders wrote our Constitution. Today, there are two Senators from California, a State with 36 million citizens. Similarly, there are two Senators from the State of Wyoming, which has slightly more than 500,000 citizens. Our Founders believed strongly in the right of minorities to have a voice on the floor of the Senate and embedded this principle in our Constitution. It is absolutely one of the most essential compromises that was a part of creating this Constitution, and it is the framework that has allowed the Constitution to work so effectively for some 217-odd years.
At a practical level, this overreach—some might call abuse—by the majority is unfortunate for those of us who have been pleased to work well with the White House in building a consensus on judicial nominations. It has happened before. For example, New Jersey Senators have met and agreed to a set of five judges, including, by the way, a circuit court judge who reflects the best of our legal community and who travels well within the mainstream.

Over my 4½ years in the Senate, the White House and I have agreed on an outstanding package of jurists of whom we can all be proud. And we are currently working with the White House on another group of mainstream judges and one additional circuit court judge.

Let me be clear, while many of these judges would not have been my first political or philosophical choice, I have worked, together with Senator Lautenberg, with the White House to come to an agreement on smart, fair, and hard-working judges for the Federal bench in New Jersey—people popularly in the mainstream, people of whom we will all be proud to have as lifetime judicial appointments. All of these are judges committed to the rule of law and not to promoting their own political agenda. For example, when the White House in building a consensus, consistent with precedent, ones that have been historically in place, consistent with precedent, ones that have existed for decades, to challenge people who we believe are fundamentally unqualified or judicially outside the mainstream to the Federal bench because of their views, which are inconsistent with precedent, or because of their activist judicial records.

One has to put it into a historical perspective. This is something that should be debated on a more fundamental level of what it is that one can draw from the reading of our Constitution. I go back to the fact that there are two Senators for every State, regardless of its size. The intent was to make sure minorities were fully represented.

Looking at this from another perspective, a more political perspective, I accept that Republicans hold 55 seats in the Senate and that President Bush won reelection. However, neither of those facts goes against the constitutional history of the right to speak your mind as a minority. And neither of those facts give the majority the right to break the rules to gain more power. The rules are the rules adopted. A ruling from the Chief Justice consultation with the Parliamentarian would be an extraordinary action, certainly contrary to anything I have seen in the 4½ years I have been here, certainly contrary to what I hear among my colleagues.

A rule change under extraordinary procedures is why it has been labeled the nuclear option. I would argue if the majority were to adopt this procedure they would be breaking the rules to make the rules. We all know we are setting an extraordinary precedent—and frankly, this could become a slippery slope for this legislative body, particularly when it sets a precedent that may be exploited by Republicans to include legislative filibusters, which I hear almost everyone argues is not something they would embrace. It could be a slippery slope and a dangerous precedent for a thriving democracy and an American way.

Our U.S. system is based on the combination of ideas between two main political parties. Clearly, each side seeks to prevail. What the majority is doing now goes beyond a simple desire to prevail. What is going on here is an attempt by the majority to break the rules to change the rules. That violates the principle of fundamental fairness and actually attacks in a fundamental sense the rule of law under which our Nation operates. You don't break the rules to win in America. That is not the American way.

The American way is to play fairly and consistently by the rules. That is all that I believe we on this side of the aisle are asking for. We are asking for the right to play by the established rules and not by a majority in place, consistent with precedent, ones that have existed for decades, to challenge people we believe are fundamentally unqualified or judicially outside the mainstream to the Federal bench because of their views, which are inconsistent with precedent, or because of their activist judicial records.
Let me be specific as to the judicial nominees before the Senate: Justice Priscilla Owen and Justice Janice Rogers Brown. Both may be remarkable people in their own right, but that is not my concern. Good people may not be fit to serve as federal judges because of their interpretation of the Constitution, how they apply it or don’t apply law, and the activist approach they take.

Let’s start with Justice Owen. This is a judge who has consistently inserted her political views into judicial opinions. That is how I read the record. She has had a record distinguished by conservative judicial activism. Justice Owen has consistently voted to throw out jury verdicts favoring workers and consumers against businesses and she has dismissed cases brought by workers for job-related injuries, discrimination, and unfair employment practices, making decisions that are inconsistent with the law and interpreting the law. Justice Owen has had a record distinguished by constitutional activism. She has repeatedly voted to abandon principles of stare decisis and mechanically to apply constitutional provisions to situations that are not intended to apply. Justice Owen has consistently voted to dismiss cases brought by workers and consumers against businesses and she has consistently voted to support the rights of businesses to discharge employees for political views. But when you go to the floor of this Senate, you will find that this is a case where there is reason to believe that Justice Brown would operate outside of the mainstream if confirmed as a federal judge.

I simply cannot support placing such an immoderate judge on the Federal appeals court for a lifetime tenure.

