The nuclear option was cast in secret, from everything I have been told by my fellow Senators, it would go down to crashing defeat. As Senators know, we have to break the rules to change the rules.

Again, I would just urge that both leaders, both the Republican and Democratic leaders, make it clear to their Members that nobody is going to be punished for a vote on conscience. I hope Senators will stand up and be a profile in courage, vote their conscience, and vote the right way.

Mr. President, the hour of 5:30 has arrived, so I yield the floor.

### Quorum Call

Mr. President, I see the Republican leader is not on the floor yet, so I will suggest the absence of a quorum to accommodate him. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll and the following Senators entered the Chamber and answered to their names:

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The motion was agreed to. The PRESIDING OFFICER. A quorum is present.

The majority leader. Mr. FRIST. Mr. President, for the information of our colleagues, we will be voting around noon tomorrow on the cloture motion with respect to Priscilla Owen. We will be in session through the night, and time is roughly equally divided.

### RECESS SUBJECT TO THE CALL OF THE CHAIR

Mr. FRIST. Mr. President, I ask unanimous consent that the Senate stand in recess subject to the call of the Chair.

There being no objection, the Senate, at 6:04 p.m., recessed subject to the call of the Chair, and reassembled at 6:33 p.m., when called to order by the Presiding Officer (Mr. THUNE).

### NOMINATION OF PRISCILLA RICHMAN O'WEN TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT—Continued

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. McCONNELL. Mr. President, I ask unanimous consent that the previous order, with respect to the division of time, be modified to extend until 10 a.m.

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

Mr. McCONNELL. I ask the Chair, what is the pending business?

The PRESIDING OFFICER. The pending business is the nomination of Judge Priscilla Owen to be U.S. circuit court judge.
Mr. MCCONNELL. Mr. President, our colleagues complained that by allowing any President’s nominees a simple up-or-down vote, we are trying to stifle the right to debate, while I think it is worth noting that we have devoted 20 days to the debate on the Owen nomination. So there is not about curtailing debating rights. This is about using the filibuster to kill nominations with which the minority disagrees so 41 Senators can dictate to the President whom he can nominate to the courts of appeal and to the Supreme Court.

If there is any doubt about this, I remind our colleagues that last year the distinguished minority leader said:

“Not enough time in the universe—"for the Senate to allow an up-or-down vote in the Senate. We should stop pretending this debate is simply about preserving debating prerogatives. It is clearly about killing nominations.”

Our debate is about restoring the practice honored for 214 years in the Senate of having up-or-down votes on judicial nominees. Never before has a minority of Senators obstructed a judicial nominee who enjoyed clear majority support.

Our friends on the other side of the aisle recite a list of nominees on whom there were cloture votes, but the problem with their assertion that these nominees were filibustered is that the name of each of these nominees is now prewritten. The Senate has always had the right to filibuster nominees. Rather, Senators did not discuss nominees in the Senate, a lot of things you could do. But what typically happens is we exercise self-restraint, and we do not engage in that kind of behavior because invoking certain obstructionist tactics is contrary to the Senate’s unwritten rules. Filibustering judicial nominees with majority support fails in that category. Let me repeat, it could have always been done. For 214 years, we could have done it, but we did not.

By filibustering 10 qualified judicial nominees in only 16 months, our Democratic colleagues have broken this unwritten rule. This is not the first time a minority of Senators has upset a Senate tradition or practice, and the current Senate majority intends to do what the majority in the Senate has often done—use its constitutional authority under article I, section 5, to reform Senate procedure by a simple majority vote. A past Senate could not, he concluded, take away the right of a future Senate to govern itself by passing rules that tied the hands of a new Senate. He said:

“A majority may adopt the rules in the first place. It is preposterous to assert that they may deny future majorities the right to change them.”

What he said makes elementary good sense. Because Walsh made clear he was prepared to end debate by majority vote, both political parties arranged to have an up-or-down vote on a formal cloture rule. Senator Clinton Anderson, a Democrat from New Mexico, not long after, said: “We won without firing a shot.” And Senator Paul Douglas, a Democrat from Illinois, observed also years later that consent was given in 1917 because a minority of obstructing Senators had Walsh’s proposal “hanging over their heads.”

I know that the Senate’s 1970 cloture rule did not pertain to a President’s nominations, nor did any Senators, during the debate on the adoption of the cloture rule, predict possible application to nominations. This was not because Senators wanted to preserve the right to filibuster nominees. Rather, Senators did not discuss applying the cloture rule to nominations because the notion of filibustering nominations was alien to them. It never occurred to anybody that that would be done.

In the middle of the 20th century, Senators of both parties, on a nearly biennial basis, invoked article I, section 5 constitutional rulemaking authority. Their efforts were born out of frustration of the repeated filibustering of civil rights legislation to protect black Americans. A minority of Senators had filibustered legislation to protect and extend the rights of black Americans. The legislation became known as the Civil Rights Act. They had filibustered antilynching bills in 1922, 1935, and 1938; antipoll tax bills in 1942, 1944 and 1946; and antitraffice discrimination bills.

In 1958, Majority Leader Lyndon Johnson agreed to reduce the number required for cloture to two-thirds of Senators who were present and voting because he was faced with a possibility
that a majority would exercise its constitutional authority to reform Senate procedure. He knew the constitutional option was possible.

Additionally, the Senate had voted four times for the proposition that the majority had authority to change Senate procedures. For example, in 1969, Senators were again trying to reduce the standard for cloture—that is, the rule to cut off debate—from 67 down to 60. To shut off debate on this proposal, Senate Majority Leader Frank Church from Idaho secured a ruling from the Presiding Officer, Democratic Vice President and former Senator Hubert Humphrey, that a majority could shut off debate, irrespective of the much higher cloture requirement under the standing rules. A majority of Senators then voted to invoke cloture by a vote of 51 to 47 in accord with the ruling of Vice President Humphrey. This was the first time the Senate voted in favor of a simple majority procedure to end debate.

The Senate reversed Vice President Humphrey's ruling on appeal. But as Senator Kennedy later noted:

This was not only the principle that a simple majority could determine the Senate's rules.

Senator Kennedy said:

Although [Vice President Humphrey's] ruling may have been reversed, the reversal was accomplished by a majority of the Senate. In other words, majority rule prevailed on the issue of the Senate's power to change its rules.

Senator Kennedy made this observation in 1975, when reformers were still trying to reduce the level for cloture from 67 down to 60. Reformers had been thwarted in their effort to lower this standard for several years.

In 1975, once again, Senate Democrats asserted the constitutional authority of the majority to determine Senate procedure in order to ensure an up-or-down vote. The Senate eventually adopted a three-fifths cloture rule—votes to cut off debate—but only after the Senate had voted on three separate occasions in favor of the principle that a simple majority could end debate. They had voted on three separate occasions that a simple majority could end debate, after which it was a compromise establishing the level at 60.

The chief proponent of this principle was former Democratic Senator Walter Mondale and four current Democratic Senators. They were in favor of it: Senator Biden, Senator Leahy, Senator Kennedy, and Senator Inouye. Indeed, Senator Kennedy was an especially forceful adherent to the constitutional authority of the Senate majority to govern—a mere majority. He asked:

By way of review, the Senate of 1917 or 1949 bind the Senate of 1975?

That was Senator Kennedy. He then echoed Senator Walsh's observation from almost 60 years earlier:

A majority may adopt the Rules in the first place in derogation to assert that they may deny to later majorities the right to change them.

Finally, referring to unanimous consent constraints that faced the Senate in 1917, Senator Kennedy made an astute observation as to why a majority of the Senate had to have rulemaking authority. Senator Kennedy said:

Surely no one would claim that a rule adopted to prevent certain changes in the rules except by unanimous consent, could be binding on future Senates. If not, then why should one Senate be able to bind future Senates to a rule that such change can be made only by a two-thirds vote?

Recently, the authority to which I have been referring has been called the "constitutional option," or the pejorative term, "nuclear option." But while the authority of the majority to determine Senate procedures has long been recognized, most often in Senate history by our colleagues on the other side of the aisle—incidentally, it was the senior Senator from West Virginia who employed this constitutional authority, most recently, most effectively, and most frequently.

Senator Byrd employed the constitutional option four times in the late 1970s and 1980s. The context varied but three common elements were present each time: First, there was a change in Senate procedure through a point of order rather than through a textual change to Senate rules; second, the change was achieved through a simple majority vote; third, the change in procedure curtailed the options of Senators, including their ability to mount different types of filibusters or otherwise pursue minority rights.

The first time Senator Byrd employed the constitutional option was in 1977 to eliminate postcloture filibuster by amendment. Senate rule XXII provides once cloture is invoked, each Member is limited to 1 hour of debate, and it prohibits dilatory and non-germane amendments. But because Democratic Senators Howard Metzenbaum of Ohio and James Abourezk of South Dakota opposed deregulating natural gas prices, they used existing Senate procedures to delay passage of a bill that would have done so after cloture had been invoked. They stalled debate by repeatedly offering amendments without debating them, thereby delaying the cloture clock.

If points of order were made against the amendments, they simply appealed the ruling of the Chair which was debatable, and a motion to table the appeal then would have to be rollcall votes. Neither of these options would consume any postcloture time.

After 13 days of filibustering by amendments, the Senate had suffered through 121 rollcall votes and endured 34 live quorums with no end in sight.

Under then existing precedent, the Presiding Officer had to wait for a Senator to make a point of order before ruling an amendment out of order. By contrast, Senator Byrd changed that procedure. He enlisted the aid of Vice President Walter Mondale as Presiding Officer and made a point of order that the Presiding Officer now had to take the initiative to rule amendments out of order that the Chair deemed dilatory. Vice President Mondale sustained Senator Byrd's new point of order. Senator Abourezk appealed, but his appeal was tabled by a majority vote. The use of this constitutional option set a new precedent. It allowed the Presiding Officer to rule amendments out of order to crush postcloture filibusters.

With this new precedent in hand, Senator Byrd began calling up amendments, and Vice President Mondale began ruling them out of order. With Vice President Mondale's help, Senator Byrd disposed of 33 amendments, making short work of the Metzenbaum-Abourezk filibuster.

Years later, Senator Byrd discussed how he created this new precedent to break this filibuster. This is what Senator Byrd said years later about what he did.

I have seen filibusters. I have helped to break them.

There are a few Senators in this body who were here when I broke the filibuster on the natural gas bill. . . . I stood up in front of Vice President Mondale, to go please sit in the chair; I wanted to make some points of order and create some new precedents that would break these filibusters.

And the filibuster was broken—back, neck, legs, and arms. It went away in 12 hours. So I know something about filibusters. I helped to set a great many of the precedents that are in the books here.

That is Senator Byrd on his effort—one of his efforts—involving the use of the constitutional option.

Although Senator Byrd acted within his rights, his actions were certainly controversial. His Democrat colleague, Senator Abourezk, complained that Senator Byrd had changed the entire rules of the Senate during the heat of the debate on a majority vote. And according to Senator Byrd's own history of the Senate, the book that he wrote that also administration and Vice President Mondale were severely criticized for the extraordinary actions taken to break the postcloture filibuster.

Some might argue that in 1977 Senator Byrd was not subscribing to the constitutional option. However, the procedure he employed, making a point of order, securing a ruling from the Chair, and tabling the appeal by a simple majority vote, is the same procedure the current Senate majority may use. Moreover, 15 months later, Senator Byrd expressly embraced the Senate majority's rulemaking authority.

Back in January of 1979, Majority Leader Byrd proposed a Senate rule to codify reform debate procedure. His proposed rules change might have been filibustered, so he reserved the right to use the constitutional option. Here is what he said.

I base this resolution on Article I, Section 5 of the Constitution. There is no higher law, insofar as our government is concerned, than the Constitution.
The Senate rules are subordinate to the Constitution of the United States. The Constitution in Article I, section 5, says that each House shall determine the rules of its proceeding. This Congress is not obliged to be bound by the dead hand of the past.

Senator BYRD did not come to his conclusion lightly. In fact, in 1975 he had argued against the constitutional option required by a filibuster in 1979 he said he had simply changed his mind. This is what he had to say: I have not always taken that position but I take it today in light of recent bitter experience. So, I say to Senators again that the time has come to change the rules. I want to change them in an orderly fashion. I want a time agreement.

But, barring that, if I have to be forced into a corner to try for majority vote I will do it because I am going to do my duty as I see my duty, whether I win or lose. If we can only change an abominable rule by majority vote, that is in the interests of the Senate and in the interests of the Nation that the majority must work its will. And it will work its will.

Senator BYRD did not have to use the constitutional option in early 1979 because the Senate relented under the looming threat and agreed to consider his proposed rule change through regular order.

As another example, in 1980, Senator BYRD created a new precedent that is the most applicable to the current dispute in the Senate. This use of the constitutional option eliminated the possibility that filibusters could affect a nomination to proceed to a nomination. We are on a nomination now on the Executive Calendar. The reason it was not possible to filibuster a motion to proceed to that nomination, we can thank Senator BYRD in 1980 when he exercised the constitutional option to simply get rid of the ability to filibuster a motion to proceed to an item on the Executive Calendar.

Before March of 1980, reaching a nomination required two separate motions, a non-debatable motion to proceed to executive session, which could not be filibustered and which would put the Senate on its first treaty on the calendar; and a second debatable motion to proceed to a particular nominee which could be filibustered.

Senator BYRD changed this precedent by conflating these two motions, one of which was debatable, into one non-debatable motion. Specifically, he made it possible to go directly into executive session to consider the first nominee on the calendar. Senator Jesse Helms made a point of order that this was improper under Senate precedent; a Senator could not use a non-debatable motion to specify the business he wanted to conduct on the Executive Calendar. The Presiding Officer sustained Senator Helms’s point of order under Senate rules and precedence.

In a party-line vote, Senator BYRD overturned the ruling on appeal. And because that decision in precedent, if effectively is no longer possible to filibuster the motion to proceed to a nominee.

So where are we? There are other examples where our distinguished colleague used the Senate’s authority to reform its procedures by a simple majority vote. We on this side of the aisle may have to employ the same procedures in fixing the process of an unconstitutional filibuster. It is the practice of allowing judicial nominees to hold up or down vote. We did not cavalierly decide to use the constitutional option. Like Senator BYRD in 1979, we arrived at this point after “recent bitter experience.” to quote Senator BYRD, and only after numerous attempts to resolve this problem through other means had failed.

Here are all we have done in recent times to restore up-or-down vote for judges: We have offered generous unanimous consent requests. We have had weeks of debate. In fact, we spent 20 days on the current nominee. The majority leader offered the Frist-Miller rule compromise. All of these were rejected. The Specter protocols, which would have required nominations not bottled up in committee, was offered by the majority leader. That was rejected; Negotiations with the new leader, Senator Reid, hoping to change the practice from the previous leadership in the previous Congress, that was rejected; the Frist Fairness Rule compromise, all of these were rejected.

Now, unfortunately, none of these efforts have, at least as of this moment, borne any fruit. Our Democrat colleagues seem intent on changing the ground rules, as the New York Times laid it out in 2002. They want to change the ground rules as they did in the previous Congress in how we treat judicial nominations. We are intent on going back to the way the Senate operated quite comfortably for 214 years. There were occasional filibusters but cloture was filed and on every occasion where the nominee enjoyed majority support in the Senate cloture was invoked. We will have an opportunity to do that in the morning with cloture on Priscilla Owen. Colleagues on both sides of the aisle who wish to diffuse this controversy have a way to do it in the morning, and that is to do what we did for 214 years. If there was a controversial nominee, cloture was filed, cloture was invoked, and that controversial nominee got an up-or-down vote.

Mr. GRASSLEY. Mr. President, will the Senator make a motion? Mr. McCONNELL. I am happy to yield.

Mr. GRASSLEY. One of the things that the public at large can get confused about is that we are going to eliminate the use of the filibuster entirely. I have seen some of the “527” commercials advising constituents to get hold of their Congressman because minority rights are going to be trampled. I, obviously, find that ludicrous. I know this debate is not about changing anything dealing with legislation. It is just maintaining the system we have had in the Senate on judges for 214 years. I wonder if the Senator would clear up that we are talking just about judicial nominees, and not even all judicial nominees, and nothing to change the filibuster on legislation.

Mr. McCONNELL. My friend from Iowa, if the majority leader does have to exercise the constitutional option and ask us to support it, it will be narrowly crafted to effect only circuit court appointments and the Supreme Court, which are, after all, the only areas where there has been a problem. I further say to my friend from Iowa, in the years I have been in the Senate, the only time anyone has tried to get rid of the entire filibuster was back in 1995 when such a measure was offered by the other side of the aisle.

Interestingly enough, the principal beneficiaries of getting rid of the filibuster in January of 1995 would have been our party because we had just come back to power in the Senate, yet not a single Republican, not one, voted to get rid of the filibuster. Nineteen Democrats did, two of whom, Senator KENNEDY and Senator KERRY, are still in the Senate and now arguing, I guess, the exact opposite of their vote a mere 10 years ago.

Mr. GRASSLEY. So when we just came back into the majority, after the 1994 election, there was an effort by Democrats to eliminate the filibuster? Mr. McCONNELL. Entirely.

Mr. GRASSLEY. For everything, including legislation.

Mr. McCONNELL. Right. Mr. GRASSLEY. We were the new majority.

Mr. McCONNELL. Right.

Mr. GRASSLEY. And we would have benefited very much from that. It would have given us an opportunity to get anything done that we could get 51 votes for doing, with no impediment, and we voted against that?

Mr. McCONNELL. Unanimously. And interesting enough, it was the first vote cast by our now-Senate majority leader, Senator Frist, here in the Senate. The very first vote he cast, along with the rest of us on this side of the aisle, was to keep the filibuster.

Mr. GRASSLEY. So I think that ought to make it clear we are just talking about the unprecedented use of the filibuster within the last 2 years. We are not talking about changing anything in regard to filibusters or cloture because that is where you can work compromises. You cannot really work compromises when it comes to an individual—is it either up or down. But you can change words, you can change paragraphs; you can rewrite an entire bill to get to 60, to get to 67, to get to finality, on any piece of legislation.

