Mr. JOHNSON. Mr. President, I move to reconsider the vote, and I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Under the previous order, the Senate insists on its amendment, requests a conference with the House, and the Chair appoints the following conferees.

The Presiding Officer appointed Mr. JOHNSON, Mr. INOUYE, Ms. LANDRIEU, Mr. BYRD, Mrs. MURRAY, Mr. REED, Mr. NELSON of Nebraska, Mr. PRYOR, Mr. LEAHY, Mrs. HUTCHISON, Mr. BROWNBACK, Mr. MCCONNELL, Ms. COLLINS, Ms. MURKOWSKI, and Mr. COCHRAN.

Mr. JOHNSON. Mr. President, I note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. JOHNSON. 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 President, I ask unanimous consent that the order for the quorum call be rescinded.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. JOHNSON. Mr. President, I wish to thank my colleagues for their help in getting this bill completed. It was a long and slow process, but I am thankful we were able to dispose of a majority of the amendments that were offered.

This is a good bill. It is truly a bipartisan bill and contains some good programs that will help out military men and women and our Nation's vets. The bill provides investments in infrastructure for our military, including barracks and family housing, training and operational facilities, and childcare and family support centers. In addition, it fulfills the Nation's promise to our vets by providing the resources needed for the medical care and benefits that our vets have earned through their service.

As I have mentioned, for the first time the bill contains advance funding for vets' medical care for fiscal year 2011. This funding will ensure that the VA has a predictable stream of funding and that medical services will not be adversely affected should another stopgap funding measure be needed in the future.

I wish to thank my ranking member, Senator HUTCHISON, for her work on this bill. She was critical in getting the amendments cleared on her side of the aisle. I wish to thank her staff, Dennis Balkham and Ben Hammond, for their hard work. I also wish to thank the majority staff, Chad Schulken and Andy Vanlandingham, for their hard work on this important bill. I would especially like to thank the subcommittee clerk, Christina Evans, for her hard work and leadership on this subcommittee.

I also wish to acknowledge the hard work of the floor staff and the cloakroom staffs. Thank you, Dave and Lula, for helping us get to this point.

Mr. President, let me again thank my colleagues. Thank you.

I yield the floor, and I note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from Indiana is recognized.

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

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

EXECUTIVE SESSION

NOMINATION OF DAVID F. HAMILTON TO BE UNITED STATES CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT—Resumed

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

The assistant legislative clerk read the nomination of David F. Hamilton, of Indiana, to be United States Circuit Judge for the Seventh Circuit.

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

The Senator from Indiana is recognized.

Mr. BAYH. Mr. President, I wish to begin by thanking our colleague, Chairman LEAHY, for his leadership in this area. He has been a model of decorum and patience, and I am personally grateful for his leadership.

My father, as my colleagues may recall, served for 18 years on the Judiciary Committee. I lack his patience and therefore never have, but I admire very much Senator LEAHY and those who help shepherd these judicial nominations, which, unfortunately, are all too frequently unnecessarily contentious.

Secondly, I note the presence—I am sure he will be speaking shortly—of our colleague, Senator SESSIONS. Although Senator SESSIONS and I have a disagreement over this nomination, we have worked well in many areas, and I look forward to collaborating with him in the future in those many areas where we do find ourselves in agreement.

Today, I find myself in agreement with my friend and colleague from my home State of Indiana, Senator LUGAR, who yesterday on this floor issued a compelling statement in support of the nomination of David Hamilton for the Seventh Circuit Court of Appeals. For all those Members of this body or those viewing us from afar who have questions about Judge Hamilton, I strongly recommend they read Senator LUGAR's very eloquent statement in his behalf. He went through every suggested controversy point by point, debunking those who raised concerns about Judge Hamilton, and ended up by noting his 40 years of acquaintance with both the nominee and his family and his strong support for Judge Hamilton's nomination.

I rise today to speak in favor of the nomination of Judge David Hamilton. I join with Senator LUGAR to recommend Judge Hamilton because I know firsthand that he is a highly capable lawyer who understands the limited role of the Federal judiciary.

In recent days, some of Judge Hamilton's critics have unfairly characterized his record and even suggested that his nomination should be filibustered. I rise today to set the record straight and hope my colleagues will join Senator LUGAR and me in supporting this superbly qualified nominee.

Before I speak to Judge Hamilton's qualifications, I wish to briefly comment on the state of the judicial confirmation process generally. In my view, this process has too often become consumed by ideological conflict and partisan acrimony. I believe this is not how the Framers intended us to exercise our responsibility to advise and consent.

During the last Congress, I was proud to work with Senator LUGAR to recommend Judge John Tinder as a bipartisan, consensus nominee for the Seventh Circuit. Judge Tinder was nominated by President Bush and unanimously confirmed by the Senate by a vote of 93 to 0.

It was my fervent hope Judge Tinder's confirmation would serve as an example of what could happen when two Senators from different parties work together to recommend qualified, nonideological jurists to the Federal bench.

I know President Obama agrees with this approach. His decision to make Judge Hamilton his first judicial nominee was proof that he wanted to change the tone and follow the ''Hoosier approach'' of working across party lines to select consensus nominees.

On the merits, Judge Hamilton is an accomplished jurist who is well qualified to be elevated to the appellate bench. He has served with distinction as a U.S. district judge for over 15 years, presiding over approximately 8,000 cases. He is now the chief judge of the Southern District of Indiana, where he has been widely praised for his effective leadership. Throughout his career, Judge Hamilton has demonstrated the highest ethical standards and a firm commitment to applying our country's laws fairly and faithfully.

In recommending Judge Hamilton, I have the benefit of being able to speak from personal experience, because he was my legal counsel when I had the privilege of serving as Indiana's Governor.

If you ask Hoosiers about my 8 years as Governor, you will find widespread agreement that we charted a moderate, practical, and bipartisan course. As my

counsel, David Hamilton helped me craft bipartisan solutions to some of the most pressing problems facing our State.

He helped resolve several major lawsuits that threatened our State's financial condition. He wrote a tough new ethics policy to ensure that our State government was operating openly and honestly.

In addition to his insightful legal analysis, I could always count on David Hamilton for his sound judgment and the commonsense Hoosier values he learned growing up in southern Indiana. Like most Hoosiers, David Hamilton is not an ideologue.

During his service in State government, he also developed a deep appreciation for the separation of powers and the appropriate role of the different branches of government. If confirmed, he will bring to the seventh circuit a unique understanding of the important role of the States in our Federal system and will be ever mindful of the appropriate role of the Federal judiciary. He understands the appropriate role for a judge is to interpret our laws, not to write them.

Despite Judge Hamilton's long record as a thoughtful, nonideological jurist, his critics have sought to portray him as an ''activist'' judge hostile to religion. I have no doubt these attacks come as a surprise to his father, the Reverend Richard Hamilton, who is the former pastor of St. Luke's United Methodist Church in Indianapolis.

It is only in the upside-down, bipartisan world of Washington, DC, that the humble son of an Indiana pastor can be turned into a partisan zealot hostile to religion, which David Hamilton is not. To my mind, such outrageous attacks say more about the sad status of our judicial confirmation process than they do about Judge Hamilton.

Some of Judge Hamilton's critics have even suggested his nomination reaches the level of ''extraordinary circumstances'' justifying a filibuster. This is a nominee jointly recommended to the President by a moderate Democrat and the Senate's senior Republican. If this nomination constitutes ''extraordinary circumstances,'' then that phrase has ceased to have any meaning whatsoever. I sincerely hope that all involved will agree to give Judge Hamilton the up-or-down vote he so clearly deserves. If not, I fear that filibusters will become routine regarding judicial nominees. That is not the way our Framers intended us to operate, nor the way that we should.

On a personal note, I have known Judge David Hamilton for over 20 years. I know him to be a devoted husband to his wife Inge, and a loving father to his two daughters, Janet and Devney. He is the nephew of former Congressman Lee Hamilton, a man whose integrity is beyond reproach.

As someone who personally knows and trusts Judge Hamilton, I say to my colleagues he is the embodiment of good judicial temperament, intellect, and evenhandedness. If confirmed, he will be a superb addition to the Seventh Circuit Court of Appeals.

I urge my colleagues to join me and Senator LUGAR in supporting this extremely well-qualified and deserving nominee.

Before I end, let me say a couple of additional things. David Hamilton has been subjected to a number of unfounded attacks, probably the most ludicrous of which is that he is anti-religion in general and hostile to Jesus Christ in particular. His father was a 40-year Methodist pastor. David Hamilton was baptized and married by his father. Before he served as a Federal district court judge, he placed his hand upon the Bible—the Old and New Testament alike—and pledged loyalty to our Nation and devotion to our laws. He is not hostile to religion or to Jesus Christ. That charge is unfounded.

Likewise, it has been suggested that he is, in some way, soft on crime. A particular case has been cited involving child pornography. I find this to be ironic since he sentenced the accused to the maximum sentence allowed by law—the maximum sentence allowed by law, not 1 day less. Judge Hamilton has had the responsibility of handing down 700 criminal sentences in his time on the bench. The Justice Department has appealed two—a mere fraction of 1 percent. Judge Hamilton is not soft on crime.

Finally, it has been suggested that Judge Hamilton is a judicial activist. A case in our State involving abortion rights has been cited in that regard. I find that to be ironic, as well, because the president of the Indiana Federalist Society, an organization not known for embracing activist judges, strongly endorsed Judge Hamilton's nomination, saying:

> I regard Judge Hamilton as an excellent jurist with a first-rate intellect. He is unfailingly polite to lawyers and asks tough questions to both sides, and he is very smart—to the left of center, but well within the mainstream.

That is the position of Geoffrey Slaughter, president of the Indiana Federalist Society.

I find this set of circumstances to be most unfortunate. David Hamilton is superbly qualified. I think this is, more than anything else, a comment on the sad state of our judicial nominating process, where this individual has been caricatured as out of sorts with reality, and if extraordinary circumstances are found with regard to David Hamilton, I am afraid that filibusters of judicial nominations will become routine on the floor of the Senate. That would not be good for this body or our country. I hope we don't go there today.

Again, I urge my colleagues to join with me and Senator LUGAR in strongly invoking cloture on this nomination and voting to confirm him to the court of appeals.

I am glad to see Senator SESSIONS. I noted our many areas of agreement and it has been my pleasure working with the Senator from Alabama in the past—even as we have a difference of opinion about this nomination today.

I ask unanimous consent that the time for any quorum calls be charged equally to both sides.

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

Mr. BAYH. I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SESSIONS. I thank Senator BAYH for his comments and admire his support for a friend, the nominee under consideration today. He is an excellent Senator who continues to strive for fairness and good policy in the Senate.

Certainly, no one likes to oppose a nominee for the Federal bench. It is not a very pleasant thing to do. Having seen that process from both sides, I particularly don't relish the thought. But judges are seeking lifetime appointments to the Federal bench, and they would hold their office for life, without the ability of the public to review, even if the judge conducts himself in a way that is not appropriate. The American people may vote us out of office, and they do from time to time. They can vote their Governors out, as well as others. But Federal judges are not subject to that. Therefore, I think it is critically important that before we bestow that lifetime appointment, that power to define the meaning of words in our laws and our Constitution, we be certain that the nominee is a person who is committed, as the oath says, to serving under the Constitution and the laws and not above them.

This nominee has some problems. Unfortunately, it is not totally an isolated matter. There is indeed a philosophy prevalent among many judges in law schools that has led to, I think, an abuse of office by certain judges. In recent years, they have developed an idea that the Constitution is not a changeless contract with the American people, but a ''living document,'' they say—in other words, a malleable instrument that they are free to massage, so that it is made to read as they would like it to read, or as they wish it had been written rather than doing their duty, which is to follow the document as it was in fact written.

I believe this disrespects the Constitution, weakens the Constitution. If it is not respected by this judge today, what would prohibit a judge tomorrow with a different philosophy from violating it at that point? I think it is indeed a dangerous philosophy, one that Judge Hamilton has bought into. That is part of his approach to law.