In closing, let me return to where I began. Yes, this is an important debate—maybe one of the two or three most important in the last few years. I think it goes at the core of our constitutional system. It is unfortunate that we are not here debating all the problems that face our Nation and the citizens of my State, which include health care costs, gas prices, education, energy costs, and the safety of service men. Those are the issues that people talk to me about when I am out and about in my home State. But the people of my home State—and I suspect it is true of people of every State in the Nation—expect us to defend our constitutional liberties. They expect us to stand for checks and balances and for the rights of the minority so that we can build a consensus to unite, not divide. They expect us to speak strongly to preserve those rights on the floor of this Senate. I think that is what this debate is about. This debate is a fundamental issue before, truly one of the most important we can have.

I want us to move on to the real issues of the day, and they are challenges for all of us. Men and women are losing their lives. But there is an absolute responsibility for all of us to make sure that our system works with the kind of care and thoughtfulness and the kind of checks and balances that have served our Nation so well.

It is our responsibility to stay tuned to the historical traditions of the Senate and to the principles our Founders put together that said minorities in this Nation do have a voice. The Founders established that principle clearly with the Philadelphia Compromise. We must sustain this principle in the days ahead in our debate.

I yield the floor.

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

The PRESIDING OFFICER. The clerk will call the roll.

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

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

Mr. DURBIN. Mr. President, this morning, Senator Gordon Smith came to the floor. He is a close friend. He made a statement relative to some things I said in the debate yesterday about the nomination of Priscilla Owen. I am flattened he was listening, or that someone was listening.

I am afraid what he said about my remarks was not completely accurate. Senator Smith made the following statement:

As I understood the assistant Democratic leader, he was saying that Judge Owen’s membership in the Federalist Society should disqualify her.

Well, this is about the nomination of Priscilla Owen from Texas. I made the point of how interesting it was that while very few lawyers in America believe in the Federalist Society, about 1 percent—it turns out that about a third of President Bush’s nominees belong to this Federalist Society. I referred to it as the “secret handshake” at the White House and that, if you belong, you have a much better chance to become a judge.

I also made a point of the fact that when we ask nominees what the Federalist Society is and why do you belong, we get the craziest answers you can imagine. There was a law professor from Georgetown, Viet Dinh, a nice man who worked for the Department of Justice, and I said to him, “What is the Federalist Society? Why is it so many Bush nominees belong to it?” “Oh,” he said, “it is an excuse to have lunch in Oxford when once a time the President goes there and somebody talks to us and we eat and come back to school.” And I would ask others, “What is it all about?”

With the exception of Senator Orrin Hatch, who I believe was on the board, only 1 percent will be on the board. The Federalist Society, almost nobody will talk publicly about who they are and what they believe.

That was the point I was making. This curious, semisecret society is so wary of disapproval by its members whenever you ask a public question about it. Yet it appears to be one of the most important things you can add to your resume if you want to be a judge from the Bush administration.

And Priscilla Owen of Texas—surprise, surprise—is a member and officer of the Federalist Society. I do not think she should be disqualified because of that. There is nothing illegal about it. I do not know what the philosophy is other than what they state on their Web site. It is very conservative. It thinks that liberals are ruining the world. It goes on and on.

I am not saying that if you belong to that you should not be qualified to serve on the bench. That is not the point. But when I asked someone such as Priscilla Owen, a supreme court justice from Texas whose time must be very precious, why she took the time to join this organization and she cannot, or will not answer it, I think it is important.

I voted to confirm the vast majority of President Bush’s nominees and a lot of Federalist Society members, so I am not blackballing or disqualifying them. I know it is an ultraliberal society, whatever it is, and I know that so many people are afraid to even acknowledge they are members when it is brought to public attention.

I think their views are extreme and off base. I think their views are extreme and off base when we look at mainstream America. How can you say, as they do, that the legal profession is strongly dominated
by a form of orthodox liberal ideology? Look at the 13 Federal courts of appeal and you find 10 of those Federal courts of appeal in America dominated by Republic-"an-appointed judges. Liberal ide-ology? How can you say the legal pro-fession is unanimously dominated by a form of orthodox liberal ideology when you leave out of the nine members of the U.S. Su-preme Court were appointed by Repub-lican Presidents?

So what I said about Justice Owen is that her ideological profile is domi-nated by her membership in the Federalist Society. However, the best documentation on her ideology is her own track record as a judge. So I say to Senator SMITH, no, it does not dis-qualify Priscilla Owen, but it is curious to me why this supreme court justice had the time to pay the dues and join an organization which she just cannot remember what they believe in. I think there is more to it.

Senator Kyl of Arizona also came to the Senate floor. He said something I would like to address. He charged that President Bush has only had 67 percent of his circuit court nominees con-firmed, and that this is an alltime low, according to Senator Kyl. I do not know if it is true or not. I do not have the data going back all the way in time. But I know this: If the Repub-lican leadership had taken me up on my offer this morning and they had confirmed the four circuit court nomi-nees they have unanimous consent to bring up for a vote, President Bush’s circuit court success rate would be 75 percent. But I was reminded by the Repub-lican whip, Senator MCCONNELL— that there is just no time in the sched-u-ule to bring up more of President Bush’s circuit court nominees.

