wants 100 percent. I can understand that. That is the way a lot of people get when they have power. They want it all. If you are against him, then he thinks you are against everything he stands for as opposed to having legitimate disagreements.

So this President has come to the majority in the Senate and basically said: Change the rules. Do it the way I want it done. And I guess there were not very many voices on the other side of the aisle that acted the way previous generations of Senators have acted and said: Mr. President, we are with you. We support you. But that is a bridge too far. We cannot go there. You have to restrain yourself, Mr. President. We have confirmed 95 percent of your nominees. And if you cannot get 60 votes for a nominee, maybe you should think about who you are sending to us to be confirmed because for a lifetime appointment, 60 votes, bringing together a consensus of Senators from all regions of the country, who look at the same record and draw the same conclusion, means that perhaps that nominee should not be on the Federal bench.

But, no, apparently that is not the advice that has been given to the President. Instead, it looks as though we are about to have a showdown where the Senate is being asked to turn itself inside out, to ignore the precedent, to ignore the way our system has worked—the delicate balance we have obtained that has kept this constitutional system going—for immediate gratification of the present President.

When I was standing on the banks of the Hudson River this morning, looking at General Washington's headquarters, thinking about the sacrifice that he and so many others made, many giving the ultimate sacrifice of their life, for this Republic—if we can keep it, as Benjamin Franklin said—I felt as though I was in a parallel universe because I knew I was going to be getting on an airplane and coming back to Washington. And I knew the Republican majority was intent upon this showdown. I knew the President had chimed in today and said he wants up-or-down votes on his nominees. And I just had to hope that maybe between now and the time we have this vote there would be enough Senators who will say: Mr. President, no. We are sorry, we cannot go there. We are going to remember our Founders. We are going to remember what made this country great. We are going to maintain the integrity of the U.S. Senate.

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I understand we have 1 minute left.

The PRESIDING OFFICER. The Senator has 1 minute 40 seconds, to be exact.

Mr. LEAHY. I thank the distinguished Presiding Officer, and I thank the Senator from New York for her comments.

Mr. President, I would simply reiterate what I said before. If the vote on 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:

[Quorum No. 3 Ex.]

Baucus	Frist	Nelson, Nebraska
Bingaman	Gregg	Pryor
Burr	Inouye	Reid
Cantwell	Kennedy	Salazar
Cochran	Leahy	Schumer
Cornyn	Lincoln	Stabenow
Dayton	Lott	
Durbin	Murkowski	

The PRESIDING OFFICER. A quorum is not present.

Mr. FRIST. Mr. President, I move to instruct the Sergeant at Arms to request the presence of absent Senators, and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is on agreeing to the motion of the Senator from Tennessee. The yeas and nays were ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. MCCONNELL. The following Senators were necessarily absent: the Senator from Mississippi (Mr. COCHRAN), the Senator from New Hampshire (Mr. GREGG), the Senator from Texas (Mr. CORNYN), the Senator from Mississippi (Mr. LOTT), and the Senator from Alaska (Ms. MURKOWSKI).

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

Mr. DURBIN. I announce that the Senator from Minnesota (Mr. DAYTON), the Senator from Hawaii (Mr. INOUYE), the Senator from Massachusetts (Mr. KENNEDY), and the Senator from Arkansas (Mrs. LINCOLN), are necessarily absent.

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

The result was announced—yeas 90, nays 1, as follows:

[Rollcall Vote No. 126 Ex.]

YEAS—90

Akaka	Dole	McConnell
Alexander	Domenici	Mikulski
Allard	Dorgan	Murray
Baucus	Durbin	Nelson (FL)
Bayh	Ensign	Nelson (NE)
Bennett	Enzi	Obama
Biden	Feingold	Pryor
Bingaman	Feinstein	Reed
Bond	Frist	Reid
Boxer	Graham	Roberts
Brownback	Grassley	Rockefeller
Bunning	Hagel	Salazar
Burns	Harkin	Santorum
Burr	Hatch	Sarbanes
Byrd	Hutchison	Schumer
Cantwell	Inhofe	Sessions
Carper	Isakson	Shelby
Chafee	Jeffords	Smith
Chambliss	Johnson	Snowe
Clinton	Kerry	Specter
Coburn	Kohl	Stabenow
Coleman	Kyl	Stevens
Collins	Landrieu	Sununu
Conrad	Lautenberg	Talent
Corzine	Leahy	Thomas
Craig	Levin	Thune
Crapo	Lieberman	Vitter
DeMint	Lugar	Voinovich
DeWine	Martinez	Warner
Dodd	McCain	Wyden

NAYS—1

Allen

NOT VOTING—9

Cochran	Gregg	Lincoln
Cornyn	Inouye	Lott
Dayton	Kennedy	Murkowski

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 6:13 p.m., when called to order by the Presiding Officer (Mr. THUNE).

NOMINATION OF PRISCILLA RICHMAN OWEN 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 affording 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—20 days—to the Owen nomination. So this 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:

There is not enough time in the universe—

''Not enough time in the universe'' for the Senate to allow an up-or-down vote on the Owen nomination. So 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 preceded by the title ''judge,'' meaning, of course, they were confirmed.

So what my Democratic colleagues did last Congress is, indeed, unprecedented. Even with controversial nominees, the leaders of both parties historically have worked together to afford them the courtesy of an up-or-down vote.

When he was minority leader, Senator BYRD worked with majority leader Howard Baker to afford nominees an up-or-down vote, even when they did not have a supermajority, nominees such as J. Harvey Wilkinson, Alex Kozinski, Sidney Fitzwater, and Daniel Manion.

As Senator BYRD knows, it is not easy being the majority or minority leader. He, Senator BYRD, could have filibustered every one of those nominations but he did not. Instead, he chose to exercise principled and restrained leadership of the Democratic caucus when he was minority leader. I would like to compliment Senator BYRD for that decision.

Affording controversial judicial nominees the dignity of an up-or-down vote did not stop, however, with Senator BYRD. It was true as recently as 2000, when Senator LOTT worked to stop Senators on our side of the aisle, the Republican side, who sought to filibuster the Paez and Berzon nominations. But, in 2001, as the New York Times has reported, our Democratic colleagues decided to change the Senate's ground rules, a media report they have yet to deny.

Just 2 years later, after they had lost control of the Senate, our Democratic colleagues began to filibuster qualified judicial nominees who enjoyed clear majority support here in the Senate. They did so on a repeated partisan and systematic basis. After 214 years of precedent, in a span of a mere 16 months, they filibustered 10 circuit court nominees—totally without precedence. Many of these nominees would fill vacancies that the administrative offices of the courts have designated as judicial emergencies, including several to the long-suffering Sixth Circuit Court of Appeals, in which my State is located. As a result, President Bush has the lowest percentage of circuit court nominees confirmed in modern history, a paltry 69 percent.

The Senate, as we all know, works not just through the application of its written rules but through the shared observance of well-settled traditions and practices. There are a lot of things one can do to gum up the works here 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 would upset the Senate's unwritten rules. Filibustering judicial nominees with majority support falls in that category. Let me repeat, it could have always been done. For 214 years, we could have done it, but we did not. We could have, 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.

Despite the incredulous protestations of our Democratic colleagues, the Senate has repeatedly adjusted its rules as circumstances dictate. The first Senate adopted its rules by majority vote, rules, I might add, which specifically provided a means to end debate instantly by simple majority vote. That was the first Senate way back at the beginning of our country. That was Senate rule VIII, the ability to move the previous question and end debate.

Two decades later, early in the 1800s, the possibility of a filibuster arose through inadvertence—the Senate's failure to renew Senate rule VIII in 1806 on the grounds that the Senate had hardly ever needed to use it in the first place.

In 1917, the Senate adopted its first restraint on filibuster, its first cloture rule—that is, a means for stopping debate—after Senator Thomas Walsh, a Democrat from Montana, forced the Senate to consider invoking its authority on article I, section 5, to simply change Senate procedure. Specifically, in response to concerns that Germany was to begin unrestricted submarine warfare against American shipping, President Wilson sought to arm merchant ships so they could defend themselves. The legislation became known as the armed ship bill.

However, 11 Senators who wanted to avoid American involvement in the First World War filibustered the bill. Think about this. In 1917, there was no cloture rule at all. The Senate functioned entirely by unanimous consent. So how did the Senate overcome the determined opposition of 11 isolationist Senators who refused to give consent to President Wilson to arm ships? How did they do it?