Mr. McCONNELL. My friend from Iowa is entirely correct. The filibuster would be preserved for all legislative items, preserved for bureaucratic branch nominations, not for the judiciary. It would be preserved even for district court judges, where Senators have historically played a special role in either
selecting or blocking district judges. All of that would be preserved. If we have to exercise the constitutional option tomorrow, it will be narrowly crafted to deal only with future Supreme Court appointments and circuit court appointments, which is where we believe the aberrational behavior has been occurring in the past and may occur in the future.

Mr. GRASSLEY. And maintain the practice of the Senate as it has been for 214 years prior to 2 years ago.

Mr. HATCH. That is precisely the point. My friend from Iowa is entirely correct.

Mr. GRASSLEY. I thank the Senator.

Mr. MCCONNELL. Will the assistant majority leader yield for a question?

Mr. MCCONNELL. Yes.

Mr. HATCH. Just to make it clear, there are two calendars in the Senate. One is the legislative calendar and the other is the Executive Calendar; is that correct?

Mr. MCCONNELL. That is correct.

Mr. HATCH. The legislative calendar is the main calendar for the Senate, and it is solely the Senate’s; is that correct?

Mr. MCCONNELL. That is correct.

Mr. HATCH. But the Executive Calendar involves nominations through the nomination power granted by the Constitution to the President of the United States, and the Senate has the power to advise and consent on that nomination power, is that right, to exercise that power?

Mr. MCCONNELL. That is entirely correct.

Mr. HATCH. What we are talking about here is strictly the Executive Calendar, ending the inappropriate filibusters on the Executive Calendar and certainly not ending them on the legislative calendar?

Mr. MCCONNELL. My friend from Utah is entirely correct.

Mr. HATCH. Well, our Democratic friends argue—just to change the subject a little bit here—they argue we have to institute the judicial filibuster to maintain the principle of checks and balances as provided in the Constitution. But unless my recollection of events is different, this contention does not fit with the historical record.

Isn’t it the case that the same party has often been in the White House and in the majority in the Senate, such as today, but in the past, while the same party has controlled the White House and been a majority in the Senate, neither party, Democrats or Republicans, over the years, has filibustered judicial nominations until this President’s term?

Mr. MCCONNELL. My friend is entirely correct. The temptation may have been there. I would say to my friend from Utah, the temptation may have been there.

Mr. HATCH. Right.

Mr. MCCONNELL. During the 20th century, the same party controlled the executive branch and the Senate 70 percent of the time. Seventy percent of the time, in the 20th century, the same party had the White House and a majority in the Senate. So I am sure—by the way, that aggrieved minority in the Senate, for most of the time, was our party, the Republican Party.

Mr. HATCH. You are absolutely right.

Mr. MCCONNELL. We are hoping for a better century in the 21st century. But it was mostly our party. So there had to have been temptation, from time to time, and frustration, on the part of this minority. Seventy percent of the time, in the 20th century, they could have employed this tactic that was used in the last Congress but did not.

Senator BYRD led the minority during a good portion of the Reagan administration. Actually, during all of the Reagan administration, 6 years in the minority, 2 years in the majority, Senator BYRD could have done that at any point. He did not do it, to his credit. To his credit, he did not yield to the temptation.

As I often say, there are plenty of things we could do around here, but we do not do it because it is not good to do it, even though it is arguably permissible. We did not do it on the other side of the aisle say the filibuster has been around since 1806, they are right. It is just that we did not exercise the option because we thought it was irresponsible.

Mr. HATCH. Not quite right because the filibuster rule did not come into effect until 1917.

Mr. MCCONNELL. No. The ability to stop the filibuster did not come about until 1917. The ability to filibuster came about in 1806.

Mr. HATCH. Well, Senators had the right to speak, and they could speak.

Mr. MCCONNELL. Absolutely.

Mr. HATCH. So in a sense it was not even known as a filibuster at that time. Nevertheless, they had the right to speak.

To follow up on what you just said, we heard repeatedly from liberal interest groups that we must maintain the filibuster to maintain “checks and balances.” My understanding of the Constitution’s checks and balances is that they were designed to enable one branch of Government to restrain another branch of Government. Are there really any constitutional checks that empower a minority within one of those branches to prevent the other branch from functioning properly?

Mr. MCCONNELL. Well, my friend from Utah is again entirely correct. The term “checks and balances” has actually nothing to do with what happened to circuit court appointments during the previous Congress. The term “checks and balances” means institutional checks against each other, the Congress versus the President, the judiciary versus the balance of power, the branches of Government. It has nothing whatsoever to do with the process to which the Senate has been subjected in the last few years. It is simply a term that is inapplicable to the dilemma in which we find ourselves now.

Mr. HATCH. One last point. The 13 illustrations that the Democrats on the other side have given that they have said, “filibusters,” if I recall correctly, 12 of those individuals sitting on the Federal bench, as you have said; is that correct?

Mr. MCCONNELL. I say to my friend from Utah, as far as I can determine, for every judge who enjoyed majority status, there was subsequently a filibuster, cloture was invoked, and all of those individuals now enjoy the title “judge.”

Mr. HATCH. In other words, they are sitting on benches today?

Mr. MCCONNELL. Because they ultimately got an up-or-down vote. I would say to my friend from Utah, we will have an opportunity tomorrow, in the late morning, to handle the Priscilla Owen nomination the way our party, at Senator LOTT’s suggestion and Senator BYRD’s suggestion, toward the end of the Clinton years, handled the Berzon and Paez nominations. They had controversy about them, just as this nomination has controversy about it.

Mr. MCCONNELL. Did we dik which controversy? We invoked cloture. And I remember you and Senator LOTT saying, to substantial grief from some, that these judicial candidates had gotten out of committee, and they were entitled to an up-or-down vote. Senator LOTT joined Senator Daschle and filed cloture on both of those nominations, not for the purpose of defeating them but for the purpose of advancing them. They both got an up-or-down vote. They both are now called judges.

Mr. HATCH. So the cloture votes in those instances were floor management devices to get to a vote so we could vote those nominations to the bench?

Mr. MCCONNELL. For the purpose of advancing the nominations, not defeating them.

Mr. HATCH. So they were hardly filibusters in that sense?

Mr. MCCONNELL. They were not. They were situations which do occur, from time to time, where a nominee has some objection. And around here, if anybody objects, it could conceivably end up in a cloture vote.

Mr. HATCH. And spend a lot of time on the Senate floor.

Mr. MCCONNELL. Yes. It does not mean the nomination is on the way to nowhere. It could mean the nomination is on the way to somewhere because you invoke cloture and then you get an up-or-down vote. And I remember you, as chairman of the Judiciary Committee, advocating cloture on the floor. Senator LOTT joined Senator Daschle and filed cloture on both of those nominations, not for the purpose of defeating them but for the purpose of advancing them.

Mr. HATCH. Advocating the step that we should invoke cloture and give these people a vote up or down?

Mr. MCCONNELL. Precisely.

Mr. HATCH. One last thing. As to the 13, 12 of them are sitting on the bench.
The 13th that they mentioned was the Fortas nomination. In that case, there was the question of whether there was or was not a filibuster. But let’s give them the benefit of the doubt and say there was a filibuster, since there are those who do say there was, although the leader of the right, Senator Griffin, at the time said they were not filibustering, that they wanted 2 more days of debate, and they were capable and they had the votes to win up or down—

Mr. MCCONNELL. I withdrew, didn’t I?

Mr. HATCH. He did. But what happened was there was one cloture vote, and it was not invoked. But even if you consider it a filibuster, the fact is, it was not a leader-led filibuster. It was a nomination that was filibustered—if it was a filibuster—almost equally by Democrats and Republicans.

Mr. MCCONNELL. And isn’t it also true, I ask my friend from Utah, that it was apparent that Justice Fortas did not get his vote in committee? Did they have any support in the Senate and would have been defeated?

Mr. HATCH. That is right.

Mr. MCCONNELL. Had he not withdrawn his nomination?

Mr. HATCH. The important thing here is that a bipartisan filibuster against a nominee by both parties, and in these particular cases, these are leader-led partisan filibusters led by the other party.

Mr. MCCONNELL. I thank my colleagues.

Mr. SESSIONS. Mr. President, will the Senator yield?

Mr. MCCONNELL. I am happy to yield.

Mr. SESSIONS. I hope Senator HATCH will remain because he has been, much of the first years of my career in the Senate, chairman of the Senate Judiciary Committee. I think it is important to drive home what you have been discussing. I think it is so important.

Further, to the distinguished assistant majority leader how much I appreciate his comprehensive history of debate in the Senate. I think it is invaluable for everyone here. But I remember the Berzon and Paez nominations. Both of those were nominees to the Ninth Circuit. Judge Paez, a magistrate judge, declared that he was an activist himself, as I recall, and even said that if legislation does not act, judges have a right to act. And the Supreme Court had reversed the Ninth Circuit 28 out of 29 times one year and consistently reversed them more than any other circuit in America. And here we had an ACLU counsel, in Marsha Berzon, and Paez being nominated.

There was a lot of controversy over that. We had a big fuss over that. We had an objection. I voted for 95 percent of President Clinton’s nominees, but I did not vote for these two. I remember we had a conference.

I will ask the assistant majority leader—we were having House Members saying: Why don’t you guys filibuster? People out in the streets were saying: Don’t let them put these activist judges on the bench. We had our colleagues saying it. I did not know what to do. I was new to the Senate. Do you remember that conference when we had the majority in the Senate, and President Clinton was of the other party and we were not in minority like the Democratic majority? And Senator HATCH explained to us the history of filibusters, why we never used them against judges, and urged us not to filibuster those Clinton nominees?

Mr. MCCONNELL. I remember it well. I would say, our colleague from Utah got a little grief for that from a number of members on our side of the aisle who were desperately looking for some way to sink those nominations. And he said: Don’t do it. Don’t do it. You will live to regret it. And thanks to his good advice, we never took the Senate to the level—never descended to the level that the Senate has been in the previous Congress.

Mr. MCCONNELL. And isn’t it also true, I ask my friend from Utah, that it was a bipartisan filibuster? It was a filibuster. It was a bipartisan filibuster. It was a filibuster. It was a bipartisan filibuster. It was a bipartisan filibuster.

Mr. MCCONNELL. I yield for a question.

Mr. HATCH. The fact is, there have always been holdovers at the end of every administration. There were 54 holdovers at the end of the Bush 1 administration, and he was only there 4 years. We didn’t cry and moan and groan and threaten to blow up the Senate. To the best of my recollection, it was part of the process.

I have to say with regard to the holdovers that were there at the end of the Clinton administration, there were some which they could have gotten rid of, but there were like 13 that were withdrawn. Ten withdrew their names. Some were not put up again between the two administrations. There is no question that I tried to do the very best I could to give President Clinton every possible edge.

But this has always been the case. It isn’t just this time. It happened with Democrats in control of the Senate and Republicans in control of the White House. I think that point needs to be made. I have heard a lot of moaning and groaning. I know my colleagues know I did everything in my power to accommodate them and help them.

Mr. MCCONNELL. I believe that is entirely correct. The only point I was seeking to make was if that criticism had any validity whatsoever—and the former chairman has pointed out that it has very little legitimacy—the distinguished majority leader offered to make that essentially impossible, and yet that was rejected.

Mr. SESSIONS. Will the Senator yield for one more question?

Mr. MCCONNELL. Yes.

Mr. SESSIONS. Isn’t it true that Trent Lott, the Republican majority leader, sought cloture to give Berzon and Paez an up-or-down vote, and those of us who opposed Berzon and Paez, as the Senator from Kentucky did, voted for cloture to give them an up-or-down vote and then voted against them when they came up for an up-or-down vote?

Mr. MCCONNELL. The Senator is entirely correct. That is the way I voted. I believe that is the way he voted. That is the way the Senate ought to operate.
That is a good model for how we ought to behave tomorrow. We will have a cloture vote on Justice Priscilla Owen. If the Senate wants to operate the way it used to, we will invoke cloture on Justice Owen and then give her the up-or-down vote which she richly deserves.

I yield the floor.

Mr. Frist. Mr. President, more than 2 years ago, this Senate first took a cloture vote to end a filibuster on the nomination of Miguel Estrada for a seat on the DC Circuit Court of Appeals. Mr. Estrada epitomizes the American dream. An immigrant from Honduras, who arrived in America speaking no English, he graduated from Harvard Law School and became one of America’s most distinguished lawyers. Mr. Estrada worked for Solicitors General under both President Bill Clinton and President George W. Bush. He argued 15 cases before the Supreme Court. The American Bar Association gave him its highest recommendation, and the American Constitution Society announced its bipartisan majority of the full Senate was assured.

But the confirmation vote never came. Instead, Mr. Estrada’s nomination was filibustered. Each time we sought to bring the nominees to the floor, to begin the confirmation process, the Democratic leadership objected. We asked over and over for a simple up or down vote. If you oppose the nominee, we stressed, then vote against him, but give him a vote. But the procedures refused. In each session, they remarked that no amount of debate time would be sufficient and that they would not permit the Senate to vote.

After 13 days of debate, with no end in sight, I filed a cloture motion. Every Republican and a handful of Democrats voted for cloture, bringing us to 55 affirmative votes, 5 short of the 60 we needed. Shortly thereafter, we tried again. We got the same 55 votes. And then we tried five more times, never budging a single vote. It was crystal clear that the object of the filibuster was not to illuminate Mr. Estrada’s record but to deny him an up or down vote. Debate was not the objective. Obstruction was the objective. Finally, to the shame of the Senate and the harm of the American people, Mr. Estrada asked President Bush to withdraw his nomination.

Before the last Congress, the record number of cloture votes on a judicial nomination was two, and no nomination with clear majority support ever died by filibuster. The Estrada case rewrote that tradition, and for the worse. On Miguel Estrada, seven cloture votes were taken, to no avail. He was a nominee who plainly could have been confirmed, but he was denied an up or down vote. Miguel Estrada’s nomination died by filibuster.

And Mr. Estrada’s case was just the beginning. After him, came the nomination of Priscilla Owen, a Justice on the Texas Supreme Court. Four cloture votes did not bring an end to the debate and we again were told on the record that no amount of debate would be enough and a confirmation vote simply would not be allowed. Thereafter, eight additional nominees were filibustered and Democrats threatened filibusters on six more. Something had radically changed in the way the Senate conducted itself.

Two hundred years of Senate custom lay shattered, with grave implications for our constitutional system of checks and balances.

As Democratic senators began to mushroom, Democratic Senator Zell Miller and I introduced a cloture reform resolution. Our proposal would have permitted an end to nominations filibustered after reasonable and substantial debate. The Rules Committee held a hearing on our resolution and reported it with an affirmative recommendation. But the proposal languished on the Senate Calendar, facing a certain filibuster from Senators opposed to cloture reform. Quite simply, those who undertook to filibuster these nominees wanted no expedients put in their way.

When Congress convened this January, I was urged to move immediately for a change in Senate procedure so that unprecedented filibusters could not be repeated. But I decided on a more measured and less confrontational course. Rather than move immediately to change procedure, I promoted dialogue at the leadership and committee level to seek a resolution to this problem. Rather than act on the record of the last Congress, I hoped that the passage of a clearly constitutional principle of checks and balances.

Sadly, these hopes were not fulfilled. More filibusters have been promoted, not only against seven nominees President Bush has resubmitted but also against other nominees not yet sent up. Although filibusters against persons denied an up or down vote in the last Congress is a grave problem and would be reason enough for reform. Threatening filibusters against new nominees compounds the wrong and is further reason for reform.

For many decades, two great Senate traditions existed side by side. These were a general respect for the filibuster and a consensus that nominations brought to the floor would receive an up-or-down vote. In the past, both traditions preponderated; but Democratic leadership and Republican filibustering from Senators opposed to cloture reform. The filibuster, because Republicans control the White House and Senate. But the majority’s conclusion that these unprecedented filibusters represent an effort by a Senate minority to obstruct the duty of the full Senate to advise and consent. The current minority claims it has no choice but to filibuster, because Republicans control the White House and Senate. But the majority’s conclusion that these unprecedented filibusters represent an effort by a Senate minority to obstruct the duty of the full Senate to advise and consent.

For 70 of the 100 years of the last century, the same party controlled the Presidency and the Senate, but the minority party leadership exercised restraint and refused to filibuster judicial nominees. In President Reagan’s first 6 years, Republicans controlled the Senate but Republican Minority Leader Robert Byrd did not filibuster judicial nominees. In President Clinton’s first 2 years, Democrats had the Senate but Republican Leader Bob Dole did not filibuster judicial nominees. During all those years, all those Congresses, and all those Presidencies, nominees brought to the floor got an up-or-down vote.

Each of those Senate minorities could have done what this minority has refused to do. It is true that there were exceptions; but Democratic nominees brought to the floor were confirmed, and the Senate had a chance to debate and to vote. But none of them did. To the great detriment of the Senate and to the constitutional principle of checks and balances, such self-restraint has vanished.

Democrats argue that by curbing judicial filibusters, we would turn the Senate into a rubberstamp. But for more than two centuries, those filibusters did not exist. Shall we conclude that for 200 years the Senate was a rubberstamp and only now has awakened to its responsibilities? What of the Clinton minority when it tried to filibuster? Were they also rubberstamps? Was Dirksen? Was Baker? Was Byrd? Was Dole? Can the minority be right?
that only through the filibuster may the Senate’s advice and consent check be vindicated? This is a novel conclusion and it stains the reputation of the great Senators that have preceded us. To make their case against curbs on judicial filibusters, Democrats have reached into history. In so doing, they cite the 1968 nomination of Abe Fortas to be Chief Justice of the U.S. Supreme Court, and Franklin Roosevelt’s court-packing plan of 1937. But use of these examples is overreach and draws false comparisons.