Curious, isn’t it? This whole debate, this constitutional confrontation is all about whether President Bush is get-ting his judicial nominees. I came to the floor this morning and said: Here are four we can take right now, confirm on a bipartisan basis, and get it done before lunchtime. Senator MCCONNELL of Kentucky said we are much too busy to deal with approving judges on a bipar-tisan basis. Instead, we are focused on deal with approving judges on a bipar-tisan basis, and get it done before we can take right now, confirm on the Senate floor this morning and said: Here are four we can take right now, confirm on a bipartisan basis, and get it done before lunchtime. Senator MCCONNELL of Kentucky said we are much too busy to deal with approving judges on a bipar-tisan basis. Instead, we are focused on deal with approving judges on a bipar-tisan basis, and get it done before we can take right now, confirm on the Senate floor this morning and said: Here are four we can take right now, confirm on a bipartisan basis, and get it done before lunchtime. Senator MCCONNELL of Kentucky said we are much too busy to deal with approving judges on a bipar-tisan basis. Instead, we are focused on deal with approving judges on a bipar-tisan basis, and get it done before we can take right now, confirm on the Senate floor this morning and said: Here are four we can take right now, confirm on a bipartisan basis, and get it done before lunchtime.

I do not want to belabor this point. Let me just say, let’s be careful with the language we use on the floor when it relates to judges. I do wish to talk about the rest of Senator FRIST’s state-ment, not that particular section. He admitted in the course of what he said that “the issue is not cloture votes per se;” it is not filibusters, per se. And we know from his own actions that the majority leader does not be-lieve that every judicial nominee with majority support deserves an up-or-down-majority vote. In fact, on March 8, 2000, voted to support a fili-buster. In other words, the thing that he is condemning when it comes to Priscilla Owen is exactly what he did on March 8, 2000—supporting a fili-buster against a nominee, Richard Paez. I do not understand that. I can-not understand how he can condemn that today, having done it himself a short time ago.

It turns out that it is a very specific type of filibuster to which Senator FRIST objects—in his words, a leader-ship-led vote. I do not understand how he can condemn filibusters and decided which filibusters are OK and which are not. That really destroys the whole argu-ment that this is all about an up-or-down-majority vote.

Senator FRIST voted to deny Richard Paez an up-down-majority vote. Now he says we need to change the 200-year tradition in the Senate so that no one can ever do the same thing he did to Richard Paez. This is an unusual prin-ciple to follow in order to create a con-stitutional confrontation over something that is very contradic-tory on its face.

I believe filibusters are constitu-tional. They are certainly allowed under the Senate rules. And when we get to the question of motives behind them, I really think that the Repub-licans, the majority has to dig very deep in order to find an argument to make against the practice we have approved in the Senate throughout the history of the Senate.

In addition, yesterday morning, be-fore Senator FRIST moved to bring up the nomination of Priscilla Owen, Sen-a-tor FRISCH asked the majority leader whether it would not make more sense for the Senate to move instead to con-sider four other nominees about whom there is little controversy. Senator FRIST refused yesterday, as Senator MCCONNELL refused today. So for 2 straight days, the Republicans have had a chance to pick up four circuit court nominees to fill vacancies, to give the President a higher success rate in filling vacancies on these courts than the President Clinton did. And why have we refused; they said we are much too busy. We have to spend time here de-stroying a precedent in the Senate. We have to spend time here de-stroying a precedent in the Senate. We have to spend time here de-stroying a precedent in the Senate. We have to spend time here de-stroying a precedent in the Senate.

Senator LEAHY asked if we could con-sider a nominee from Utah, who would likely win confirmation easily yesterday. Senator FRIST refused. He insisted on bringing up this nomination of Priscilla Owen, one of the most contro-versial judicial nominees in re-cent memory, someone who has al-ready been rejected by the Senate.

Why would the majority leader flatly refuse every effort to find a way out of this crisis? I don’t know. It is possible he will tell the people who should not be trusted for advice. I don’t know if the name Manny Miranda rings a bell, but it should. From the spring of 2002 until April 2003, Mr. Miran-da was working for the chairman of the Senate Judiciary Committee, ORRIN HATCH, and then for majority leader BILL FRIST.

Mr. Miranda and other Republican staff hacked into the committee’s com-puters and systematically stole thou-sands of documents, including con-fidential memos between Democratic Senators and their staff. I know. I was the biggest target of Mr. Miranda.
I discovered it when the Wall Street Journal published an editorial and quoted extensively from a staff memo in my office. And I said as soon as I read it: Somebody stole this memo. There is no way the newspaper would have a copy of an obscure memo and build a story around it.

After some investigation, we learned that in fact Mr. Miranda was behind it.

Let me tell you what then-chairman of the Senate Judiciary Committee, Orrin Hatch, said. I quote him directly:

I am mortified that this improper, unethical and simply unacceptable breach of confidential files may have occurred on my watch.

