CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 86, the nomination of Priscilla Richman Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit:

Bill Frist, Orrin Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

NOMINATION OF CAROLYN B. KUHL TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. FRIST. Mr. President, I ask unanimous consent that the Senate now proceed to the consideration of Calendar No. 169, the nomination of Carolyn B. Kuhl, to be a United States Circuit Judge for the Ninth Circuit.

The PRESIDENT pro tempore. The nomination will be stated.

The assistant legislative clerk read the nomination of Carolyn B. Kuhl, of California, to be United States Circuit Judge for the Ninth Circuit.

Mr. FRIST. Mr. President, again I ask the other side if they would be prepared to set a time certain for an up-or-down vote on this nominee after whatever debate they may need.

The PRESIDENT pro tempore. The Senator from Nevada.

Mr. REID. Mr. President, in an effort to understand what is going on here, everyone should understand, these requests require a simple majority vote, and it would be senseless to take a vote on this. That is why we did not object.

I would say with this nominee, Carolyn Kuhl, we have reviewed this in very deep detail and would not be in agreement at this time to set any time limit on the debate. I ask the distinguished majority leader to advise us when we finish this woman and the following nominee, if you would be good enough to tell us when you anticipate voting. We are waiving the request for the requirement of a quorum. So if the majority leader can give us some indication when he desires to vote on this, whether it is 12:01 on Friday morning or later in the day.

Mr. FRIST. Mr. President, in response, we plan on voting Friday morning at a reasonable hour to be defined. That means sometime after 8:30 Friday morning. I will be more specific.

Mr. REID. I appreciate that very much. I object.

The PRESIDENT pro tempore. Objection is heard.

CLOTURE MOTION

Mr. FRIST. I send a cloture motion to the desk.

The PRESIDENT pro tempore. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative 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, do hereby move to bring to a close debate on Executive Calendar No. 169, the nomination of Carolyn B. Kuhl, of California, to be United States Circuit Judge for the Ninth Circuit.

Bill Frist, Orrin Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

NOMINATION OF JANICE R. BROWN, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. FRIST. Mr. President, I ask unanimous consent that the Senate now proceed to the consideration of Calendar No. 455, the nomination of Janice R. Brown, of California, to be a United States Circuit Judge for the District of Columbia Circuit.

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

The assistant legislative clerk read the nomination of Janice R. Brown, of California, to be United States Circuit Judge for the District of Columbia Circuit.

Mr. FRIST. Mr. President, once again, I ask if we would be able to limit the time for debate on this nominee to 8 hours or 10 hours.

Mr. REID. We object, Mr. President.

The PRESIDENT pro tempore. Objection is heard.

CLOTURE MOTION

Mr. FRIST. With that answer, Mr. President, I send a cloture motion to the desk.

The PRESIDENT pro tempore. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative 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, do hereby move to bring to a close debate on Executive Calendar No. 455, the nomination of Janice R. Brown, of California, to be United States Circuit Judge for the District of Columbia Circuit.

Bill Frist, Orrin Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

Mr. FRIST. Mr. President, I now ask unanimous consent that the three live quorums required under rule XXII be waived en bloc.

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

Mr. FRIST. Mr. President, parliamentary inquiry: In terms of the time we used on our side, how much time, in terms of my initial speech, was used by this side?

The PRESIDENT pro tempore. The majority has 4 minutes 47 seconds. The minority has 11 minutes 22 seconds.

Mr. REID. If I can make an inquiry through the Chair, Mr. President, the unanimous consent request, as I have heard the ruling of the Chair, is not counted against anybody; is that the way it is?

The PRESIDENT pro tempore. The time to object or reserving the right to object has been charged to the side making such a reservation.

Mr. FRIST. Mr. President, I suggest the general agreement is to spend an hour, 30 minutes to a side, and if they are not using the time, it will be yielded back to the other side. I ask unanimous consent that I use 15 minutes, 15 minutes for Senator HATCH, and we go to the other side.

Mr. REID. And we would have an hour?

Mr. FRIST. You would have 30 minutes.

Mr. REID. I say to the distinguished majority leader, we have had no time agreement the first hour other than listening to me object.