I do think judges must be committed to their oath and to the Constitution, and that they are not empowered to amend the Constitution, or write footnotes to it. Judge Hamilton has been nominated by the President for the U.S. Court of Appeals for the Seventh Circuit. He is now a Federal district judge. In that capacity, he is one step

below the Supreme Court, and he would have considerably more power to define words in our laws and Constitution than he does as a district judge. During his campaign, the President promised to seek a bipartisan administration, but we have had a number of candidates, I think, for the judiciary, and efforts on matters such as health care, that demonstrate otherwise. Some time ago, a number of us—I think all 40 Republicans—wrote and suggested that he re-nominate some outstanding candidates for the circuit court, who President Bush had submitted and were not confirmed, just as President Bush re-nominated some of President Clinton's nominees when he took office. We suggested it would be a good first step in showing that kind of commitment to openness. But the White House never even acknowledged that letter.

With Judge Hamilton, his first judicial nominee, I think we have a problem. According to some press reports, Judge Hamilton's nomination was intended to send a pacifying signal to the Republicans, and they indicated—some of the Administration's spokesmen—that future nominees would be more ideologically provocative. I am at a loss to think that we would have someone with greater ideological commitment than Judge Hamilton. Perhaps we will see that in the future. I don't think we have seen that to date. I have voted for most of the President's nominees, but some I have not supported.

To begin with, Mr. Hamilton was a board member and vice president of the ACLU chapter of Indiana. They take some very strong positions on constitutional questions that I think are unjustified. He signed onto that organization fully knowing what they stood for. He previously worked for and has been associated with ACORN, which is certainly not a mainstream organization but a real left-wing group. Investigations and reports of their activities have not made us feel good about ACORN, that is for sure.

There is a theory that Judge Hamilton's views are outside the mainstream of President Obama's other nominees, the vast majority of whom have openly rejected the President's so-called empathy standard, and have stated that empathy should not play a role in a judge's consideration of a case. Associate Justice Sotomayor rejected this notion explicitly at her confirmation.

However, instead of embracing the constitutional historic standard of jurisprudence that Justice Sotomayor said she believed in, one that says judges must faithfully adhere to the rule of law as written, Judge Hamilton has embraced openly the empathy standard which, I submit, is no standard at all. It is not a legal standard.

In response to a follow-up question after his hearing, Judge Hamilton said empathy was ''important in fulfilling judicial oaths.'' He further stated, and this was in answer to a question, I believe, by Senator HATCH—he further stated:

> A judge needs to empathize with parties in the case, plaintiff and defendant, crime victim and accused defendant, so that the judge can better understand how the parties came to be before the court and how rules affect those parties and others in similar situations.

I disagree with that. It is a pretty significant disagreement, actually. Whenever a judge empathizes with a party, whenever a judge uses or allows his personal beliefs, biases, or experiences to inform or influence a decision in favor of one party, he would then necessarily disfavor the other party. Empathy directly conflicts with the judicial oath which requires judges to faithfully and impartially ''administer justice without respect to persons, and do equal right to the poor and the rich . . . under the Constitution and laws of the United States.''

Judge Hamilton has said he believes a judge will ''reach different decisions from time to time . . . taking into account what happened and its effect on both parties, what are the practical consequences.''

But this is an outcome-determinative philosophy of law, and outcomes are to be considered by the legislative branch, the policymaking branch, when they pass the law. We pass laws and we do our best to figure out what impact they will have and how they should be enforced, and we draw the lines at this and that. It goes to a judge. Then a judge now is empowered to say: I know they wrote this, but I don't like the effect it is going to have on party A, so I am not going to enforce it. I don't want to be harsh. I don't want to be a strict constructionist. I believe I have the ability to empathize with the parties. The way I feel today I empathize with this party and not that party.

You see, that is not law. It is not law in the great American tradition of law. It is more akin to politics. Judges put on robes, they take oaths, they conduct themselves—the judges I have known over the years—in every way possible to send a message that they follow their oath and they do their duty and they treat people fairly, without bias or prejudice or empathy. Is empathy not a form of prejudice for one party or another?

I think this is a big deal. These are big issues, and I think Judge Hamilton's position is incorrect. He is a good person; I do not dispute that. But we are talking about whether he should be empowered to be an appellate judge, one step below the U.S. Supreme Court.

His view of the role of a judge troubles me. In a 2003 speech he said the role of a judge includes ''writing a series of footnotes to the Constitution.''

In explaining this answer to a question Senator HATCH submitted to him after the hearing, he wrote that he believes the Framers intended for judges to be able to amend the Constitution through evolving case law, in effect saying:

> Both the process of case-by-case adjudication and the Article V amendment processes are constitutionally legitimate, and were both, in my view, expected by the Framers, provided that case-by-case interpretation follows the usual methods of legal reasoning and interpretation.

I think that is a pretty strong statement. He says the process of case-by-case adjudication and Article V amendment processes are constitutionally legitimate—in effect, constitutionally legitimate ways to alter the document.

Article V is the amendment process. That is how we amend the Constitution. I am troubled by his statements. That was just recently when he submitted a written answer to questions. That is not a sound view of judging, in my opinion.

I would say, indeed, it is the essence of an activist judicial philosophy. That philosophy has impacted a number of his rulings as a Federal district court judge. His rulings show a lack of appreciation for the popular will of the people, of the State and Federal Government, and the elected branches. In more than a few instances he has used his position to drive a political agenda, it seems clear to me. Some can say it is not. We all make our best judgment about those matters. I think in this case he has a political agenda that is guided by personal beliefs and not the rule of law.

He has been reversed quite a number of times by the Seventh Circuit Court of Appeals, the very court for which he has now been nominated.

I would like to next look at the Hinrichs v Bosma case. I do not contend, and it is not right to say, Judge Hamilton is hostile to religion. It does appear he is hostile to the free expression of religion in certain circumstances and has been reversed as a result of it.

I want to be fair to him. In the Hinrichs case, he enjoined or issued an order to the speaker of the Indiana House of Representatives, telling the speaker that he cannot allow sectarian prayers, ruling that the prayers being said violated the Establishment Clause of the Constitution because many of the prayers expressly mentioned Jesus Christ. Yet in a post-judgment motion, Judge Hamilton permitted the use of Allah by a Muslim imam who was invited to pray at the legislature because he found there was ''little risk'' that such prayers ''would advance a particular religion or disparage others.''

I don't think that is a sound legal approach. But that is exactly what he said. People can say he did not mean that. But that is what happened. Judge Hamilton concluded in that case:

> When government prayers are expressly and consistently sectarian, i.e., when they express faith of a particular religion, then the opportunity for prayers is being used to advance a particular religion contrary to the mandate of the Establishment Clause.

I don't think that is accurate because the law is, indeed, difficult in this area. But this is one of the more dramatic rulings I have seen in this area of the law.

In addition to prohibiting such sectarian prayers, as he defined it, Judge

Hamilton held that the speaker of the house must advise any officiant who opens the legislature with a prayer that a prayer must be nonsectarian, must not advance any one faith, or disparage another, and must not use ''Christ's name or any other denominational appeal.''

The Seventh Circuit initially denied the speaker's request for a stay of that injunction, finding that the ruling was supported by some precedent. However, after full briefing and oral argument, they reversed and remanded with instructions to dismiss, finding that the plaintiffs lacked standing.

I would just note for my colleagues that every day this Senate opens with a prayer. We have a Chaplain on the payroll of the U.S. Government who walks up those steps and stands behind the Speaker's chair and opens the session with a prayer and periodically mentions Jesus's name in that process. So I don't know how we get to this. Nobody, I assume, would challenge what we do here—at least they have not done so effectively yet.

In Grossbaum v Indianapolis-Marion County Building Authority, Judge Hamilton denied a rabbi's plea to allow a menorah to be part of a municipal building's holiday display. The Seventh Circuit unanimously reversed that erroneous opinion, finding that Judge Hamilton failed to acknowledge the rabbi's right to display the menorah as symbolic religious speech protected by the Constitution.

As we know, in the Constitution's first amendment it says Congress—us—Congress shall make no law respecting the establishment of a religion, or prohibiting the free exercise thereof. That is all the Constitution says about religion. It just as strongly prohibits limitations on free exercise of religion as it clearly prohibits the government from establishing a church and making it preferable over others.

It is interesting. The results reached in these decisions are strikingly similar to the positions consistently advocated by the ACLU, the organization with which Judge Hamilton has been associated prior to becoming a judge.

Judge Hamilton's problematic rulings are not limited to cases involving religion. Lawyers quoted in the Almanac of the Federal Judiciary describe him as one of the most lenient judges in his district in criminal matters. His rulings on the bench have lived up to that reputation.

In the Rinehart case, Judge Hamilton, I think inappropriately, acted and used his opinion in the case to request clemency—that is either elimination of the penalty he imposed pursuant to the mandatory Federal guidelines, at least within that range—for a police officer who had pled guilty to two counts, not of seeing pornography or possessing pornography but producing child pornography. A 32-year-old officer had engaged in ''consensual''—consensual sex with two teenagers and videotaped the activity.

In United States v Woolsey, the Seventh Circuit faulted Judge Hamilton for disregarding an earlier felony drug conviction in order to avoid imposing a life sentence on a repeat offender. He didn't want to do that so he ignored the prior conviction that would have called for that.

In reversing his decision, the Seventh Circuit reminded Judge Hamilton that he was not free to ignore prior convictions, regardless of whether he deemed the penalty for recidivists to be appropriate.

Judge Hamilton's most activist decision may be a series of rulings in A Woman's Choice v. Newman. Through the rulings in this case, Judge Hamilton succeeded in blocking the enforcement of an Indiana informed consent law for 7 years. In reversing, the Seventh Circuit court noted that Judge Hamilton had abused his discretion. This is how they described it.

This is a strong condemnation, from my experience, as to how appellate judges deal with lower court judges who make errors. They know judges make errors from time to time. They just reverse it and try not to be too critical. But this is what they said in this case:

> For seven years Indiana has been prevented from enforcing a statute materially identical to a law held valid by the Supreme Court in Casey, by this court in Karlin, and by the Fifth Circuit in Barnes. No court anywhere in the country (other than one district judge in Indiana) has held any similar law invalid in the years since Casey . . . Indiana (like Pennsylvania and Wisconsin) is entitled to put its law into effect and have that law judged by its own consequences.

They were referring to Judge Hamilton. In other words, if the judge didn't like the consequences of it and if his empathy made him believe this was not a good policy, he is not empowered to do that. The legislature passed a constitutional statute that simply said: Before a person has an abortion, they must be given notice of what the ramifications are so they can be informed when they make their decision. Apparently, he didn't like that. For 7 years, through a series of rulings, he kept it from being enforced. This case is a blatant example of him allowing his personal views to frustrate the will of the people and the popularly elected representatives of the government of Indiana. The people of Indiana went through a lot as a result. There were multiple appeals and lawsuits and attorneys. They were forced to expend great sums of money to overcome what appeared to me to be obstructionism.

Chief Justice Roberts said it best when he said judges should be neutral umpires, calling balls and strikes based on the law and the evidence. Unfortunately, Judge Hamilton disagrees with the idea that a judge should be a neutral umpire. This is what he said:

> Judges reach different decisions from time to time. In that sense, the call is not was that a ball or a strike. But taking into account what happened and its effects on both parties, what are the practical consequences.

We don't want a baseball umpire who says: If I call this a strike, that will be the third out and the game will be over. I believe, with all sincerity, these views represent a results-oriented, activist philosophy that is hostile to the great American role of a judge in our constitutional system. I believe it disqualifies him for elevation to the court of appeals.

This is one of those extraordinary circumstances where the President should be informed of that fact by a vote of the Senate. That is why I will not be able to support cloture.