At which point Senator Hatch asked the Senate Sergeant at Arms to conduct an investigation. Mr. Miranda was forced to resign from the Senate staff in disgrace. The findings of the Sergeant at Arms investigation were referred to the Justice Department, which commenced a special prosecutor to the case.

Two years later, with the case still unresolved and finished, it appears Mr. Miranda is back. According to news reports, he is now helping to lead the nuclear option from outside the Senate. Yesterday, Mr. Miranda sent an e-mail to allies of Senator Frist, demanding, “a straightforward rallying cry: NO DEALS, VOTE PRINCIPLE—and no UNPRINCIPLED COMPROMISES.”

So here we have a former aide to Senator Frist, a person who, according to the investigation, broke into Senate computers. He is now in charge of rallying the troops on the conservative side. He is the cheerleader for the nuclear option. And he is demanding that Senator Frist and other Republicans break the Senate rules to give extremist judges lifetime appointments.

I do not quite understand this. I commend Senator Hatch for the investigation. I commend Senator Frist for the investigation. They knew as we knew that something wrong, probably criminal, had occurred, and they went forward with an honest investigation. When this man resigned in disgrace you would think that would be the end of his role on Capitol Hill, but now he has returned as a cheerleader for the cause of the nuclear option.

It is hard to keep track of some of these veiled references to the scorecard. But keep track of Mr. Miranda. He will undoubtedly pop up again.

There is another thing that should be addressed. Senator Frist has given his word in writing that he will not seek to eliminate the filibuster when it comes to legislation—just judicial nominees. Senator Frist said. But he also said he is leaving the Senate at the end of next year. He has voluntarily, on his own, decided to limit the terms that he would serve.

So the next majority leader, Republican or Democrat is not obliged to take any promise Senator Frist might make. The truth is, if this Senate, for the first time in history, rejects the principle of extended debate, there is no guarantee that the damage of the nuclear option will not spread. In his opening remarks yesterday Senator Frist said if Republicans would vote the nuclear option, Democrats “will retain the entire list of extended filibusters. I do not think that would be a proud moment for this body. I do not think it would be a proud part of any Senator’s legacy. That is why many of us are appealing to the other side of this aisle.

Time and again in our Nation’s history when we really faced some very difficult situations with judges who were controversial and courts that didn’t agree with the President, Presidents have said: Give us more power. We will control those courts.

And when those Presidents came to Congress, as they had to, they found that even their own party would not go along with them. The Senators in those days themselves served on the Senate Rules Committee. Franklin Roosevelt took enough pride in this institution to say: We will make our own rules, Mr. President. We will stand by the Constitution. We will not give you more power.

We seek what is going on now with this nuclear option. It is being orchestrated by the President. And we have too many Senate Republicans who are playing the role of lapdog to the Commander in Chief. They are sitting there like a group of cocker spaniels in a room full of pit bulls, afraid to speak up. They want to give this President whatever power he asks for, whatever nominee he asks for. What a departure from the tradition of this Senate, when it was truly independent, when we respected the President but also respected—maybe more—our constitutional responsibilities.

Our constitutional responsibility is not to agree with everything the President says; not to agree with everything that he wants; not to give him every shred of power that he seeks. Throughout history, Senators have said: We respect you, Mr. President. We respect the Constitution more.

In the midst of this debate, that has been completely thrown away by so many Republican Senators. They are so loyal, to the point of blind loyalty, that they cannot see what is happening to this institution. That they would walk away from the institutional authority of the Constitution, the constitutional authority of the Senate, over what?

Take a look at these numbers—208 to 10. How much more graphic could it be? The full Senate has considered 218 judges, since President Bush was elected, and 208 have been approved. Over 95 percent.

When it comes to the 10, it is arguable who dropped out and who retired, but I will use the larger number of 10 just to demonstrate to the Senate who are following this debate that there is hardly a crisis. This President has been more successful appointing judges than...
any President in 25 years. There are fewer vacancies on the Federal courts of America than at any time in recent memory. And it was not that long ago when the Republicans, during the Clinton administration, held a series of hearings, which I attended, arguing that there were too few vacancies. Democratic judges. Senator Grassley of Iowa, a good friend, chairman of a subcommittee on Judiciary, used to hold regular hearings calling Republican judges from different circuits who wouldn’t agree to vacancies. Democratic judges. We have plenty of judges. The caseload is not that heavy.

Now the argument is being made, with even fewer vacancies, that we are in a judicial crisis. We are not. It has been 9 years since we had so few judicial emergencies in the courts. We have been through times of larger vacancies and, unfortunately, the Republican majority would not give President Clinton the judges he needed to fill them.

There are the Republican Senators. We need six—six who will stand up and say: History is our guide. We cannot let this institution change or diminish. We will stand with those on the Democratic side of the aisle, understanding that each of us has to use our own discretion when it comes to those nominees we will vote for, understanding that each of us is aware of the fact that the next election could change the balance in this Senate so quickly.