The PRESIDENT pro tempore. Reserving the right to object and statements made under such objection or reservation has been charged against the side making that reservation.

Mr. REID. I understand. So the Chair has ruled that the statement by Senator BYRD ran against us; is that true?

The PRESIDENT pro tempore. That is correct.

Mr. REID. So the next half hour will be used by Senators FRIST and HATCH, and then we will use our half hour.

Mr. FRIST. Again, I think it is time for us to move forward. Conceptually, we are going to have an hour, 30 minutes either side. Say I used 15 minutes—it may be more—Senator HATCH will speak about 15 minutes, and 30 minutes will be to your side, and we will be going back and forth.

Mr. REID. Fine. My only concern is we have had Senators we have scheduled to speak to use our half hour. Some of them have been champing at the bit here. If they don't speak now, they lose their time, their day in the sun.

Mr. FRIST. I thought I had a pretty good 20-minute speech. I was ready to start, but because of questions directed to me, again, about scheduling—we get things well set and then because of questions—if we can just start now and do as I requested, have 15 minutes and you take 30 minutes, we will be able to get started.

Mr. REID. I am wondering, I ask if we could use the next 15 minutes so my people who have been here, Senators waiting could take the time. I would divide whatever by 3 until the time until 7 o'clock.

Mr. FRIST. Would you please repeat that?

Mr. REID. Then we can start fresh at 7 o'clock with you and Senator HATCH giving us your statements, and we will take the next half hour.

Mr. FRIST. Mr. President, you mean I have Senator HATCH speak?

Mr. REID. We would take approximately 4 minutes each until 7.

Mr. FRIST. No, Mr. President, Senator HATCH is going to follow me, and then we will go into going back and

forth. Senator HATCH has also been waiting 30 minutes. If it hadn't been for these questions, we would have been done 15 or 20 minutes ago.

Mr. REID. I say through the Chair, I am trying to be peaceful and calm here. The Chair ruled we have 4 minutes left.

Mr. FRIST. Would the Chair clarify how much time we have available on either side?

The PRESIDENT pro tempore. The majority has 4 minutes 37 seconds. The minority has 10 minutes 47 seconds.

Mr. HATCH. I ask unanimous consent that immediately after the half hour taken by the Democrats, I be given an additional 11 minutes. I will take 4 right now.

Mr. SCHUMER. I could not hear the Senator from Utah.

Mr. REID. The Senator from Utah said we would go until 7 o'clock and then they would do the next half hour; is that right? Is that what you said?

The PRESIDENT pro tempore. Is there objection?

Mr. HATCH. No, I said I would take the 4 minutes now and then take the 11 minutes after you had half an hour. How is that?

Mr. REID. Out of their time, that is absolutely fine.

The PRESIDENT pro tempore. The Senator is recognized for 4 minutes.

Mr. HATCH. Mr. President, I think it is appropriate to have the chairman of the Judiciary Committee who has had to go through all this rigmarole to say a few words before we get into this debate. I know the distinguished majority leader wanted me to do so.

To be honest with you, Mr. President, just think about it. All we want to do is what the Senate has always done. Once a nominee comes to the calendar, that nominee deserves a vote up or down under the advise and consent clause which is clearly a majority vote.

Never in the history of this Congress have we had what has been happening over the last number of years caused by the Democrats on the other side.

We should be voting on judges tonight, not debating judges. Frankly, there is a vocal minority of Senators preventing us from doing our constitutional duty to vote on judicial nominees. The American people need to know this, and although some of these folks have been moaning and groaning on the other side that we are taking this time, I suggest to them that there is hardly anything more important in a President's life, whoever that President may be, than getting his or her judicial nominations through.

Frankly, it is extremely important because this involves one-third of the coequal branches of Government. We found a continual filibuster on a number of these nominees.

Let me say this. Democrats seem to be very fond of saying: We passed 168 and we only filibustered 4. The fact is, that raw number of 168 we have had to fight pretty hard to get as well. But we have. Never in the history of this country have we had four stopped. That is only part of it.