In 1968, Abe Fortas was serving on the Supreme Court as an Associate Justice. Three years earlier, he had been confirmed by the Senate by voice vote, following a unanimous affirmative recommendation from the Judiciary Committee. Then Chief Justice Earl Warren announced his retirement, effective on the appointment of his successor. President Lyndon Johnson proposed to elevate Fortas to succeed Warren.

The noncontroversial nominee of 1965 became the highly controversial nominee of 1968. Justice Fortas was caught in a political perfect storm. Some Senators raised questions of ethics. Others complained of cronyism. Yet others were concerned about Warren Court decisions. And still others thought that with the election looming weeks away, a new President should fill the Warren vacancy. But this political perfect storm was thoroughly bipartisan in nature, and reflected concerns from certain Republicans as well as numerous southern and northern Democrats.

Senator Mike Mansfield brought the Fortas nomination to the Senate floor late on September 24, 1968. After only 2 full days of debate, Mansfield filed a cloture motion. Almost a third of the 26 Senators who signed the cloture motion were Republicans, including the Republican whip. The vote on cloture was 45 votes, and 43 votes, well short of the two-thirds that needed to close debate. Nearly a third of Republicans supported cloture, including the Republican whip. Nearly a third of Democrats opposed it, including the Democratic whip. Of the 43 negative votes on cloture, 24 were Republican and 19 were Democratic.

Opponents of cloture claimed that debate had been too short in order to develop the full case against the Fortas nomination. But the precedents of the last Congress as an instrument of party policy. At most, it was opposition to one man, and was not an effort to leverage judicial appointment through the threat of a filibuster-veto. The Fortas opposition came together in one abberational moment. Nothing like it happened in the previous 180 years and nothing like it happened for the next 35 years. Absolutely, it did not represent a sustained effort by a minority Senate to shatter Senate confirmation traditions and exercise a filibuster-veto destructive of checks and balances. No comparison can be made between that single aberrational moment and the pattern of judicial filibusters we now confront.

Democrats also contend that if we move against the judicial filibusters, we will follow in the footsteps of Franklin Roosevelt’s attempt to pack the Supreme Court. But this is a scare tactic and it, too, is a comparison without basis.

Frustrated by the Supreme Court’s ruling unconstitutional several New Deal measures, President Roosevelt sought legislation to pack the court by appointing for every sitting Justice over the age of 70. In a fireside chat, he compared the three branches of government to a three horse team pulling a plow. Unless all three horses pulled in the same direction, the plow could not move. To synchronize all the horses, Roosevelt proposed to pack the court.

Roosevelt’s effort was a direct assault on the independence of the judiciary and plainly undermined the principles of separation of powers and checks and balances. He failed in a Senate with 76 Members of his own party. But no good analogy can be drawn between what he attempted and our effort to end judicial filibusters.

Unlike Roosevelt, Republicans are not trying to undermine the separation of powers. And unlike Roosevelt, Republicans are not trying to destabilize checks and balances, but to restore them.

Mr. President, that the judicial filibusters undermine a longstanding Senate tradition is evident. But traditions are not laudable merely because they are old. This tradition is important because it underpins a vital constitutional principle that the President shall nominate, subject to the advice and consent of the Senate. When filibusters are used to block a vote, the advice and consent of the Senate is not possible.

A cloture vote to end a filibuster is not advice and consent within the Constitution’s meaning. Notwithstanding the minority’s claim, nominees denied a confirmation vote due to filibuster have not been “rejected.” Instead, what has been rejected is the constitutional right of all Senators to vote up or down on the nominees.

To require a cloture threshold of 60 votes for confirmation burrs checks and balances between the Executive and the Senate and creates a strong political check on minority. A minority may hold hostage the nomination process, threatening to undermine judicial independence by filibustering any appointment that does not meet particular ideological or litmus tests.

This is not a theoretical problem. Look what has happened already. Asserting claims that nominees from the last Congress were “rejected.” Democrats have urged President Bush to withdraw the nominations he has submitted anew. If he does not, they will be filibustered. And at that point, the nominating power effectively passes to the Senate minority. If Senate traditions are not restored, this audacious and unprecedented assertion of minority power is coming next, and Presidents will be subject to it from now on.

The Constitution provides that a duly elected Executive shall nominate, subject to advice and consent by a majority of the Senate. Implicit in that structure is that the President and the Senate shall be politically accountable to the American people, and that accountability will be a sufficient check on decisions made by them. That was the system by which we Americans addressed nominations for more than two centuries, until the last Congress. If we allow recent precedents to harden and give the minority a filibuster-veto in the confirmation process for court appointments, the system and the checks and balances it serves, will be permanently destroyed.

Trying to legitimate their judicial filibusters, Democrats have taken to the floor to extol the virtue of filibusters generally. And as to legislative filibusters, I agree with them. But judicial filibusters are not cut from the same cloth as legislative filibusters and must not receive similar treatment. So, I concur with the sentiments Senator Mansfield expressed during the Fortas debate:

In the past, the Senate has discussed, debated and sometimes agonized, but it has always voted on the merits. No Senator or group of Senators has ever usurped that constitutional prerogative. That unbroken tradition, in my opinion, merely reflects on the part of the Senate the distinction heretofore recognized between its constitutional responsibility to confirm or reject a nominee and its role in the enactment of new and far-reaching legislative proposals.

President, history demonstrates that filibusters have almost exclusively been applied against the Senate’s own constitutional prerogative to initiate legislation, and not against nominations. The Frist-Miller cloture reform proposal from the last Congress dealt with nominations only, not legislation and not treaties. We addressed solely what was broken. Over many decades, numerous cloture reforms have been proposed. But ours was the only one to apply strictly to nominations. We left legislative filibusters alone.

Contrary to what Democrats would have you believe, no Republican seeks
to end legislative filibusters. The Democrats are creating a myth. These are the facts: my first Senate vote was to defeat a 1995 rules change proposal to curtail filibusters of every kind. Introduced by Democrats, it received 19 votes, all from Democrats. Since then, 200+ times we have failed to restore Senate traditions, were among those voting for the 1995 change. And here is the irony: had the 1995 change been adopted, the judicial filibusters would be impossible.

Some who oppose filibuster reform do so because they fear that curbing judicial filibusters will necessarily lead to ending the right to filibuster legislation. But history strongly suggests this slippery slope argument is groundless. In 1917, under the leadership of Senator Byrd and on a bipartisan vote, Senate Democrats engineered creation of a precedent to bar debate on a motion to proceed to a nomination. Before then, the potential existed for extended debate on a motion to proceed to a nomination and again on the nomination itself. Indeed, debate on the Fortas nomination occurred on the motion to proceed. The 1980 precedent rendered such debate impossible.

Byrd likely dictated that a parallel precedent would be established next, to bar debate on motions to proceed to legislation. But that logic was not followed. The Byrd precedent of 1980 has stood for 25 years and no move has ever been made to extend it to legislation. Why not? I suggest there are two reasons. First, the Senate has recognized substantial distinctions between procedures applicable to Executive matters—nominations and treaties—and those applicable to legislation. Second, within the Senate there is no discernible political sentiment to curtail the right to debate a motion to proceed to legislation.

Given those substantial procedural distinctions and the absence of such political sentiment, the spillover from the 1980 Byrd precedent has been nil.

There is a further reason why I do not believe curbing judicial filibusters implicates legislation. For 22 years, between 1980 and 1997, floor fights over the cloture rule were a biennial ritual. Finally, in 1975, the rule was amended to require 60 votes before cloture could be invoked. A bipartisan consensus gathered around the new cloture threshold and, at least as to legislation, this consensus has held fast. That is the principal cause why the 1995 effort by certain Democrats to liberalize the cloture rule got only 19 votes. Indeed, both the Republican and Democratic leadership opposed it.

The bipartisan consensus on cloture has unraveled on judges, where filibusters are new, but it remains intact on legislation, where filibusters are traditional. While no one can be sure what procedural changes a future majority may propose, this consensus is so broad and longstanding that predictions of a move against the legislative filibuster lack basis.

Finally, Mr. President, I will repeat what I have said in a series of public statements both on this floor and to the press: the Republican majority will oppose any effort to restrict filibusters on legislation.

All this, Mr. President, brings us to the question of how to address the problem of judicial filibusters. What might reform look like and how might the Senate adopt it?

A good place to start is with first principles. In the case of judicial nominations, I believe the foundational principle is that if a majority of Senators wishes to exercise its right to advise and consent to a nomination, it must be exercised.

To that end, I have offered a Fairness Rule, which takes account of complaints set forth by both parties. My proposal addresses the question of holding nominations in committee, so that nominations may come to the floor for a confirmation vote. By this step, the Senate would respond specifically to concerns Democrats have voiced about the treatment of Clinton nominees. So, if a majority of Senators wishes to advise and consent, committee inaction would not block it. Thereafter, a majority can bring a nomination to the floor. After 100 hours of debate, equally divided, the Senate would vote up or down on the nominee. This step responds specifically to concerns Republicans have had about filibusters of Bush nominees.

The Fairness Rule is the product of listening to the often rancorous arguments about filibusters of Bush nominees. The Fairness Rule is responsive to the concerns Democrats have raised and to the desire to move matters forward. It represents an opportunity, much desired by Senators on both sides of the aisle, to avoid a confrontation on judges. But if the answer is obstruction, then we are faced with having to initiate exercise of the Senate’s constitutional options—best understood as reliance on the power the Constitution gives the Senate to govern its own proceedings.

The Senate is an evolving institution. Its rules and processes are not a straitjacket. Over time, substantial changes have occurred in Senate procedure to reflect changes in Senate behavior. Tactics no longer limited by self-restraint became constrained by rules and precedents. This Senate, equal to the first Senate, has the constitutional right to determine how it wishes to conduct its business.

Self-governance involves writing rules or establishing precedents, and the Constitution fully grants to the Senate the authority to afford the Senate a way to break the rules change filibuster. Faced with that pressure, and with an appropriate parliamentary tool at hand, the Senate adopted its first cloture rule in 1917.

The cloture rule itself was created in 1917, under pressure from Montana Democrat Thomas Walsh. Fed up with obstruction and with the prospect that any effort to amend Senate rules would be filibustered, Walsh proposed exercising the constitutional option. Old Senate rules would not operate while the Senate considered new rules, including a cloture procedure. Meanwhile, general parliamentary law has changed in response to changing conditions. And quite often, it was the credible threat or actual use of the constitutional option that caused these changes to be made.

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Mr. President, I introduced the Frist-Miller cloture reform proposal nearly 2 years ago, on May 9, 2003. The problem of judicial filibusters had just taken root. At the time, I said that I was acting with regret but determination. Regret, because no one who loves the Senate can but regret the need to alter its procedures, even if to restore old traditions. Determination, because I was determined that the changes judicial filibusters had wrought in the Senate could not become standard operating procedure in this Chamber.

Since then, the Senate majority has exercised self-restraint, hoping for a bipartisan understanding that would make procedural changes unnecessary. But if an extended hand is rebuffed, we cannot take rejection for an answer.

Much is at stake in resolving the issue of judicial filibusters. Senator BYRD strenuously took this issue during the Fortas debate in 1968. His words are instructive now:

I reiterate we have a constitutional obligation to consent or not to consent to this nomination. We may evade that obligation by procedural device. But we must act in good faith. The question which must be faced is simply: Is the man qualified for the appointed position? That is the test. It cannot be hedged, hemmed or hawed. There is one question: shall we consent to this Presidential appointment? A Senator or group of Senators may frustrate the Senate indefinitely in the exercise of its constitutional obligation with respect to this question. In so doing, they presume great personal privilege at the expense of the responsibilities of the Senate as a whole, and at the expense of the constitutional structure of the Federal government.

Mr. President, exercising the constitutional option to restore Senate traditions would be an act of last resort. It would be undertaken only if every reasonable step to otherwise resolve this impasse is exhausted. At stake are the twin principles of separation of powers as well as checks and balances bedrock foundations for the Constitution itself. And at stake is our duty as Senators of advice and consent, to confirm a President’s nominee or reject her, but at long last to give her a vote.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. LAUTENBERG. Mr. President, the debate bounces back and forth, and we hear the complaints about the change in the system, one that has been in existence for some 200 years. It was formally adopted in the early part of the 20th century.

I see the fact that the traditions and rules that have broken down. They are in deep jeopardy. The current majority leader is threatening to annihilate over 200 years of tradition in this Senate by getting rid of our right to extended debate. The Senate that will be here as a result of this nuclear option will be a dreary, bitter, far more partisan landscape, even though it obviously prevents us from operating with any kind of consensus. It will only serve to make politics in Washington much more difficult.

On has to wonder, what happened to the claims that were made so frequently, particularly in the election year 2000, when then-candidate Bush, now President, talked about being a unit er, not a divider? It has been con turned on them. The current majority leader wants the Senate to make it easier for the Republican Senators to change the rules when you don’t like the way the game is going. What kind of example does that set for the country? Some may fol low our own rules, why should the average American follow the rules that we make here?

If the majority leader wants to change the rules, there is a legal way to do it. A controversial Senate rule change is supposed to go through the Rules Committee. Once it reaches the full Senate for consideration, it needs 67 votes to go into effect. But rather than follow the rules, Vice President Bush and the majority leader want to get rid of the filibuster because it is the only thing standing between them and absolute control of our Government and our Nation. They think that the Senate should be a rubber stamp for the President. That is not what our Founders intended. It is an abuse of power, and it is wrong, whether a Republican or a Democrat lives in the White House.

I say to the American people: Please, get past the process debate here. Let’s not forget how important our Federal judges are. They make decisions about
what rights we have under our Constitution. They make decisions about what our education and environmental laws will be enforced. They make decisions about whether we continue to have health care as we know it. And sometimes, let us not forget, they don’t even step in to decide a Presidential election.

The Constitution says the Senate must advise and consent before a President’s judicial nominations are allowed to take the bench. It doesn’t say advise and consent, it doesn’t say consent first and then advise. As Democratic leader HARRY REID recently said: George Bush was elected President, not king.

The Founding Fathers, Washington, Jefferson, and Madison, did not want a king. And that is why the Constitution created the Senate as a check on the President’s power. With terrible ideas like Social Security privatization coming from the President these days, the American people are thankful that we are here to stop it.

I yield the floor.

The PRESIDING OFFICER. The Senator from Indiana.

Mr. BAYH. Mr. President, I compliment my colleague from New Jersey for his eloquence and for his insight on the important role the filibuster has always played in building consensus in our society.

It is unfortunate that we are here. It is unfortunate for this institution. It is unfortunate for the Members of this body. It is unfortunate for our country and for the political process that governs us all.

Mr. President, let there be no illusions. There will be no winners here. All will lose. The victors, in their momentary triumph, will find that victory is fleeting. They will nurture their resentments until the tables one day turn, as they inevitably will, and the recrimination cycle will begin anew.

This sorry episode proves how divorced from reality is America Washington and the elites that too often govern here have become. At a time when Americans need action on health care, the economy, deficit, national security, and at a time when challenges form around us that threaten our national security, and at a time when we need anew.

I want the American people to understand one thing: The big fight here is because the people who will get these positions have lifetime tenure. That means they could be here 20, 30, or 40 years. I have faith in the courage of my colleagues across the aisle. I hope they are going to put loyalty to their country ahead of loyalty to a political party.

I yield the floor.

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aside. First was in the immediate aftermath of the first impeachment of a President since 1868 and the feeling that perhaps we had gone too far. The second was in the immediate aftermath of 9/11, when our country had literally been shaken to its core. There was a palpable understanding that we were not Republicans or Democrats, but first and foremost Americans. It is time for us to recapture that spirit once again.

Today, all too often, we live in a time of constant campaigns and politicking, an atmosphere of win at any cost, an aura of ideological extremism, which makes principled compromise a vice, not a virtue. Today, all too often, it is the political equivalent of social Darwinism, the survival of the fittest, a world in which the strong do as they will and the weak suffer what they must. America deserves better than that.

I would like to say to you, Mr. President, and to all my colleagues, that you, too, have suffered at our hands. Occasionally, we have gone too far. Occasionally, we have behaved in ways that are injudicious. I think particularly about the President's own brother, who was brought to the brink of personal bankruptcy because he was pursuing an investigation by the Congress, not because he had plundered his savings and loan, but because he happened to be the President's brother. Each of us is to blame, Mr. President. More recently, each of us has responsibility for taking us to the better place that the American people have a right to deserve.

There is a need for unity in this land once again. We need to remember the words of a great civil rights leader who once said: We may have come to these shores on different ships, but we are all in the same boat now.

We need to remember the truth that too many today in public life don’t want us to understand; that, in fact, we have more in common than we do that divides us. We are children of the same God, citizens of the same Nation, one country indivisible, with a common heritage forged in a common bond and a common destiny. It is about time we started behaving that way. We need to remember the words of Robert Kennedy, who was in my home State the day Martin Luther King was assassinated. Indianapolis was the only major city that year that did not want Martin Luther King was killed today. A gasp went up from the audience. He said: For those of you who are tempted to lash out in anger and violence, I can only say that I too had a relative who was killed. He too was killed by a white man. Kennedy went on to say that what America needs today in these desperate times is not more hatred, or more anger, or more divisiveness; what America needs today is more unity, more compassion, and more love for one another.

That was true in 1968; it is true today. The time has come for the sons and daughters of Lincoln and the heirs of Jefferson and Jackson to no longer wage war upon each other, but instead to take up the struggles against the ancient enemies of man—ignorance, poverty, and disease. That is what has brought us here. That is why we serve.

Mr. President, we need to rediscover the deeper sense of patriotism that has always made this Nation such a great place, not as Democrats or Independents, not as residents of the South, or the East, or the West, not as liberals or conservatives, or those who have no ideological compass, but as one Nation, understanding the threats that face us, determined to lead our country forward to better times.