One of those who will be considered next is Janice Rogers Brown. She may be the nuclear trigger—either she or Priscilla Owen. There was an article in a recent New York Times magazine about a far-right legal movement in America called the Constitution in Exile. This movement consists of judges and scholars who believe that the right to private property and economic liberty is almost absolute. Its adherents believe that nearly all government infringes on property rights. They encourage judges to strike down laws on behalf of rights that do not appear explicitly in the Constitution.

If this philosophy sounds familiar, it should. The article lists Janice Rogers Brown as a key figure for the Constitution in Exile movement.

I served as the ranking Democrat at Justice Brown’s hearing in October of 2003. I asked her a lot of questions. Her answers offered little assurance that she was anything other than a judicial activist with a very extreme agenda. Her views on Government, courts, and the Constitution are troubling. She called the year 1997 “the triumph of our socialist revolution.” She has said:

Where government moves in, community retreats, civil society disintegrates and our ability to control our own destiny atrophies.

She has said that politicians are “handing out new rights like lollipops in the dentist’s office.”

She claimed that our Federal courts “seem ever more ad hoc and expedient, perilously adrift on the rolling seas of feckless, photo-op compassion and political correctness.”

She has even complained in the last 30 years, the Constitution has “been demoted to the status of a bad chain novel.”

Her rhetoric makes it clear she is inspired and guided by Fountainehead, Atlas Shrugged, and the Road to Serfdom, more than the Constitution and the Bill of Rights.

At her hearing, Justice Brown said her speeches were just an attempt to “stir the pot.” Justice Brown’s speech did more than stir the pot. Those speeches knocked it off the stove.

I have concerns about her record on the bench, even beyond these speeches where she has a heart.

In her own words, she said:

I have been making a career out of being the lone dissenter.

In case after case, she has come out on the side of denying rights and remedies to the disadvantaged. Oftentimes she ignored even established court precedent and rulings. I have a lot of concerns about her tendency to push her philosophical views into opinions.

The California State Bar Commission in 1996 said as much when it rated Justice Brown as not qualified for the California Supreme Court. Yet the Bush White House wants to appoint her to the second highest court at the Federal level in America.

Justice Brown suggested at her hearing the views in her speech do not reflect the view and her decisions. The facts tell a different story. There is a seamless web between Justice Brown’s speeches and her decisions. It is the same person. It is the same philosophy. It is the same conclusion. I have concern about nominating to the DC Circuit someone with her hostility to the forces of Government.

The DC Circuit is the No. 1 adjudicator of Federal agency disputes. I don’t think someone who considers the New Deal a “socialist revolution” is the right person for the job. Think of all the socialism in the New Deal. I can think of one element that she might call socialism. Franklin Delano Roosevelt called it Social Security.

I want to discuss her evasiveness too. She is a wise lawyer. And good lawyers know how to duck a question better than a politician. We can’t properly perform the advice and consent function of the Senate if nominees will not level with us. Take the Lochner case. This is a famous case that most students study in law school, certainly those who study constitutional law. In her speeches, Justice Brown has praised it. Now, at her hearing we asked her, and she attempted to distance herself from what she said before, saying that the case has been “appraised, criticized and discredited.” Yet she evaded a simple question about whether she agreed with it.

It is an important case. It is a case that spells out the responsibility of the Federal Government when it comes to questions of commerce and liberty of contract. It was a decision by the court many thought moved clearly in the wrong direction and did not even allow Federal jurisdiction in questions regulating health and safety.

Here is another example of her evasiveness. I asked her in writing to explain what rights she was referring to when she said that politicians are handing out new rights like lollipops in a dentist’s office. Her full answer to this important question was:

I was merely commenting in general terms and was not specifically criticizing a particular legislative action.

Now, in all fairness, that is a duck and a dodge. She did not answer the question. I asked her whether she agreed with the Federalist Society mission statement, the one I said earlier, about orthodox liberal ideology dominating the legal profession and so forth. She gave me the most evasive answer of any nominee, once again making what I said to what the Federalist Society really means, although she has attended their events.

She said:

As a judge, I have not had occasion to determine whether the law schools and legal professors are by and large liberal or conservative, and thus do not find myself qualified to offer an opinion on that subject.

She did not answer half the question. My question was about law schools and the legal profession and she did not address the legal profession. I can go on, but I tell you this: She was not going to answer questions. We have seen nominees like her before who come before us and defy us to ask questions and to have answers come forward.

There is a legitimate area of inquiry. I can recall when a Republican Member of the Senate Judiciary Committee asked one of President Clinton’s nominees to disclose every vote she had cast for a California referendum for or against medical marijuana. She clammed up, but was called to account.

Justice Brown is one of the most unapologetically ideological nominees of either party in many years.
A Los Angeles Times editorial entitled “A Bad Fit for a Key Court,” stated:

In opinions and speeches, Brown has articulated disdainful views of the Constitution and the judges who are so strong and so far from the mainstream as to raise questions about whether they would control her decisions.