It will be the first time I have voted against cloture in a matter of this kind. I take this seriously. I talked about it some yesterday. If we could reach an agreement with my colleagues, Senator LEAHY and others, to not follow the filibuster rule, I think the Senate would probably be better. But under President Bush, some 30 filibusters against his nominees were effected. Eventually, we had a political brouhaha here for several years that culminated in a decision that the filibuster would be acceptable if you believed there were extraordinary circumstances justifying that against a nominee. This judge's history and background reach that level. That is why I will not be voting for him.

I don't think we should abuse this policy. I think we would be better off if we did not. But that is what the Senate basically decided when the Gang of 14 reached their agreement in the midst of a debate, for those who said you shouldn't filibuster and for those who said you can, and they reached that agreement. I think that is probably the state of the situation in the Senate. Based on that standard, I will oppose cloture.

I yield the floor.

Mr. HATCH. Mr. President, today the Senate takes up the nomination of David Hamilton to the U.S. Court of Appeals for the Seventh Circuit. This controversial nominee's record including his decisions, speeches, and testimony before the Judiciary Committee reflects an activist judicial philosophy that is inconsistent with the proper role of judges in our system of government. As a result, while I voted for cloture, I will vote against confirmation.

Even with control of both the White House and Senate, and with the largest Senate majority in 30 years, Democrats are still complaining about the slow judicial appointment pace. But we have nominees for only 19 of the current 99 judicial vacancies. Twenty-four of the 80 current vacancies for which there are no nominees are more than 1 year old. And yet one of the nominees we have received and who will have a hearing tomorrow would fill a seat on the U.S. district court that is not vacant at all.

At this point in 2001, President George W. Bush had sent nearly twice as many judicial nominees to the Senate despite dealing with the aftermath of the 9/11 terrorist attacks and a Senate controlled by the other political

party. And nominees to the U.S. district court this year have been confirmed nearly 15 percent faster than President Bush's district court nominees during the 107th Congress.

Democrats have nonetheless accused the minority of engaging in filibusters. If the word ''filibuster'' is used anytime the Senate does not blindly and immediately rubberstamp nominees, then the word no longer means anything at all. Democrats have circulated their talking points to reporters and commentators, who in some cases repeat outright falsehoods. Last week, the Judiciary Committee chairman placed in the Record a commentary by a law professor claiming that there had already been cloture votes on three judicial nominees. The CONGRESSIONAL RECORD is supposed to be a nonfiction work.

On the one hand, Democrats claim the Senate is not confirming nominees and then, on the other hand, complain that Senators actually must vote on them. This no doubt baffles many Americans, who probably think that voting is one of the things Senators come here to do. But the practice of using a rollcall vote to confirm norcontroversial judicial nominees was already firmly established, and not by Republicans. The percentage of district court nominees confirmed by rollcall vote during the administration of George W. Bush was 26 times higher than during the previous 50 years. You heard that right, 26 times higher. And the percentage of those rollcall votes without any opposition skyrocketed as well. The majority today has no one to blame but themselves for forcing such changes in confirmation tradition and practice.

If Republicans really wanted to obstruct President Obama's nominees, I suppose we could have followed the Democrats' example from 2001. Under Senate rules, pending nominations expire and return to the President when the Senate adjourns or recesses for more than 30 days. We routinely waive that rule to carry pending nominations over the August recess. But on August 3, 2001, Democrats objected to that traditional practice in order to send 45 judicial nominees back to the President. Some had been nominated literally the day before. Some had been nominated to life-tenured Federal courts, but others to term-limited courts such as the U.S. Court of Claims or the District of Columbia Superior Court. It did not matter to my Democratic friends, they did anything and everything they could to keep nominees from any consideration at all, including inventing entirely new forms of obstruction.

And then, of course, there were the first filibusters in American history used to defeat majority-supported judicial nominees. My Democratic friends invented that one too during the previous administration. Their scorched-earth campaign changed many long-established confirmation traditions and practices. So it is little wonder that today, with such a controversial nominee before us, many on this side of the aisle feel justified in following the Democrats' playbook. I do not blame them for that. I voted for cloture today because I continue to believe that the Constitution's assignment of roles in the judicial selection process counsels against using the filibuster to defeat majority-supported nominees. Democrats should not have dragged the Senate across that line, and I fear that doing so may have unalterably changed how this body fulfills its role in the judicial selection process. Yet, for now at least, I still believe that the Senate fulfills its advice and consent role best by voting up or down on nominees that have been reported to the floor. That is why I voted for cloture on this nomination.

That said, I must vote against confirmation of this controversial nominee. Qualifications for judicial office include not only legal experience but also judicial philosophy. I define judicial philosophy as an understanding of the power and proper role of judges in our system of government. Judge Hamilton's activist record fails that standard.

Turning to that record, Judge Hamilton has rendered a pattern of decisions that evidence a willful assertion of personal views over the requirements of the law. Now I know we will hear that only a fraction of Judge Hamilton's decisions as a U.S. district judge are controversial. Most of any judge's decisions make no waves and raise no flags. When he served in this body, President Obama himself said that only 5 percent of the Supreme Court's decisions are truly the hard cases, and this percentage may shrink with each step down the judicial pyramid. I need not recount the few cases that my friends on the other side found more than sufficient to oppose so many nominees in the past. The cases that matter are the ones that tell us what we need to know about a judge and his judicial philosophy. I know other Senators will be speaking about a number of these and I want to highlight two of them.

In one notorious case, Judge Hamilton for 7 years blocked enforcement of Indiana's law requiring informed consent before a woman can obtain an abortion. The Supreme Court had 5 years earlier upheld a Pennsylvania informed consent law that the seventh circuit would later describe as ''materially identical'' to the one before Judge Hamilton. That was the precedent he should have followed. Instead, he turned a minor factual distinction into a constitutional difference and issued a preliminary injunction in 1995. Following the Supreme Court, the Seventh Circuit upheld a virtually identical Wisconsin statute in 1999, but Judge Hamilton also ignored that precedent and issued a permanent injunction in 2001 against the Indiana law. I do not see any way to explain his decisions in this case except as a willful assertion of his own opinion over what the law required. When the Seventh Circuit finally reversed him in 2002, it said that no court anywhere in America had done what Judge Hamilton had done.

In another case, Judge Hamilton chose to ignore one of a defendant's prior drug convictions so that he did not have to impose a life sentence. In Judge Hamilton's personal opinion, a court in another state—where Judge Hamilton, of course, had no jurisdiction whatsoever should have set aside that earlier conviction and so he was simply going to ignore it. Mind you, even the defendant himself had not denied the earlier conviction, but Judge Hamilton was still going to substitute his own judgment. In one of the most stunning statements I have ever read in a judicial opinion, Judge Hamilton wrote that he ''ought to treat as having been done what should have been done.'' In other words, he would not let the law, the facts, rulings of other courts with proper jurisdiction, or anything else stand in the way of how he wanted things to be. That is perhaps the ultimate mark of the activist judge, driven by results and finding whatever means necessary to get there. When the Seventh Circuit reversed Judge Hamilton, it cited its own precedents that Judge Hamilton should have followed and concluded: ''Furthermore, we have admonished district courts that the statutory penalties . . . are not optional, even if the court deems them unwise or an inappropriate response to repeat drug offenders.''

A judge should not have to be told that statutory requirements are not optional. A judge should not have to be told that he must decide cases based on the law rather than on his personal sense of justice or his belief about what should have been done at other times by other courts. A judge who must be told that he has an activist approach to judging that, in my opinion, should not be rewarded with promotion to the federal appeals court.

Those are just two of Judge Hamilton's decisions which I found fit a disturbing pattern of deciding cases based on his own views rather than the law. I also found that the rest of Judge Hamilton's record reflected the same activist view of judicial power. In speeches, for example, Judge Hamilton has endorsed the view that ''part of our job here as judges is to write a series of footnotes to the Constitution.'' He has said that those supporters to the equal rights amendment to the Constitution ''lost the battle but have won the war'' because the Supreme Court changed the Constitution in substantially the same way that the ERA would have.

This latter view that judges may amend the Constitution through their decisions is particularly troubling. I asked Judge Hamilton about this statement in written questions following his hearing. Judge Hamilton stated that both the process of case-by-case adjudication and the article V amendment

process are constitutionally legitimate means of changing the Constitution and both were expected by America's Founders. He is wrong on both counts. If judges may change the Constitution through their decisions, they literally can make the law they use to decide cases. The Constitution cannot control judges if judges control the Constitution.

America's Founders flatly and explicitly rejected that view. In his farewell address, President George Washington said that if the Constitution must be changed, ''let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation.'' By his own words, the Father of our Country disputed Judge Hamilton's assertion about the judiciary's proper role. In Marbury v. Madison, Chief Justice Marshall wrote that America's Founders intended the Constitution to govern courts as well as legislatures. This notion that constitutional amendments by judges are as legitimate as those by the people is completely inconsistent with the proper role of judges in our system of government but completely consistent with the activist approach evidenced by Judge Hamilton's decisions.

Well, I have said enough here to indicate the basis for my opposition to this controversial judicial nominee. I regret that President Obama chose someone with such an activist judicial philosophy as his first judicial nominee. I had hoped that he would take a more balanced approach to judicial selection, choosing consensus nominees that most Senators could support. I hope the nominee before us today does not set a pattern to be followed in the future and I will vote against his confirmation.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I wish to respond to some of the things the distinguished Senator from Alabama has said. To call this the first filibuster of a judicial matter this year is not totally accurate. We have people who are confirmed unanimously after being blocked for month after month by the Republican side, who then says: But we didn't filibuster.

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

Mr. LEAHY. Yes.

Mr. SESSIONS. Will the Senator cite a single vote prior to this where this Senator has voted against cloture?

Mr. LEAHY. That is not what I said. I am saying we have had several nominees who were approved, not only judicial but others, overwhelmingly—80, 90, 100 votes. They had to wait month after month because the Republican side would not allow us to even proceed to them by filibustering or threatening a filibuster. You have de facto de jure filibusters. During President Clinton's time, the Republicans pocket-filibustered 60 of President Clinton's nominees.

I yield up to 5 minutes to the distinguished senior Senator from Pennsylvania.

The PRESIDING OFFICER (Mr. KAUFMAN). The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I have sought recognition to speak in favor of the nomination. Speaking candidly, perhaps bluntly, Judge Hamilton is a pawn in partisan political warfare. That is the long and short of it. This is the 90th filibuster in the past several months. This follows a pattern, regrettably, that goes back almost two decades, when both sides, Democrats and Republicans at various times, have engaged in filibusters against judicial nominees where there was no justification to do so. It occurred extensively during the Clinton administration. At that time, on the other side of the aisle, I supported many of President Clinton's nominees. It occurred during the Bush administration, when I chaired the Judiciary Committee, and there were repeated filibusters by Democrats against President Bush's nominees.

At that time, this Chamber was almost torn apart with the ferocity and intensity of the partisanship, with serious consideration being given to what was called the nuclear or constitutional option, when there was serious consideration given to altering the traditional requirement of 60 votes to end a filibuster. There was a tactic devised to challenge the ruling of the Chair, which could be overruled by or upheld by only 51 votes, and thereby move the judicial nominees without the traditional 60 votes. Fortunately, sanity and tradition prevailed and we worked out a compromise with the so-called Gang of 14 to confirm some and to reject others. Now we find the pattern continues.

It is my hope that at some point we can declare a truce, an armistice, and stop the partisan political warfare. The nomination of Judge Hamilton would be a good occasion to do that.

Senator LUGAR, in his mild manner, in a floor statement in support of the nomination, has said:

> The confirmation process is often accompanied by the same oversimplification and distortions that are disturbing even in campaigns for offices that are, in fact, political.

Having worked with Senator LUGAR in this Chamber for the better part of three decades, I have observed his modesty, his circumspection, and his understatement. But those soft words about oversimplification and distortions give a clue to what is going on today.