Senator Walsh made clear the Senate would exercise its constitutional authority under article I, section 5, to reform its practices by 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, noted years later that ''Walsh 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 Senator 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 1917 cloture rule, discuss its 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 black voters at the end of the 19th century. They had filibustered antilynching bills in 1922, 1935, and 1938; antipoll tax bills in 1942, 1944 and 1946; and antirace discrimination bills.

In 1959, 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 has the 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 proposed rule change, Democratic Senator 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 subsequent vote only cemented 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—that is, 60 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 voted 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 what logic can 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. It is preposterous 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 by one Senate, prohibiting 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 nongermane 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, thereabout delaying the postcloture clock.

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

After 13 days of filibustering by amendment, 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 creating a precedent, 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 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 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 asked Mr. Mondale, the Vice President, to go please sit in the chair; I wanted to make some points of order and create some new precedents that would break these filibusters.

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 we all admire so greatly, he and Vice President Mondale were severely criticized for the extraordinary actions taken to break the postcloture filibusters.

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 greatly 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 proceedings. . . . 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 but faced with 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 one could filibuster a motion 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 nondebatable 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 nondebatable motion. Specifically, he made a motion 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 nondebatable 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 of this change in precedent, it 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 procedure in order to restore the practice of affording judicial nominees an 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 is 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 guarantee that nominations were 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 want 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 yield for a question?

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. I say to 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 interestingly 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 on legislation because we understand 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 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 executive 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. MCCONNELL. That is precisely the point. My friend from Iowa is entirely correct.

Mr. GRASSLEY. I thank the Senator.

Mr. HATCH. 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 got that 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 the 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. So when our friends 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 both—the balance of power among 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 are filibusters, if I recall it correctly, 12 of those 13 are now 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 support, upon which 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 your suggestion and Senator LOTT'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.

How did we deal with controversy? We invoked cloture. And I remember you and Senator LOTT saying, to substantial grief from some, that these judge candidates had gotten out of committee, and they were entitled to an up-or-down vote 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. They both got an up-or-down vote. They both are now called judge.

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 that step, even though we all ended up, many of us, voting against those nominations once we got to the up-or-down vote.

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 fight, 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. He withdrew, didn't he?

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 enjoy majority 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 it was 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 colleague.

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.

First, I will say 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 Democrats are today—we had the 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. SESSIONS. Let me ask this, with the presence of the distinguished former chairman of the Judiciary Committee in the Chamber. At that very moment when it was to the Republican interests to initiate a filibuster, if we chose to do so, at that moment, when he was, on principle, opposing it, the very Members of the opposite party, leading Senators on that side—Senator LEAHY and Senator KENNEDY and Senator FEINSTEIN and Senator BOXER—were making speeches saying how bad the filibuster was and how it should not be done.

Mr. MCCONNELL. I would say to my friend that is why we have been quoting them so much in all of our speeches on this side of the aisle. You could just change the names, and they could have been giving our speeches as recently as 1998, 1999, and even 2000.

Mr. SESSIONS. I could not agree more. A half-dozen years ago, the people who are leading the filibuster were the very ones objecting to it. But Senator HATCH and the Republicans, isn't it fair to say, have been consistent?

Mr. MCCONNELL. Absolutely. Let's just be fair here. I would say to both of my colleagues, without getting into the details of any particular nomination, that I think the Democrats have arguably a legitimate complaint—it has a patina of legitimacy—when they argue that we simply did in committee what they are doing on the floor.

The PRESIDING OFFICER. The time controlled by the majority has now expired.

Mr. MCCONNELL. Mr. President, I ask unanimous consent for an additional 5 minutes.

Mr. LAUTENBERG. I didn't hear that.

Mr. MCCONNELL. I ask unanimous consent for 5 more minutes.

Mr. LAUTENBERG. No objection.

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

Mr. MCCONNELL. They argue that we simply did in committee what they are doing on the floor, and that there is not a dime's worth of difference between holding up a nominee in committee and holding up a nominee on the floor. I think there are some distinctions to be made.

It is not entirely the same thing, but granting that that might have some legitimacy, the majority leader offered these Specter protocols with which the former chairman of the Judiciary Committee is intimately familiar, which would have guaranteed some kind of procedure to extricate those nominations from committee and bring them out to the floor and give them an up-or-down vote. We are in the majority, and we volunteered to give up the ability to routinely kill nominations in committee. Yet they turned that down, too.

Mr. HATCH. Will the Senator yield on that point?

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 over that. We recognized 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 through, but there were like 18 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 as well.

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 the 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 Miguel Estrada's confirmation by a 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 a consent agreement to limit debate, 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 partisan minority refused. In open 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 deals with nominations. Two hundred years of Senate custom lay shattered, with grave implications for our constitutional system of checks and balances.

As the filibusters began to mushroom, Democratic Senator Zell Miller and I introduced a cloture reform resolution. Our proposal would have permitted an end to nominations filibusters 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 impediments put in their way.

When Congress convened this January, I was urged to move immediately for a change in Senate procedure so that these 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 solution to this problem. Rather than act on the record of the last Congress, I hoped that the passage of a clearly won election and presence of new Democratic leadership would result in a sense of fairness being restored.

Sadly, these hopes were not fulfilled. More filibusters have been promised, not only against seven nominees President Bush has resubmitted but also against other nominees not yet sent up. A renewal of 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. Filibusters have been periodically conducted on legislation, sometimes successfully and sometimes ended by cloture. However, filibusters have not impeded the Senate's advice and consent role on nominations. In the exceedingly rare cases they were attempted, cloture was always invoked with bipartisan support and the filibusters ceased.

But in the last Congress, judicial filibusters became instruments of partisan politics. Organized and promoted by the Democratic leadership, these filibusters proved resilient to cloture. And that was the difference between these filibusters and the handful of judicial filibusters conducted in the past. For example, to close debate on President Clinton's nominees, Marsha Berzon and Richard Paez, the Republican leader, Senator LOTT, took the initiative to file for cloture. Because he acted to conclude the debate, both Berzon and Paez sit on the bench today.

Due to the current filibusters, two great Senate traditions that used to coexist now collide. If matters are left in this posture, either the power of advice and consent will yield to the filibuster or the filibuster will yield to advice and consent.

Until these judicial filibusters were launched, the Senate observed the principle that filibusters would not impede the exercise of constitutional confirmation powers and that a majority of Senators could vote to confirm or reject a nominee brought to the floor. The unparalleled filibusters undermine that tradition, denying nominees the courtesy of an up or down vote. They 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 minority's conclusion defies history.

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. The past half century amply illustrates this point. During the Kennedy and Johnson administrations, Democrats controlled the Senate, but the Republican Minority Leaders Everett Dirksen did not filibuster judicial nominees. While President Carter was in office, Democrats controlled the Senate, but Republican Leader Howard Baker did not filibuster judicial nominees. For President Reagan's first 6 years, Republicans controlled the Senate, but Democratic 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 done, using the same rationale. 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 those minority leaders who did not 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 try to reach 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 an 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 about 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 yeas and 43 nays, well short of the two-thirds then 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. In contrast to the Miguel Estrada and Priscilla Owen filibusters, no one claimed that debate would go on endlessly and that no amount of time would be sufficient. Indeed, those who opposed cloture denied there was a filibuster at all.

So, Mr. President, the Fortas case is not analogous to the judicial filibusters we now confront. Support for and opposition to Fortas was broadly bipartisan, a fact that stands in stark contrast to the partisan filibusters that began in 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 appointments through the threat of a filibuster-veto. The Fortas opposition came together in one aberrational 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 party 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 a new Justice 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 disturbs checks and balances between the Executive and the Senate and creates a strong potential for tyranny by the 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 ensure the nominees are denied a confirmation vote. It is but a tiny step from there to claim that any nominee must first secure minority clearance, or else 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 the decisions made by each of 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, that system and the checks and balances it serves, will be permanently destroyed.

Trying to legitimize 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.

Mr. 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. In 1995, we had a new Republican majority. We would have been the prime beneficiaries of the rules change, but we supported minority rights to filibuster on legislation. Some of the Senators who most vigorously promote judicial filibusters and condemn us for trying 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 1980, under the leadership of Senator BYRD and on a partisan 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 the 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.

Simple logic would dictate 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 1953 and 1975, 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 30-year 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 able to do so.

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 can move to the floor for a conformation 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 can 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 expressed by Democrats and Republicans. It would reform the confirmation process fairly and completely, and well serve this and future Senates and this and future Presidents.

The cycle of blame and finger-pointing must halt. We must stop nursing grievances and start addressing problems. Thus far, the Fairness Rule has received an unwelcoming response. I urge the minority to reconsider. I urge them to join hands with us in dissipating bitter partisanship by considering this proposal.