That is from her home-State newspaper.

The New York Times echoed that sentiment and said Brown “has declared war on mainstream legal values that most Americans hold dear.”

The Journal-Consttution wrote that Brown’s views “are far out of the mainstream of accepted legal principles.”

The list goes on and on of over 100 organizations, including the Congressional Black Caucus, that oppose Justice Brown.

Dorothy Height recently received the Congressional Gold Medal. She said this about a vote on Justice Brown:

I cannot stand by and believe when a jurist with such performance California Supreme Court Justice Janice Rogers Brown is nominated to a federal court, even though she is an African-American woman.

Ms. Height, an African-American women herself, goes on to say:

In her speeches and decisions, Justice Janice Rogers Brown has articulated positions that weaken the civil rights legislation and programs that I and others have fought so long and hard to achieve.

Stephen Barnett, a University of California-Berkeley constitutional law professor who had endorsed Brown before her hearing and whose support Chairman Hatch specifically mentioned in his opening statement at Justice Brown’s hearing, sent a letter to Senator Hatch after the hearing and withdrew his support for Janice Rogers Brown. This is what Professor Barnett, who was once supposed to be a strong advocate for her, wrote to Senator Hatch after her hearing:

Having read the speeches of Justice Brown that have now been disclosed, and having watched her testimony before the Committee on October 22, I no longer support the nomination.

So you would hear from the Republican side that she is just another routine nominee who is being beaten up on by the Democratic side of the aisle. But when you read through all these comments of people who have observed her in her professional life, those who have followed her, not only fellow judges but those in the legal profession, it is very clear: This is a controversial nominee. She is a person who will bring to the bench something less than the moderation that we look for.

I come from the Democratic side of the aisle. I understand if you are going to put a person on the bench, 9 times out of 10 you should look for a person who is going to try to be moderate and mainstream. What I found is that 10 times out of 10, with very few exceptions, that is exactly what we have ended up with. That is not the case here.

The White House strategy is unfair to Justice Brown and her family, unfair to the Senate, and unfair to those who want to move beyond the environment of political confrontation which has become the hallmark of our efforts. We should not have to through this knock-down, drag-out battle filling these court vacancies. I have said to Chairman Hatch, and I will say again to those listening, there are plenty of good, conservative Republican attorneys and judges who are not so ideologically radical as these nominees. You can find them in Ohio. You can find them in Virginia. You can even find them in Illinois. Why this White House continues to go after some of the most inflammatory, some of the most extreme judges to fill the benches in the highest courts in the land is beyond me.

So when we find, among 218 nominees, 10 who fall into this extreme category, when we say they have gone too far, is it the President’s fault? You may have 95 percent, but for this other 4 or 5 percent the answer is no—I think we are doing what the Constitution asks us to do: advise and consent.

But the President, of course, says no. I want all of them, no distinctions. I do not seek agreement—I want every single judge. Strike “advise and consent” and put “consent” in there. That is what this President wants. Maybe that is what every President wanted. But the Constitution tells us: The President is not to seek the consent of the Senate. The Constitution does not give him the right to do so. It is an abuse of power that this White House continues to go after nominees and judges who are not so ideological. They want them all. And they have found too many compliant Republican Senators who have said: Whatever you want, Mr. President. Sign us up.

I sincerely hope the Senate rises to the occasion. I sincerely hope that six Republican Senators will show the courage to speak out for the value of our Constitution and the tradition of thoughtful consideration of nominees.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. THUNE). The Senator from Ohio.

Mr. VOINOVICH. Mr. President, I rise to support the nomination of Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit.

I believe it is important that the Senate take its responsibility to advise and consent with respect to nominations very seriously. The people who are appointed to the judiciary, as well as to the executive branch of Government, can have an enormous impact on how our Government operates. In many cases, an appointee can make the difference on whether a particular policy or program is effective.

I also believe the Senate should seek to work in a bipartisan manner, particularly with respect to judges. Since I came to the Senate 6 years ago, I have always been open to listen to any concerns that my colleagues have. But if Justice Owen is not acceptable as a nominee to the U.S. Court of Appeals, we are going to have a hard time filling the vacancies in the court of appeals.

Let’s review Justice Owen’s record. Justice Owen has a very distinguished and impressive record as a lawyer, community leader, and most recently as a Justice on the Texas Supreme Court.

Justice Owen graduated cum laude from Baylor University and cum laude from Baylor Law School in 1977. She was on the Baylor Law Review and earned the highest score on the Texas bar exam in December of 1977. Justice Owen joined the well-regarded firm of Andrews & Kurth and rose to be a partner by the remarkably young age of 30. Any lawyer in this body has to be impressed with the fact that someone such as Justice Owen could become a partner at the age of 30.

She has had a busy life, and has practiced commercial litigation for 17 years.