I can name at least 15 that I have had various Democrats tell me they are going to filibuster. Most of them are circuit court of appeals nominees for the very important circuit courts in this country, people who have the ABA imprimatur, people such as Miguel Estrada; Priscilla Owen, who broke through the glass ceiling for women; Bill Pryor—even though he is conservative, he has always upheld the law even when he disagreed with the law; Charles Pickering, unanimously confirmed to the district court in 1990 and treated like dirt in the Senate—a racial reconciling. Yet he has been treated just like dirt. Carolyn Kuhl—we are going to have her first cloture vote on Friday because they are going to filibuster. Janice Brown—they are filibustering her; Claude Allen, I am told they are going to filibuster Claude Allen. How about Terrence Boyle of the Fourth Circuit? It looks as if they are going to filibuster him. James Deavers is being held up. Bob Conrad is being held up.

Four Circuit Court of Appeals judges for the Sixth Circuit out of Michigan are being held up by our colleagues on the other side; two district court nominees, and I could name some others.

The fact is, for the first time in history, they are treating a President of the United States in a ridiculous, unconstitutional fashion and not allowing him to have an up-or-down vote on his nominees. If they can defeat these nominees, that is their right, but they should not be dragging their feet and making it very difficult for these nominees to come up.

I heard some of the comments about how important the appropriations process is. It is important, but I can tell you we have had foot dragging almost all year by our colleagues on the other side, and it is important, but there is nothing more important than making sure that our courts are well staffed with competent judges who are going to enforce the law for the benefit of the American citizens.

There is nothing more important than that. Frankly, it is the one legacy that any President can leave. When Bill Clinton was President, we helped him put through 377 judges, the second all-time record. I might add Ronald Reagan was the all-time record holder at 382, 5 more than President Clinton. President Reagan had 6 years of a Republican Senate to help him and President Clinton had only 2 years of a Democratic Senate, and he was treated abundantly fair.

There were 47 holdovers at the end. Contrast that to when Democrats controlled the committee and Bush 1 was President. There were 54 holdovers.

Mr. President, this is really wrong what they are doing. It has the potential of exploding this body. Frankly, we can't allow it to continue. It is time for the American people to understand this. I understand my time is up.

Mr. REID. Mr. President, I yield 2½ minutes to the Senator from New York, Mr. SCHUMER; 2½ minutes to the Senator from California, Mrs. FEINSTEIN; and 2½ minutes to the Senator from Wisconsin, Mr. FEINGOLD; in that order.

The PRESIDENT pro tempore. The Senator from New York.

Mr. SCHUMER. Mr. President, they say one picture says a thousand words; one sign will equal 30 hours of palaver. The bottom line is very simple, we have supported and confirmed 168 judges whom President Bush has sent us. We have blocked 4.

All the rhetoric, all the splitting of hairs, all the talking about angels on the head of a pin don't equal that. This debate will boomerang on my colleagues from the other side of the aisle because all the American people have to do is look at that sign and they say: Gee, you're right.

The bottom line is the President, the majority leader, and the chairman of the Judiciary Committee will not be content unless every single judge the President nominates is rubberstamped by this body. That is what they want. We all know it. We have been very careful and very judicious in whom we have opposed.

People who are getting life appointments should not be extremists, should not be out of the mainstream, should not be asked to roll back 30 or 60 years of jurisprudence, and the four we have blocked fall in that category.

The bottom line is very simple: If you want agreement, then read the Constitution and tell the President, in all due respect, to read the Constitution. It says advise and consent. Advise means consult. We get no consultation. Consent means the Senate does its own independent review. That is what we have done.

So I understand why early on this sign vexed my colleagues from the other side. The bottom line is simple: We have been reasonable; we have been careful; we have been moderate; we have been judicious. The other side and the President simply say my way or the highway. That will not stand.

The PRESIDENT pro tempore. The Senator's time has expired. The Senator from California is recognized 2½ minutes.

Mrs. FEINSTEIN. I thank the Chair.

Mr. President, I have served as a member of the Judiciary Committee since I came to the Senate. I take the job very seriously. I try to do my homework in looking at these judges. I very deeply believe that this election provided no mandate to skew the courts to the right. I deeply believe that judges should be in the mainstream of American legal thinking, that they should have the temperament and the wisdom and the intellect to represent us well on the highest courts of our land.