For some time, the issue of judicial filibusters has captured considerable attention in the Senate. Both parties have had substantial opportunities to think about reform, so we can initiate consideration of it through the committee process and should be able to move ahead with alacrity.

But to act on reform by this method, we must have a unanimous consent agreement that allows time for debate, a chance for amendment, and the certainty of a final vote. An agreement can provide for robust, principled, and lengthy discussion. Without an agreement, any reform we bring to the floor is subject to being filibustered itself.

So, I ask the minority for an agreement 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 option—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, adjustments 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 power to do either.

Democrats contend that if the constitutional option is used to restore checks and balances, Republicans would be veering into unchartered waters. But history is rich with examples of how Senate rules and precedents have 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.

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 would govern—affording 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.

As the issue of civil rights gripped the Senate in the 1950s, a bipartisan group of Senate liberals, led by New Mexico Democrat Clinton Anderson, proposed using the constitutional option to liberalize a cloture process, because filibusters had either doomed or weakened civil rights legislation. Anderson's support grew throughout the decade. By 1959, it was apparent he might command a majority, which forced Senator Lyndon Johnson into a compromise by which the cloture threshold was relaxed. But for the credible threat the constitutional option would be exercised, the rules change would not have happened.

In 1975, Minnesota Democrat Walter Mondale and Kansas Republican Jim Pearson pressed for cloture reform through the constitutional option. Majority Leader Mike Mansfield, who earlier in his career had supported this tactic, offered three separate points of order against it. Three times, those points of order were tabled. With a majority of Senators squarely on record

supporting the constitutional option, the Majority Whip, Senator BYRD, offered a successful leadership compromise to lower the cloture threshold. But for the constitutional option, the change would not have happened.

In 1979, Majority Leader BYRD sought to make a variety of rules reforms, principally with regard to cloture. Introducing a rules change resolution, he beseeched Republicans for a time agreement to consider it. But he also expressly warned that, if an agreement were not forthcoming, he would use the constitutional option to change the rules. Minority Republicans did not threaten to shut the Senate down. Instead, they gave him an agreement, from which followed a lengthy and spirited debate. In the end, the cloture rule was amended—a change that happened under pressure from the constitutional option.

From this history, one must conclude that the threat or use of the constitutional option was a critical factor in the creation and development of the Senate cloture rule.

The constitutional option is also exercised every time the Senate creates a precedent. Four examples will illustrate the point. I have spoken already of Senator BYRD's 1980 precedent to bar debate on motions to proceed to nominations. In 1977, 1979, and 1987 he led a Senate majority to establish precedents that restricted minority rights and tactics in use at the time. We do not have to pass judgment on the purposes or value of any of these moves to note the following: three of these cases were decided on a party-line or near party-line vote. Moreover, every time Senator BYRD commanded a majority to make these precedents, minority rights were limited.

We have been publicly threatened that if we act to end judicial filibusters, Democrats will fundamentally shut the Senate down. To follow their logic, if we expect to get the public's business done, we must tolerate upending Senate traditions and constitutional checks and balances.

I would strongly prefer that matters not come to that. It would be far better for the Senate to have a vigorous and elevated debate about reforming the entire confirmation process, followed by a vote. I am ready for that debate and willing to schedule the floor time necessary to make it happen.

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 Mansfield spoke to 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 but we cannot deny it. As for any post, the question which must be faced is simply: Is the man qualified for the appointed position? That is the only question. 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 of the Senate are, frankly, 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.

One 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 uniter, not a divider? It has been constantly referenced. ''I want to unite the American people, not divide them.''

With this abuse of power, the majority is about to further divide our Nation with the precision of a sledgehammer.

I want the American people to understand what is going to happen on the floor of the Senate if things go as planned. Vice President CHENEY, whom we rarely see in this Chamber, is going to come here for the specific purpose of breaking existing rules for the operation of the Senate. He is going to sit in the Presiding Officer's chair and do something that, frankly, I don't remember in my more than 20 years in the Senate. He could intentionally misstate, if what we hear is what we are going to get, the rules of the Senate.

Think about the irony. Vice President CHENEY gets to help nominate Federal judges. Then when the Senate objects to the administration's choices, he is going to come over here and break our rules to let his judges through. Talk about abuse of power. The Founding Fathers would shudder at the thought of this scenario. It runs counter to the entire philosophy of our Constitution. Our Constitution created a system that they thought would make it impossible for a President to abuse his powers.

Tomorrow, we are going to see what amounts to a coup d'etat, a takeover right here in the Senate. The Senate, just like society at large, has rules. We make laws here and we brag about the fact that this is a country of laws. We make laws here and expect Americans to follow them. But now the 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 an example does that set for the country? Some may ask if we don't follow 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 CHENEY will break the rules from his position as the Presiding Officer and change the rules by fiat. In other words, we will see an attempt to overthrow the Senate as we know it.

Hopefully, some courageous Senators will step forward, vote their conscience, and put a stop to this once and for all. There are several people who disagree with their leader on the Republican side, and they have expressed their unwillingness to go through with this muscular takeover of the Senate.

It is unbefitting the body. 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 the Senate should be a rubberstamp 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 whether 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 may 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 relent. 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.

President Bush once famously said:

If this were a dictatorship, it'd be a heck of a lot easier, just so long as I'm the dictator.

I am hopeful that President Bush was kidding when he said that. But the President's allies don't seem to be. They want the Senate to simply approve every Bush nominee regardless of the record.

We have confirmed 208 of President Bush's nominees. But there are several we objected to because we believed they were too extreme. They voiced their opinions. This was not based on hearsay. It was based on things they said. They are too extreme to sit on the Federal bench.

The Republican side of the aisle calls this the tyranny of the minority. But in the Senate, who is the minority and who is the majority? When you do the math on the current Senate, you will find that the majority is actually in the minority. The minority is the majority. Here is what I mean: Majority or minority. Current Senate: Republican caucus, 55 Senators, they represent 144,765,000 Americans. The Democratic caucus has less Senators, 45 as opposed to 55, and they represent some 148,336,000 Americans. So where is the minority here?

In this chart each Senator is allotted one-half of his or her State's population, just to explain how we get there. What you find is that the minority in this body, the Democratic caucus, represents 3.5 million more people than does the majority. That is exactly why the Founding Fathers wanted to protect minority rights in the Senate because a minority of Senators may actually represent a majority of the people.

How do you discard that and say: Well, we are the majority? You don't own the place. It is supposed to be a consensus government, particularly in the Senate.

I make one last appeal to the majority leader: Don't take this destructive action.

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.

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 ephemeral. The losers 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 the reality of most 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 to shape the future, we are obsessing about the rules of the Senate and a small handful of judges. At times like this, I feel more like an ambassador to a foreign nation than a representative of my home.

This episode feeds the cynicism and apathy that have plagued the American people for too long. It brings this institution and the process that has brought us here into disrepute and low esteem. No wonder so few of our citizens take the time to exercise even the most elementary act of citizenship—the act of going to the polls to vote.

Very briefly, let me say what this is all about, but let me begin by saying what it is most definitely not about. This is not about the precedents and history of this body. It has been interesting to sit silently and observe colleagues on both sides of the aisle make appeals to precedent and history, and both do so with equal passion. History will not provide an answer to this situation that confronts us. It is not about whether nominees get an up-or-down vote. In fact, it is about the threshold for confirmation that nominees should be held to, a simple majority or something more. It is not about whether the chief executive will have his way the vast majority of the time. This President has seen 96 percent, or more, of his nominees confirmed by this Senate, which is a high percentage by any reckoning. This debate is not about whether or not there are ideological or partisan tests being applied to nominees. I would assume that the 200-some nominees sent to us by this President are, for the most part, members of his party, that most share his ideology, and yet more than 200 have been confirmed. There are no litmus tests here.

Mr. President, this is really about the value we, as a people, place upon consensus in a diverse society. It is about the reason that the separation of powers and the balance of powers were created by the Founders of this Republic in the first place. And it is ultimately about whether we recall our own history and the understanding of human nature itself, the occasional passions and excesses and deals of the moment that lead us to places that threaten consensus and the very social fabric of this Republic. It is about the value we place upon restraint in such moments.

Is it unreasonable to ask more than a simple majority be required for confirmation to lifetime appointments to the courts of appeal or the Supreme Court of the United States, who will render justice and interpret the most fundamental, basic framing documents of this Nation? Should something more than a bare majority be required for lifetime appointments to positions of this importance and magnitude? I believe it should.