So I will cast my vote against changing the rules of this Senate for all of the reasons based in my brief remarks and those that have been mentioned by speakers before me. But more than that, I will cast my vote in the profound belief that this is a rare opportunity to put the acrimony aside, that we need to find more reconciliation, more understanding and cooperation for the greater good. And if in so doing, I and those of similar mind can drain even a single drop of blood or venom from the blood that has coagulated through the body of this political process for too long, we will have done our duty to this Senate and to the Republic that sent us here, and that is reward enough for me.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island is recognized.

Mr. REED. Mr. President, first, I commend my colleague for his wise words. I thank Senator Bayh. This morning I had the occasion to meet with Mayor David Cicilline of the public at the Old State House in Providence, RI, the seat of Rhode Island Government for many years in the early days of this country. In fact, in 1790, George Washington and Thomas Jefferson enjoyed a banquet in that building to celebrate the Constitution of the United States—that careful balancing of majority power and minority rights.

Unfortunately, these days in Washington we are on the verge of upsetting that balance, of using majority power to undermine minority rights. In doing so, we are stilling the voices of millions of Americans—the millions of Americans that we represent—and not just geographically, but represent—the poor, the disabled, those who fight vigorously for environmental quality—all of those individuals will see their voices diminished and perhaps extinguished if we choose this nuclear option.

The Senate was created to protect the minority. It was also clearly envisioned to serve as a check on Presidential power, particularly on the power to appoint judges. Indeed, it was in the very last days of the Constitutional Convention in 1787 that the Founding Fathers decided to move the power to appoint Federal judges from the control exclusively of the Senate to that of a process of a Presidential nomination with the advice and consent of the Senate.

Indeed, in those last days, there was a shift of power, but not a surrender of power. This Senate still has an extraordinary responsibility to review, to confirm or to reject the nominations of those individuals who would serve for a lifetime on our Federal courts.

It is very important that the American people, when they come before the bar of Federal justice, stand before a judge of the United States, feel and know that that individual has passed a very high test, that that individual is not a Republican judge or a Democratic judge, not an ideologue of the right or left, but they received broad-based support in the Senate, and they stand not for party, but for law and the United States of America.

We are in danger of upsetting that balance, of putting on the court people who are committed to an ideological position, who are seeking to undo what they are trying to do in Iraq they are trying to undo in the United States of America by stripping away those procedural protections that give the American people a real voice in our Government.

In a recent National Review article by John Cullinan, a former senior policy adviser to the U.S. Catholic Bishops, he said it very well. He posed a question in this way: Will Iraq’s overwhelming Shiite majority accept structural restraints in the form of guaranteed protections for others? Or does the majority see its demographic predominance as a mandate to exercise a monopoly of political power? This, in a very telling phrase, sums it up:

Does a 60-percent majority translate into 100 percent of the political pie?

The question we will answer today, tomorrow, and this week: Does the 55-vote majority in the Senate translate to 100 percent of the political pie when it comes to naming Federal judges? Just as it is wrong in Iraq, I believe it is wrong here because without minority protections, without the ability of the minority to exercise their rights, to raise their voice, this process is
dramed to a very difficult and, I think, disastrous end.

We have today measures before us that threaten the filibuster, and I believe this is not the end of the story if this nuclear option prevails because I think, by the interest groups that are pushing this issue—the far right who are demanding that this nuclear option be exercised—will not be satisfied by simply naming judges because that is just part of what we do. They have other days ahead. If this nuclear option succeeds, opportunities to strike out our ability to stop legislative proposals, to stop other Executive nominees. They will be unsatisfied and unhappy that in the course of debate and deliberation here, we are not willing to accept their most extreme views about social policy, about economic policy, about the world at large. The pressure that is building today will be brought to bear on other matters.

So this is a very decisive moment and a step. I hope we can avoid stepping into it, but I hope we can. I hope we can avoid stepping into the abyss. I hope we can maintain the protections that have persisted in this Chamber in one form or another for 214 years. The rules give Senators many opportunities to express themselves. It is not an up-or-down vote. There are procedures to call committee hearings, to call up nominees that have been appointed, that also give Senators an opportunity to express themselves.

I mention again, many people here at least 60 of President Clinton's judicial nominees never received an up-or-down vote, and it is ironic, to say the least, that many who participated in that process now claim a constitutional right for an up-or-down vote on a Federal nominee to the bench.

In fact, according to the Congressional Research Service, since 1945, approximately 18 percent of judicial nominees have not received a final vote in this Senate. President Clinton has done remarkably well by his nominees—218 nominees, 208 confirmations, a remarkable record, which shows not obstruction but cooperation—which shows that this Senate, acting together, with at least 60 votes, but still exercising its responsibility to carefully screen judges has made decisions that by a vast majority favor the President's nominees. That is not a record of obstruction, that is a record of responsibility.

Again, at the heart of this is not simply the interplay of Senators and political. At the end of the day, we have to be able to demonstrate to the American public that if they stand before a Federal judge, they will be judged by men and women with judicial temperament, who understand not only the law and precedent, but understand they have been given a responsibility to do justice, to demonstrate fairness.

If we adopt this new procedure and are able to ram through politically, ideologically motivated judges, that confidence in the fairness of federal judges might be fatally shaken and that would do damage to this country of immense magnitude.

The procedure that is being proposed is not a straightforward attempt to change the rules of the Senate because that also requires a supermajority. No, this is an end run around the rules of the Senate, a circumvention, and a circumvention that will do violence to the process here and, again, I think create a terrible example for the American public.

We used to talk about the Supreme Court and we use the word. There are those who suggest that it is somehow unconstitutional not to provide an up-or-down vote. Where were they when the 60 judges nominated by President Clinton were denied an up-or-down vote? Where were they when the 60 judges nominated by President Clinton were denied an up-or-down vote? In that process now claim a constitutional right for an up-or-down vote on judges? No, the rules of the Senate prevailed at that time, as they should prevail at this time because the Constitution clearly states that each House may determine the rules of its proceedings. And we have done that in a myriad of ways and will continue to do that. The right to unlimited debate in this Senate is one of the rights that has been protected by rules that have been in force for many years.

We are involved in a debate that has huge consequences for this country and for the Senate. I believe this institution must remain a place where even an individual Senator can stand up and speak in such a way and at such length that he not only arouses the conscience of the country, but, indeed, should maybe be able to deflect the country away from a dangerous path.

In the 1930s, President Roosevelt also had problems with the court system, he thought. He decided he would pack the courts. He would propose the expansion of the U.S. Supreme Court. Even though it was supported by the majority leader at that time, it was brought to this floor, and a small band of Senators stood up and spoke and convinced him, President Roosevelt, that what he was proposing was a parliamentary ploy, an end run around the rules, and saved President Roosevelt from a grave mistake.

Today, once again, we are debating the future of our judicial system, and I believe without the filibuster, we will make grave mistakes about who goes on our courts and what will be the makeup of those courts.

It might be that I have a particular fondness for the ability to represent those who are not numerous. I come from the smallest State, geographically, in the country, Rhode Island. We have two Senators, and we have two Members of the U.S. House of Representatives. But myself and my colleagues, Senator Chafee, can stand up and speak and have the force of any of the larger States in this country. That is an essential part of our Federal system, an essential part of the Constitution that provided this wise balance between majority power and minority rights.

We are in danger of seeing that power—I believe arrogantly displayed—potentially undercutting the rights of one Senator or two Senators or eight Senators to stand up, to speak truth to power, to challenge the views, to awaken the conscience of the country, to prevent the accumulation of so much power that we slowly and perhaps imperceptibly slide to a position where the President would have an end run around the rules of the Senate, and that would do great harm to this constitutional balance.

Mr. President, this is a serious debate—a very serious debate. It is one in which I hope cooler heads prevail. It is one in which I hope back and recognize that what we do will affect this institution and this country for a long time. I hope that we will refrain from invoking this nuclear option, that we recognize the traditions of the Senate not out of nostalgia but because they have served us well, and will continue to serve us well. They will ensure that we can speak not just as an exercise in rhetoric, but to have real effect in this body, the greatest deliberative assembly the world has ever known.

Mr. President, with that, I yield the floor to my colleague from Michigan.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. Kennedy. Mr. President, President Harry Truman once said that the only thing new in the world is the history that you do not know. And so it is today with those who think this effort to amend the rules by breaking them, that is, the nuclear option, is something new under the Sun.

This is not the first time that it has been tried. Sadly, there have been a few other efforts to amend the rules by fiat, but, and this is the crucial point, the Senate has never done it.

Whenever an effort was made to change the rule by fiat, it has been rejected by this body. There are procedures for amending the Senate's rules, and the Senate has always insisted, and rightly so, that those procedures be followed. In very few cases, the majority of Senators has stood up for that principle, often over the wishes of their own party's leader. It is my hope there will be a majority of such Senators tomorrow.

I entered some of that history in the CONGRESSIONAL RECORD last week, and I will not repeat it all now. One incident stands out and bears repeating, and after doing so, I will add a second chapter to that incident.

In 1938 the Vice President from Michigan Alben Barkley ruled that cloture applied to a motion to proceed to consideration of a bill. In other words, that rule XXII, which allows for the cutoff of debate, applied to a motion to proceed to consideration of a bill. The ruling was contrary to Senate precedent and against the advice of the Senate Parliamentarian and was made despite the fact that rule XXII, as it then existed, clearly provided only that the pending matter was subject to a vote.

The Senate rejected Vice President Barkley's ruling by a vote of 46 to 41. Significantly, 23 Democratic Senators, nearly half of the Democrats voting,
opposed the ruling by the Vice President of their own party. Later, the Senate, using the process provided by Senate rules, by a vote of 63 to 23, adopted a change in rule XXII to include a motion to proceed.

After that rule change, changed according to the procedures for amending rules, a supermajority could end a debate on the motion to proceed to a bill, for instance, as well as ending debate on the bill itself.

Last week, I quoted the words of one of the giants of Senate history, Senator Arthur Vandenberg of Michigan about that debate. This is what Senator Vandenberg said:

I continue to believe that the rules of the Senate are as important to equity and order in the Senate as is the Constitution to the life of the Republic, and that those rules should never be changed except by the Senate itself, in the direct fashion prescribed by the rules themselves.

Senator Vandenberg continued:

One of the immutable truths in Washington's Farewell Address, which cannot be altered even by changing events in a changing world, is the sentence: "The constitution which at any time exists, until changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."[1]

The father of his country said to us, by analogy, "the rules of the Senate which at any time exist until changed by an explicit and authentic act of the whole Senate are sacredly obligatory upon all."[2]

Senator Vandenberg continued:

When a substantive change is made in the rules by sustaining a ruling by the Presiding Officer of the Senate—and that is what I contend is being undertaken here—it does not mean that the rules are permanently changed. It simply means, that regardless of precedent or traditional practice, the rules, hereafter, mean whatever the Presiding Officer of the Senate says they mean. The Senate majority of Senators voting at the time, want the rules to mean. We fit the rules to the occasion, in stead of fitting the occasion to the rules. Therefore, in normal analysis, under such circumstances, there are no rules except the transient, unregulated wishes of a majority of whatever quorum is temporarily in control of the Senate.

And Senator Vandenberg added:

That, Mr. President, is not my idea of the greatest deliberative body in the world. . . . No matter how important [the pending issue's] immediate incidence may seem today, if the Senate changes one of the Senate's rules it is our paramount concern, today, tomorrow, and so long as this great institution lives.

Senator Vandenberg continued:

This is a solemn decision—reaching far beyond the immediate consequences—and will have a profound effect on our system of Government. What do the present Senate rules mean; and for the sake of law and order, shall they be protected in that meaning until changed by the Senate itself? Do the rules required by the rules?

Senator Vandenberg eloquently summarized what is at the root of the nuclear option:

. . . [The rules of the Senate as they exist at any given time and as they are changed by precedent and tradition, shall not be changed substantively by the interpretive action of the Senate's Presiding Officer, even with the transient sanction of an equally transient Senate majority. The rules can be safely changed only by the direct and conscious action of the Senate itself, acting in the fashion prescribed by the rules. Otherwise, no rule in the Senate is worth the paper that it is written on, and this so-called "greatest deliberative body in the world" is at the mercy of arbitrary and personal authority.

Mr. President, tonight, I do more than underscore the foresightful words of Senator Vandenberg, which are all the more significant because, as he made clear, he agreed that the Senate's rules could change in the fashion proposed, but not by using the illegitimate process proposed of amending our rules by fiat of a Presiding Officer.

There was even more to it—and it is again directly relevant to the proceeding that is pending. The year was 1948, 1 year before the Barkley ruling which I just described. Senator Vandenberg was President pro tempore of the Senate and was presented with a motion to end debate on a motion to proceed to consideration of an antipoll tax bill.

Senator Vandenberg ruled, as Presiding Officer, that the then-language of rule XXII, providing a procedure for terminating debate, meant that he had before the Senate[3] did not apply to cutting off debate on the motion to proceed to a measure, even though he thought that it should on the merits. So he ruled against what he believed in on the merits because of his deep belief in the greatness of the Senate and in the rule itself.

In making that ruling, again while serving as the Presiding Officer, this is what Senator Vandenberg said:

The President pro tempore [that's him] finds it necessary . . . before announcing his decision, to state again that he is not passing on the merits of the poll-tax issue nor is he passing on the desirability of a much stronger cloture rule in determining this point of order. The President pro tempore is not entitled to consult his own predilections or his own convictions in the use of this authority. He must act in his capacity as an officer of the Senate, under oath to enforce its rules as he finds them to exist, whether he likes them or not. Of all the precedents necessary to preserve, this is the most important of them all. Otherwise, the preservation of any minority rights for any minority at any time would become impossible.

Senator Vandenberg continued:

The President pro tempore is a sworn agent of the law as he finds the law to be. Only the Senate has the right to change the law. The President pro tempore feels that he is entitled particularly to underscore this axiom in the present instance because the present circumstances themselves bring it to such bold and sharp relief.

He further stated, again referring to himself:

In his capacity as a Senator, the President pro tempore favors the passage of this anti-poll-tax measure. He has similarly voted on numerous previous occasions. In his capacity as President pro tempore he believes that the rules of the Senate should permit cloture upon the pending motion to take up the anti-poll-tax measure, but in his capacity as the senior Senator from Michigan is bound to recognize what he believes to be the clear mandate of the Senate rules and the Senate precedents; namely that no such authority presently exists.

So, again, Senator Vandenberg says that he believes the rules of the Senate should be changed to permit cloture on the pending motion to take up the anti-poll-tax measure, but he is bound by the Senate rules to do that. He cannot rule against what the rules clearly provide.

Senator Vandenberg then went on to say:

If the Senate wishes to cure this imperfection it has the authority, the power, and the mandate to do so. Therefore, the Senate majority of the Senate does not have the authority, the power, or the means to do so except as he arbitrarily takes the law into his own hands. This he declines to do in violation of his oath. If he did so, he would feel that the what might be deemed temporary advantage by some could become a precedent which ultimately, in subsequent practice, would rightly be condemned by all.

I want to emphasize Senator Vandenberg’s point for our colleagues. In the view of that great Senator, it would have been a violation of his oath of office to change the Senate rules by fiat; to rule, as President pro tempore, contra the word of the Senate’s rules, even though he personally agreed with the proposition that the rule needed to be changed. Senator Vandenberg’s ruling was a doubly difficult one because it left the Senate with no means of cutting off debate and so proceed to a measure. The Senate then voted to change the rule a year or so later, with Senator Vandenberg’s support, to allow for cutting off debate on the motion to proceed.

Senator Vandenberg’s words and his example are highly relevant to us today. The majority leader’s tactic to have the Presiding Officer by decree, by fiat amend our rules by exercising the so-called nuclear option is wrong. It has always been wrong. And the Senate has rejected it in the past.

I want to simply read that one last line of Senator Vandenberg one more time:

In his capacity as a Senator, the President pro tempore [Senator Vandenberg] favors the passage of the anti-poll-tax measure [before him].

He has voted for it on similar occasions, he said.

In his capacity as President pro tempore [he] believes the rules of the Senate should permit cloture on the pending motion to take up the . . . measure. But . . . and this is the "but" which everybody in this Chamber should think about—

in his capacity as President pro tempore the senior Senator from Michigan is bound to recognize what he believes to be the clear mandate of the Senate rules and the Senate precedents; namely that no such authority presently exists.

For him to rule as President pro tempore against the clear meaning of rule XXII to do so. The President pro tempore of the law, the rules, into his own hands. Senator Vandenberg was not about to do that.
Rule XXII is clear. It takes 60 votes to end debate on any measure, motion, or other matter pending before the Senate. It does not make an exception for nomination of judges. The nuclear option is not an interpretation of rule XXII. It goes head long into the heart of rule XXII. What we have in this body are the custodians of a great legacy. The unique Senate legacy can be lost if we start down the road of amending our rules by fiat of a Presiding Officer. We are going to be judges of future generations for what we do here this week. Arthur Vandenberg, look upon us, when we leave this Chamber at Arthur Vandenberg’s portrait in the Senate reception room alongside of just six other giants for more than 215 years of Senate history.

As the present-day custodians of the great Senate tradition, we should uphold that tradition by rejecting an attempted rule change by any decree of the Presiding Officer instead of by the process in our rules for changing our rules. We must reject that attempt to rule by fiat instead of by duly adopted rules of the Senate. In that way, we will pass on to those who follow us a Senate that is enhanced, not diminished, by what we do here this week.

Mr. ALEXANDER. Mr. President, I would like to take a moment to remind my colleagues across the aisle just what the Constitution has to say about the confirmation of judges.

In a recent speech on the filibuster of President Bush’s judicial nominees, I cited the actions of Senator BYRD when he was majority leader in 1979 as justification for the proposed constitutional option. However, the historical precedent for the actions the Minority is forcing the majority to take goes much further back than even the tenure of the Senator from West Virginia. The power to confirm or deny the President’s judicial nominees because the Constitution explicitly grants us that power. Article II, section 2 reads: He the president shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, which shall be established by law.