What I wanted to use my time for—and the 2½ minutes will not be enough to do it—is to indicate that during the

time I have been on the Judiciary Committee how I have seen the rules and the procedures of the committee change. Those changes have not been good. They have served to divide the committee more. They begin with changing the American Bar Association's 50-year tradition of rating the qualifications of potential nominees before the President nominates them, to after the President nominates them. I would like to say why I think that is important.

There have been changes made in the so-called blue slip policy so that concerns Senators from a nominee's home State are no longer given any consideration whatsoever. There has been a reinterpretation of a longstanding committee rule, rule 4, prohibiting the majority from prematurely cutting off debate over a nominee in committee. There has been the elimination of the tradition of holding a hearing on only one controversial nominee for appellate vacancies at one time. There have been changes to committee practice——

The PRESIDENT pro tempore. The Senator's time has expired.

Mrs. FEINSTEIN. I hope in the next hour perhaps I might have more time. I yield the floor.

The PRESIDENT pro tempore. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I think we ought to be spending 30 hours on the manufacturing crisis in our country. Since January 31, we have lost 2.5 million manufacturing jobs and over 70,000 of them are from Wisconsin alone.

These jobs are more than numbers on a page. They are all too real. The thousands of Wisconsin residents who have petitioned their Government know this firsthand.

In their letters to me—and, Mr. President, I have with me over 2,000 letters that were sent recently to my home by manufacturers, not labor union members but manufacturers from the State of Wisconsin that are desperate about this problem. Thousands of people from all around Wisconsin, from places such as Sparta and Trempeleau and West Bend and Muskego, write that the first and foremost reason behind these lost jobs is our trade policy.

These letters say: Our elected officials say workers will benefit from this free trade policy and the free trade agreements that come with it, but the opposite has occurred. Our trade deficit is increasing at a pace of $1.5 billion per day. That is how many more products we are importing than we are making. As you can see, these trade agreements are not working to the benefit of U.S. workers.

These letters go on to talk about how manufacturing in America is dying a slow death. That is a much higher priority than spending 30 hours talking about four judicial nominations, and we should respond to the desperate situation that the American people are facing with manufacturing job loss.

I yield the floor.

The PRESIDENT pro tempore. Under the previous order, the next hour is equally divided between the two parties, 30 minutes to each side. Who yields time? The Senator from Utah.

Mr. HATCH. As I understand it, I have 11 minutes left; is that correct?

The PRESIDENT pro tempore. The Senator has a half hour.

Mr. HATCH. Mr. President, we should be voting on judges tonight. Instead we are debating judges tonight because a vocal minority of Senators is preventing us from doing our constitutional duty to vote on judicial nominees.

The American people need to know that. That is why we are here. If you stop and think about this sudden new set of arguments or at least arguments they have used for a long time, the Democratic leadership has been blocking all kinds of passage of bills that are America's priorities for the whole year.

Now they are complaining because we want to let the American people know how bad they have been about Federal judges, which, after all, is one of the most important things we do around here. Just think about it. The long overdue fiscal year 2003 appropriations bills were finally enacted on February 20, 2003. For the first time in history, there were filibusters to defeat the President's circuit court nominees, now up to six who are actually filibustered, and at least another nine whom, I have been told, they will filibuster. The sign they have is an absolute outright falsehood.

We needed legal reforms to stop lawsuit abuse against doctors, businesses, and industries that have been virtually banned by the tactics of the minority. Medical liability, class action reform, gun liability, and asbestos reform: they have all been subject to delays or filibuster by the minority.

Similar delays led to a record number of days spent on the budget resolution and the near record number of rollcall votes on amendments, many of which were virtually identical. The distinguished Senator from Alaska understands that as chairman of the Appropriations Committee.

The most innovative waste of time came on the Energy bill. After spending 22 days on the Energy bill last year, we spent 18 days on the Energy bill this year, only to pass the same version of the Energy bill that passed the Senate last year.

Bioshield legislation necessary to ensure proper vaccines in medicine to counter bioterrorism attacks has still not cleared.