Should we be concerned about a lack of consensus on such appointees who will be called upon to rule upon some of the most profound decisions which inevitably touch upon the political process itself? I think my colleague, Senator LAUTENBERG, mentioned the decision in Gore v. Bush. And if a sizable minority of the American people come to conclude that individuals who are rendering these verdicts are unduly ideological or perhaps unduly partisan themselves, will this not undermine the respect for law and the political process itself and ultimately undermine our system of governance that brought us here? I fear it might. Essentially, aren't these concerns—respect for the rule of law, respect for the independence of the judiciary, the importance of building consensus, and the need in times of crisis to lay aside the passions of the moment and understand the importance of restraint on the part of the majority—aren't these concerns more fundamentally important to the welfare of this Republic than four or five individuals and the identities of those who will fill these vacancies? The answer to that must be, unequivocally, yes.

There are deeper concerns than even these, Mr. President. The real concerns that I have with regard to this debate have to do with the coarsening of America's politics. In the 6½ years I have been honored to serve in this body, there have been just two moments of true unity, when partisanship and rancor and acrimony were placed

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 attacked and there was a palpable understanding that we were first 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 pursued in 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 importantly, each of us has a 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 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 escaped the violence of that day, most attributed by Kennedy's presence in our city. He went into Indianapolis in front of an audience that was mostly minority citizens. He went up on a truck bed and said: I am afraid I have some bad news. 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 again our 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 I have mentioned 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, put us on a better path toward 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 coarsed through the body of this politic 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 members of the press and 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 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 nominee 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 carefully scrutinize the records 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 plan. We are seeing people who are being presented to us who will, I think, undermine that sense of confidence that the American people must have in the judges they face in the courts of this land.

Indeed, it is also ironic that today as we discuss this issue of eviscerating minority rights in the United States Senate, we hear our leaders talk about the necessity—the absolute necessity—of protecting the minority in Iraq. If you listen to the President, Secretary of State Rice, and others, they talk about how essential it is to ensure that there are real procedural protections for the Sunni minority in Iraq. In fact, what they are trying to do in Iraq they are trying to undo in America by stripping away those procedural protections that give the minority 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

doomed 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 the pressure 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 will see in the 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 very decisive step. I hope we can avoid stepping over it 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 just the cloture 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 need not remind many people here that 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. By that measure, President Bush 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 politics. 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 on the law; 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 a parliamentary ploy, 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 have difficult choices before us. 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? 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 the 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, he or she may 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 the public of the wrongness of that path and saved this country 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 colleague, 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 there is no effective challenge, 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 we all step 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. LEVIN. 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, 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 that they be followed. In previous 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 1949, Vice President 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 cloture.

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 following 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.''

[T]he 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.''

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, plus a simple majority of Senators voting at the time, want the rules to mean. We fit the rules to the occasion, instead of fitting the occasion to the rules. Therefore, in the final 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, the integrity of the Senate's rules 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 consequence—and it involves just one consideration. 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 in the fashion required by the rules?

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

. . . [T]he rules of the Senate as they exist at any given time and as they are clinched by precedents should 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 every change in parliamentary 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 cloture rule needed to be changed 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 for ''measures before the Senate'' 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 integrity of the rules of the Senate. And 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 antipoll-tax measure. He has similarly voted on numerous previous occasions. In his capacity as President pro tempore believes that the rules of the Senate should permit cloture upon the pending motion to take up the antipoll-tax measure, but 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.

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 antipoll-tax measure, but he is bound to recognize those rules. He cannot rule against what the rules clearly provide.

Senator Vandenberg then went on to say:

If the Senate wishes to cure this impotence it has the authority, the power, and the means to do so. The President pro tempore 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 Presiding Officer, contrary to the words of the Senate 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 on the motion to 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 and our rules would be to take 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 runs head long into the words of rule XXII and our rules. We 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 judged by future generations for what we do here this week. Arthur Vandenberg has been judged by history as well. If you want to know what the verdict of history is relative to Arthur Vandenberg, look up 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 attempt to change the rules by arbitrary 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 Senate has 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 of the members were not judges of the requisite qualifications. . . . On the other hand he was not satisfied with referring the appointment to the Executive.

Madison and others were 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:

> . . . his [referring to the president] nomination may be overruled: this it certainly may, yet it can only be to make a place for another nomination by himself. The person ultimately selected must be the object of his preference. . . .

Let me emphasize that—Hamilton says the person elected is ultimately the object of the president's preference. That suggests to me that it is not up to the Senate to demand that nominees be withdrawn and that others be nominated in accordance with the leadership in the Senate or the home State senators of the nominee. It sounds to me like the Framers intended for the president to choose and then the Senate to either reject or accept the nominee.

However, I would argue that we don't even need to look to Hamilton to decide that the eventual appointee should be the object of the president's preference. Look where the power to nominate and appoint is placed in the Constitution—in article II, which sets out the powers of the President—not Congress.

In Federalist 76, Hamilton goes on to describe the role of the Senate:

> To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

Nowhere in that description of the Senate's role does it suggest that the Senate is supposed to reject nominations based on judges' views of the issues. It suggests that we are here to prevent the president from appointing only nominees from Texas, from appointing only friends or campaign contributors, or from otherwise abusing this power. It does not suggest that we should go through a lengthy process of trying to anticipate how a particular judge would rule on all future cases that may come before him or her.

In fact, given that it was the intent of the Founders to create an appointments process that would allow for the appointment of judges who could serve as a check on the other two branches, I think they would be appalled to think that the Senate might be prepared to block any judges that will not rule on abortion or gay marriage or the reinsertion of a feeding tube in the way the Senate happens to favor at any one time. That sounds to me like anything but an independent judiciary branch. What's next? Will senators ask judges how they will rule on pending bills and support only those judges who will uphold the laws passed by this body?

The role of the Senate having been established, I also want to address the mechanism by which we confirm these judges.

The issue before us centers around whether the Constitution requires a simple majority or a supermajority to confirm judicial nominations. Once again, an analysis of the history suggests that it was the intention of the Framers to provide for only a simple majority of the Senate to confirm nominees.

Look at the language of all of article II, section 2. In the clause immediately before the nominations clause, the Constitution specifically calls for two-thirds of the Senate to concur. In the nominations clause, there is no such provision.

I don't believe that this is an inadvertent omission. During the drafting of the Constitution, Roger Sherman of Connecticut argued at great length for the insertion of a comma instead of a semicolon at one point to make a section on Congressional powers crystal clear. I find it hard to believe that in the meantime the Framers deliberately left this section vague.

In fact, the debate around this section of the bill suggests that there was a specific discussion about how many Senate votes would be required to confirm judges. On July 18, 1787, James Madison proposed a plan that would allow judges to be confirmed with only one-third of the Senate. The record of the debate states that Madison felt that such a requirement would ''unite the advantage of responsibility in the

Executive with the security afforded in the second branch against any incautious or corrupt nomination by the Executive.''

So that sounds to me like the Framers viewed the role of the Senate in such a way as to consider the possibility that even less than a majority could be required to confirm a judge—because the Senate was there as backstop to prevent the appointment of political cronies and unfit characters. That is a far cry from the role my colleagues across the aisle 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 cannot confer office, unless approved by a majority of the Senate.

Judges are to be confirmed by a majority vote. That is the bottom line. That decision was made long before the first Senate was gaveled into session and before any thought was given to rules of procedure and filibusters.

You will hear during this debate ominous warnings from my colleagues across the aisle about ''the tyranny of the majority.'' You will hear that the Founders intended for the Senate to protect the rights of the minority. You will hear that our Founders created the Senate as a check on the popular whim of the day, as a place to slow down legislation and ensure that only the very best laws are passed. This is true. George Washington is said to have said of the Senate that ''we pour legislation into the senatorial saucer to cool it.''

But the Founders did not create the Senate to give a minority of Senators 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.

So it is not a new idea for the majority in the Senate to believe they should have the power to confirm the president's nominees. It is a very old idea that dates back to the founding of our country.

It is a new idea, however, that a minority should have the power to deny the President's choice. The minority used the filibuster rule in the Senate 10 times in the last Congress to create this new idea that 40 percent should be able to thwart the will of both the President and the majority. 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 be confirmed by majority vote.

Mr. President, 2 years ago, my first speech as a Member of the Senate was on the topic of judges. I have spoken many times since then on this same subject. I would like to not 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 misguided effort that would undercut 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. In that regard, I thank the Senators who joined in the debate on Friday for their contributions, including in particular Senator DODD, Senator LEVIN, Senator JEFFORDS, Senator DAYTON, Senator LINCOLN, Senator LIEBERMAN and Senator DORGAN. Theirs were outstanding statements.