The President gets to nominate a judge, but only with the consent of the Senate is that judge actually appointed to serve.

The Constitution is not totally clear on the surface as to what should constitute “advice and consent” by the Senate. But, fortunately, our Founding Fathers provided us with not just a Constitution but with a whole raft of writings that help us understand just what they were thinking when they drafted it. Those records confirm, I believe, that they were not concerned with a clash between political parties when they wrote the Constitution, but with the balance of power between the executive, legislative, and judicial branches.

The history of the “advice and consent” clause suggests that the Founders were uncomfortable with either branch completely controlling the nomination of judges. As a result, they found a compromise that sought to prevent either the executive or the legislative branch from dominating the nomination process.

In the Constitutional Convention of 1787, there was lengthy discussion about who should appoint judges to the bench—the executive or the legislative branch. After extensive debate, the delegates to the Constitutional Convention rejected the possibility that the power to elect Judges would reside exclusively with one body or another. On June 5, 1787, the Records of the Federal Convention record James Madison’s thoughts on the issue:

Mr. Madison disliked the election of the Judges by the Legislature or any numerous body. Besides the danger of intrigue and partiality, many senators were not judges of the requisite qualifications. . . . On the other hand he was not satisfied with referring the appointment to the Executive.

Madison was concerned that vesting the sole power of appointment in the executive would lead to bias and favoritism. In the end, the Framers of the Constitution arrived at the language I just read. Should there be any doubt as to what was intended, Alexander Hamilton and others provided us with the Federalist papers. In Federalist 76, Hamilton discusses the nominations clause:

The history of the “advice and consent” clause suggests that the Framers did not intend for the Senate to have no role in the appointments process that would allow for the Senate to reject the President’s nominees. As a result, they placed a requirement that such a requirement would “unite the advantage of responsibility in the
Executive with the security afforded in the second branch against any incunabulous or corrupt nomination by the Executive.’

So that sounds to me like the Framers viewed the role of the Senate in such cases as a check that even less than a majority could be required to confirm a judge—because the Senate was there as a backstop to prevent the appointment of political cronies and unfit characters. That is a far cry from the role my colleagues and I would like for us to play today—that of co-equal to the president in the process and capable of demanding nominees that would rule in favor of their positions.

Madison’s language was not adopted, but the language that was adopted certainly cannot be read to require a supermajority. You don’t have to just accept my interpretation of this language. Shortly after the Constitutional Convention, Justice Joseph Story—appointed to the Supreme Court by President James Madison—wrote his Commentaries on the Constitution and stated explicitly:

‘The president is to nominate, and thereby has the sole power to select for office; but his nomination is subject to the Senate’s ratification as a check and to provide balance in our federal system, as a place to slow down legislation and ensure that only the very fundament of population or based on the size of a district, nominations are constitutionally required. The Senate rules have for some time expressed that constitutional requirement. Senate Republicans now deny the power to stop the President from appointing judges. Quite the opposite. As I have outlined, James Madison and Alexander Hamilton, two of the greatest minds that helped design our Constitution, put it down in writing for us that judges are to be confirmed by a majority vote. Furthermore, the Constitution that creates a right to a vote for a nomination or a bill. If there were such a right, it was violated more than 60 times when Republicans refused to consider President Clinton’s judicial nominees. According to the Congressional Research Service, more than 500 judicial nominations for circuit and district courts have not received a final Senate vote between 1945 and 2004—over 50—that is 18 percent of those nominations. By contrast, this President has seen more than 95 percent of his judicial nominations confirmed, 208 to date.

The Constitution provides for the Senate to establish its own rules in accordance with article I, section 5. The Republican Senate has for some time expressly provided for nominations not acted upon by the Senate—‘neither confirmed nor rejected during the session at which they are made”—being ‘returned by the Secretary to the President.” That is what happened to those 500 nominations over the last 60 years.

What the Republican leadership is seeking to do is to change the Senate rules not in accordance with the Constitution, but by imposing their own idiosyncratic rules on the Senate. For example, one of the many Republican Senators, who prevented votes on more than 60 of President Clinton’s judicial nominees and hundreds of his executive branch nominees because one anonymous Republican Senator objected, now contend that the votes on nominations are constitutionally required.

No President in our history, from George Washington on, has ever gotten a confirmation vote, much less a majority vote. It is time for us to restore the Senate to the operation envisioned by the Founding Fathers more than 200 years ago that the President’s judicial nominees should be able to confirm by majority vote. Mr. President, 2 years ago, my first speech as a Member of the Senate was on this topic of judiciary. I have spoken many times on this same subject. I would like to talk about it again—other than to discuss the merits of a particular judge before having an up-or-down vote on confirmation.

That is the way we have functioned in the past, it is the way the Founders meant for us to operate, and it is the way the American people should demand their elected representatives work together.

Mr. LEAHY. Mr. President, I have made no secret how I regard the Republican Leader’s bid for one-party rule through his insistence to trigger the “nuclear option.” I view it as a misbegotten effort to find out the checks and balances that the Senate provides in our system of government, undermine the rights of the American people, weaken the independence and fairness of the federal courts, and destroy minority rights here in the Senate. It is time again for the Senate to stand up, and I hope that there are Senators of this President’s party who have the courage to do so, today.

The Constitution nowhere says that judicial confirmations require 51 votes. Indeed, when Vermont became the 14th State in 1791, there were then only 28 Members of the U.S. Senate. More recently, Supreme Court Justices Sherman Minton, Louis Brandeis, and James McReynolds were confirmed with 48 votes, 47 votes and 44 votes, respectively.

As the Republican leader admitted in debate with Senator BYRD last week, there is also no language in the Constitution that created a right to a vote for a nomination or a bill. If there were such a right, it was violated more than 60 times when Republicans refused to consider President Clinton’s judicial nominees. According to the Congressional Research Service, more than 500 judicial nominations for circuit and district courts have not received a final Senate vote between 1945 and 2004—over 50—that is 18 percent of those nominations. By contrast, this President has seen more than 95 percent of his judicial nominations confirmed, 208 to date.

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No President in our history, from George Washington on, has ever gotten all his judicial nominees confirmed by the Senate. President Washington’s commission of John Rutledge to be Chief Justice of the U.S. Supreme Court was not confirmed by the Senate. Senate Republicans now deny the
filibusters they attempted against President Clinton's judicial nominees and they ignore the filibusters they succeeded in using against his executive branch nominees. They seek not only to rewrite the Senate's rules by breaking them but to rewrite history. I ask that a copy of the recent article by Professor John J. Flynn be included in the RECORD.

Helping to fuel this rush toward the nuclear option is new vitriol that is being heaped both upon those who oppose a handful of controversial nominees and oppose the nuclear option, as well as on the judiciary itself. We have seen threats from House Majority Leader TOM DELAY and others about mass impeachments of judges with whom they disagree. We have seen Federal judges compared to the KKK, called "the focus of evil," and we have heard those supporting this effort quote Joseph Stalin's violent answer to anyone who opposed his totalitarian form of government: "I kill the man, No problem." Stalin killed those with whom he disagreed. That is what the Stalinist solution is to independence. Regrettably, we have heard a Senator trying to relate the recent rash of rhetoric about one of his Senate colleagues to" oddly he wasSenators "to start with with what President Clinton's judicial nominees are brand- ed as being anti-Christian, or anti-Catholic, or "against people of faith." It continued over the last several weeks. Recently last week on the Senate floor. It is wrong; it is reprehensible. These charges, this virulent religious McCarthyism, are fraudulent on their face and destructive.

Injecting religion into politics to claim that a President's judicial nominees are brand- ed as being anti-Christian, or anti-Catholic, or "against people of faith." It continued over the last several weeks. Recently last week on the Senate floor. It is wrong; it is reprehensible. These charges, this virulent religious McCarthyism, are fraudulent on their face and destructive.

This debate in the Senate last week started with rhetoric from the other side concerning what one and the killings of judges and justices family members with philosophical differences about the way some courts have ruled. This debate in the Senate last week started with rhetoric from the other side concerning what one and the killings of judges and justices family members with philosophical differences about the way some courts have ruled. This debate in the Senate last week started with rhetoric from the other side concerning what one and the killings of judges and justices family members with philosophical differences about the way some courts have ruled.

This in direct violation of the Repub- lican leader's own statement at the outset of this debate that the rhetoric in this debate would "follow the rules and best traditions of the Senate." This has sunk too low and it has got to stop.

It is one thing for those outside the Senate to engage in incendiary rhet- oric. In fact, I would have expected Senators and other leaders to call for a toning down of such rhetoric rather than participating and lending support to events that unfairly smear Senators as against people of faith. Within the last few days the Rev. Pat Robertson, a son called Federal judges, quote, "a more serious threat to America then Al Qaeda and the the Sept. 11 terrorists" and "more serious than a few bearded ter- rorists who fly into buildings." He went on to proclaim the Federal judici- ary "the worst threat this country has faced in 400 years worse than Nazi Ger- many, Japan and the Civil War." This is the sort of incendiary rhetoric that Republicans should be dis- avowing. Instead, they are adopting it and exploiting it in favor of their nu- clear option.

It is base and it is wrong, and just the sort of overheated rhetoric that we should all repudiate. Not repeating such slander is not good enough. We should reject it and do so on a bipartisan basis. Republicans as well as Democrats should affirmatively reject such harsh rhetoric. It does not inspire; it risks imitating it and considering it and creating a full and fair record so that the Senate itself would be in position to consider it. That is what we used to call "regular order." That is how the Senate is in- tended to operate, through deliberative processes and with all points of view being protected and being heard.

That is not how the "nuclear option" will work. It is intended to work outside the established precedents and proce- dures. Use of the "nuclear option" in the Senate is akin to amending the Constitution by following the proce- dures required by article V but by proclaiming that 50 Republican Sena- tors and the Vice President have de- termined that every copy of the Constitu- tion shall contain a new section— or not contain some of those trouble- some amendments that Americans like to think of as being in the Bill of Rights and what is wrong. It is a kind of lawlessness that each of us should oppose. It is rule by the parliamentary equivalent of brute force.

However in our history has the Senate changed its governing rules except in accordance with those rules. I was a young Senator in 1975 when Senate rule XXII was last amended. It was amended after cloture on proceeding to the resolution to change the Senate rules. It was invoked in accordance with rule XXII itself and after cloture on the resolu- tion was invoked in accordance with the requirement then and still in our rules that ending debate on a rule change requires the concurrence of two-thirds of the Senate. That was achieved in 1975 due in large part to the extraordinary statesmanship and lead- ership of Senator BYRD. And then the Senate adopted the resolution, which I supported. The resolution reduced the number of votes needed to end debate in the Senate from two- thirds to three-fifths of those Senators duly chosen and sworn. The Senate has oper- ated under these rules to termi- nate debate on legislative matters and nominations for the last 30 years. Be- fore that the Senate's requirement to bring debate to a close was even more exacting and required more Senators to vote to end a filibuster. I say, again, that the change in the Senate rules was accomplished in accordance with the Senate rules and the way in which they provide for their own amendment.

There has been a good deal of chest pounding on the other side of the aisle about the necessity of 51 votes to prevail, to end debate, to amend the Senate rules. Senators know that, in truth, there are a number of instances in which 60 votes are needed to prevail. These are not theoretical matters, but matters that have been used by Republican leaders to thwart "ma- jority" votes on matters they do not like.

Republicans are in the majority in the Senate and chair all of its committees, including the Rules Committee. If Rep- ublicans have a serious proposal to change the Senate rules, they should introduce it. The Rules Committee should hold meaningful hearings on it and consider it and create a full and fair record so that the Senate itself would be in position to consider it. That is what we used to call "regular order." That is how the Senate is in- tended to operate, through deliberative processes and with all points of view being protected and being heard.

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The most common 60-vote threshold is what is required to prevail on a motion to waive a series of points of order arising from the Budget Act and budget resolutions. In fact, just this year in the deficit-creating budget process, though 53 Senators voted, they created new points of order that will require 60 votes in order to be overcome.

There are dozens of recent examples, but a few should make this concrete. In March, a majority of Republicans voted to establish a Social Security and Medicare “lockbox.” That was a good idea. Had we been able to prevail then, maybe some of the problems being faced by the Social Security trust fund and Medicare might have been averted or mitigated. But even though 53 Senators voted to waive the point of order and create the lockbox, it was not adopted by the Senate.

There is another example from soon after the 9/11 attacks. A number of us wanted to provide financial assistance, training and health care coverage for aviation industry employees who lost their jobs as a result of the terrorist attacks. We had a bipartisan coalition of more than 50 Senators; it was, I recall, so that the votes of 56 Senators were not sufficient to end the debate and enact that assistance. I also remember an instance in October 2001, when I chaired the Foreign Operations Subcommittee of the Senate Appropriations Committee. I very much wanted to have the Senate do our job and complete our consideration of the funding measure necessary to meet the commitments made by President Bush to foreign governments and to provide life-saving assistance around the world. We voted on whether the Senate would be allowed to proceed to consider the bill—not to pass it, mind you, just to proceed to debate it. Republicans objected to considering the bill and attempted to require a two-thirds vote to proceed to the bill. Then minority Senators, Republican Senators, filibustered proceeding to consideration of the bill. We were required to petition for cloture to ask the Senate to agree to end the debate on whether to proceed to consider the bill and begin that consideration. Fifty Senators voted to end the debate. Only 47 Senators voted to continue the filibuster. Still, the majority, with 50 votes to 47 votes did not prevail. Although we had a majority, we failed and the Senate did not make progress.

It happened again, in the summer of 2002, a bipartisan majority here in the Senate wanted to make progress on hate crimes legislation. The Senate got bogged down because the bill was filibustered. The pressure to end the debate and vote up or down on the bill got 54 votes, 54 to 43. Fifty Senators voted to end the debate. Only 43 Senators voted to continue the filibuster. Did the majority prevail? No. The bill was not passed.

More recently, in 2004, 59 Senators supported a 6-month extension of a program providing unemployment benefits to individuals who had exhausted their State benefits. Those 59 Senators were not enough of a majority to overcome a point of order and provide the much-needed benefits for people suffering from extensive and longstanding unemployment. The vote was 59 to 40, but that was not a prevailing majority.

Around the same time in 2004 we tried to provide the Federal assistance needed to help the individuals with Disabilities Education Act. Although 56 Senators voted in support and only 41 in opposition, that was not enough to overcome a point of order. The vote was 56 to 41, but that was not a sufficient majority.

Just last month, too recently to have been forgotten, there was an effort to amend the emergency supplemental appropriations bill to include the bipartisan Agricultural Jobs bill that Senator Craig and I have championed. That amendment was filibustered and the Senate voted whether to end debate on the matter. The vote was 53 in favor of terminating further debate and providing the much-needed and long overdue measure. Were those 53 Senators, Republicans and Democrats, enough of a majority to have the Senate proceed to consider an up or down vote on the AgJobs bill to help our local industries, again, the Republican leadership prevailed and prevented consideration of the bipartisan measure with only 45 votes.

Every Senator knows, and others who have studied the Senate and its practices to provide minority rights, know that the Senate rules retained a provision that requires a two-thirds vote to end debate on a proposed change to the Senate rules. Thus, rule XXII provides that ending debate on “a measure or motion” requires “two-thirds of the Senators present and voting.” If all 100 Senators vote, that means that 67 votes are required to end debate on a proposal to amend the Senate rules. In 1975, for example, the debate on the resolution I have spoken about to change the Senate rules was 73 to 21.

Every Senator knows that for the last 30 years, since we lowered the cloture requirement in 1975, it takes “three-fifths of the Senators duly chosen and sworn,” or 60 votes to end debate on other measures and matters brought before the Senate. Just recently there was a filibuster on President Bush’s nominee to head the Environmental Protection Agency, Douglas Johnson. Sixty-one Senators voted to end that filibuster, to bring that debate to a close, and Mr. Johnson was confirmed. I voted for cloture and for the appointment. Republican Senators, filibusters of Dr. Henry Foster to be the Surgeon General, Sam Brown to be an ambassador and others during the Clinton years, I considered the Senate on its merits, as I always try to do, and voted to approve the supermajority needed for Senate action.

So when Republican talking points trumpet the sanctity of 51 votes, Senators know that the Republican majority insists upon 60-vote thresholds all in their short-term interests.

Finally, Mr. President, for purposes of the record, I need to set the record straight on the Republican destruction of Senate rules and traditions that was leading us to this situation. The administration and its facilitators in the Senate have left Democrats in a position where the only way we could effectively express our opposition to a judicial nominee was through the use of the filibuster.

We did not come to this crossroads overnight. No Democrat wanted to filibuster, not one of us came to those votes easily. We hope we are never forced by an aggressive Executive and compliance majority into another filibuster for a judicial nominee, again. The filibusters, like the confirmations that the White House charted and being forced into over the last several days, are the direct result of a deliberate attack by the current administration and its supporters here in the Senate against the rules and traditions of the Senate and against the Republican majority to gut Senate rule XXII and prohibit filibusters that Republicans do not like is the culmination of their efforts. That is intended to clear the way for this President to appoint a more extreme and more divisive choice should a vacancy arise on the Supreme Court.

This is not how the Senate has worked or should work. It is the threat of a filibuster that should encourage the President to moderate his choices and work with Senators on both sides of the aisle. Instead, this President has politicized the process and Senate Republicans have systematically eliminated every other traditional protection for the minority. Now their target is the Senate filibuster, the only tool that was left for a significant Senate minority to be heard.

Under pressure from the White House, over the last 2 years, the former Republican chairmen of the Senate Appropriations and Budget Committees led Senate Republicans in breaking with longstanding precedent and Senate tradition with respect to handling lifetime appointments to the Federal bench. With the Senate and the White House under control of the same political party we have witnessed one committee rule after another broken or misinterpreted away. The Framer’s of the Constitution warned against the dangers of such factionalism, undermining the structural separation of powers. Instead, Senate Republicans have utterly failed to defend this institution’s role as a check on the President in the area of nominations. It surely
weakens our constitutional design of checks and balances. As I have detailed over the last several years, Senate Republicans have had one set of practices to delay and defeat a Democratic President’s moderate and qualified judicial nominations and a different playbook to rubberstamp a Republican President’s extreme choices to lifetime judicial positions. The list of broken rules and precedents is long—from the way that home State senators were treated, to the way hearings were scheduled, to the way the committee questionnaire was unilaterally altered, to the way the Judiciary Committee’s historic protection of the minority by committee rule IV was repeatably violated.