Regrettably, this is part of a broader picture, a broader picture of partisan political warfare. On the major issues of the day, the stimulus package, not one Member of 170-plus in the House of Representatives, not one Republican Member was for the stimulus package. Only three Republicans in this Chamber would even talk to Democrats. In the House of Representatives, on comprehensive health care reform, only one Republican out of 170-plus stood in favor of the bill. He became a hero or, perhaps more accurately, an oddity. In the Senate, only one Republican in the Finance Committee would stand and vote in favor of reform. Is it any wonder why the Congress of the United States is held in such low esteem by the American public? Is it any wonder why approval ratings across the board are dropping in practically free-fall, with a dull thud, because the American people see what is going on in this Chamber and in the Chamber across the Rotunda and are, frankly, disgusted with it. They are sick and tired of seeing the partisan politics at play.

A great deal has been said about the qualifications of David Hamilton. Beyond any doubt, he is well qualified for the job. During my tenure on the Judiciary Committee, some three decades, part of which I served as chairman, I have seldom seen a better qualified candidate. I am reminded of the objections raised by Democrats to Judge Southwick, picking a couple lines from a couple opinions. Fortunately, sanity prevailed and Judge Southwick was confirmed. This is an outstanding man.

One additional note. His uncle is Lee Hamilton, the very distinguished former Member of the House of Representatives.

I address all my colleagues: Let's call a truce. Let's end the partisan political warfare. Let's start with the confirmation of Judge Hamilton.

Mr. LEAHY. I thank the distinguished Senator from Pennsylvania.

I yield up to 4 minutes to the Senator from Michigan.

The PRESIDING OFFICER. The Senator from Michigan.

Ms. STABENOW. I thank the distinguished chairman of the Judiciary Committee, not only for his commitment but his patience as he has had to labor through objection after objection, stalling tactic after stalling tactic, to fill these critical judgeships. On March 17, President Obama nominated his first judge to the Federal bench, David Hamilton, whose nomination the Republicans are now filibustering. He nominated him on March 17. Judge Hamilton is not a partisan judge. He has an excellent record. He has upheld the law. He has been an impartial umpire of cases before him. For 15 years, he has served with distinction on the Federal district court, and he has the strong support of his two home State Senators, a distinguished Republican and a distinguished Democrat. He has the highest rating from the American Bar Association. Yet the Republicans are still stalling his confirmation vote. Again, he was nominated on March 17.

This fair and impartial judge is being blocked for no other reason than to stop us from filling a critical seat on the appeals court with President Obama's nominee.

As we know, and as the distinguished Senator from Pennsylvania spoke about a moment ago, this is not a first.

In fact, 90 times so far this year—I am going to have to get a bigger chart soon—90 times we have seen Republicans come to the floor and object in some manner to moving our country forward, to moving the people's agenda forward.

Over and over again, we are seeing tactics to simply slow the Senate down, and a majority of these objections, as the Presiding Officer knows, have ended actually in unanimous votes once we have actually gotten through all of the process, all of the strategies, and actually gotten to a vote. Almost in every case, people have been confirmed overwhelmingly, if not unanimously, and the same is true with legislation.

We are at a point where the stalling has to stop. We have two wars happening. We have the highest unemployment in a generation. We have an economy to worry about, financial reform to worry about, and certainly health care, which is about jobs, which is in front of us now.

The time is now to stop. Every Senator has the right to vote yes or no on a nominee or on legislation. But 90 times—and counting—we have simply seen objections and stalling tactics to slow down the business of this country. I hope we are going to see that stop in the interest of everything we need to get done.

I strongly support this nominee.

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I ask the distinguished Presiding Officer to notify me when I have 3 minutes remaining.

The PRESIDING OFFICER. The Chair will do so.

Mr. LEAHY. Mr. President, today, the Senate finally turns to the Republican filibuster against the nomination of Judge David Hamilton of Indiana to the Seventh Circuit. Republican Senators who, just a few years ago, protested that such filibusters were unconstitutional. Republican Senators who joined in a bipartisan memorandum of understanding to head off the ''nuclear option'' that the Republican Senate leadership was intent on activating. Republican Senators who agreed that nominees should only be filibustered under ''extraordinary circumstances.'' Those same Republican Senators are now abandoning all that they said they stood for, and are instead joining together in an effort to prevent an up-or-down vote on the nomination of a good man and a good judge, David Hamilton of Indiana.

The American people should see this for what it is: more of the partisan, narrow, ideological tactics that Senate Republicans have been engaging in for decades as they try to pack the courts with ultraconservative judges. What is at stake for the American people are their rights, their access to the courts, their ability to seek redress for wrongdoing.

I thank the distinguished Senator from Michigan for pointing out these 90 delays just in this year alone. In evaluating this nomination, the nonpartisan American Bar Association's Standing Committee on the Federal Judiciary unanimously rated Judge Hamilton ''well qualified,'' the highest rating possible. He has served as a Federal district Judge for 15 years and is now the chief judge in his district. His nomination is supported by the senior Republican in the Senate, his senior home State Senator, Senator LUGAR, and by Senator BAYH. That is correct: Judge Hamilton has the support of both of his home state Senators, the longest-serving Republican in the Senate, and a well-respected moderate Democrat.

Unlike his predecessor, President Obama has reached across the aisle to work with Republican Senators in making judicial nominations. The nomination of Judge Hamilton is an example of that consultation. Other examples are the recently confirmed nominees to vacancies in South Dakota, who were supported by Senator THUNE, and the nominee confirmed to a vacancy in Florida, supported by Senators MARTINEZ and LEMIEUX. Still others are the President's nomination to the Eleventh Circuit from Georgia, supported by Senators ISAKSON and CHAMBLISS, his recent nominations to the Fourth Circuit from North Carolina, which I expect will be supported by Senator BURR, and the recent nomination to a vacancy in Alabama supported by Senators SHELBY and SESSIONS on which the Judiciary Committee held a hearing 2 weeks ago.

I remind those Republican Senators who endorsed the Memorandum of Understanding on Judicial Nominations in 2005 of what they wrote when there was a Republican President in the White House. How quickly they seem to forget. They said:

> We believe that, under Article II, Section 2, of the United States Constitution, the word ''Advice'' speaks to consultation between the Senate and the President with regard to the use of the President's power to make nominations. We encourage the Executive branch of government to consult with members of the Senate, both Democratic and Republican, prior to submitting a judicial nomination to the Senate for consideration.
>
> Such a return to the early practices of our government may well serve to reduce the rancor that unfortunately accompanies the advice and consent process in the Senate.
>
> We firmly believe this agreement is consistent with the traditions of the United States Senate that we as Senators seek to uphold.

How easy it was for them to say at a time when we had a Republican President. Now we have a Democratic President who has done exactly what these Republican Senators recommended. He has consulted with home state Senators from both sides of the aisle regarding his judicial nominees. And yet Republican Senators still say: Whoops, no. We are going to stall. We are going to filibuster. We are going to make you wait 6 months to get a nominee through, in one instance, who then got a unanimous vote.

In the last administration, with a Republican President, they condemned filibusters of judicial nominations as ''unconstitutional,'' ''obstructionist,'' and ''offensive.'' They issued a threat, though, to filibuster before President Obama made a single nomination. They wrote in a March 2 letter to the President:

> If we are not consulted on, and approve of, a nominee from our states, the Republican Conference will be unable to support moving forward on that nominee.

Well, of course, they were consulted. The President, in his first nomination, went to the senior most member of the Republican Party, Senator LUGAR, for his approval and his support. He ended up doing every single thing the Republicans demanded that he do, and their response was: Whoops, never thought you would do what we asked for. We are still going to filibuster.

The American people and the Senate need to understand that Judge Hamilton was nominated with the support and strong endorsement of Senator LUGAR, the longest-serving Republican in the Senate. At Judge Hamilton's hearing over 7 months ago Senator LUGAR described Judge Hamilton as ''an exceptionally talented jurist'' and ''the type of lawyer and the type of person one wants to see on the Federal bench.'' He knows David Hamilton and said of him at his hearing:

> I have known David since his childhood. His father, Reverend Richard Hamilton, was our family's pastor at St. Luke's United Methodist Church in Indianapolis, where his mother was the soloist in the choir. Knowing first-hand his family's character and commitment to service, it has been no surprise to me that David's life has borne witness to the values learned in his youth.

Senator LUGAR gave a brilliant speech on the Senate floor just yesterday, speaking in favor of Judge Hamilton. I encourage every member of the Senate to review his well-considered statement in which he rebuts the thin, partisan attacks on Judge Hamilton and his record. As Senator LUGAR said, a fair review of his judicial record ''will reveal that Judge Hamilton has not been a judicial activist and has ruled objectively and within the judicial mainstream.''

Senator LUGAR is one of the finest Senators to have ever served in the Senate. First elected in 1976, he is the longest serving U.S. Senator in Indiana history. He is a strong man with strong views, a conservative Republican. He is no one's shill.

Instead of praising the President for consulting with the senior Republican in the Senate, the Republican leadership has doubled back on their demands when a Republican was in the White House. No more do they talk about each nominee being entitled to an up-or-down vote. That position is abandoned and forgotten. Instead, they now seek to filibuster this judicial nomination and engage is the very act that Republican leaders used to contend that they never do. They have also abandoned the new position they

took only months ago when they threatened to filibuster if not consulted. We are forced to overcome a filibuster of this nomination despite the President's bipartisan consultation with Senator LUGAR.

When President Bush worked with Senators across the aisle, I praised him and expedited consideration of his nominees. When President Obama reaches across the aisle, the Senate Republican leadership delays and obstructs his qualified nominees.

Today is November 17. By November 17 of the first year of George W. Bush's Presidency, the Senate had confirmed 18 district and circuit court judges. By contrast, once cloture is invoked and the Republican filibuster ended, Judge Hamilton will be just the seventh lower court nomination the Senate has considered all year. We achieved those results in 2001 with a controversial and confrontational Republican President after a mid-year change to a Democratic majority in the Senate. We did so in spite of the attacks of September 11; despite the anthrax-laced letters sent to the Senate that closed our offices; and while working virtually around the clock on the USA PATRIOT Act for six weeks. By comparison, the Republican minority this year has allowed action on only one-third that many judicial nominations to the Federal circuit and district courts as were confirmed by this date in 2001.

Charlie Savage made this point in The New York Times this past Sunday when he wrote:

> By this point in 2001, the Senate had confirmed five of Mr. Bush's appellate judges . . . and 13 of his district judges. Mr. Obama has received Senate approval of just two appellate and four district judges.

David Savage of the Los Angeles Times wrote if even starker terms yesterday:

> So far, only six of Obama's nominees to the lower federal courts have won approval. By comparison, President George W. Bush had 28 judges confirmed in his first year in office, even though Democrats held a narrow majority for much of the year.

This is not for lack of qualified nominees. There are eight judicial nominees, including Judge Hamilton who have been reported by the Judiciary Committee on the Senate Executive Calendar. Had those nominations been considered in the normal course, we would be on the pace Senate Democrats set in 2001 when fairly considering the nominations of our last Republican President.

Another aspect of the Republican obstruction is its refusal to consider the nomination of Professor Christopher Schroeder to serve as the Assistant Attorney General for the Office of Legal Policy at the Justice Department. Professor Schroeder has been stalled on the Senate Executive Calendar by Republican objection since July 28 since it was reported by the Judiciary Committee without a single dissenting vote. Professor Schroeder is a distinguished scholar and public servant who has served with distinction on the staff of the Senate Judiciary Committee and in the Justice Department. He has support across the political spectrum.

I can only imagine that the reason his confirmation is being delayed is part of the partisan effort to slow progress on judicial nominees. The Office of Legal Policy is traditionally involved in the vetting of those nominees. So when Republican Senators excuse their obstruction by suggesting that the President has not sent the Senate enough nominees, they are wrong on at least two counts. They have not allowed the Senate to act on the nominees he has sent, and they are delaying appointment of the Assistant Attorney General who contributes to that process.