In 1994, Justice Owen was elected to the Texas Supreme Court, and, in 2000, as has already been noted, she won a second term to the Texas Supreme Court with a vote of 86 percent.

This is a very impressive record.

I am not surprised that the American Bar Association unanimously rated Justice Owen as “well qualified.” That is the highest rating the American Bar Association can give to someone seeking a judgeship.

But Justice Owen’s legal credentials are not the only reasons I support her.
nomination. In an age where I believe too many people do not take the time to become active members of their communities, Justice Owen has been a real leader in her community.

She is a member of the board of the Texas A&M Service Dogs, and a member of the St. Barnabas Episcopal Mission, where she teaches Sunday school. She helped organize Family Law 2000, which seeks to lessen the adversarial nature of divorce proceedings in her State.

She has been honored as Baylor Young Lawyer of the Year and as a Baylor University Outstanding Young Alumna. She also has been active in helping the poor obtain legal services, as well as other pro bono legal activities.

I think her involvement in her community is important. We need judges who not only have exceptional legal skills, which Justice Owen certainly has, but also who have a perspective about how law impacts upon individuals and communities.

I have reviewed the letters of support she has received, and I am pleased that she has such broad support from the people who know her best and have worked with her.

I also would like to note that even her opponents in the Senate have said they believe her to be a very good person. Accordingly, I do not see any issues that could raise any questions about whether she should be confirmed. Rather, she is exactly the type of serious, hard-working, and well-respected person who should be nominated to the court of appeals.

Some have said that Justice Owen is an extremist who will be a judicial activist. Again, I see no reason for such conclusions. Reviewing her record, I see a judge who vigorously but carefully sets forth her reasoning in her decisions and is willing to stand up for what she thinks is the correct decision. She is not an activist. She is an excellent judge.

Any good nominee who has been active in thinking and writing about issues is going to have statements in their writings that, if taken out of context, can be made to appear extreme. This is what has happened to Justice Owen. Her opponents—mainly partisan interest groups—have scrutinized her writings, looking for anything that they could make into a sound bite to distort her record. But an examination of her record as a whole reveals that claims that she is extremist are baseless. Justice Owen is a good judge and would and will make a great circuit court judge.

There is no need to filibuster this nominee. Justice Owen deserves an up-or-down vote. The filibustering of Justice Owen reveals just why the constitutional option may be necessary. The filibuster is being abused. If the minority is going to abuse its power to filibuster nominees such as Justice Owen, then the nomination process will break down completely. It is already too long and demanding on nominees and their families and deters excellent candidates from choosing to serve. We have no idea of what a chill this is sending throughout the country to people who we would like to serve on the bench. We do not want to go through that process. It is a shame that such an exceptionally qualified nominee such as Miguel Estrada finally asked that his nomination be withdrawn after being filibustered for 2 years. As I look at what a clearly qualified nominee such as Miguel Estrada and Justice Owen must go through to serve our country, I wonder that the judiciary is not going to be able to attract the talent it needs.

If every nominee must get 60 votes, it is clear that many posts simply will not be filled. In addition, if we require 60 votes to confirm nominees, we are only going to see nominees who have no paper trails or records of achievement, who have done little, if any, legal work, who avoid public or judicial controversies. I don't want extremists on the bench, but I also don't want bland nominees who have never had to make difficult decisions.

Comparing the Senate process to the Senate procedures prior to the 108th Congress when filibustering of judicial nominations first occurred, I have to say that I think the old system was a lot better than what we saw in the 108th Congress. Under that system, a nominee had to have the support of a majority of Senators, who was reported out of the Judiciary Committee, would get an up-or-down vote after review of the nominee's record and a robust debate. That was the fair way to proceed. It has been that way many times. It has been that way, as a matter of fact, for 214 years. No judicial nominee sent to the Senate floor who had the support of a majority of Senators was denied an up-or-down vote. There were no judicial filibusters.

The constitutional option as a change in the rules but a restoration of a Senate tradition, the tradition that filibusters do not apply to judicial nominees.

My colleagues on this side of the aisle, including myself, had many opportunities to filibuster judicial nominees during the Clinton years as well as during the decades it spent in the minority. Just think about how long the Republican Party was in the minority. During that time, they never used a filibuster to stop a judge who was nominated. They insisted that there be an up-or-down vote. This was the courtesy that was extended to the other party. It helped make sure that the judicial nomination process worked smoothly and fairly. I wish the present minority would extend the same courtesy now.

I also believe the ongoing abuse of the filibuster is preventing the Senate from addressing other, often more pressing, issues such as passing an energy bill, addressing asbestos litigation, and other issues. I can recall in the 108th Congress how after hour after hour, staying here late at night, working on these judicial nominees when, in my opinion, we should have been doing the other work of the Senate that was important to the people of our country.