In the last Congress, the Republican majority of the Judiciary Committee destroyed virtually every custom and courtesy that had been used throughout Senate history to help create and enforce cooperation and civility in the confirmation process. We suffered through 3 years during which Republican staff stole Democratic files off the Judiciary computers reflecting a “by any means necessary” approach. It is as if these currently in power believe that they are above our constitutional checks and balances and that they can reinterpret any treaty, law, rule, custom or practice they do not like or they find inconvenient. The mandate is that the President seek the Senate’s advice on lifetime appointments to the Federal bench. Up until 4 years ago, Presidents engaged in consultation with home State senators about judicial nominations, both trial court and appellate nominations. This consultation made sense: Although the judgeships are Federal positions, home State officials were best able to ensure that the nominees would be respected. The structure laid out by the framers for involving the Senate and the local community in the support and appointment in the appointments, and for almost 200 years, with relatively few exceptions, the system worked. This administration, by contrast, rejects our advice but demands our consent.

The sort of consultation and accommodation that went on in the Clinton years is an excellent example. The Clinton White House went to great lengths to work with Republican senators and seek their advice on appointments to both circuit and district court vacancies. There were many times when the White House made nominations at the direct suggestion of Republican senators, and there are judges sitting today on the Ninth Circuit in Arizona, Utah, Mississippi, and many other places because President Clinton listened to the advice of senators in the opposite party. Some nominations, like that of William Taft to the Fourth Circuit; and of Carol Baras and Richard Tallman to the Ninth Circuit; and of Ted Stewart to the District Court in Utah; James Tellkerry to the District Court in Arizona; Allen Pepper to the District Court in Mississippi; Barclay Surrick to the District Court in Pennsylvania, and many others were made on the recommendation of Republican senators. Others, such as President Clinton’s two nominations to the Supreme Court, were made with extensive input from Republican senators. For evidence of this, just look at Orrin Hatch’s book “Square Peg,” where he tells the story of suggesting to President Clinton that he nominate Ruth Bader Ginsburg and Stephen Breyer to the Supreme Court and of warning him off of other nominees whose confirmations would be more controversial or politically divisive.

In contrast, since the beginning of its time in the White House, this Bush administration has sought to overturn traditions of bipartisan nominating commissions and to run roughshod over the advice of Democratic senators. They changed the systems in Wisconsin, Washington, and Florida that had worked so well for so many years. Senators Graham and Nelson were compelled to write in protest of the White House counsel’s flaunting of the time-honored procedures for choosing qualified candidates for the bench. They ignored the protests of senators like Barbara Boxer and John Edwards that the only objection to the unsuitable nominees proposed by the White House, but who, in attempts to reach a true compromise, also suggested Republican alternatives. Those overtures were flatly rejected.

Indeed, the problems we face today in Michigan are a result of a lack of consultation with that state’s senators. The failure of the nomination of Claude Allen of Virginia to a Maryland seat on the Fourth Circuit shows how aggressive this White House has been. When the White House counsel of the home office will say it informs Democratic senators’ offices of nominations about to be made. Do not be fooled. Consultation involves a give and take, a back and forth, an actual conversation with the other party and an acknowledgement of the other’s position. That does not happen.

The lack of consultation by this President and his nominations team resulted in a predictable outcome—a predictable Republican Senate withheld their consent to nominations. The next action, however, was unpredictable and unprecedented. The former Republican chairman of the Judiciary Committee went ahead, ignored his own perfect record of honoring Republican home state senators’ objections to President Clinton’s nominees and scheduled hearings nonetheless. In defense of those hearings we have heard how other chairmen, senators Kennedy and Biden, and other senators from our state, who allow for more fairness in the consideration of a more diverse Federal bench. That is not what the former Republican chairman was doing, however. His was a case of double standards—one set of rules and practices for honoring Republican objections to Clinton’s nominees and another for overriding Democratic objections to President Clinton’s.

While it is true that various chairmen of the Judiciary Committee have used the blue-slip in different ways, some to maintain unfairness, and others to attempt to remedy it, it is also true that each of these chairmen was consistent in his application of his own policy—that is, until 2 years ago. When a hearing was held for Carolyn Kuhl, a nominee to the Ninth Circuit from California who lacked consent from both of her home State senators, that was the first time that the former chairman had ever convened a hearing for a judicial nominee who did not have two positive blue slips returned to the committee. The first time, ever. It was unprecedented and directly contrary to the former chairman’s practices during the Clinton years.

Consider the two different blue slips utilized by the former Republican chairman: one used while President Clinton was in office and one used after George W. Bush became the President. These pieces of blue paper are what then-Chairman Hatch used to solicit the opinions of home-state senators about the President’s nominees. When President Clinton was in office, the blue slip sent to senators asked their consent. On the face of the form was written the following: “Please return this form as soon as possible to the nominations office. No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee’s home state senators.”

Now consider the blue slip when President Bush began his first term. That form sent out to senators was totally different. The Republican blue slip said simply: “Please complete the attached blue slip form and return it as soon as possible to the committee office.” That change in the blue slip form marked the about-face in the direction of the policy and practiced used by the former Republican chairman once the person doing the nominating was a Republican.

I understand why Republican senators want to have amnesia when it comes to what happened to any of President Clinton’s nominees. The current Republican chairman calculates that 70 of President Clinton’s judicial nominees were not acted upon. One of the many techniques used by the former Republican chairman was to enforce strictly his blue slip policy so that no nominee to any court received a hearing unless both home state senators agreed to it. Any objection acted as an absolute bar to the consideration of any nominee to any court. No time was set for the return of a blue slip. No reason had to be articulated. In fact, the former Republican chairman cloaked the matter in secrecy.
from the public. I was the first Judiciary chairman to make blue slips public. During the Clinton years home State Senators’ blue slips were allowed to function as anonymous holds on otherwise qualified nominees. In the 106th Congress in 1999, more than half of President Clinton’s circuit court nominees were denied confirmation through such secret partisan obstruction, with only 15 of 34 confirmed in the end. Outstanding and qualified nominees were allowed a hearing, an up or down vote in committee vote or on the Senate floor. These nominees included the current dean of the Harvard Law School, a former attorney general from Iowa, a former law clerk to Chief Justice Rehnquist and many others—women, men, Hispanics, African Americans and other minorities, an extensive collection of qualified nominees.

Another longstanding tradition that was broken in the last two years was a consistent and reasonable pace of hearings. Perhaps it is not entirely accurate to say the tradition had been respected during the Clinton administration, since during Republican control months could go by without a single hearing being scheduled. But as soon as the occupant of the White House changed and a Republican majority controlled the committee that all changed. In January, 2003, one hearing was held for three controversial circuit court nominees. It was a madhouse, with no place in the course of a very busy day in the Senate. There was no precedent for this in the years that Republicans served in the majority and a Democrat was in the White House. In 6 years during the Clinton administration, never once were three circuit court nominees, let alone three very controversial ones, before this body in a single hearing. But it was the very first hearing that was scheduled by the former Republican chairman when he resumed his chairmanship. That first year of the 107th Congress, with a Republican in the White House, and a Republican chairman of the Judiciary Committee, the Republican majority went from idling—the restrained pace it had said was required for Clinton nominees—to overdrive for the most controversial of President Bush’s nominees.

When there was a Democratic President in the White House, circuit nominees broke through, and the Judiciary Committee held hearings on the courts of appeals more than doubled under Republican leadership, from 16 in January 1995, to 33 when the Democratic majority took over midway through 2001. Under Democratic leadership we held hearings on 20 circuit court nominees in 17 months. Indeed, while Republicans averaged seven confirmations to the circuit courts every 12 months for President Clinton, the Senate under Democratic leadership confirmed 17 circuit judges in its 17 months in the majority—and we did so with a White House that was historically uncopera-

Under Republican control, the Judiciary Committee played fast and loose with other practices. One of those was the committee practice of placing nominees on markup agendas only if they had answered all of their written questions in the amount of time before the meeting. What Congress that changed, and nominees were listed when the former chairman wanted them listed, whether they were ready or not. Of course, any nominee can always be held by a committee member for any reason, according to longstanding committee rules. By listing the nominees before they were ready, the former chairman “burned the hold” in advance, circumvented the committee rule, and forced the committee to consider them before they were ready. Another element of unfairness was thereby introduced into the process.

Yet another example of the kind of petty changes that occurred during the last Congress were the bipartisan changes to the committee questionnaire that were unilaterally rescinded by the former Republican chairman. In April of 2003 it became clear that the President’s nominees had stopped filling out the Judiciary Committee questionnaire we had approved a year and a half earlier with the agreement of the administration and Senate Republicans. It was a shame, because my staff and Senator Hatch’s staff filling out the old questionnaire, which had not been changed in many years, and was in need of updating for a number of reasons. There were obsolete references, vague and redundant requests for information, and instructions sorely in need of clarification. There were also important pieces of information not asked for in the old questionnaire, including congressional testimony a nominee might have given, writings a nominee has prepared on the Internet, and a nominee’s briefs or other filings in the Supreme Court of the United States. We worked hard to include the concerns of all members of the committee, and we included the suggestions from many people who had been involved in the judicial nominations process over a number of years.

Indeed, after the work was finished, Senator Hatch himself spoke positively about the revisions we had made. At a meeting he praised my staff for, “working with us in updating the questionnaires.” He noted: “Two weeks ago, we resolved all remaining differences in a bipartisan manner. We got an updated questionnaire that I think is satisfactory to everybody on the committee and the White House as well.” I accepted his words that day.

As soon as he resumed his chairmanship, he rejected the improvements we made in a bipartisan way, however. The former Republican chairman notified the Department of Justice that he would no longer be using the updated questionnaire he praised not so long before but, instead, decided that the old questionnaire be filled out. He did not notify any member of the minority party on the committee. Unlike the bipartisan consultation my office engaged in during the fall of 2001, and the bipartisan agreement we reached, the former Republican chairman informed me by unilateral fiat without consultation.

The protection of the rights of the minority in the committee was eliminated with the negotiation of the committee’s rule IV, a rule parallel to the Senate filibuster rule. In 17 months of the rules that have governed that committee’s proceedings since 1979, the former Republican chairman chose in 2003 to ignore our longstanding committee rules and he short-circuited committee consideration of the circuit court nominations of John Roberts and Deborah Cook.

Since 1979 the Judiciary Committee has had this committee rule to bring debate on a matter to a close while preserving the rights of the minority. It may have been my first meeting as a Senator on the Judiciary Committee in 1979 that Chairman Kennedy, Senator Thurmond, Senator Hatch, Senator Cohen and others discussed adding this rule to those of the Judiciary Committee. Senator Thurmond, Senator Hatch and the Republican minority at that time took a position against adding the rule and argued in favor of any individual Senator having a right to unlimited debate—so that every Senator had a matter. Senator Hatch said that he would be “personally upset” if unlimited debate were not allowed. He explained:

“There are not a lot of rights that each individual Senator has, but at least two of them are that he can present any amendments which he wants and receive a vote on it and number two, he can talk as long as he wants to as long as he can stand, as long as he feels strongly about an issue.

It was Senator Bob Dole who drew upon his Finance Committee experience to suggest in 1979 that the committee rule be that “at least you could require the vote of one minority member to terminate debate.” Senator Cochran likewise supported having a “requirement that there be an extraordinary majority to shut off debate in our committee.”

The Judiciary Committee proceeded to refine its consideration of what became rule IV, which was adopted the following week and had been maintained ever since. It struck the balance that Republicans had suggested of at least having one member of the minority before allowing the chairman to cut off debate. That protection for the minority had been maintained by the Judiciary Committee for 24 years under five different chairmen—Chairman Kennedy, Chairman Thurmond, Chairman Biden, under Chairman Hatch and during my tenure as chairman.

Rule IV of the Judiciary Committee rules provided the minority with a
right not to have debate terminated and not to be forced to a vote without at least one member of the minority agreeing to terminate the debate. That rule and practice had until two years ago always been observed by the committee and by the Senate and had dealt with the most contentious issues and nominations that come before the Senate. Until that time, Democratic and Republican chairmen had always acted to protect the rights of the Senate minority.

Although it was rarely utilized, rule IV set the ground rules and the backdrop against which rank partisanship was required to give way, in the best tradition of the Senate, to a measure of bipartisanship in order to make progress. That is the important function of the rule. Just as we have been arguing lately about the Senate’s closure rule, the committee rule protected minority rights, and enforced a certain level of cooperation between the majority and the minority. It protected the rights of the Senate minority.

That this was a premeditated act was apparent from the debate in the Senate. The former Republican chairman indicated that he had checked with the Parliamentarians in advance, and he apparently concluded that since he had the raw power to ignore our committee rule so long as all Republicans stuck with him, he would do so. It was a precursor of what is happening now in the Senate.

I understand that the Parliamentarians advised the former chairman that there is no enforcement mechanism for a violation of committee rules and that the Parliamentarians view Senate committees as autonomous. I do not believe that they advised him that he should violate our committee rules or that they interpreted our committee rules. I cannot remember a time when Senator Kennedy or Senator Thurmond or Senator Biden were chairing the Senate committees as autonomous. I do not believe that they advised him that he should violate our committee rules or that they interpreted our committee rules.

In fact, the only occasion I recall that the former Republican chairman was previously faced with implementing committee rule IV, he himself did so. In 1997, Democrats on the committee were seeking a Senate floor vote on President Clinton’s nomination of Bill Lann Lee to be the assistant attorney general for civil rights in the Department of Justice. Republicans were intent on killing the nomination in committee. The committee rule came into play when in response to an alternative proposal by the Republican Chairman, I outlined the tradition of our committee and said:

This committee has rules, which we have followed assiduously in the past and I do not think should change them now. The rules also say that 10 Senators, provided one of those 10 is from the minority, can vote to cut off debate. We are also required to have a quorum for a vote. I intend to insist that the rules be followed. A vote that is done contrary to the rules is not a valid one.

Immediately after my comment, the same former Republican Chairman abandoned his earlier plan and said:

I think that is a fair statement. Rule IV of the Judiciary Committee rules effectively establishes a committee filibuster right, as the distinguished Senator said.

With respect to that nomination in 1997, he acknowledged:

Absent the consent of a minority member of the Committee, a matter may not be brought to a vote. However, Rule IV also permits in its 1997 form to the Senate committee to entertain a non-debatable motion to bring any matter to a vote. The rule also provides as follows: The Chairman shall entertain a non-debatable motion to bring any matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a rollcall vote of the Committee shall be taken on whether to end the debate. In that case, the former Republican chairman followed the rules of the committee.

At the beginning of the last Congress, we reaffirmed our tradition and clarified that at the time the Senate was divided 50-50 and the committee was divided 50-50, the rule would be interpreted so that the minority was the other party of the chair of the committee.

But when the nominations of John Roberts, Deborah Cook and Jeff Sutton were being considered simultaneously, Democrats sought to continue debate on some of them and focus first on Sutton. We were overridden and the bipartisan tradition and respect for the rights of the minority ended when the former Republican Chairman decided to override our rights and the rule rather than follow it. He did so expressly and intentionally, declaring: “You have no right to continue a filibuster in this committee.” He decided, unilaterally, to declare the debate over even though all members of the minority were prepared to continue the debate and it was, in fact, terminated prematurely. I had yet to speak to any of the circuit nominees and other Democratic Senators had more to say. But I made it clear that this was my own position from the Bill Lann Lee nomination and took a step unprecedented in the history of the committee.
the executive, its protection must be preserved. That is the decision the Senate will be facing tomorrow.

[From the Salt Lake Tribune]

HATCH IS WRONG ABOUT HISTORY OF JUDICIAL APPOINTMENTS

(By John J. Flynn)

The Constitution provides the president “shall nominate and with the Advice and Consent of the Senate,” appoint judges and all other officers of the United States. Throughout most of the Constitutional Convention, nominees to appoint ambassadors, judges and other officers of the United States was vested solely in the Senate. It was decided late in the convention that a “majority rule” provision to share the appointment power with the president. Clearly, the framers expected the Senate would have an equal say in appointments.

Several nominations for positions in the executive branch have been rejected over the past two centuries. Even more nominations for life-time appointments to the judiciary have been rejected because such nominations are for life and they are nominations to an independent branch of government.

For many years rejections were often carried out by the informal practice of senators withholding “blue slips” for nominees from their home states. When a senator did not return a blue slip approving the nominee, the nomination died without a vote by the full Senate. It was a method for insuring the president sought the “advice” of the Senate and senators before nominating a person for the judiciary. The result was that only qualified moderates were usually appointed to the bench.

Utah’s Sen. Orrin Hatch ended the “blue slip” practice. Sen. Hatch also began the practice of “filibustering by committee chairperson” nominees proposed by President Clinton. He simply refused to hold hearings on nominations even where senators from the nominee’s home state approved of the nomination.

More than 50 Clinton judicial nominees were not even accorded the courtesy of a hearing during the Hatch chairmanship of the Senate Judiciary Committee. They were never accorded even for an “unanimous consent” vote by the full Senate. For Sen. Hatch to now object to the use of a filibuster to halt nominations is less than disingenuous.

Contrary to Sen. Hatch’s representations in his Tribune op-ed piece last Sunday, Republicans led a filibuster of the nomination of Justice Abe Fortas to the position of chief justice in 1968. I watched the filibuster. When a cloture vote failed to muster the necessary super majority to end the debate after four days of the filibuster, Justice Fortas asked to have his nomination withdrawn.