The Senate is not the House. It was not intended to function like the House. The ''Great Compromise'' of the Constitutional Convention more than 200 years ago was to create in the Senate a different legislative body from the House of Representatives. Those fundamental differences include equal representation for each State in accordance with article I, section 3. Thus, Vermont has equal numbers of Senators to New York and Idaho, as compared to California. The Founders intended this as a vital check. Representation in the Senate is not a function of population or based on the size of a State or its mineral wealth.

Another key difference is the right to debate in the Senate. The filibuster is quintessentially a Senate practice. James Madison wrote in Federalist No. 63 that the Senate was intended to provide ''interference of some temperate and respectable body of citizens'' against ''illicit advantage'' and the ''artful misrepresentations of interested men.'' It was designed and intended as a check and to provide balance. In no way do I intend to disrespect the House of Representatives by these remarks. I respect the House. I respect its traditions. But it is the Senate that protects the minority and thereby serves a special role in our national government.

Others have alluded to some valuable history lessons during the course of this debate. One of those lessons comes from 1937, the last time a President sought to pack the courts. President Franklin Roosevelt was coming off a landslide victory over Alf Landon. He attempted to pack the Supreme Court. Democrats—Senators from President Roosevelt's own party—stood up to him. In May 1937 the Senate Judiciary Committee criticized the Roosevelt court-packing plan as an effort by the executive branch to dominate the Judicial Branch with the acquiescence of the legislative branch. The Senate stood up for checks and balances and protected the independence of the judiciary. 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 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 500—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 Senate rules have 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 them but by breaking them. It is ironic that 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 all his judicial nominees confirmed by the Senate. President Washington's nomination 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 totalitarianism by urging the formula of ''No 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 courtroom violence and the killings of judges and judges' 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 accusing disagreeing Senators of seeking to ''kill'' and ''assassinate.'' Later in the week another member of the Republican leadership likened Democratic opponents of the nuclear option to Adolph Hitler. Still another Republican Senator accused Senators who oppose judicial nominees of discriminating against people of faith. This is in direct violation of the Republican leader's own statement at the outset of this debate that the rhetoric in this debate should ''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 rhetoric. 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 several days, the Rev. Pat Robertson called Federal judges, quote, ''a more serious threat to America then Al Qaeda and the Sept. 11 terrorists'' and ''more serious than a few bearded terrorists who fly into buildings.'' He went on to proclaim the Federal judiciary ''the worst threat American has faced in 400 years worse than Nazi Germany, Japan and the Civil War.'' This is the sort of incendiary rhetoric that Republican Senators should be disavowing. Instead, they are adopting it and exploiting it in favor of their nuclear 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 inciting.

Last week as we began this debate, the Judiciary Committee heard the testimony of Judge Joan Lefkow of Chicago. She is the Federal judge whose mother and husband were murdered in their home. She counsels: ''In this age of mass communication, harsh rhetoric is truly dangerous. [F]ostering disrespect for judges can only encourage those that are on the edge, or on the fringe, to exact revenge on a judge who ruled against them.'' She urged us as public leaders to condemn such rhetoric. I agree with her. She is right and she has paid dearly for the right to say so.

Those driving the nuclear option engage in a dangerous and corrosive game of religious McCarthyism, in which anyone daring to oppose one of this President's judicial nominees is branded as being anti-Christian, or anti-Catholic, or ''against people of faith.'' It continued over the last several weekends, it continued 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 a monopoly on piety and political truth by demonizing those you disagree with is not the American way. Injecting politics into judicial nominations, as this administration has done, is wrong, as well.

I would like to keep the Senate safe and secure and in a ''nuclear free'' zone. The partisan power play now underway by Republicans will undermine the checks and balances established by the Founders in the Constitution. It is a giant leap toward one-party rule with an unfettered Executive controlling all three branches of the Federal Government. It not only will demean the Senate and destroy the comity on which it depends; it also will undermine the strong, independent Federal judiciary that has protected the rights and liberties of all Americans against the overreaching of the political branches.

Our Senate Parliamentarian and our Congressional Research Service have said that the so-called nuclear option would go against Senate precedent. Do Republicans really want to blatantly break the rules for short-term political gain? Do they really desire to turn the Senate into a place where the parliamentary equivalent of brute force is what prevails?

Just as the Constitution provides in article V for a method of amendment, so, too, the Senate rules provide for their own amendment. Sadly, the current crop of partisans who are seeking to limit debate and minority rights in the Senate have little respect for the Senate, its role in our government as a check on the executive, or its rules. Republicans are in the majority in the Senate and chair all of its committees, including the Rules Committee. If Republicans 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 intended 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 established precedents and procedures. Use of the ''nuclear option'' in the Senate is akin to amending the Constitution not by following the procedures required by article V but by proclaiming that 50 Republican Senators and the Vice President have determined that every copy of the Constitution shall contain a new section—or not contain some of those troublesome amendments that Americans like to call the Bill or Rights. That is wrong. It is a kind of lawlessness that each of us should oppose. It is rule by the parliamentary equivalent of brute force.

Never 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 rule was invoked in accordance with rule XXII itself and after cloture on the resolution 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 leadership of Senator BYRD. And then the Senate adopted the resolution, which I supported. The resolution we adopted 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 operated under these rules to terminate debate on legislative matters and nominations for the last 30 years. Before 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 recently about the supposed sanctity 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 constantly used by Republican leaders to thwart ''majority'' votes on matters they do not like.

The most common 60-vote threshold is what is required to prevail on a motion to waive a series of points of orders arising from the Budget Act and budget resolutions. In fact, just this year in the deficit-creating budget passed by the Senate with Republican votes, 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 2001, a majority of Senators 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 were seeking 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, as I recall, 56. But 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 both times. We were required to make a formal motion 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 when the bill was filibustered. The effort 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 fund compliance with the Individuals with Disabilities Education Act. Although 56 Senates 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 has 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 proceeding to consider this 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? No, here, 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 protect 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 to amend the Senate rules'' takes ''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 vote to end 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 nomination 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 Mr. Johnson. Despite Republican 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 matter on its merits, as I always try to do, and voted to provide 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 the time, or rather all the time that it is in their short-term interests.

Finally, Mr. President, for purposes of the record, I need to set the record straight, again. I have done so periodically, including most recently on May 9, 2005, and toward the end of the last session of Congress on November 23, 2004.

Unlike the frog in the water who fails to notice the heat slowly rising until he finds himself boiling, Democrats have been warning for years that the Republican destruction of Senate rules and traditions 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 Democratic Senator wanted to filibuster, not a 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 confrontation that the Senate is 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. Breaking the rules to use 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 chairman of the Judiciary Committee 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. Republicans in the Senate 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 repeatedly 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 those currently in power believe that 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 Constitution mandates 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 contemplated local involvement 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 and the Fourth Circuit, in the district courts 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 Traxler to the Fourth Circuit from South Carolina; Barbara Durham and Richard Tallman to the Ninth Circuit from Washington; Stanley Marcus to the Eleventh Circuit from Florida; Ted Stewart to the District Court in Utah; James Teilborg 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 who not only objected to the unsuitable nominee 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. Now, the White House counsel's 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 number of instances where home State Senators 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, modified the committee's policies to 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 President Clinton's nominees and another for overriding Democratic objections to President Bush'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 those 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 Republican 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 unilaterally changed. The new 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 practice 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 so many 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 limit was set for returning the 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 1999–2000, 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 never 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, scheduled to take 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 were delayed and deferred, and vacancies 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 uncooperative.

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 within a reasonable amount of time before the meeting. Last 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 be held over one time by any 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 revised 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 worked hard to revise 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 might have published 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 Committee business 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 acted by unilateral fiat without consultation.

The protection of the rights of the minority in the committee was eliminated with the negation of the committee's rule IV, a rule parallel to the Senate filibuster rule. In violation 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 protecting 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 COCHRAN 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 even one Senator could filibuster 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 previously 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, even as we dealt with the most contentious social 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 cloture rule, the committee rule protected minority rights, and enforced a certain level of cooperation between the majority and minority in order to get anything accomplished. That was lost last Congress as the level of partisanship on the Judiciary Committee and within the Senate sunk to a new low when Republicans chose to override our governing rules of conduct and proceed as if the Senate Judiciary Committee were a minor committee of the House of Representatives.