President Bush's first nominee to head that division, Viet Dinh, was confirmed 96 to 1 only 1 month after he was nominated, and only a week after he his nomination was reported by the committee. The three nominees to that office that succeeded Mr. Dinh—Daniel Bryant, Rachel Brand, and Elisebeth Cook—were each confirmed by voice vote in a shorter time than Professor Schroeder's nomination has been pending. As Charlie Savage wrote in The New York Times this weekend:

> In addition, no one has been confirmed as head of the Justice Department's Office of Legal Policy, which helps vet judges; Mr. Obama's nomination of Christopher Schroeder for the position remains stalled in the Senate.

As chairman of the Judiciary Committee, I treated President Bush's nominees better than the Republicans had treated President Clinton's. That effort has made no difference; Senate Republicans are now treating this President's nominees worse still. During the 17 months I chaired the Judiciary Committee in President Bush's first term, we confirmed 100 of his judicial nominees. At the end of his Presidency, although Republicans had run the Judiciary Committee for more than half his tenure, more of his judicial nominees were confirmed when I was the chairman than in the more than 4 years when Republicans were in charge.

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

Rather than continued progress, we see Senate Republicans resorting to their bag of procedural tricks to delay and obstruct. They have ratcheted up the partisanship and seek to impose ideological litmus tests. If partisan, ideological Republicans will filibuster David Hamilton's nomination, the nomination of a distinguished judge supported by his respected home State Republican Senator, they will filibuster anybody. This is partisanship gone rampant.

Senate Republicans are intent on turning back the clock to the abuses they engaged in during their years of resistance to President Clinton's moderate and mainstream judicial nominations. The delays and inaction we are seeing now from Republican Senators in considering the nominees of another Democratic President are regrettably familiar. Their tactics have resulted in a sorry record of judicial confirmations this year. There are more judicial nominees recommended to the Senate and sitting on the Executive Calendar awaiting consideration than the Senate has confirmed all year.

Last week, the Senate was finally allowed to consider the nomination of Judge Charlene Honeywell of Florida, but only after 4 weeks of unexplained delays. She was confirmed without a single negative vote, 88–0. The week before, the Senate was finally allowed to consider the nomination of Irene Berger, who has now been confirmed as the first African-American Federal judge in the history of West Virginia. The Republican minority delayed consideration of her nomination for more than 3 weeks after it was reported unanimously by the Judiciary Committee. When her nomination finally came to a vote, it was approved without a single negative vote, 97–0. The week before that the Senate was finally allowed to consider the nomination of Roberto A. Lange to the District of South Dakota. The Republican minority required 3 weeks before allowing consideration of that nomination after it was unanimously reported by the Judiciary Committee to the Senate. They also required 2 hours of debate before allowing the Senate to vote on that nomination. They, in fact, used less than 5 minutes of the time they demanded to discuss that nomination and that came when the ranking Republican on the Judiciary Committee spoke to endorse the nominee. That nomination had the support of both Senator JOHNSON and Senator THUNE, a member of the Senate Republican leadership. Ultimately, Judge Lange's nomination was confirmed 100–0. That follows the pattern that Republicans have followed all year with respect to President Obama's nominations.

Last week, the Senate finally debated the nomination of Judge Andre Davis of Maryland to a seat on the Fourth Circuit. He was confirmed 72–16. Sixteen Republican Senators voted in favor of the nomination and 16 were opposed. As Senators, they may vote as they see fit. What was wrong was that they delayed Senate consideration of that nomination for 5 months.

The obstruction and delays in considering President Obama's judicial nominations is especially disappointing given the extensive efforts by President Obama to turn away from the divisive approach taken by the previous administration and to reach out to Senators from both parties as he selects mainstream, well-qualified nominees. The President has done an admirable job of working with Senators from both sides of the aisle, Democrats and Republicans.

Professor Carl Tobias wrote about President Obama's approach recently in a column that appeared in McClatchy newspapers across the country on October 30. He wrote:

Obama has emphasized bipartisan outreach, particularly by soliciting the advice of Democratic and Republican Judiciary Committee members, and of high-level party officials from the states where vacancies arise, and by doing so before final nominations.

He had it right when he wrote that the real problem lies not with President Obama or with his nominations but with the Republican Senate minority. They are the principle cause of the current, sorry record regarding Senate confirmation of this President's outstanding nominees.

Federal judicial vacancies, which had been cut in half while George W. Bush was President, have already more than doubled since last year. There are now 98 vacancies on our Federal circuit and district courts, including 22 circuit court vacancies. There are another 23 future judicial vacancies already announced. Justice should not be delayed or denied to any American because of overburdened courts, but that is the likely result of the stalling and obstruction.

Despite the fact that Senate Republicans had pocket filibustered President Clinton's circuit court nominees, Senate Democrats opposed only the most extreme of President Bush's ideological nominees and worked to reduce judicial vacancies. This is not an extreme nominee. This is a nominee in the mold of Judge John Tinder, President Bush's nominee to the Seventh Circuit, also a well-respected district court judge in Indiana who was unanimously rated ''well-qualified'' by the American Bar Association. His nomination was supported by both Senator LUGAR and Senator BAYH and was confirmed 93–0 just 84 days after the Judiciary Committee held a hearing on his nomination.

When he testified in support of Judge Hamilton, Senator LUGAR thanked Senator BAYH for ''the thoughtful, cooperative, merit-driven attitude that has marked his own approach to recommending prospective judicial nominees'' and his ''strong support for President Bush's nominations of Judge Tinder for the Seventh Circuit and of Judge William Lawrence for the Southern District of Indiana.'' I supported both of those nominees with the endorsement of both of Indiana's Senators and both were easily confirmed. This nomination should be no different.

I hope that Senators now considering whether to even allow this nomination to be considered by the full Senate heed the advice of Senator LUGAR, which he reiterated yesterday when he said:

[I] believe our confirmation decisions should not be based on partisan considerations, much less on how we hope or predict a given judicial nominee will rule on particular issues of public moment or controversy. I have instead tried to evaluate judicial candidates on whether they have the requisite intellect, experience, character and temperament that Americans deserve from their judges, and also on whether they indeed appreciate the vital, and yet vitally limited, role of the Federal judiciary faithfully to interpret and apply our laws, rather than seeking to impose their own policy views.

As other editorial pages across the country have already done, the Washington Post today urges Senate Republicans to reject the distortions of Judge Hamilton's record, and to heed Senator LUGAR's ''words of praise for Judge Hamilton's record, intellect and character and allow a vote, and then vote in favor of confirmation.'' I could not agree more.

Mr. President, I ask unanimous consent that a copy of today's editorial be printed in the RECORD.

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

[From The Washington Post, Nov. 17, 2009]

GIVING HYPOCRISY A BAD NAME

During the Bush administration, Republicans decried Democratic attempts to filibuster judicial nominees. Some went so far as to label such filibuster attempts unconstitutional and threatened to exercise the ''nuclear option'' to ban the procedural tool in nomination matters.

Yet now Republicans are threatening to filibuster in an attempt to thwart confirmation of President Obama's first judicial nominee, Indiana federal Judge David F. Hamilton. The Senate is scheduled to vote on cloture Tuesday on Judge Hamilton's nomination to the U.S. Court of Appeals for the 7th Circuit. The prospect of a filibuster is made all the more ridiculous because Judge Hamilton has been rated ''well-qualified'' by the American Bar Association, enjoys the support of both home state senators, including Republican Richard G. Lugar, and even wins praise from the conservative Federalist Society of Indiana.

Sen. Jeff Sessions of Alabama, ranking Republican on the Judiciary Committee, has distorted Judge Hamilton's record on the trial court in an effort to rally the GOP caucus. For example, Mr. Sessions, arguing that Judge Hamilton is too liberal, cites a case in which Judge Hamilton struck down as unconstitutional sectarian Christian prayers in the Indiana state house but allowed those that referred to Allah. Mr. Sessions points out that the decision was overturned by the court of appeals that Judge Hamilton now hopes to join.

But the senator fails to explain that Judge Hamilton documented that 41 of the 53 invocations during the 2005 session of the Indiana House were given by Christian clergy; nine were delivered by elected officials; one each was said by a Muslim imam, a Jewish rabbi and a layperson. Such a lopsided tally, Judge Hamilton reasoned, could leave the constitutionally unacceptable impression that Indiana lawmakers favored one religion above all others. Judge Hamilton explained in his written opinion that the ruling did not ''prohibit the House from opening its session with prayers if it chooses to do so, but will require that any official prayers be inclusive and non-sectarian, and not advance one particular religion.'' Mr. Sessions also fails to note that the 7th Circuit reversed Judge Hamilton on procedural grounds and not because it disagreed.

There are probably not the 40 votes needed to block Judge Hamilton's nomination from reaching the floor. We hope that Republicans in large numbers heed Mr. Lugar's words of praise for Judge Hamilton's record, intellect and character and allow a vote—and then vote in favor of confirmation. In this instance, a vote for Judge Hamilton will be a vote to restore much needed comity and integrity to the process—qualities that the next Republican president will greatly appreciate when his nominees are considered.

Mr. LEAHY. Senator LUGAR believes Judge Hamilton ''is superbly qualified under both sets of criteria.'' I agree. I urge the Senate to reject these efforts and end this filibuster with a bipartisan vote.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SESSIONS. 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. SESSIONS. Mr. President, how much time remains on this side?

The PRESIDING OFFICER. The Senator has a minute and a half remaining.

Mr. SESSIONS. All right. I will briefly say that for the first time, I believe, in the history of the Senate, a number of President Bush's nominees were systematically filibustered. At 30 different times, cloture votes were required, and some failed, so the nominee did not go forward. That was unprecedented in the history of the Senate.

Now my colleagues say the dispute over that eventually got settled by the fact that a group of 14 Senators said: We need a compromise, and this is the compromise. You should not filibuster a Presidential judicial nomination unless there are extraordinary circumstances.

I opposed that. I have opposed filibusters before. But I do think since we have had no debate on this nominee to date, and this nominee has extraordinary statements in cases, and a record that indicates to me a lack of commitment to following the law—even though he is a person with whom I have no problem as to character and intelligence and ability, but I do not agree with his judicial philosophy—therefore, I believe this side cannot acquiesce to a precedent that says Democratic Presidents can get their judges confirmed with 51 votes; but if a Republican President nominates a nominee, he has to have 60 votes.

The PRESIDING OFFICER. The time is expired.

Mr. SESSIONS. So I think we have changed the rule, unfortunately. I think based on this situation, I will ask my colleagues not to support cloture.

I yield the floor.

Mr. LEAHY. Mr. President, I ask for the yeas and nays.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. REID. 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. REID. Mr. President, I am going to use some leader time now to speak on a matter that will shortly be before the Senate.

As I indicated to you, the Chair, we will vote on advancing the nomination of a man named David Hamilton, a supremely qualified individual who is already a district court judge from the State of Indiana. He has been an outstanding trial court judge, and he has been nominated by President Obama to be a judge in the Seventh Circuit. But, as many have heard here over this last hour or so—and you might have guessed simply if you have followed the Senate over the last 2 years—Republicans would rather we didn't vote on this man, ever. They would rather that a critical seat such as this remain empty, but not because of who was nominated to fill that seat; Judge Hamilton's professional performance has been exceptional. His qualifications are stupendous. He is widely admired on all sides because of his stellar judicial performance and his fair judicial philosophy. Senators from that State, Democrat EVAN BAYH and the Republican, the long-serving Senator RICHARD LUGAR, strongly urge confirmation. He is a man who is respected.

It is unusual that we would have the Republicans focus on one opinion he wrote dealing with religion. No one should ever second-guess this man's religious capacity.

He served as the attorney for Gov. EVAN BAYH. His father is a 40-year minister of a large Methodist Church in Indianapolis in which Judge Hamilton was baptized. Senator LUGAR, the Republican senior Senator from Indiana, has called Judge Hamilton exactly the kind of person one would want to see on the Federal bench. He has called him brilliant, fair, and committed to the law. I agree.

I have had the good fortune to serve in Congress with his uncle, Lee Hamilton, a longtime-serving Member of the House of Representatives from Indiana, the chairman of the Foreign Affairs Committee—really a good person. Being a good person and being involved in public service runs in that family, obviously, because of Judge Hamilton and Chairman Lee Hamilton.