It is the President's job to nominate judges, and it is the Senate's job to advise and consent. It is time the Senate started doing its job. The minority has successfully prevented the confirmation of about a third of President Bush's nominations. President Bush has the lowest confirmation rate of circuit court judges of any President going back as far as President Roosevelt. I think the statistics show that the real issue here is not that any of these judges is extreme but that there is an active campaign to use the filibuster to prevent President Bush from appointing circuit court judges.

It is the President's job to nominate judges, and it is the Senate's job to advise and consent. It is time the Senate started doing its job and voted on these nominees. If a Senator doesn't like the nominee, I would like to note that even that Senator should vote against the nominee. If someone doesn't like Justice Owen, vote against her, don't filibuster her and deny your colleagues an up-or-down vote. I want to vote on these nominees.

There have been nominees in the past and some currently and some from my own party who I did not support. But I never filibustered them, even during the Clinton years. I can remember in our conference meetings talking about judges and some of my colleagues getting up and saying at those meetings: Let's filibuster this judge. We can't allow that judge to go forward. That judge is going to be bad for the district court, which that judge is going to be assigned to. I can remember ORRIN HATCH saying: We can't do that because if we start to do this, God only knows where we are going.

Let's filibuster this judge. We can't allow that judge to go forward. That judge is going to be bad for the district court, which that judge is going to be assigned to. I can remember ORRIN HATCH saying: We can't do that because if we start to do this, God only knows where we are going.

Just a few years ago, the Minority Leader in the Senate said: we are going to make the minority pay for the filibuster. I think the minority has successfully prevented the confirmation of about a third of President Bush's nominations. President Bush has the lowest confirmation rate of circuit court judges of any President going back as far as President Roosevelt. I think the statistics show that the real issue here is not that any of these judges is extreme but that there is an active campaign to use the filibuster to prevent President Bush from appointing circuit court judges.
point that the Democrats’ partisan ob-

ground noise is trying to avoid the

straight.

try: The United States of America. In

created to protect minority rights, it is

from New Jersey says the Senate is

prerogatives. So when the Senator

many respects, as a safeguard of State

House.

The Senate is not representative of the

interests of the people in the States.

find that the Senate is to protect the

House of Representatives is, one would

vote.

To accord the fairness, the de-

the Judiciary Committee, they ought

rest.

sions made about you and statements

bruised and you may have some asper-

through that gauntlet, you may be

at the end of the day, when a major-

ity of the Senators are in favor of that

conference, which was that a Senator from the Commonwealth of Virginia, the State of James Madison, one of the key authors of our Constitu-

tion. It is my constitutional duty to

advise and consent. What 41 Sen-

ators are trying to do is take away my

responsibility to the citizens of the Commonwealth. I see noth-

thing wrong with voting yes or no.

Now, also in the midst of this flailing

Commonwealth of Virginia. I see noth-

ing wrong with voting yes or no.

Sadly, the Democrats have changed

years before they changed it. It is an

struction of the President’s nominees

is unprecedented. We are trying to get

back to the precedent we had for 214 years before they changed it. It is an

issue of fairness. It is an issue for me as a Senator from the Commonwealth of Virginia, of Professor Thomas Corzine, and of Madison, one of the key authors of our Constitu-

tion. It is my constitutional duty to

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ators are trying to do is take away my

responsibility to the citizens of the Commonwealth. I see noth-

thing wrong with voting yes or no.

Now, also in the midst of this flailing

and background noise, from time to
time, we have heard from the senior Senator from Illinois, who is running aspersion on an organization called the Federalist Society, saying because Jus-

tice Owen of Texas was a member of the Federalist Society, and that many

of President Bush’s nominees for the Federal courts were in the Federalist Society, he wondered what this society was all about.

Well, after listening, I had my crack staff get on the Internet and get me

The Federalist Society established its Fac-

ulty Division in early 1999 with a conference

that was attended by many of the rising

stars in the legal academy. The objective of the Faculty Division is to foster a greater appreciation for the role of the judiciary to say

what the law is, not what it should be. The Society seeks to promote awareness of these principles and to further their application through its activities.

It goes through its mission and says the purpose of the society is unique. They have legal experts of opposing views to interact with members of the legal profession, the judi-

iciary, law students, academics, and the ar-

chitects of current intellectual and practical developments in the law. It has active chapters in 60 cities, including Washington, D.C., New York, Boston, Chicago, Los An-

gles, Milwaukee, San Francisco, Denver, At-

lanta, Houston, Pittsburgh, Seattle, and

Indianapolis. Activities include the annual Na-

tional Lawyers Convention, a Speakers Bu-

deu for organizing lectures and debates, and 15 Practice Groups.

Finally, the Federalist Society provides opportunities for effective participation in the public policy process. The Society’s on-
going programs encourage members to involve themselves more actively in local, state-wide, and national affairs and to con-

tribute more productively to their commu-

nities.

Mr. ALLEN, Mr. President, the Sen-

ator from Illinois went on further to


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

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

MORNING BUSINESS

Mr. ALLEN. Mr. President, I ask unanimous consent that there now be a period for morning business, with Senators permitted to speak for up to 10 minutes each.

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