That this was a premeditated act was apparent from the debate in the committee. 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 on the committee 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 committee when any of them would have even considered violating their responsibility to the Senate and to the committee and to our rules or that we needed an enforcement mechanism or penalty for violation of a fundamental committee rule.

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 at 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 we 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 the Chairman of the 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 a 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, and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with ten votes in the affirmative, one of which must be cast by the Minority.'

Thereafter, he made the nondebatable motion to proceed to a vote and under the rules of the committee there was objection and a rollcall vote was 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 rules would be interpreted so that the minority was the party other than that of the chairman.

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: ''[Y]ou 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. He completely reversed his own position from the Bill Lann Lee nomination and took a step unprecedented in the history of the committee.

I know the frustrations that accompany chairing the Judiciary Committee. I know the record we achieved during my 17 months of chairing that committee, when we proceeded with hearings on more than 100 of President Bush's judicial nominees and scores of his executive nominees, including extremely controversial nominations, when we proceeded fairly and in accordance with our rules and committee traditions and practices to achieve almost twice as many confirmation for President Bush as the Republicans had allowed for President Clinton, and know how that record was mischaracterized by partisans. I know that sometimes a chairman must make difficult decisions about what to include on an agenda and what not to include, what hearings to hold and when. In my time as chairman I tried to maintain the integrity of the committee process and to be bipartisan. I noticed hearings at the request of Republican Senators and allowed Republican Senators to chair hearings. I made sure the committee moved forward fairly on the President's nominees in spite of the administration's unwillingness to work with us to fill judicial vacancies with consensus nominees and thereby fill those vacancies more quickly. But I cannot remember a time when Chairman KENNEDY, Chairman THURMOND, Chairman BIDEN, or I, ever overrode by fiat the right of the minority to debate a matter in accordance without longstanding committee rules and practices.

By bending, breaking and changing so many committee rules, Republicans crossed a threshold of partisan overreaching that should never have been crossed. As they passed each awful milestone, I urged the Republican leadership to reconsider, to turn back and to reinstate comity.

That is the backdrop for this debate now before the Senate. An overly aggressive executive, added by a majority of the same political party in the Senate, acted last Congress to eliminate any meaningful role of the minority at the committee level and to eliminate our traditions, rules and practices that had protected the minority. This abuse of power and drive toward one-party rule by the Republican leadership has been building for years and is culminating this week through their unprecedented attack on the Senate's rules, role and history. For years now, Democratic Senators have been warning that the deterioration of Senate rules and practices that have protected minority rights was leaving us, the Senate, and the American people in a dire situation.

This systematic and corrosive erosion of checks and balances has brought the Senate to this precipice. The filibuster in the Senate is the last remaining check on the abuses of one-party rule and the undermining of the fairness and independence of the federal judiciary. If the Senate is to serve its constitutional role as a check on

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 by 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, the power 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 the Senate should 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 process 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 was killed 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 60 Clinton judicial nominees were not even accorded the courtesy of a hearing during the Hatch chairmanship of the Senate Judiciary Committee. They were never given the chance for an ''up or down 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 modem divisiveness in the Senate over judicial nominations is directly traceable to the Senate's partisan treatment of judicial nominations beginning 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 rubberstamp nominees it selects without Senate advice, much less the consent of a sizeable majority of the Senate. Slogans like seeking the appointment of judges who will not ''make law'' are trumpeted while President Bush nominates persons who will ''make law''—law of the sort advocated by his administration and its closed-minded right-wing supporters.

Because of the nature of the job of judges, the framers of the Constitution vested the Senate with a co-equal power over the nomination and confirmation of persons for life-time appointments to the judiciary. The Senate's role is not a subservient one of rubber-stamping anyone the president nominates unless it is found that they are an ax murderer or child molester.

This was made clear in the Federalist Papers, numbers 76–78. Over the past two centuries, the Senate developed a number of checks on both the president and members of the Senate to prevent the president and a majority of the Senate from running roughshod over those with substantial objections to nominations made by the president.

The result, until the first Bush administration and Sen. Hatch's chairmanship of the Judiciary Committee, has been negotiation and compromise over judicial nominees and the appointment of qualified moderates to the bench for the most part.

The present dispute over whether to eliminate the filibuster as a device to block nominees that a sizeable block of senators finds objectionable presents a further and dangerous erosion of the Senate's advice-and-consent function.

The Republicans hold a 55–to–45 majority of the seats in the Senate. The Republican majority represents approximately 47 percent of the United States population, while the 45-member Democrat minority represent 53 percent of the population. Senators representing less than a majority of the population are advocating the complete ceding of the advice-and-consent function to any president with a numerical majority of the membership of the Senate from his or her own political party.

The end result of the political campaign to further weaken, if not eliminate, the advice and-consent function of the Senate, will be to establish powers similar to those of the English monarch in 1789. The founders expressly sought to avoid this result by requiring the independent advice and consent of senators in the nomination and confirmation of important executive branch positions and lifetime appointments to the bench.

For Republicans to repudiate that role of the Senate, especially after their sorry record in dealing with the judicial nominees of President Clinton, is not only the height of hypocrisy, but is a dangerous precedent they will live to regret.

This is not the time for political opportunism, presidential arrogance or misleading oped pieces by Sen. Hatch. It is a time for members of the Senate to begin to act responsibly when carrying out their advice-and-consent function rather than further erode an important institutional check upon executive branch power and a majority party in the Senate that does not represent a majority of the American people.

Mr. WARNER. Mr. President, I rise today in support of the nomination of Justice Priscilla Owen to serve as a judge on the United States Court of Appeals for the Fifth Circuit.

When I evaluate individuals for Federal judgeships, I turn first to the U.S. Constitution. Article II, section 2 of the Constitution gives the President the responsibility to nominate, with the ''Advice and Consent of the Senate,'' individuals to serve as judges on the Federal courts. Thus, the Constitution provides a role for both the President and the Senate in this process. 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 27 years that 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 Reagan, 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 would serve 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 have 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 more impressive records.

In 1975, she earned her bachelors 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 score in the State on the December 1977 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 through her efforts as a commercial litigator she later became a partner at the firm.

In 1994, Priscilla Owen was first elected to the Texas Supreme Court. Six years later, she overwhelmingly won a second term with 84 percent of the vote—a strong testament of public support given to her by the citizens of the State of Texas.

But not only do the people of Texas overwhelmingly believe that Judge Owens is a highly qualified Federal judge, it is important to recognize that every major newspaper in Texas endorsed her reelection.

She also has notable 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'' around here for evaluating judges, 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, such an exemplary 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 fact of the matter is that 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.

I look forward to voting in support of her nomination and encourage my colleagues to do the same.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. DEMINT). The clerk will call the roll.

The legislative clerk proceeded to call the roll

Mr. FRIST. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. FRIST. Mr. President, I have had the opportunity to review the agreement signed by the Senator from Virginia, the Senator from Arizona, the Senator from Nebraska, and 11 other Senators, an agreement that I have reviewed but to which I am not a party.

Let me start by reminding the Senate of my principle, a simple principle, that I have come to this Senate day after day stating, stressing. It is this: 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 horse traded; they cannot be logrolled. 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 part of this particular 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 or up-or-down vote. I expect Richard Griffin, after 2 years and 11 months, will get a fair up-or-down vote.

Now, the bad news, to me, or the disappointing news in this agreement. It is a shame that well-qualified nominees are threatened, still, with not having the opportunity to have the merits of their nominations debated on the floor.

Henry Saad has waited for 3 years and 6 months for the same courtesy. Henry Saad deserves a vote. 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 but is not in this agreement. If Owen, Pryor, and Brown can receive the courtesy and respect of a fair up-or-down vote, so can Myers and Saad.

I will continue to work with everything in my power to see that these judicial nominees also receive that fair up-or-down vote they deserve. But it is not in this agreement.

But in this agreement is other good news. It is significant that the signers give up using the filibuster as it was deployed in the last Congress in the last 2 years. The filibuster was abused in the last Congress. Mr. President, 10 nominees were blocked on 18 different occasions, 18 different filibusters in the last 2 years alone, with a leadership-led minority party obstruction, threatening filibusters on six others. That was wrong.

It was not in keeping with our precedents over the past 214 years. It made light of our responsibilities as United States Senators under the Constitution. It was a miserable chapter in the history of the Senate and brought the Senate to a new low.

Fortunately, tonight, it is possible 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 committee acts, and then 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 a norm of behavior as a result of the mutual trust and good will in that agreement.