The Federalist Society of Indiana, a strongly conservative institution—and that is an understatement—acknowledges that Judge Hamilton is well within the mainstream of the law. The American Bar Association has rated him as high as anyone can be rated.

The solitary decision of his, that is, Judge Hamilton, with which the Republicans claim to find fault is one in which Judge Hamilton stood for the separation of church and state, a principle protected by the first words of our Constitution's first amendment.

The reason most Republicans object to advancing his nomination has nothing to do with Judge Hamilton himself and everything to do with pure partisanship. Such shortsightedness is the reason why, even though the Judiciary Committee approved Judge Hamilton back in early June—he was nominated in April—he has had to wait 166 days for this procedural vote and it has had to be forced upon the Senate. We have a lot of things to do here in this body. It is very unfortunate we had to file cloture on a judge.

Judge Hamilton is far from the first victim of this partisan strategy to slow and stall the Senate. We have had that happen over 90 times already this year. In fact, Republican Senators have made a habit of objecting to the least objectionable nominees of President Obama's. The Senate has so far confirmed six judges for the court of appeals and the district court. Five of them were reported out of committee by voice vote. That means they were so obviously qualified that the committee didn't even feel the need to have a roll-call vote. When they reached the Senate floor, four of those five passed unanimously by votes of 88 to 0, 97 to 0, 99 to 0, and 100 to 0. Yet Republicans forced us to wait, wait, and wait for all of those votes in the first place. They did so for no other reason than to waste the American people's time.

I was stunned to hear my friend from Alabama say we haven't had enough time to debate this man. We have offered consent agreements, we have talked to everyone: How much time do you want? You can have it. We haven't had a debate on this nominee because we had to file cloture. The Republicans didn't want a debate on it. This is how the Republicans have forced the Senate to operate. It is not how it always works or how it should work. When President Bush was in office, as we have heard the distinguished chairman of the committee say on many occasions, the Democratic majority in the Senate confirmed three times as many nominees as we have been able to confirm in the same amount of time under President Obama.

Let's be clear. We are not yet voting on whether to confirm Judge Hamilton for this important position. Our votes today simply indicate whether we believe the judge, Judge Hamilton, deserves an up-or-down vote before the full Senate.

The votes of each Senator today will demonstrate whether he or she believes in the Senate's power as outlined in our Constitution to advise and give its consent to the President's nominations to the Federal bench.

Going to law school was a very good experience for me. It was not like undergraduate school. It wasn't how much you could memorize. For those of us who endured law school, we did more than learn about obscure facts and learn rigid legal rules; we analyzed the abstract thinking behind our laws and the logic out of which our great judicial system grew. That is what law school is all about. That is what lawyers train to do—think abstractly lots of times.

One of the very first principles I learned in law school—and I still have it in my mind—was following precedent. I believe in what we call stare decisis. It is how we maintain consistency in our court rulings, and it is a cornerstone of the common law we brought over from Great Britain when we became a country. Precedent is a simple notion: Once a rule has been established, we must apply that standard to all future cases in which the facts are similar to the first. This concept predates our courts, our Constitution, and even our country. Every aspiring lawyer studied it and every judge considers it when deciding a case.

The future of that same legal system rests before the Senate today. In the Senate, as in the law, what we say in this Chamber and in the public record should set the precedent for our own actions. That is why the Parliamentarians who serve us so well understand the precedents. We ask them a question, and they follow the precedent.

Here is what has been decided in the Senate previously. The record is replete with my Republican colleagues—including Members of the Republican leadership today and the Judiciary Committee—speaking about the solemn responsibility of the Senate to confirm judges. In other words, the record is replete with precedent.

For example, my counterpart, the distinguished Senator from Kentucky, the Republican leader, has argued strongly that the present judicial nomination deserves a simple up-or-down vote. He reminded the Senate of that not long ago; in fact, it was May of 2005. He said that our job is to give our advice and consent and not, as he put it in May 2005, and I quote, ''advise and obstruct.'' I agree. Two years earlier, my distinguished counterpart said that filibustering judges—which is exactly what is happening right now at a record pace—is ''a terrible precedent.'' I sincerely hope the Republican leader heeds his own words and doesn't repeat the very obstruction he condemned in the past.

The ranking member of the Judiciary Committee, the junior Senator from Alabama, has also rightly called the filibustering of judicial nominations ''obstructionism,'' and that is his word. He has said it is ''very painful,'' and he has described it as ''a very, very grim thing.'' He is right.

The Senator from Alabama went further to say the following:

We ought to be pleased that a nominee has cared enough about his or her country to speak out about issues that come before the country.

I agree. I share the belief that those who have chosen to serve our Nation must be able to get to work without delay. I hope the gratitude of the Senator from Alabama will be reflected in his vote this afternoon.

The Republican whip, the junior Senator from Arizona, has expressed similar disgust with judicial filibusters such as the one we are seeing today. In November of 2003, he said:

It is time to take politics out of the confirmation process, give nominees the up-or-down vote they deserve, and move the orderly process of justice forward.

He, too, is right. I hope the Senator from Arizona will consider that orderly process when he votes on advancing Judge Hamilton's nomination a few minutes from now.

The senior Republican Senator from Utah, who has served as chairman of the Judiciary Committee three separate times and still sits on that distinguished panel, also spoke out strongly against filibustering judges. He said in 2005 that doing so ''undermines democracy, the judiciary, the Senate, and the Constitution.'' And it does. I hope the Senator from Utah doesn't contribute to such affronts by voting no today.

Another Republican Senator, the senior Senator from Iowa, who also serves on the Judiciary Committee, warned in 2003 that filibustering judges would lead to ''a constitutional crisis.'' I agree with him. I hope he helps us avert a filibuster and avoids a crisis by voting yes today for Judge Hamilton.

Another Republican Senator, the junior Senator from Texas, who served on the Judiciary Committee and was a supreme court justice in Texas, said in 2006 he hopes the filibuster of judicial nominees ''should never happen again, and that all nominees of a President are entitled to an up-or-down vote.'' That was a few years ago. He called what Republicans are doing today ''an abomination'' and ''the most virulent form of unnecessary delay one can imagine.'' The same Senator also said on the Senate floor that he finds it ''simply baffling that a Senator would vote against even voting on a judicial nomination.'' I find it baffling, also. I sincerely hope the Senator from Texas will not delay us unnecessarily by supporting his party's filibuster. I could go on with a lot more quotes. It was interesting this morning. I listen to National Public Radio. There was a nice piece on there talking about what the Republicans are doing here, and it had the actual voices of the Senators. I cannot give the voices, but that was done on public radio, where they had the voices of the Senators saying things such as I have read today.

I could go on and on. For example, another Republican Senator, the senior Senator from Kansas, has said that forcing supermajorities to confirm nominees—which is what a filibuster does—is inappropriate.

Another Republican Senator, the senior Senator from Idaho—and by the way, his brother was a law school professor at Brigham Young University, where my son-in-law went to law school. My son-in-law has a wonderful mind, and he said he was the best professor he ever had and the smartest he ever had. Unfortunately, he died as a very young man. The senior Senator from Idaho said: ''It turns the Constitution on its head and begins a very dangerous precedent with regard to how the nominees for the judicial branch are treated by the Senate.''

He talked about what a filibuster does. Again, my Republican friends are right. I hope the Senators from Idaho and Kansas will make sure filibusters still have no place in the confirmation process, and I hope they don't make such a practice precedent. They can do so by voting yes today.

Every single Senator may vote either for or against the nomination as he or she sees fit. That right will never be in jeopardy. But that is not the issue before us today. The question before us is whether the President of the United States deserves to have his nominees reviewed by the Senate, as the Constitution demands he does.

I feel so strongly about what took place a few years ago. We could go back and debate whether President Bush's nominations—whether he should have gotten more than what he did. We know he got hundreds of them. As I said on the floor, the point is, what the Republicans were going to do—a very slight majority—is they were going to do away with precedent, with filibusters in the Senate. I said at that time, if they did that and I ever came into a position of authority, I would never reverse it. I felt that strongly about it. If the Republicans would make us do what I think is wrong—that is, vote on cloture on all these nominations—it will take a lot of time and it is not fair. We should not do that.

I only say to my friends that very few judges were held up by the Democrats when we were in the minority. Some were held up. Regardless, when I took this job in 1998—when I was elected to a leadership position—I said we should treat the Republicans as we would like to be treated, which is the Golden Rule. When we got the majority, I said the same thing. That is how I feel about it. Let's go by the Golden Rule in the Senate. Let's treat judicial nominees the way they would want them treated if the roles were reversed. I hope we can do that.

That is not the issue before us today. The issue today is whether the President of the United States deserves to have his nominees get a vote up or down. The question before us is whether the President deserves to have his nominees reviewed by the Senate, as the Constitution demands he does.

The question before the Senate is whether the nominees themselves deserve to be confirmed or rejected based on their judicial philosophy, their experience, moral turpitude, and whatever else people decide they don't like—their looks or they are too old or too young, whatever. But it should be on that person's qualifications as seen by the individual Senators.

The question is whether Senators who publicly demand up-or-down votes when it is politically convenient will follow the precedents they set for themselves, even when it is not. The vote we are about to hold will give us that answer. I hope we will have a large vote on being able to proceed to this nomination, and I hope we don't get into this situation where, out of spite—because there has always been plenty of time to debate this man—postcloture we have to wait 30 hours to confirm the nomination. That would not look good for this body, and I hope it is not necessary.

Mr. President, have the yeas and nays been ordered?

The PRESIDING OFFICER. They have not.

Mr. REID. I ask for the yeas and nays.

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

The yeas and nays were ordered.

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The bill clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on the nomination of David F. Hamilton, of Indiana, to be a United States Circuit Judge for the 7th Circuit.

Harry Reid, Herb Kohl, Sheldon Whitehouse, Richard J. Durbin, Benjamin L. Cardin, Patty Murray, Mark Begich, Kirsten E. Gillibrand, Mark R. Warner, Russell D. Feingold, Al Franken, Roland W. Burris, Dianne Feinstein, Patrick J. Leahy, Barbara Boxer, Charles E. Schumer, Edward E. Kaufman.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call is waived.

The question is, Is it the sense of the Senate that debate on the nomination of David F. Hamilton, of Indiana, to be a U.S. circuit judge for the Seventh Circuit, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The bill clerk called the roll.

Mr. KYL. The following Senator is necessarily absent: the Senator from Texas (Mrs. HUTCHISON).

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

The result was announced—yeas 70, nays 29, as follows:

[Rollcall Vote No. 349 Ex.]

YEAS—70

Akaka	Franken	Murkowski
Alexander	Gillibrand	Murray
Baucus	Gregg	Nelson (NE)
Bayh	Hagan	Nelson (FL)
Begich	Harkin	Pryor
Bennet	Hatch	Reed
Bingaman	Inouye	Reid
Boxer	Johnson	Rockefeller
Brown	Kaufman	Sanders
Burris	Kerry	Schumer
Byrd	Kirk	Shaheen
Cantwell	Klobuchar	Snowe
Cardin	Kohl	Specter
Carper	Landrieu	Stabenow
Casey	Lautenberg	Tester
Chambliss	Leahy	Thune
Collins	Levin	Udall (CO)
Conrad	Lieberman	Udall (NM)
Cornyn	Lincoln	Warner
Dodd	Lugar	Webb
Dorgan	McCaskill	Whitehouse
Durbin	Menendez	Wyden
Feingold	Merkley	
Feinstein	Mikulski	

NAYS—29

Barrasso	DeMint	McCain
Bennett	Ensign	McConnell
Bond	Enzi	Risch
Brownback	Graham	Roberts
Bunning	Grassley	Sessions
Burr	Inhofe	Shelby
Coburn	Isakson	Vitter
Cochran	Johanns	Voinovich
Corker	Kyl	Wicker
Crapo	LeMieux	

NOT VOTING—1

Hutchison

The PRESIDING OFFICER. On this vote the yeas are 70, the nays are 29. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

Mr. CARDIN. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. REED. I ask unanimous consent that the order for the quorum call be rescinded.