The State Department reauthorization has been stalled by Democrats insisting upon unrelated poison pill amendments be voted on prior to passage. I could go on and on.

The fact is, there has been a steady slowdown, steady slow walk around here, ever since we became the majority.

Now, the issues we are highlighting tonight could not be more fundamental to our country, to democracy, to the rule of law: separation of powers. All are at stake in this ongoing debate. Among the constitutional Framers' conceptual breakthroughs was that the judicial branch would receive equal status to that of the executive and legislative branches. An independent judiciary is the thread that binds the country together and ensures law and order. It is important. It is indispensable to the survival of a civilized society.

If it had not been for the restraining force of an independent judicial branch, either the executive or the legislative branches would have usurped incredible power and destroyed the checks and balances that are at the very foundation of our constitutional form of government. So we all have a stake in this debate tonight, and it is my hope that our opponents across the aisle will act to restore the constitutionally required up-or-down vote for judicial nominees. Ultimately, through the ballot box, the people in my home State of Utah and across America will decide who nominates and who confirms judges.

Let me repeat that our Nation's founding document requires that every judicial nominee who reaches the Senate floor receive an up-or-down vote. It is a simple, clear, and fair fact that lies at the heart of this debate. Once they hit the floor, they have always gotten a vote.

Every one of President Clinton's judges who hit the floor got a vote up or down, and only 1 out of 377 was defeated. But a minority of the Senate is rigging the system by engaging in an unfair set of unprecedented filibusters which are the culmination of an outright assault on the independence of the Federal judiciary.

When our colleagues across the aisle controlled the Senate, we saw nominees with the full support of their home State Senators denied hearings and votes for months and months. We saw nominees stalled by demands for unpublished opinions and volumes of written questions. We saw this become more and more serious since the beginning of this year.

We have continued to see ideology used to threaten the independence of our Federal judiciary by essentially requiring nominees to announce their views on issues that may come before them as Federal judges, something that has not happened in the past. But that is what they are requiring of President Bush's nominees, at least some of them.

They treated Miguel Estrada like dirt, while they allowed John Roberts to go through. Roberts was also in the Solicitor General's office. They did not ask for the highly privileged confidential matters for Roberts, but they did for Miguel Estrada.

By the way, most all of these people have high ratings from their gold standard, the American Bar Association.

We have seen for the first time in American history true filibusters of judicial nominees which are preventing the Senate from exercising its constitutional right and duty of advice and consent. This is harmful to the Nation, it is harmful to the judiciary, and it is certainly harmful to our institution. It is harmful to the President. It is harmful to these people who are willing to put their names up and to do this.

Article II of the Constitution of the United States invests in the President alone the power to nominate judges. There is no room for interpretation. The words are explicit. Yet we have seen efforts to usurp the President's constitutional authority not by constitutional amendment but through various proposals on how nominations should be made and demands on who should be nominated that exceed any reasonable interpretation of consultation.

We have also seen the filibusters of judicial nominees that brought us here tonight and prevent us from exercising our constitutional obligation of an up-or-down vote.

This assault on the judiciary is not without victims. There is no question that it is harmful to the Federal judiciary. More than half of its existing vacancies are considered judicial emergencies. So it is harmful to the President. He is not being treated fairly compared to all Presidents before him. And it is harmful to the Senate, whose constitutional roles are turned on their heads. It is perhaps most harmful to the individual lives of the nominees who have been denied a simple up-or-down vote, which they have always gotten before when they have been brought to the floor on the Executive Calendar.

Now let me talk about some of these nominees because I think it is important to remember that they are very real people who want to get on with their very real lives instead of hanging in the limbo of what has become the Senate's confirmation stall.

Let me turn to this particular picture. Former DC Circuit nominee Miguel Estrada, who is an American success story, unanimously gets the highest rating from the American Bar Association, the Democrats' gold standard. He was stopped for over 2 years—actually 3 years. Priscilla Owen broke through the glass ceiling for women and made it so women could become partners in major law firms, one of the most brilliant people in our society. She was an excellent witness, but they just do not want her.

William Pryor, of course, in my opinion, the outside groups tried to smear Pryor, and they did so with regard to his strongly held personal beliefs on abortion.