I, of course, will monitor this agreement carefully as we move ahead to fill the pending 46 Federal vacancies today and any 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 will 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 ought to guarantee a return to good behavior, appropriate behavior, on the Senate floor and that when the gavel falls on this Congress, the 109th Congress, the precedent of the last 214 years will once again govern up-or-down votes on the floor of the Senate.

Now, this 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 vital 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. President, I yield the floor.

The PRESIDING OFFICER. The Democratic leader is recognized.

Mr. REID. Mr. President, this is a day I have waited for for a long time. We can put the 8 years of the Clinton administration behind us, the problems he had with the judges, over 60. We can put the first 4 years of the Bush administration behind us. I have looked forward to this day for a long time. We are now in a new Congress and a new day, and it was made possible by virtue of some very, very 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 the white-haired Senator from Virginia, JOHN WARNER. They worked for months with some of the youngsters here, 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 be giving 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, SPECTER, 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 a brokerage, for sure.

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 expand health care opportunities for all families. 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 it took. And 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 and we gave 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 will 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 issue that is now terminated. 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 is subject to a simple majority to change the rules. The filibuster is here. Mr. SMITH can still come to Washington.

I, through the Chair, extend my appreciation to the distinguished Republican leader for his patience, my many trips to his office, the few trips he made to my office, the many telephone calls, the BlackBerrys we exchanged. I have admiration for the good doctor from Tennessee. And I hope that we, working together, can do good things for this country. The country needs a Senate that works together.

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.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, before he leaves the floor, I want to extend my congratulations to the majority leader for moving us to this point. Obviously, human nature, being what it is, had we not had a deadline, had the Priscilla Owen nomination not been brought up, had the debate not begun, we would not be where we are today. Senator FRIST, in a tireless and persistent manner, has been working on this issue since shortly after the election last year, talking to Senator REID.

I also want to compliment the Democratic leader. I suspect there is no issue upon which Senator FRIST and Senator REID have had discussions more frequently than this one, going back for the last 6 months.

I think there was bipartisan unhappiness in the Senate with the degree to which the Senate had deteriorated in the last Congress—this sort of random, mindless killing of nominees, 10 of them.

I think what has happened tonight 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 seven Democrats and seven Republicans, 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 Illinois.

Mr. DURBIN. I thank the Chair.

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 will excuse me. Let me say that I need to recognize the Senator from Colorado.

Mr. ALLARD. Mr. President, I inquire what the regular order might be. I was scheduled to speak at 8:15. I am not entirely sure on the regular order.

The PRESIDING OFFICER. The majority controls the time until 9 o'clock.

Mr. ALLARD. Mr. President, my time right now as set aside for the majority is now being taken up by this discussion. I would like to have some time reserved for myself in the 30 minutes. Right now we have 6 or 7 or 8 speakers lined up, and so I want to have an opportunity to make my views known at some point in time. I think we need to establish regular order, and if both parties have agreed that it goes back over to the other side at 9 o'clock, I would like to have that extended out so that when we reach 9 o'clock then I can speak from 9 to 9:30.

Mr. DURBIN. Mr. President, I make the unanimous consent request that as soon as I finish speaking, and the other Senators who have sought recognition, the Senator from Colorado be recognized for 30 minutes.

Mr. HARKIN. Mr. President, reserving the right to object, do I understand the order is that when 9 o'clock comes what is in order is before the Senate right now?

The PRESIDING OFFICER. The Senator is correct.

Mr. HARKIN. I did not hear the unanimous consent request 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, and I am 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 continue.

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?

The PRESIDING OFFICER. The unanimous consent request that the Senator from Colorado have 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.

Mr. KYL. Mr. President, reserving the right to object, since I was to speak at 9:30, I want to intervene. I will withhold depending upon what my colleagues say in the spirit of the latest agreement to see whether it is necessary to comment, and if not then I won't, but otherwise I will not object to the request that has been made.

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

Mr. DURBIN. I thank my colleagues.

It is great to have these bipartisan agreements on the floor of the Senate. Maybe a new spirit is dawning. I am going to take a very few moments. As I said at the outset, Winston Churchill said there is nothing more exhilarating than being shot at and missed. Many of us in the Senate feel that this agreement tonight means some of the most cherished traditions of the Senate will be preserved, will not be attacked, and will not be destroyed. I think it is a time for celebration on both sides of the aisle.

I salute one of my colleagues who is on the Senate floor this evening, Senator WARNER of Virginia. I was asked by my friends back in Illinois not long ago, Senator WARNER, tell us the Republican Senators you really respect, and I said JOHN WARNER is certainly one of those Senators. And I mean it sincerely. He has played a central role with Senator MCCAIN, Senator BYRD, Senator NELSON, Senator PRYOR, and so many others to bring us to this point.

What I think is important is this: What we have seen as the emergence of resolving this issue is the emergence of people from the center who are dedicated to this institution and to our role in our government. I hope that continues over to other issues, and I hope the White House, as well as the leaders of both political parties, will try to work in that same spirit, the spirit of moving toward the center in moderation. I might say that the fact that the President has had 95 percent of his nominees to the bench approved by the Senate is an indication that if he will pick men and women more toward the center, even a little right of center, which we expect, that the President is not going to run into the resistance he did with a handful of nominees that we on the Democratic side thought went too far.

I would like to say a word about Senator HARRY REID, who was in the Chamber just a moment ago. He spoke about sleepless nights. He and I talked about that for weeks. No one has spent more time worrying over this situation. He understood, as we all did, that this was not just another political issue, not just another political vote, but had Vice President CHENEY come to that chair tomorrow and ruled as we heard he would under the nuclear option, the Senate would have been changed forever. This institution has been preserved. The nuclear option is off the table. We have been admonished, and I think appropriately so, not

to misuse the filibuster, certainly when it comes to judicial nominees. That is good advice on both sides of the aisle under Democratic and Republic Presidents. I thank my colleagues, too, for bringing up some of the more contentious judges as part of this debate.

Senator REID went to Senator FRIST weeks ago and said if this is about one or two judges, let us get that resolved. The Senate, its traditions and the constitutional issues at stake, are more important than any single judge in our land. Unfortunately, that negotiation between Senator REID and Senator FRIST did not lead to the culmination that we had hoped it would. But thanks to the leadership of colleagues on both sides of the aisle in good faith and good spirit on a bipartisan basis we have now moved ourselves beyond this crisis. Now the challenge is whether we can continue in this spirit: Will we tomorrow come together and start working on important issues such as retirement security, health care in America, the protection of our Nation, the support of our men and women in uniform, doing something to help with education? It is an important agenda that calls for the best on both sides of the aisle to work together.

Again, let me thank Senator WARNER for his leadership. I know he has been patient. A couple weeks ago, the Senator came over to me in the corner of the Chamber and said: We ought to work together to get this resolved.

The Senator never quit. I admire him for that. I admire Senators on both sides of the aisle who brought us to this happy occasion.

And at that point, Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. I thank my distinguished colleague from Illinois.

Mr. President, when we opened our brief press conference upstairs, Senator MCCAIN and Senator BEN NELSON spoke for the entire group. It was made clear our everlasting gratitude to the tireless efforts by Senator FRIST and Senator REID. The framework that we have created can be no stronger than the foundation on which it rests. And that foundation was laid by our two respective leaders, and, indeed, the whips, Senator MCCONNELL and the Senator from Illinois. So we are not around this evening to try to take credit for anything. As a matter of fact, this was the most unusual gathering of Senators, and the manner in which it was conducted over a number of days—total humility among our group.

We are proud of the leadership that Senator MCCAIN gave, Senator BEN NELSON, Senator ROBERT BYRD, and others. But each Senator of the 14 was 1, but 1 among equals, working toward a common goal. And no one articulated that goal time and time again in every meeting more than Senator ROBERT BYRD of West Virginia, who said it is the Nation, it is the institution of the Senate, and the third priority is our own career. So I thank him for that.

I am proud to have been a part of this. I do hope that our wonderful Senate can now resume its long and distinguished service to our Nation over these 214 or 216 years, and I am very privileged to have been a small part of it at this time.

I thank the Chair. I yield the floor.

PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, I thank the Chair. I thank all my colleagues. This 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 from blue States, 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 says 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 lesson of this agreement. The reason 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 it will 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 about it, if we don't all make efforts, 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 will 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 bipartisanship is what differentiates us from the other body. Those checks and balances differentiate 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 announcement of 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 for confirmation and vote them up or down based on their qualifications. That is what our forefathers had in mind when the advise and consent.