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

UNANIMOUS CONSENT AGREEMENT—S. 1963

Mr. REED. Mr. President, I ask unanimous consent that upon disposition of the nomination of Judge David Hamilton and the Senate resuming legislative session that the Senate then proceed to the consideration of Calendar No. 190, S. 1963, Veterans Health Care Initiatives, and that the bill be considered under the following limitations: that general debate on the bill be limited to 30 minutes equally divided and controlled between Senators AKAKA and BURR or their designees; that the only amendment in order be a Coburn amendment regarding funding priorities which is at the desk and that it be printed in the RECORD once this agreement is entered; that debate on the amendment be limited to 3 hours, with 2 hours under the control of Senator COBURN and 60 minutes under the control of Senator AKAKA or his designee; that upon the use or yielding back of all time, the Senate proceed to vote in relation to the Coburn amendment; that upon disposition of the Coburn amendment, the bill, as amended, if amended, be read a third time, and the Senate then proceed to vote on passage of the bill.

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

(The amendment (No. 2785) is printed in today's RECORD under ''Text of Amendments.'')

Mr. REED. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BURRIS. I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. BURRIS. I ask unanimous consent to speak as in morning business.

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

HEALTH CARE REFORM

Mr. BURRIS. Mr. President, as I address this Chamber today, there is a broad consensus across the country that our health care system is broken. It simply doesn't work for Americans anymore. Everyone agrees that we need real comprehensive health care reform. In order to accomplish this, I believe we must include a strong public option to restore competition, cost savings, and accountability to the health care insurance industry. In fact, I have stated before that I will not vote for any reform measure that fails to include a strong public option.

A few of my colleagues are still not convinced. Some have honest questions. But there are others who are not interested in winning this argument on the merits. A few of my colleagues across the aisle are trying to stop this Congress from passing any health care reform at all. Some of my distinguished Republican friends have said our proposals are simply too expensive. They say a trillion dollars is too high a price to pay for a better health care system.

I beg to differ. We already pay far too much for health care. Our reform bill would reduce costs over the long term. It would allow consumers to hold insurance companies accountable for the first time in many years. It would restore real competition to markets that are currently monopolized by a few big corporations. It would accomplish all of that without adding to the budget deficit. Yet my colleagues continue to insist that health care reform would be too expensive. Despite the number of Americans suffering under our broken system, they want to talk about fiscal responsibility instead of health care reform. My Republican friends have simply lost their credibility when it comes to this issue. They say they would not support reform that will save lives and improve health outcomes for millions because it costs too much. Yet under a Republican President, they were willing to write bigger and bigger checks to benefit the wealthy.

In 2001, when President Bush asked Congress to pass tax cuts that mostly helped the super rich, the total cost came to $1.35 trillion over 10 years. That is more than $300 billion more than our health care reform bill, and it provided significant benefits to far fewer Americans.

More than half of the current Republican caucus was serving in the Senate at the time of this vote. Did they try to block the bill? Did they stand up and say: $1.3 trillion for the super rich—that is wasteful, irresponsible, and far too costly? No, they did not.

When President Bush called, they answered. My Republican friends voted in favor of this massive spending program, even though it added more than $1 trillion to the deficit.

Many of the same people now want to put the brakes on a deficit-neutral health care reform bill designed to help millions of ordinary Americans.

Later in 2003, just as this country began to spend hundreds of billions of dollars to conduct two wars, President Bush asked for yet another tax cut. This tax cut also benefited the richest of the rich and added $330 billion more to the deficit.

But did my distinguished Republican colleagues urge fiscal responsibility? Did they demand that the President explain how he would finance the wars or balance the budget before they voted on another massive tax cut? No, they did not. Their vocal support for fiscal responsibility was nowhere to be found. Once again, they voted overwhelmingly for the second round of tax cuts.

Yet as I address this Chamber today, a few of the same Senators are doing everything they can to stop us from passing health care reform.

I would urge the American people to consult the record for themselves. The same voices that now oppose extending health care coverage actually supported spending significantly more money to pad the bank accounts of the richest people in this country.

It is the same story for expensive programs such as Medicare Part D. More than half of the Republicans still in the Senate voted for $400 billion of new spending back in 2003. Almost all of these distinguished Senators voted time and again to fund the ongoing wars in Iraq and Afghanistan, which have cost the American taxpayers more than $1 trillion and far too many American lives.

I do not mean to suggest every single one of these spending programs was a bad idea. But I would like to point out that when my Republican colleagues talk about ''fiscal responsibility,'' they are talking about an issue on which they have lost their credibility. They recklessly added trillions of dollars to the deficit under a Republican President, but today they oppose health care reform even though it will be paid for by cost offsets. Their actions simply do not match their words. They are placing cynical politics ahead of good policy.

So I have a question for my Republican friends who have been Members

of this Senate since 2001: If they supported almost $2 trillion of deficit spending for tax relief for the rich, then, I ask them, exactly how much are we allowed to spend for health care that will benefit millions of people across this country?

Mr. President, 45,000 Americans die every single year because they do not have insurance and cannot get the quality care they need. Without competition in the industry, insurance companies have raised premiums, denied benefits, and refused coverage to millions. So I ask my colleagues: How much is too much for this Congress to spend to save these lives?

My colleagues like to talk about responsibility, so I put it to them that the only responsible course of action is to pass this health care bill, and pass it now. That is the reaction we need.

Unfortunately, there are some in this Chamber who are not interested in addressing the issue of health care reform. There are some who do not want to have an honest, open debate on the subject. They want to kick the can further down the road, as our predecessors have done time and time again for the last 100 years.

That would be the easy answer—to leave it to someone else to solve the difficult problem of health care reform after the problem has gotten even worse, to settle for the status quo or put a band-aid on a gaping wound and hope that future legislators will muster the political will that a century of lawmakers has lacked. There are some in this body who would settle for this.

But I believe the American people deserve better. Especially in difficult times, they demand better of their representatives in Congress. So I say to my colleagues, as great leaders have said to us time and time again throughout our history: Let's seize this moment to do what is right, not what is easy. Let's summon the will to succeed where others have failed.

It is time to deliver on meaningful health care reform. It is time for competition, cost savings, and accountability in the insurance industry. It is time to be honest with the American people.

Friends, colleagues—Republicans and Democrats—this is no time for partisan games and empty rhetoric. This is time for action. Millions of Americans are counting on us to make health care reform a reality, and we must not let them down. I will say that again. We must not let them down.

Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GRASSLEY. 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. GRASSLEY. Mr. President, I oppose the nomination of Judge David Hamilton to be a Seventh Circuit Appeals Court judge. I have serious concerns about this nomination and will be voting not to confirm him.

During his time as a Federal judge on the U.S. District Court for the Southern District of Indiana, Judge Hamilton has issued a number of highly controversial rulings and, more importantly, has been reversed in some very prominent cases. In my opinion, these decisions strongly indicate that Judge Hamilton is an activist judge who will ignore the law in favor of his own personal ideology and beliefs.

For example, in one case, Judge Hamilton succeeded in blocking enforcement of an informed consent law for 7 years. In that case, called A Woman's Choice v. Newman, Judge Hamilton struck down an Indiana law requiring that certain medical information be given to a woman in person before an abortion can be performed. The Seventh Circuit overruled Judge Hamilton's decision, stating:

> For 7 years, Indiana law has been prevented from enforcing a statute materially identical to a law held valid by the Supreme Court in Casey, by this court in Karlin, and by the Fifth Circuit in Barnes. No court anywhere in the country (other than one district judge in Indiana) has held any similar law invalid in the years since Casey . . . Indiana (like Pennsylvania and Wisconsin) is entitled to put its law into effect and have that law judged by its own consequences.

That was the circuit court overturning Judge Hamilton. It seems to me that Judge Hamilton went out of his way to make his finding and actually block the Indiana law. That is not the proper role of a judge.

In addition, Judge Hamilton has shown hostility against the expression of religion in the public square. In two prominent cases, he ruled against public prayer in the State legislature and religious displays in public buildings, and in both cases he was reversed. In the case of Hinrichs v. Bosma, Judge Hamilton enjoined the speaker of the Indiana house of representatives from permitting sectarian prayer. Judge Hamilton ruled that the Indiana State legislature was prohibited from starting its session with prayers, specifically those that expressly mentioned Jesus Christ, but that it would be permissible for a prayer to mention Allah. The Seventh Circuit overturned Judge Hamilton's decision in Hinrichs, and subsequently the Indiana house passed a resolution 85-to-0 opposing Judge Hamilton's ruling.

Then in Grossbaum v. Indianapolis-Marion County Building Authority, Judge Hamilton ruled that a county could prohibit the display of a menorah in a nonpublic forum. The Seventh Circuit unanimously reversed Judge Hamilton, noting that the judge disregarded relevant Supreme Court precedent to reach his ruling and that he failed to recognize a rabbi's first amendment right to display the menorah as symbolic religious speech.

Judge Hamilton also ignored clear statutory mandate so he could impose his own personal beliefs when sentencing criminal defendants. Example: In the 2008 case U.S. v. Woolsey, Judge Hamilton disregarded an earlier conviction in order to avoid imposing a life sentence on a repeat drug offender. The Seventh Circuit reversed the decision, admonishing Judge Hamilton, specifically stating that he was ''not free to ignore'' prior conviction because ''statutory penalties for recidivism . . . are not optional, even if the court deems them unwise or an inappropriate response to repeat drug offenders.''

In another case, U.S. v. Rinehart, Judge Hamilton used his court opinion to request clemency for a police officer who pled guilty to two counts of producing child pornography. In this case, the police officer had engaged in and videotaped ''consensual'' sex with two teenagers.

In addition, in writings and speeches, Judge Hamilton has indicated that he approves of the concept that judges should make policy from the bench. For example, he has embraced President Obama's empathy standard, a standard so radical that even the new Supreme Court Justice Sotomayor had to rebuke it at her confirmation hearings. In response to written questions for his confirmation hearing, Judge Hamilton answered this way:

> Federal judges take an oath to administer justice without respect to persons, and to do equal right to the poor and to the rich. Empathy—to be distinguished from sympathy—is important in fulfilling that oath. Empathy is the ability to understand the world from another person's point of view. A judge needs to empathize with all parties in cases—plaintiff and defendant, crime victims and accused defendant—so that the judge can better understand how the parties came to be before the court and how legal rules affect those parties and others in similar situations.

To empathize with the parties is not the proper role of a judge. Rather, the proper role of a judge is to apply the law to the facts in an impartial manner, and that is what we refer to as blind justice.

Further, in a 2003 speech, Judge Hamilton endorsed the idea that the role of a judge includes ''writing footnotes to the Constitution'' through evolving case law. He said:

> Judge S. Hugh Dillin of this court has said that part of our job here as judges is to write a series of footnotes to the Constitution. We all do that every year in cases large and small.

Oddly enough, the last time I checked, it was the role of Congress to write laws, not the judicial branch. Judge Hamilton's personal bias has been noted by lawyers who practice before him. In fact, statements of local practitioners in the Almanac of the Federal Judiciary described Judge Hamilton as ''the most lenient of any judges in the district.'' Another quote: ''One of the more liberal judges of the district.'' Another quote: ''Goes out of his way to make the defendant comfortable.'' Another quote: ''He is your

best chance for downward departures.'' Lastly, ''in sentencing, he tends to be very empathetic to the downtrodden, or to those who commit crimes due to poverty.''

Contrary to how the White House has tried to characterize Judge Hamilton, I believe that the record amply demonstrates that Judge Hamilton is an activist judge. He has taken radical positions, and a number of his rulings indicate that Judge Hamilton will impose his own personal beliefs and values in cases. We should not promote an individual whose track record clearly demonstrates that he will carry out an outside-of-the-mainstream personal agenda on the Federal appeals court. For these reasons, I will oppose the nomination of Judge Hamilton to the Seventh Circuit. If he was going to serve on a circuit, as many times as he has been overruled, it would be more appropriate for him to be on the Ninth Circuit, where a lot of those decisions on appeal are overturned by the Supreme Court—about 9 times out of 10.