The modern divisiveness in the Senate over judicial nominations is directly traceable to the Senate’s partisan treatment of judicial nominations with Justice Fortas. The level of divisiveness has been increased by President Bush. He threw down a partisan gauntlet by renominating several controversial candidates not confirmed by the prior Senate.

The main qualifications of these candidates appears to be their appeal to the religious right and their rigid ideological views calling into question their capacity to judge objectively contentious issues coming before the courts.

The Bush administration apparently believes that the Senate should simply rubber-stamp nominees it selects without Senate advice, much less the consent of a sizeable majority of senators. Sen. Hatch, with the Republicans, is not only impressed with this nominee’s character, professional career, experience, integrity, and temperament all are important. In addition, I consider whether the nominee is likely to interpret law according to precedent or impose his or her own views. The opinions of the officials from the State in which the nominee was born and the views of my fellow Virginians are also important. In addition, I believe our judiciary should reflect the broad diversity of the citizens it serves.

These principles were served me well as I have closely examined the records of thousands of judicial nominees.

With respect to the nominee currently before the Senate, I reviewed Justice Owen’s record, met with her personally last week, and considered her qualifications in light of all of these aforementioned factors. And let me say, Mr. President, that I came away rather impressed with this nominee.

You see, out of the thousands of nominees I have reviewed in the U.S. Senate, I have to say that Justice Owen has, without a doubt, one of the most impressive records.

As she earned her bachelor’s degree, cum laude, from Baylor University. She then remained at Baylor to earn her law degree. While in law school, she served as a member of the Baylor Law Review. And, when she graduated from law school in 1977, she once again earned the honors of graduating cum laude.

Upon graduating from law school, Justice Owen took the Texas bar exam. Not only did she pass it, she earned the highest possible score on the bar exam.

Since passing the bar, she spent approximately 16 years practicing law in a distinguished Houston law firm. She started as a young associate and won her efforts as a commercial litigator she later became a partner at the firm.

In 1994, Priscilla Owen was first appointed by President Bush to the Texas Supreme Court. Six years later, she overwhelmingly won a second term with 90 percent of the vote—a strong testament of public support given to her by the citizens of the State of Texas.

The President is given the responsibility of nominating, and the Senate has the responsibility to render “advice and consent” on the nomination.

As I have fulfilled my constitutional responsibilities as a Senator over the past two centuries, I have had the honor of representing the citizens of the Commonwealth of Virginia in the U.S. Senate, I have conscientiously made the effort to work on judicial nominations with the Presidents with whom I have served.

Whether our President was President Carter, President Bush, President Clinton, or President George W. Bush, I have accorded equal weight to the nominations of all Presidents, irrespective of party.

I have always considered a number of factors before casting my vote to confirm or reject a nominee. The nominee’s character, professional career, experience, integrity, and temperament are all important. In addition, I consider whether the nominee is likely to interpret law according to precedent or impose his or her own views. The opinions of the officials from the State in which the nominee was born and the views of my fellow Virginians are also important. In addition, I believe our judiciary should reflect the broad diversity of the citizens it serves.

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These principles were served me well as I have closely examined the records of thousands of judicial nominees.
But not only do the people of Texas overwhelmingly believe that Judge Owen is a highly qualified Federal judge, it is important to recognize that every major newspaper in Texas endorsed her re-election. She has shown consistent bipartisan support for her nomination, including three former Democrat judges on the Texas Supreme Court and the bipartisan support of 15 past Presidents of the State bar of Texas. The American Bar Association, often called the “gold standard” for evaluating jurists, has unanimously deemed Justice Owen “Well Qualified”—its highest rating.

Despite all of this strong, bipartisan support, however, over the course of the past 4 years, we have been unable to get to an up-or-down vote in the Senate on Justice Owen’s nomination. All the while, this outstanding nominee has been waiting patiently for the Senate to act on her nomination. In my view, this extraordinary nominee should have been confirmed far sooner, especially since the seat for which she has been nominated has been dubbed by the Judicial Conference of the United States as a “judicial emergency.”

The matter is this: Justice Priscilla Owen is a highly distinguished jurist with impeccable credentials. There is no doubt in my mind that she should be confirmed for this lifetime appointment.

Let me start by reminding the Senate of my principle, a simple principle, that I have come to this Senate day after day, week after week, month after month, and that is: I fundamentally believe it is our constitutional responsibility to give judicial nominees the respect and the courtesy of an up-and-down vote on the floor of the Senate. Investigate them, question them, scrutinize them, debate them in the best spirit of this body, but then vote, up or down, yes or no, confirm or reject, but each deserves a vote.

Unlike bills, nominees cannot be amended. They cannot be split apart; they cannot be tabled; they cannot be held. Our Constitution does not allow for any of that. It simply requires up-or-down votes on judicial nominees. In that regard, the agreement announced tonight falls short of that principle.

It has some good news and it has some disappointing news and it will require careful monitoring.

Let me start with the good news. I am very pleased, very pleased that each and every one of the judges identified in the announcement will receive the opportunity of that fair up-or-down vote. Priscilla Owen, after 4 years, 2 weeks, and 1 day, will have a fair and up-or-down vote. William Pryor, after 2 years and 1 month, will have a fair up-or-down vote. Janice Rogers Brown, after 22 months, will have a fair up-or-down vote. Three nominees will get up-or-down votes with certainty now because of this agreement, whereas a couple of hours ago, maybe none would get up-or-down votes. That would have been wrong.

With the confirmation of Thomas Griffith to the DC Circuit Court of Appeals we have been assured—though it is not in this agreement—there will be four who will receive up-or-down votes. And based on past comments in this Senate—although not in the agreement—I expect that David McKeague, after 3 years and 6 months, will get a fair up-or-down vote. I expect that Susan Neilson, after 3 years and 6 months, will get a fair up-or-down vote. I expect Richard Griffin, after 2 years and 11 months, will get a fair up-or-down vote. I expect Henry Saad to get a fair up-or-down vote. I expect that William Myers will have a fair up-or-down vote. He deserves a vote. He deserves a vote.

I look forward to voting in support of three nominees. They have rose to principle. They have risen above the petty politics of the day. And I am very pleased, very pleased that David McKeague, after 3 years and 6 months, will get a fair up-or-down vote. Janice Rogers Brown, after 22 months, will have a fair up-or-down vote. William Pryor, after 2 years and 1 month, will have a fair up-or-down vote. Priscilla Owen, after 4 years, will have a fair up-or-down vote. But it is not in this agreement. William Myers has waited for 2 years and 1 week for a fair up-or-down vote. He deserves a vote.

Fortunately, tonight, it is possible that this unfortunate chapter in our history can close. This arrangement makes it much less likely—indeed, nearly impossible—for such mindless filibusters to erupt on this floor over the next 18 months. For that I am thankful. Circuit Court and Supreme Court nominees face a return to normalcy in the Senate where nominees are considered on their merits. The records are carefully examined. They offer testimony. They are questioned by the Senate Judiciary Committee. The Senate discharges its constitutional duty to vote up or down on a nominee.

Given this disarmament on the filibuster and the assurance of fair up-or-down votes on nominees, there is no need at present for the constitutional option. With this agreement, all options remain on the table, including the constitutional option.

If it had been necessary to deploy the constitutional option, it would have been successful and the Senate would have, by rule, returned to the precedent in the past 214 years. Instead, tonight, Members have agreed that this precedent of up-or-down votes should be restored as a result of the mutual trust and good will in this agreement.

I, of course, will monitor this agreement carefully as we move ahead to fill the pending 46 Federal vacancies today and other vacancies that may yet arise during this Congress. I have made it clear from the outset that I haven’t wanted to use the constitutional option. I do not want to use the constitutional option, but bad faith and return to bad behavior during my tenure as majority leader will bring the Senate back to the point where all 100 Members will be asked to decide whether judicial nominees deserve a fair up-or-down vote.

I would not hesitate to call all Members to their duty if necessary. For now, gratified that our principle of constitutional duty to vote up or down has been taken seriously and as reflected in this agreement, I look forward to swift action on the identified nominations.

Now, the full impact of this agreement will await its implementation, its full implementation. But I do believe that the good faith and the good will that this evening will be spun as a victory, I would assume, for everybody. Some will say it is victory for leadership, some for the group of 14. I see it as a victory for the Senate. I honestly believe it is a victory for the Senate where Members have put aside a party demand to block action on judicial nominees. They have rose to principle and then acted accordingly.
I am also gratified with how clearly the Democratic leader has repeated over and over again during this debate how much he looks forward to working with us, and I with him, as we move forward on the agenda of the 109th Congress. Our relationship has been forged in part by circumstance, but it has been leavened by friendship. I look forward to working with him as we work together to move the Nation’s agenda forward together.

We have a lot to do, from addressing those urgent issues of national defense and homeland security, to reinforcing a bill that hopefully will come very soon, addressing our energy independence, our role as a reliable and strong trading partner, to an orderly consideration of all the bills before us about funding, and to put the deficit on the decline. I look forward to working with the Democratic leader on these and many other issues of national importance.

Mr. President, a lot has been said about the uniqueness of this body. Indeed, our Senate is unique, and we all, as individuals and collectively as a body, have a role to play in ensuring its cherished nature remains intact. Indeed, as demonstrated by tonight’s agreement, and by the ultimate implementation of that agreement, we have done just that.

It has withstood mighty tests that have torn other governments apart. Its genius is in its quiet voice, not in any mighty thunder. The harmony of equality brings all to its workings with an equal stake at determining its future. In all that the Senate has done in the last 2 years, I, as leader, have attempted to discharge my task to help steward this institution consistent with my responsibilities, not just as majority leader and not just as Republican leader, but also as a Senator from Tennessee.

In closing tonight, with this agreement, the Senate begins the hard work of steering back to its better days, leaving behind some of its worst. While I would have preferred and liked my principle of up-or-down votes to have been fully validated, for this Congress now we have begun our labors for fairness and up-or-down votes on judicial nominees with a positive course. And as all involved keep their word, it should be much smoother sailing.

Mr. REID. Mr. President, this is a day I have waited for for a long time. We are now in a new Congress and a new day, and it was made possible by virtue of some unique individuals called Senators. One of them is here on the floor. The other, Senator BYRD, has left.

Senator BYRD has served 53 years in the Congress, 47 in the Senate, 6 in the House. The chairman of the most important committee, many say around here, the Armed Services Committee, Senator Warner of Virginia—if there were ever a southern gentleman, it is Senator Warner of Virginia, JOHN WARNER. They worked for months with some of the youngest members of the Senate, LINDSEY GRAHAM, MARK PRYOR, KEN SALAZAR, in coming up with this unique instrument that is only possible in the Senate.

Now, Mr. President, I say that this is not a victory for the Senate, though it is. I say this is a victory for the American people. It is a victory for the American people because the Senate has preserved the Constitution of the United States. No longer will we have to give the speeches here about breaking the rules to change the rules. We are moving forward in a new day, a new day where the two leaders can work on legislation that is important to this country.

Just as a side note, I can throw away this rumpled piece of paper I have carried around for more than a month that has the names MCCAIN, CHAFEE, SNOWE, WARNER, COLLINS, HAGEL, SPEICHER, MURkowski, and SUNUNU. It is gone. I do not need that any more because of the bravery of these Senators. I am grateful to my colleagues, as I have said, who brokered this deal. And it was not by my design.

Now we can move beyond this time-consuming process that has deteriorated the comity of this great institution called the Senate. I am hopeful we can quickly turn to work on the people’s business. We need to ensure that our troops have the resources they need to fight in Iraq and around the world and that Americans are free from terrorism. We need to protect retirees’ pensions and long-term security. We need to address rising gasoline prices and energy independence, and we need to restore fiscal responsibility and rebuild our economy so it lifts all American workers. That is our reform agenda. Together we can get the job done.

It is off the table. People of good will recognize what is best for the institution. There are no individual winners in this. Individual winners? No. A little teamwork means that the American people should see this picture: Democrats and Republicans, some who have been here as long as Senator BYRD and Senator Warner, and some newcomers. Senator SALAZAR has been here for 5 months. He was part of this arrangement. People from red States, from blue States, they represent America. That is what happened tonight.

Now, I would rather that something else had happened. I would rather that we had marched down here tomorrow and voted our high fives and we had won. We are not doing that. We have won anyway because this is a victory for the American people.

I love this country, Mr. President. I have devoted my life to public service. I do not regret a day of it. I have been in public service 41 years, and I said to my caucus that there has never been a more important issue I have dealt with in my political life than this. We have a role in this, it is over with. And I feel so good. This will be the first night in at least 6 weeks that I will sleep peacefully. I have not had a peaceful night’s rest in at least 6 weeks.

I owe a debt of gratitude to these Senators who did what the two leaders could not do. I tried. It could not be done. But I hope, as we proceed in the days to come, that this is past history. Of course, there will be filibusters in the future. It is the nature of this institution. And that is the way it should be. We are not on a slippery slope to saying all the Presidential nominations are subject to a simple majority—to change the rules. We are not going to say that legislation that is important to the American people should see this picture: Democratic, Republican. There are no individual winners. It is a victory for the Senate, though it is not a victory for the Senate, though it is a victory for the American people because the Senate has preserved the Constitution of the United States. No longer will we have to give the speeches here about breaking the rules to change the rules. We are moving forward in a new day, a new day where the two leaders can work on legislation that is important to this country.

Again, Mr. President, the only person I see here who I can personally thank is the distinguished Senator from Virginia. I say, through the Chair, to you and the other 13 Senators, thank you very much.

Mr. REID. Mr. President, I say that this is a result not only of the steadfastness of our majority leader, BILL FRIST, but also this coming together of the group...
of 14, led in large measure on our side by Senator McCain and Senator Warner from Virginia, one of the real true supporters of this institution. They have allowed us to sort of step back from the brink. As I read this memorandum of understanding, signed by the senators and senators-elect, all options are still on the table with regard to both filibusters and constitutional options. But what I also hear from these 14 distinguished colleagues is that they do not expect this to happen.

We have marched back from the brink, hopefully taken the first step, beginning tomorrow with cloture on Justice Priscilla Owen, to begin to deal with judicial nominations the way we always have prior to the last Congress. Sure, there were occasional cloture votes, but they were always invoked. They were always for the purpose of getting the nominee an up-or-down vote.

I want to thank Senator Warner and his colleagues for making it possible for us to get back to the way we operated quite comfortably for 214 years. So even though this is not an agreement that I would have made or that the majority leader would have made—because he and I both believe that all nominees who come to the floor are entitled to an up-or-down vote—it is certainly a good beginning. And three very, very distinguished nominees, whose nominations have been languishing for a number of years, are going to get an up-or-down vote. I think that is something we can all celebrate on a bipartisan basis.

So I do indeed think this has been a good night for the Senate. And I am optimistic that for the balance of this Congress, we will operate the way we did for 214 years prior to the last Congress.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. DURBIN. Thank you.

Winston Churchill once said there is nothing more exhilarating than being shot at and missed. This evening I think Members of the Senate feel as I do.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. DURBIN. Thank you.

I ask unanimous consent of my friend from Illinois.

Mr. DURBIN. I say through the Chair to my friend from Iowa, since there has been the interruption of the good news of this agreement, it was taken from the time of the Senator from Colorado, the majority leader trying to make sure his time is protected and that we can move all times to the point where the Senator from Colorado has his 30 minutes as soon as a few of us have spoken for just a few minutes and then we will resume.

Mr. HARKIN. I ask unanimous consent at the conclusion of the 30 minutes for the Senator from Colorado, the Senator from Iowa be recognized for 15 minutes.

Mr. WARNER. Mr. President, reserving the right to object—I shall not object—I hope I could state a few words following the distinguished Senator from Illinois. I was scheduled to speak at 8 o'clock. My time I think has been put to good use, and I would be very pleased if I could make my remarks. So if I could follow the Senator from Illinois for not to exceed 4 minutes.

Mr. SCHUMER. Mr. President, I just want to get the regular order. I was scheduled to speak at 9 o'clock on our side. Is that time preserved under the order?

Mr. HARKIN. The unanimous consent request that the Senator from Colorado has 30 minutes is also at 9 o'clock; is that correct?

Mr. SCHUMER. All right, then, Mr. President, I ask unanimous consent that immediately after the Senator from Colorado, I be given the 15 minutes I was going to be given at 9 o'clock.

The PRESIDING OFFICER. Will the Senator from Illinois modify his request?

Mr. DURBIN. Let me try to modify this appropriately. I ask unanimous consent that I speak for 5 minutes, that I be followed by Senator Warner who wishes to speak for 5 minutes, Senator Schumer for 5 minutes, then Senator Allard for 30 minutes, and Senator Harkin following him for 15 minutes.

The PRESIDING OFFICER. Is there objection?

Mr. DURBIN. And after Senator Harkin, Senator Boxer for 15 minutes.
to misuse the filibuster, certainly when it comes to judicial nominees. That is good advice on both sides of the aisle under Democratic and Republican Presidents. I thank my colleagues, too, for bringing up some of the more contentious issues of this debate.

Senator REID went to Senator FRIST weeks ago and said if this is about one man we will go down, hopefully, as a fine night in the Senate, in the U.S. Government. Armageddon has been avoided, and thank God for that.

We in the Senate stepped right up to the precipice, but we did not fall in. This Republic works in amazing ways. And just as we were about to fall into an abyss of partisanship, of a destruction of the checks and balances that are the hallmark of this institution and this government, 12 Senators, many Democrats from red States, some Republicans, came together and created an agreement that I think serves this body well.

Does it have everything that we would have wanted on this side? No. But it takes the nuclear option off the table. It is possible that filibusters may continue to be used, albeit in a restrained way—although many would argue 10 out of 218 was restrained in itself. It also asks the President to consult and that, to me, would be a key piece of this agreement. The fact that we came so close to this Armageddon is because, in my judgment, we didn’t have the typical consultation that previous Presidents—Clinton, Bush, Reagan—had with the Senate before nominating judges.