I join my colleagues in support of the nomination of Priscilla Owen, the Texas Supreme Court justice who was first nominated to the Fifth Circuit Court of Appeals in May 2001 by President Bush. I urge my colleagues to support her confirmation and allow an up-or-down vote on her nomination. I hope that fairness prevails and that we do indeed proceed with a vote on her nomination, and it looks like that is indeed the way the events have unfolded this evening.

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 courtesy to meet her in person before deciding 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 a personal note, 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 we need on the bench, one who 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.

Priscilla Owen has served the law with distinction. A justice of the Texas Supreme Court since 1995, she received overwhelming approval from the people of Texas, 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 major newspaper 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 works with the hearing impaired and organizations dedicated to service animals for those with disabilities. She teaches Sunday school and is committed to the poor and underprivileged.

It is clear that she is qualified to serve on the Fifth Circuit Court. The American Bar Association unanimously rated Justice Owen ''well qualified,'' its highest possible rating. She has the support of former Democrat justices on the Texas Supreme Court and 15 past presidents of the Texas State Bar.

To say that she is not qualified is utterly ridiculous. Because her credentials are so outstanding, throughout this debate, the other side has relied on hyperbole and rhetoric, accusing her of being ''extreme'' in order to smear her nomination. So the question her nomination presents us, then, is whether she is extreme or qualified? The great thing about the Constitution is that it provides us with a mechanism to make this type of ''advice and consent'' determination on whether she is extreme or qualified—through a simple up-or-down vote.

An up-or-down vote is a simple matter of fairness. Every judicial nominee that makes it out of the Judiciary Committee should receive an up or down vote. The filibuster is not in the Constitution. It is merely a parliamentary delay tactic that was relatively unused until modern times. In 214 years, never has a nominee with the majority of support of the United States Senate been denied a vote.

Throughout the history of the United States, a nominee who clearly held the majority support of the Senate had never been defeated by the use of the filibuster—until now. During the last Congress those opposed to President 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 affording 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—up or down. I don't believe there is anything wrong with providing a nominee an up-or-down vote once they reach the floor.

Some in this body act as if 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 lifetime appointment to a position that requires a deep and mature understanding of the law.

We were elected to the Senate by 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 judges that Republicans confirmed or how many judges Democrats have confirmed. To frame this debate as a numbers fight is not being fair to the American people. We were not sent to Congress to focus on a numerical count, but instead to carry out our 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 we 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 meaning of the advise 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 executive powers. It is not listed 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. Had the Founders intended the legislature to be the fulcrum, they would have listed the advise and consent clause as a fundamental duty in the article addressing legislative powers.

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

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

[From National Review Online, May 17, 2005]

BREAKING THE RULES: THE FRAMERS INTENDED NO MORE THAN A SENATE MAJORITY TO APPROVE JUDGES

(By Clarke D. Forsythe)

The sharpening debate in the U.S. Senate over whether Democrats can block 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 constitutional. However, the text of the Constitution, the record of the Constitutional Convention of 1787, and Supreme Court decisions all concur to show that the Constitution intended no more than a majority ''vote'' for the Senate's ''Advice and Consent'' for judicial appointments.

The key provision is Article II, Section 2, called the Appointments Clause: ''[The president] 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 public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . .''

There are three striking aspects of the Appointments Clause, all of which are intentional and not accidental.

First, it is instructive if not definitive that the Appointments Clause is contained as an explicit power in Article II, involving executive powers, not in Article I, involving legislative powers.

Second, only 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.'' The clause on 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 5, 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 the Constitution 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 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.

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, making the president primary and the Senate (alone) secondary, with a role of ''advice and consent.''

Obviously, this question is something that the Framers carefully considered. The Constitution and Supreme Court decisions are quite clear that only a majority is necessary for confirmation. Neither the filibuster, nor a supermajority vote, is part of the Advice and Consent role in the U.S. Constitution. Until the past four years, the Senate never did otherwise. Changing the Senate rules to eliminate the filibuster and only require a majority vote is not only constitutional but fits with more than 200 years of American tradition.

Mr. ALLARD. Mr. President, had the Founders intended a 60-vote supermajority, they would have included the requirement in the Constitution the way they did on the treaty power clause. The clause on the treaty power, after mentioning ''advice and consent,'' requires concurrence by two-thirds of the Senators present. The clause on the appointment of ambassadors and others, including Supreme Court Justices, by contrast, does not.

The author then pointed out 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 5, 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 the Constitution 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.

The article also cited a Supreme Court case noting that more than a century ago, in United States v. Ballin, that ''the general rule of 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.''

In the author's own words: ''. . . the particular process in the 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.

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.

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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, making the President primary and the Senate alone secondary with the role of advise 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 a mere 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 nominee. But do not deprive those of us in the Senate who 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 advise 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 parliamentary procedure. That is the Constitution versus the filibuster. I urge my colleagues to put their faith in the

founding 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 advise 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 yield to me, 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. 93–148) and P.L. 107–40.

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

THE WHITE HOUSE,
Washington, DC, May 20, 2005.

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 93–148), 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 Afghanistan against al-Qaida terrorists and their Taliban supporters, which began on October 7, 2001, and the deployment 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 threat to the United States.

United States Armed Forces, with the assistance of numerous coalition partners, continue to conduct the U.S. campaign to pursue al-Qaida terrorists and to eliminate support to al-Qaida.

These operations have been successful in seriously degrading al-Qaida's training capabilities. United States Armed Forces, with the assistance of numerous coalition partners, ended the Taliban regime in Afghanistan and are actively pursuing and engaging remnant al-Qaida and Taliban fighters. Approximately 90 U.S. personnel are also assigned 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 since that time, most recently, for a 12-month period from October 13, 2004, in U.N. Security Council Resolution 1563 of September 13, 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 the reestablishment 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 detain several hundred al-Qaida and Taliban fighters who are believed to pose a continuing threat to the United States and its interests. The combat-equipped 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 a Multinational Force (MNF) in Iraq under unified command in 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 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, 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 U.S. contribution to the MNF is approximately 139,000 military personnel.

In furtherance of our efforts against terrorists who pose a continuing and imminent threat to the United States, our friends and allies, and our forces abroad, the United States continues to work with friends and allies in areas around the globe. United States combat-equipped and combat-support forces are located in the Horn of Africa region, and the U.S. forces headquarters element in Djibouti provides command and control support as necessary for military operations against al-Qaida and other international terrorists in the Horn of Africa region, including Yemen. These forces also assist in enhancing counterterrorism capabilities in Kenya, Ethiopia, Yemen, Eritrea, and Djibouti. In addition, the United States continues to conduct maritime interception operations on the high seas in the areas of responsibility of all of the geographic combatant commanders. These maritime operations have the responsibility to stop the movement, arming, or financing of international terrorists.

NATO-LED KOSOVO FORCE (KFOR)

As noted in previous reports regarding U.S. contributions in support of peacekeeping efforts in Kosovo, the U.N. Security Council authorized Member States to establish KFOR in U.N. Security Council Resolution 1244 of June 10, 1999. The mission of KFOR is to provide an international security presence in order to deter renewed hostilities; verify and, if necessary, enforce the terms of the Military Technical Agreement between NATO and the Federal Republic of Yugoslavia (which is now Serbia and Montenegro); enforce the terms of the Undertaking on Demilitarization and Transformation of the former Kosovo Liberation Army; provide day-to-day operational direction to the Kosovo Protection Corps; and maintain a safe and secure environment to facilitate the work of the U.N. Interim Administration Mission in Kosovo (UNMIK).

Currently, there are 23 NATO nations contributing to KFOR. Eleven non-NATO contributing countries also participate by providing military personnel and other support personnel to KFOR. The U.S. contribution to KFOR in Kosovo is about 1,700 U.S. military personnel, or approximately 10 percent of KFOR's total strength of approximately 17,000 personnel. Additionally, U.S. military personnel occasionally operate from Macedonia, Albania, and Greece in support of KFOR operations.

The U.S. forces have been assigned to a sector principally centered around Gnjilane 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. The KFOR operates under NATO command and control and rules of engagement. The KFOR coordinates with and supports UNMIK at most levels; provides a security presence in towns, villages, and the countryside; and organizes checkpoints and patrols in key areas to provide security, protect minorities, resolve 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 Kosovar 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 rationalize its force structure in the Balkans. The UNMIK international police and the Kosovo Police Service (KPS) have full responsibility for public safety and policing throughout Kosovo except in the area of South Mitrovica, where KFOR and UNMIK share this responsibility due to security concerns. The UNMIK international police and KPS also have begun to assume responsibility for guarding patrimonial sites and established border-crossing checkpoints. The