I might add that Charles Pickering, who I mentioned before, was passed by this body unanimously in 1990. Yet all of a sudden in the next 13 years he is unworthy to be on the circuit court of appeals?

No. It all comes down to abortion. We can go further. We can go further than just these nominees. I have mentioned a whole raft of others. I could name at least 15 colleagues on the other side who have indicated they are going to filibuster. Now that is abominable. All four of those nominees have been waiting years, and in some cases many years, for confirmation. All of them have been denied up-or-down votes.

On Friday, the Senate will consider the nomination of two more outstanding jurists, and let me just put up this second chart. Carolyn Kuhl served in the Reagan administration. She was only 28 years old at the time and they have tried to act like she had all kinds of authority to do things with which they disagree. She has virtually unanimous support from her fellow judges in California, many of whom are Democrats, who say she will make a terrific addition to the Ninth Circuit Court of Appeals.

Take Janice Rogers Brown, this African American woman who was the daughter of sharecroppers. She put herself through college and law school as a single mother—just think about that—and yet she is being treated in a very improper fashion.

I might add that nearly 100 of her fellow judges on the Los Angeles County Superior Court are in support of Carolyn Kuhl. She is a terrific nominee, but they suspect that she is probably pro-life. I do not know what she is. I do not know what Janice Rogers Brown is. They may be right on that, but so what?

I think if a person is otherwise qualified, no single issue should stop them from being able to serve their country on the Federal bench, and if we had taken the attitude they are taking, my gosh, President Clinton would have got very few judges. Instead he got 377, the second all-time record for confirmations.

DC Circuit Court nominee Janice Brown has spent nearly a quarter century in public service, including nearly a decade as a judge in the California State courts. This daughter of a sharecropper became the first African American woman to sit on the California Supreme Court in 1996. Why are they against her? Because they know she is conservative, and they want just one way of thinking among African Americans. She does not qualify because she happens to be conservative. No matter that she won 76 percent of the vote in the last election, more than any other nominee for the California Supreme Court, and wrote most of the majority opinions in the last year.

On Friday, we will have the opportunity to give these two nominees the up-or-down vote they deserve, but it is apparent the minority whip has said they are going to filibuster them.

I am proud to say in my 27 years in the Senate, some of my Democratic colleagues expressed similar views when a different President was in the White House. For example, the distinguished minority leader stated:

> As Chief Justice Rehnquist has recognized: The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. An up-or-down vote, that is all we ask.

That was their philosophy when they had the Presidency and they had the Senate Judiciary Committee and were the leaders in the Senate.

On this point, I agree with Senator DASCHLE. All we ask for is an up-or-down vote. If they want to vote against these people, that is their right, but they need to have an up-or-down vote. Why are they afraid of allowing simple up-or-down votes in the cases of these excellent nominees? Well, because we think—I think—there is more than adequate evidence that on a bipartisan set of votes these nominees would be confirmed by the Senate. If not, let the chips fall where they may. But these nominees deserve a vote. Vote them up or vote them down, but just vote.

I yield the floor.

The PRESIDENT pro tempore. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, my Democratic colleagues try to justify their unprecedented filibusters of President Bush's nominees by arguing that they want mainstream judges and that President Bush's nominees do not fit that criteria. Mainstream judges—I am a little puzzled by that assertion. I would think, for example, that Priscilla Owen is in the mainstream. She was rated unanimously well qualified by the ABA. She was endorsed by the past 16 Texas Bar Association presidents, both Democrats and Republicans. She has been twice elected to statewide judicial office in Texas, one of the States where they elect judges, and the last time, interestingly enough, she got 84 percent of the vote—unanimously well qualified by the ABA; supported by 16 presidents of the State bar of Texas, Democrats and Republicans, and gets 84 percent of the vote. Sounds like mainstream to me. Yet Democrats filibustered her nomination because of her interpretation of a Texas law saying minor girls could not have an abortion without their parents being notified—not consent but merely notified.

After all, school nurses need a parent's consent to dispense an aspirin to a child. Should not a parent be entitled to a simple notification when their child seeks an abortion? Over 80 percent of Americans think they should. That is a very mainstream notion.