I yield the floor.

The PRESIDING OFFICER. The Senator from Florida is recognized.

Mr. LEMIEUX. Mr. President, I ask unanimous consent to speak as in morning business.

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

NATIONAL DEBT

Mr. LEMIEUX. Mr. President, the clock has struck 12 on a $12 trillion debt. Like Cinderella when she was revealed when the clock struck 12, this Congress is now revealed—revealed for the problem it has in spending more than we can afford. We are being a body and an institution that spends money without thinking about the future of this great country. It spends the money of our children and our grandchildren.

It took this country 193 years to spend a trillion dollars and to get a trillion dollars into debt. We are now $12 trillion into debt as of today. That $12 trillion is the equivalent of $40,000 per person, $107,000 per household. This is what American families are now responsible for, because unlike American families who sit around their kitchen tables and try to make ends meet, and unlike the States that have to balance their budgets, this Congress spends more than it has. There is no evaluation in this Congress about how much money is being taken in versus how much money we spend.

Instead, we raised this year $1.4 trillion in debt, more debt in a single year than the past 4 years combined.

Outside this Chamber, outside the main entrance, is a clock, called the Ohio Clock—the fabled clock that has been in this institution for more than a hundred years. It stands there to tell the time. I suggest that standing next to that clock should be the debt clock to remind the Members of this Senate, and perhaps our friends in the House, that we are spending money we cannot afford to spend, and it is risking the future of our children and grandchildren.

As you know, I have three small boys, Max, Taylor, and Chase, 6, 4, and 2, and a baby on the way. We worry for their future—just like Americans across this country and my fellow Floridians are worrying for the future of their children. How can we afford this and continue to spend more than we have?

I have been coming to the floor weekly to talk about the various appropriation bills I have been voting on—and, frankly, voting against—because they spend more and more of the people's money and put this country further into debt.

Today, we have marked this occasion with $12 trillion in debt—an amount of money that is hard to fathom, an amount of money that is so large it is hard to comprehend. But we know that every family in America is now responsible—every household—for $107,000. That debt now rides upon their shoulders.

In a week—perhaps even this week—Democrats in the Chamber are going to introduce a health care reform bill that is estimated to spend another $1 trillion. This bill will raise taxes, cut Medicare, and increase premiums—another large governmental program, when we cannot afford the programs we have. We should focus on spending the money we have, spending it more efficiently and effectively, before we go on to create a new program, a new bureaucracy, and more obligations than we can afford.

The Congressional Budget Office estimates that the health care plan being brought forth by the Democrats in this Chamber will spend 24.5 percent of GDP, 19 percent in revenue only. So we have 19 percent in revenue, but 24.5 percent of GDP, which is a huge unsustainable gap. It was recently reported that the deficit for October alone is $176 billion—$26 billion more than estimates by economists. In fact, the debt increased by $40 billion just over this past weekend.

Our spending is out of control. The Federal Government does not recognize it. This Congress cannot afford the programs it has, let alone the programs it wants. So I am here to sound the alarm. I could not let this day pass as we hit this $12 trillion mark in national debt.

I look forward to coming back to the floor to explain again and again to the American people that this is a problem that must be solved. We cannot continue to spend our children's and grandchildren's future.

I yield the floor.

The PRESIDING OFFICER (Mr. TESTER). The Senator from Delaware is recognized.

Mr. KAUFMAN. Mr. President, I ask to speak as in morning business.

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

IN PRAISE OF ANN AZEVEDO

Mr. KAUFMAN. Mr. President, I rise once more to honor an outstanding Federal employee.

Next week, American families will gather around dinner tables in celebration of Thanksgiving.

Thanksgiving is a time for coming together. In earlier ages, members of an extended family usually resided in close proximity to one another. Today, however, the typical American family is spread across the country, with members far in distance even if close in spirit.

Americans of all backgrounds and from all walks of life will be travelling long distances to be with their loved ones. It is no wonder that Thanksgiving weekend is one of the busiest travel periods of the year.

Tens of millions of us will be driving, flying, and taking trains or ferries next week. For some it will be stressful, for others exciting. Most, though, will do it without even realizing how much work goes into keeping American travelers safe.

The Department of Transportation employee whose story I will share today has been instrumental in ensuring the safety of those who travel. But before I tell you about this outstanding public servant, I want to reflect on how important transportation is for America.

From its humble beginnings, ours has been a Nation on the move. In George Washington's day, their mercantile spirit drove our founding generation to dig canals and clear roads across the Appalachians. Steamships and railroads fueled the expansion across the West and helped close the frontier. Air travel in the last century brought every corner of our 50 States ever closer and opened new opportunities for the growth of business and tourism.

This march of progress in transportation technology has not been a smooth ride. When the railroads were new, train wrecks were fairly common. In fact, President-Elect Franklin Pierce was en route to Washington for his inauguration when his train derailed, tragically killing his 11-year-old son.

Travel by ferry or steamship on our rivers and lakes was far from safe in those days. For pioneer families, roads were often impassible during wintertime, and many lost their lives just trying to get to the West. While air travel is the safest form of transportation in our day, it was not always the case.

Making sure that our Nation's ''planes, trains, and automobiles'' are safe remains one of our highest priorities. My home State of Delaware, like every other State—like Montana—depends on a top-notch transportation infrastructure to facilitate economic activity, moving people and goods across markets.

Travel can and should be a safe and fun experience. No one should ever have to worry that the vehicles on our roads, rails, rivers, or in our skies are unsafe. That is where the hardworking men and women of the Department of

Transportation excel. They set and enforce regulations upholding the strictest standards in transportation safety.

The great Federal employee I have chosen to recognize this week has been a leader on safety issues at the Transportation Department's Federal Aviation Administration for 12 years.

Ann Azevedo came to the department in 1997 with nearly two decades of experience in the private sector. Working from the FAA facility in Burlington, MA, when she first started at the FAA, Ann served as the risk analysis specialist for the Engine and Propeller Directorate.

In her current role as chief scientific and technical adviser for aircraft safety analysis, Ann focuses on safety, risk management, and analyzing accidents. From the data she gathers, Ann is able to develop solutions to help prevent future incidents.

Regularly representing the FAA at national and international air safety round-tables, Ann has become a respected voice among those engaged in risk management analysis. She helped write the training manuals for turbofan and turboprop aircraft used across the industry, and she continues to teach risk analysis at the FAA Academy.

Ann holds a bachelor's degree in systems planning and management in applied mathematics and a master's of science in mechanical engineering. When she was once asked how she ended up in her chosen career field, Ann cited her love of math and an influential physics teacher in high school.

Ann was awarded the Arthur S. Flemming Award for public service in 2002 for developing safety solutions that resulted in a 64 percent decrease in the commercial aviation fatality rate between 1998 and 2002. She also was honored as Distinguished Engineer of the Year by the American Society of Mechanical Engineering in 1996.

Her work, and that of all her colleagues at the FAA and other Transportation Department agencies, helps ensure that travel in our country continues to be as safe as possible.

Most importantly, they facilitate the smiles of those arriving safely at a journey's end and seeing their loved ones for the first time after weeks, months, or even years apart.

That remains a central element of Thanksgiving, and I hope all Americans will join me in thanking Ann Azevedo and all the men and women of the Department of Transportation for their hard work keeping American travelers safe.

They keep us, whether on the road, on the rails, at sea, or in the sky, moving ever forward.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mrs. MURRAY. I ask unanimous consent that the order for the quorum call be rescinded.

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

MORNING BUSINESS

Mrs. MURRAY. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak for up to 10 minutes each.

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

FORT HOOD ATTACK

Mr. FEINGOLD. Mr. President, it is with great sadness that I wish to remember victims of the horrific shootings at Fort Hood. This was a senseless attack on innocent people who were serving their country. To know that these people, 12 servicemembers and 1 civilian, were taken from their families in this way is very difficult to accept. I join with people across the country in mourning these tragic deaths. My thoughts are with each and every one of their families.

As a Senator from Wisconsin, I do feel a special duty to remember the two Wisconsinites who were killed. Both were extraordinary members of our Armed Forces, and their deaths are a terrible blow to all who knew them, and to our State. Wisconsin takes so much pride in its long traditon of military service, and in the Wisconsinites who serve so bravely in the Armed Forces today. Wisconsin has already lost so many servicemembers in recent years—90 in Operation Iraqi Freedom and 12 in Operation Enduring Freedom. We recently honored our veterans by celebrating Veterans Day, and we are thinking of these men and women and the sacrifice they made, so to suffer these additional losses at this time is simply tragic.

SSG Amy Krueger from Kiel, WI, and CPT Russell Seager from Mount Pleasant, WI, were both outstanding servicemembers, and their families and communities are heartbroken by their deaths.

Staff Sergeant Krueger, who was just 29, joined the Army after the 2001 terrorist attacks. She had deployed previously to Afghanistan in 2003 and helped soldiers dealing with combat stress. Staff Sergeant Krueger arrived at Fort Hood on November 3 and was scheduled to be redeployed to Afghanistan in December. She graduated from Kiel High School in 1998 and was very proud to serve her country. About 500 family and friends gathered recently at the Veterans Memorial Park in Kiel to remember and pay tribute to Sergeant Krueger.

CPT Russell Seager, 47, was a registered nurse and advanced practice nurse prescriber who was with the primary care mental health integration program at Zablocki VA Medical Center in Milwaukee. He also taught classes at Bryant and Stratton College in Milwaukee. As part of the combat stress control unit, Seager was tasked with watching for warning signs among soldiers on the front lines that could signal long-term mental health problems. He is survived by his wife and adult son.

It is so tragic to think that these two people, who were trained to help fellow servicemembers cope with the stress of combat, were struck down when their help is needed the most. These servicemembers are really unsung heros of our military today—the men and women who help other servicemembers deal with post traumatic stress disorder, which has skyrocketed since the start of the wars in Iraq and Afghanistan. Both Staff Sergeant Krueger and Captain Seager were truly selfless people who helped their fellow servicemembers through some very tough times. Both were part of the 467th Medical Detachment, which is based in Madison, WI. It is an outstanding unit doing much-needed work, and it is terrible that the unit suffered these losses.

I also want to say a few words about the four Wisconsinites who were injured at Fort Hood. At the recent memorial at Fort Hood, which was such a moving tribute to those who were killed, I had the privilege of meeting Specialist John Pagel, 28, of North Freedom, WI, who was also with the 467th Medical Detachment. Specialist Pagel is married and has two children.

I also had the privilege of meeting SPC Grant Moxon, 23, of Lodi, WI, another member of the 467th, who is a mental health specialist. Specialist Moxon graduated from UW-La Crosse. He joined the military just last year and had arrived in Texas one day before the shooting incident.

Both Sergeant Pagel and Specialist Moxon were shot but are now both doing well.

CPT Dorothy ''Dorrie'' Carskadon, 47, of Madison, WI, is also a member of the 467th. Carskadon fought with the Army in Iraq during Operation Desert Storm and then enlisted in the Army Reserve 2 years ago. She is a clinical social worker with the U.S. Army Reserve. She was set to deploy to Iraq to counsel troops suffering from PTSD. She was shot twice in the hip and underwent an all-night surgery. Fortunately, she is expected to make a full recovery.

Army PFC Amber Bahr, 19, of Random Lake, WI, with the 187th medical battalion, has been at Fort Hood for a year working as an Army nutritionist. She was scheduled to deploy for the first time in January. In the midst of the shootings, Bahr was putting a tourniquet onto another soldier and helping him out of harm's way before she discovered that she was shot herself. She was released Friday night from the hospital.

I think the conduct of Private First Class Bahr, and everyone at the base who responded to the attack with such heroism, says volumes about the men and women who serve today. I am so proud of them, and so profoundly saddened by this attack. As the nation grieves, we offer heartfelt thanks to all