The agreement widely states that it is the hope of the Senate—at least of the 12 signatories, but I am sure the other 88 Senators would join—that the President will begin to consult. That will not mean that judges will be so far from his political philosophy. He is the President and he gets to choose them. But will it mean that the kinds of partisan division that we have seen here is gone.

Mr. President, what I most feared about the nuclear option was the destruction of the checks and balances that are the hallmark of this institution. Those checks and balances have been preserved tonight. But make no mistake, Senate, they will all make every effort, we could get right back to this point soon enough. It could be on the issue of judges or on the issue of something else. The poison of too much partisanship is still here, and it is hoped that this agreement can set a model where everyone can pull back, it is hoped that there will be consultation on judges, and it is hoped that this agreement will set the stage for a better Senate, a better Congress, and a better Republic in the future.

Mr. President, this could become a historic night if the agreement that has been created keeps. We must preserve the checks and balances in the Senate. We must preserve the rights of the minority in the Senate. We must understand that a vote of 51 percent on the most major of decisions is not the right vote that is always called for. That has been the tradition in the Senate.

The reason we say that our rules take two-thirds to change is exactly to make it hard to change the rules and force the proposed changer to seek a bipartisan coalition. That bipartisanism is what differentiates us from the other branches of government, that differentiates us from most other governments. We must fight to keep them and tonight we have made a giant step in that direction.

I yield the floor. The PRESIDING OFFICER. The Senator from Colorado is recognized.

Mr. ALLARD. Mr. President, I thank the Senator from New York for his kind comments on the judicial nomination process. My thanks extend to all my colleagues tonight for their comments on the judicial nomination process and compromise negotiations.

I rise to congratulate the 14 Senators who have indicated through a Memorandum of Understanding that they will no longer support a filibuster on 3 of President Bush’s judicial nominees. This is a good first step toward a bipartisan resolution.

My statement this evening is based on remarks that I prepared prior to the agreement on the judicial nomination compromise; however, the basic intent of my remarks has not changed even though the filibuster has been broken on three of the President’s nominees. Tonight, I will address the qualifications of Priscilla Owen, and how important it is that we allow a yes or no vote on judicial nominees. All I ask for is an opportunity to have a yes or no vote on those judges that are pending before the Senate.

I am concerned about the next step in the judicial nomination debate—where are we going to go from here when it comes to the filibuster? I join my colleagues on both sides of the aisle who wish to move forward and forget about finger pointing and blame—who voted for who, who voted for a filibuster and how many times did they vote against cloture. I just hope we do indeed move forward. I hope we will look at each judge that is before the Senate, and make sure those who do not support the nominee can either override or down vote on their qualifications. That is what our forefathers had in mind when they wrote the Constitution.
I have had the opportunity to meet with Priscilla Owen personally. I don’t know how many of my colleagues who oppose or who continue to oppose her have accepted her offer to visit with them, but I hope they will have the courage and personal integrity to decide to refuse to offer her a fair up-or-down vote. If they do, they will quickly learn she is a person of integrity, humility, and possesses a keen understanding of the law.

On the other hand, she is a wonderful human being. I was particularly impressed when she told me that growing up she hoped to be a veterinarian. As a veterinarian myself, you can understand why I was impressed. She spoke of growing up and participating in a family cattle ranching enterprise, helping her parents and grandparents during calving season, nursing and branding.

There is something special about a person who has been kicked by a cow and swatted across the face with a dirty cow tail. It makes a person more real, more understanding of life and hard work. This is exactly the type of judge one would want on the Texas Supreme Court since 1995, she received a majority support of the United States Senate, 84 percent of whom voted to retain her service on the bench. Unlike many Members of the Senate, including myself, when it came time for the voters to decide whether or not she should remain on the bench, Ms. Owen received the endorsement of every paper in the State of Texas. I ask, does that sound like someone who is too extreme?

Priscilla Owen’s life has not been limited to the law. She is a decent human being and dedicated community servant. She has worked to educate parents about the effect divorce has on children and worked to lessen the adversarial nature of legal proceedings when a marriage is dissolved. She understands real life, honest-living and hard-working people.

Instead of defaming her, I wish my colleagues would get to know her so that they might recognize the legal skill and value she would bring to the United States as a member of the Fifth Circuit Court of Appeals. Priscilla Owen will uphold the law, not make the law. Some find this to be a problem. I find it to be a blessing.

Throughout the history of the United States, a nominee who clearly held the major support of the Senate had never been defeated by the use of the filibuster—until now. During the last 4 years of Presidents Bush’s nominees tried to establish a precedent by using the filibuster to block a nomination. Having witnessed what was taking place, I appealed to my colleagues to restore the fairness that this body and the American people deserve. That is why I am so excited about moving forward with 3 of the nominations, which includes Priscilla Owen, so we can have an up-or-down vote.

Throughout this debate, I have consistently stated we must reach a compromise that allows an up-or-down vote on all nominees, while allowing everybody an opportunity to be heard. This is not a partisan issue or flippant suggestion; it is simply a matter of fairness. If a nominee reaches the floor, then they should receive a vote—or down. I don’t believe there is anything wrong with providing a nominee an up-or-down vote. Some in this body have used the filibuster to block a nomination. Having witnessed first-hand how the filibuster has been used before to kill a judicial nominee. But such actions are simply misguided. Every nominee with a majority of support has received an up-or-down vote—every nominee for over 200 years. I do not take the confirmation of judicial nominations lightly, nor do my colleagues. But we must not twist the confirmation process into a partisan platform.

Our fundamental duty to confirm the President’s nominees is not an easy task. It carries with it the weight and responsibility of generations—a life-time commitment to a position that requires a deep and mature understanding of the law.

We were elected to the Senate by the people who believed we would accomplish our fundamental duties—as representatives of the people to say yes or no to the President’s nominees. I believe Members have a right to express their opinions. I also believe that Members have a right to a vote and that it is wrong to deny others of their opportunity to vote on judicial nominations.

The debate is not about numbers. It is not about percentages—how many senators support President Bush or how many judges Democrats have confirmed. To frame this debate as a numbers fight is not fair to the American people. We were not sent to Congress to focus on a numerical count, but to carry out the constitutional obligations, in this instance the advice and consent clause.

Some Senators have come to the floor to argue that the advice and consent clause doesn’t mean that the actually vote on nominees. They argue that a vote is only needed to confirm the nominee, but that other tactics can be used to disapprove the nominee. Unfortunately, these other tactics that have been used to kill a nomination have resulted in the obstruction of our constitutional duties.

To help address this point, I will turn to a recent article published in the National Review, which discusses the history of the advice and consent clause through the eyes of our country’s Founders. The article notes the appointment clause is listed as an explicit power vested in the executive.

The advise and consent obligation follows this clause but it is in the article addressing legislative powers. The author believes that this is instructive because it helps us understand that the Founders intended the President to play the main role in the nomination process, not the legislature.

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

The debate is not about numbers. It is not about percentages—how many senators support President Bush’s judicial nominations by filibuster raises the basic question of the scope of the Senate’s constitutional role to give “Advice and Consent.” What does it mean for the Senate to give “Advice and Consent” for federal judges?

Many people question whether changing the rules to allow only a majority vote for confirmations is proper, or even constitutionally required. The article notes that the advice and consent clause doesn’t mean that the Senate “should deny the President’s “Advice and Consent” for judicial appointments.

The key provision is Article II, Section 2, clause 2, which states: “The Advice and Consents [of the Senate] shall have Power, by and with the Advice and Consent of the Senate, to make
Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other publick Ministers, Judges of the Supreme Court, and all other Officers of the United States..."

There are three striking aspects of the Appointment Convention—of which are intentional and not accidental.

First, it is instructive if not definitive that the Advice and Consent, not in Article II, involving executive powers, not in Article I, involving legislative powers. Second, a simple majority is required. The clause on the treaty power, after mentioning "Advice and Consent," requires concurrence by "two thirds of the Senators present in the appointment of ambassadors and others, including Supreme Court justices—by contrast—does not. This is reinforced by the contrast found in several other provisions in the Constitution where a "supermajority" vote is required. In Article I, section 3, two-thirds (of members present) are required for Senate conviction for impeachment. In Article I, section 4, two-thirds are required to expel a member of either House. Article I, section 7 requires two-thirds for overriding a presidential veto. The fact that an explicitly requires two-thirds in some contexts indicates that the Senate's consent in Article II, section 2 is by majority vote when no supermajority vote is required.

The general rule is that majorities govern in a legislative body, unless another rule is expressly provided. Article I, section 5, for example, provides that "a Majority of each House shall constitute a Quorum to do Business." More than a century ago, the Supreme Court stated in United States v. Ballin, a unanimous decision, that "the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations... No such limitation is found in the federal constitution, and therefore the general law of such bodies obtains."

Third, the particular process in the Appointments Clause—of presidential nomination and Senate "consent" by a majority—was expressly determined by the Constitutional Convention. A number of alternative processes for appointments were thoroughly considered—and rejected—by the Constitutional Convention. And this consideration took place over several months.

The Constitutional Convention considered at least three alternative options to the final Appointments Clause: (1) placing the power in the president alone, (2) in the legislature alone, (3) in the legislature with the president's advice and consent.

On June 13, 1787, it was originally proposed that judges be "appointed by the national Legislature," and that was rejected. Madison objected and made the alternative motion that appointments be made by the Senate, and that was at first approved. Madison specifically proposed that a "supermajority" be required for judicial appointments, but this was rejected. On July 18, Nathaniel Ghorum made the alternative motion "that the Judges be appointed by the Executive with the advice & consent of the 2d branch," following on the practice in Massachusetts at that time.

Finally, on Friday, September 7, 1787, the Convention approved the final Appointments Clause—of presidential nomination and Senate "consent" by a majority—was carefully considered by the Constitutional Convention. A number of alternative processes for appointments were thoroughly considered—and rejected—by the Constitutional Convention. And this consideration took place over several months.

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Finally, on Friday, September 7, 1787, the Convention approved the final Appointments clause, making the President primary and the Senate alone secondary with the role of advice and consent.

I am no lawyer, but to me if a document consistently states when a supermajority vote is required and silent when it is not required, that they meant to write it that way and it was not merely oversight no supermajority was required for the approval of judicial nominees.

Clearly, a supermajority was never intended, but what was intended was an up-or-down vote, a fair nonpartisan up-or-down vote.

If a Member of the Senate disapproves of a judge, then let them vote against the nominee. I encourage them to express their dissatisfaction and vote no on the nominees. But do not deprive those of us that support a nominee of our right to a vote. Do not deny an up-or-down vote entirely. Let's decide whether the Members of this body approve or disapprove of the nominees, and let's vote. Let's vote to show whether this body believes the nominees are unfit for service or out of the mainstream. I believe they have majority support—majority support from the elected representatives of the people. But let's vote and find out.

It is our vote—the right of each Member to collectively participate in a show of advice and consent to the President—that exercises the remote choice of the people who sent us to Congress.

Our three-branch system of government cannot function without an equally strong judiciary. It is through the courts that justice is served, rights protected, and that lawbreakers are sentenced for their crimes.

Unfortunately, one out of four of President Bush's circuit nominees have been subjected to the filibuster, the worst confirmation of appellate court judges since the Roosevelt administration. The minority cannot willingly refuse to provide an up-or-down vote on judicial nominees without acknowledging that irreparable harm may be done to an equal branch of government.

The decision to vote up or down on a nominee or deny that vote entirely pits the Constitution against the parliamentary procedure. That is the Constitution versus the filibuster. I urge my colleagues to put their faith in the
foundering document and not in a filibuster. To do anything else dishonors the Constitution and relegates it to a mere rule of procedure.

I am pleased that we have reached a common ground on three of the judicial nominees. I am pleased that we have recognized our duties as Members of this body to uphold the Constitution. But I would ask my colleagues for fairness as we move forward for the rest of the session, for the rest of this Congress, to put partisan politics aside and to fulfill our advisory and consent obligations on all nominations. As we move through the rest of the Congress, let’s vote up or down and end this debate about filibusters with honor.

Mr. President, I am excited that we can now move forward.

I yield to the Senator from Iowa.

The PRESIDING OFFICER. The Senator from Iowa is recognized.

Mr. ALLARD. Mr. President, it seems as though we need to do closing script, and if the Senator from Iowa will 1 to 1, I will be glad to do that formality.

The PRESIDING OFFICER. The Senator from Colorado is recognized.

MORNING BUSINESS

Mr. ALLARD. Mr. President, I ask unanimous consent that there now be a period for the transaction of morning business, with Senators permitted to speak for up to 10 minutes each.

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

Mr. STEVENS. Mr. President, I ask unanimous consent that the attached statement from the President of the United States be entered into the RECORD today pursuant to the War Powers Resolution (P.L. 93–417) and P.L. 107–40.

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


Hon. Ted Stevens
President pro tempore of the Senate
Washington, DC.

Dear Mr. President: I am providing this supplemental consolidated report, prepared by my Administration and consistent with the War Powers Resolution (Public Law 95–417), as part of my efforts to keep the Congress informed about deployments of U.S. combat-equipped armed forces around the world. This supplemental report covers operations in support of the global war on terrorism, Kosovo, and Bosnia and Herzegovina.

THE GLOBAL WAR ON TERRORISM

Since September 24, 2001, I have reported, consistent with Public Law 107–40 and the War Powers Resolution, on the combat operations in support of various combat-equipped and combat-support forces to a number of locations in the Central, Pacific, and Southern Command areas of operation in support of those operations and of other operations in our global war on terrorism.

I will direct additional measures as necessary in the exercise of the U.S. right to self-defense and to protect U.S. citizens and interests. Such measures may include short-notice deployments of special operations and other forces for sensitive operations in various locations throughout the world. It is not possible to know at this time either the precise scope or duration of the deployment of U.S. Armed Forces necessary to counter the terrorist threats faced by the United States.

The United States Armed Forces, with the assistance of numerous coalition partners, continue to conduct operations to expose al-Qaida terrorists and to eliminate support to al-Qaida. These operations have been successful in stopping the terrorist network's capability to plan and conduct operations, and in engaging and destroying remnants of al-Qaida and Taliban fighters. Approximately 90 U.S. personnel are also as-signed to the International Security Assistance Force (ISAF) in Afghanistan. The U.N. Security Council authorized the ISAF in U.N. Security Council Resolution 1386 of December 20, 2001, and has reaffirmed its authorization several times since that time, for a 12-month period ending on September 24, 2004, in Resolution 1546 of August 21, 2004. The mission of the ISAF under NATO command is to assist the Government of Afghanistan in creating a safe and secure environment that allows reconstruction and building of Afghan authorities. Currently, all 26 NATO nations contribute to the ISAF. Ten non-NATO contributing countries also participate by providing military and other support personnel to the ISAF.

The United States continues to retain the presence of the Multinational Force in Iraq under U.N. Security Council Resolution 1511 of October 16, 2003, and reaffirmed its authorization in U.N. Security Council Resolution 1546 of June 8, 2004, noting the Iraqi Interim Government's request to retain the presence of the U.S. armed forces in Iraq, under U.N. Security Council Resolution 1546, the mission of the MNF is to contribute to the security and stability in Iraq, as reconstruction continues, until the completion of Iraq's political transformation. These contributions include assisting in building the capability of the Iraqi security forces and institutions, as the Iraqi people, represented by the Transitional National Assembly, draft a constitution and establish a constitutionally elected government. The comparison to the MNF is approximately 130,000 military personnel.

In furtherance of our efforts against terrorists on the high seas, our forces continue to pose a continuing and imminent threat to the United States and its interests. The deployed and combat-support forces deployed to Naval Base, Guantanamo Bay, Cuba, in the U.S. Southern Command area of operations since January 2002 continue to conduct secure detention operations for the approximately 520 enemy combatants at Guantanamo Bay.

The U.N. Security Council authorized the Multinational Force (MNF) in Iraq under unified command of the U.N. Security Council Resolution 1483 of June 8, 2003, and reaffirmed its authorization in U.N. Security Council Resolution 1511 of October 16, 2003, and most recently, in Resolution 1546 of June 8, 2004, noting the Iraqi Interim Government's request to retain the presence of the MNF. Under U.N. Security Council Resolution 1546, the mission of the MNF is to contribute to the security and stability in Iraq, as reconstruction continues. The U.S. military forces conducting the operation in support of the MNF are approximately 520 enemy combatants at Guantanamo Bay.

The U.S. forces have been assigned to a sector principally centered around Gjiliana in the eastern region of Kosovo. For U.S. KFOR forces, as for KFOR generally, maintaining a safe and secure environment remains the primary military task. KFOR operates under NATO command and control and rules of engagement. The KFOR coordinates and supports all military personnel, provides security presence in towns, villages, and the countryside; and organizes checkpoints and patrols in key areas to provide security, protect the disputes, and help instill in the community a feeling of confidence.

In accordance with U.N. Security Council Resolution 1244, UNMIK continues to transfer additional competencies to the Kosovo provisional Institutions of Self-Government, which includes the President, Prime Minister, multiple ministries, and the Kosovo Assembly. The UNMIK retains ultimate authority in some sensitive areas such as police, justice, and ethnic minority affairs.

NATO continues formally to review KFOR's mission at 6-month intervals. These reviews provide a basis for assessing current force levels, future requirements, force structure, force reductions, and the eventual withdrawal of KFOR. NATO has adopted the Joint Operations Area plan to regionalize and triplement KFOR and to provide the Kosovo Assembly a level of assistance. The UNMIK international police and the Kosovo Police Service (KPS) have full responsibility for public safety and policing the Kosovo capital and surrounding area of interest, including the boundary areas with Serbia and Montenegro. The KPS are 500 Serbs and 500 Kosovars. The UNMIK international police and the Kosovo Police Service have full responsibility for public safety and policing the Kosovo capital and surrounding area of interest, including the boundary areas with Serbia and Montenegro. The UNMIK international police and the Kosovo Police Service have full responsibility for securing the status and established border-crossing checkpoints. The