So I was astonished that Democrats would say she was not ''in the mainstream,'' and, frankly, I think the American public would be astonished by such a conclusion that a person so ruling would not be in the mainstream. But ''mainstream,'' of course, is a relative term.

To help the American people understand the Democrats' view, we should look at some of the Clinton judges my Democratic colleagues have supported. Upon doing so, it should be pretty clear

that the Democrats' view of mainstream is colored by the fact that they are sitting on the far left bank.

Clinton class of 1994, Judge Shira Scheindlin, a get-out-of-jail-free card for terrorist sympathizers. In the days after 9/11, Federal agents did their job by detaining a material witness to the 9/11 attacks, a Jordanian named Osama Awadallah. Osama knew two of the 9/11 hijackers and met with one at least 40 times. His name was found in the car parked at the Dulles Airport by one of the hijackers of American Airlines Flight 77, and photos of his better known name's sake, Osama bin Laden, were found in Osama Awadallah's apartment.

Under the law, a material witness may be detained if he or she has relevant information and is a flight risk. The Justice Department thought Osama met both of those tests. While detained, he was indicted for perjury. But Judge Shira Scheindlin, a 1994 Clinton nominee, dismissed the perjury charges and released this man on the street. Her reason? She ruled that the convening of a Federal grand jury investigating a crime was not a criminal proceeding, and therefore it was unconstitutional to detain this Mr. Awadallah.

This was quite a surprise to Federal prosecutors who, for decades, had used the material witness law in the context of grand jury proceedings for everyone from mobsters to mass murderer Timothy McVeigh. So much for following well-settled law.

If anyone wants to read a good article about this case, I recommend the Wall Street Journal editorial from last year entitled ''Osama's Favorite Judge.'' It notes that thanks to Judge Scheindlin, this fellow is out on bail. We wonder how he is spending his time.

Just last Friday, the Second Circuit reversed Judge Scheindlin. The appellate court seemed quite puzzled that she would release this man given his obvious connection to terrorists. The Second Circuit held that his detention as a material witness was a scrupulous and constitutional use of the Federal material witness statute.

It is too bad Judge Scheindlin did not act in a similarly scrupulous fashion. Nevertheless, to Democrats she is probably ''in the mainstream.''

Let us take a look at the Clinton class of 1995, Judge Jed Rakoff. One of Judge Scheindlin's colleagues, a 1995 Clinton nominee, has ruled that the Federal death penalty is unconstitutional in all instances.

Now, some of my colleagues may share this position, but their views differ from the majority of Americans. When Judge Rakoff acts on his personal views, it is a very clear failure to follow Supreme Court precedent. Indeed, Judge Rakoff's rulings so brazenly violated precedent that even the Washington Post, which is against the death penalty as a policy matter, came out against his decision as gross judicial activism.

In an editorial entitled ''Right Answer, Wrong Branch,'' the Post noted that the fifth amendment specifically contemplates capital punishment three separate times. The Post noted:

> [T]he Supreme Court has been clear that it regards the death penalty as constitutional. . . . The High Court has, in fact, rejected far stronger arguments against capital punishment. . . . Individual district judges may not like this jurisprudence, but it is not their place to find ways around it. The arguments Judge Rakoff makes should, rather, be embraced and acted upon in the legislative arena. The death penalty must be abolished, but not because judges beat a false confession out of the Fifth Amendment.

Another editorial, this one from the Wall Street Journal entitled ''Run for Office, Judge,'' said as follows:

> It hardly advances th[e] highly-charged debate [on capital punishment] to have a Federal judge allude to Members of Congress who support capital punishment as murderers. If Judge Rakoff wants to vote against the death penalty, he ought to resign from the bench and run for Congress or the state legislature, where the Founders thought such debates belonged.

Judge Rakoff's ruling would prevent the application of the death penalty against mass murderers like Timothy McVeigh or Osama bin Laden. I guess Judge Rakoff is the kind of mainstream judge the Democrats would like to see on the bench.

There have also been some interesting rulings from the Ninth Circuit, finding the right to long distance procreation for prisoners. My friends on the other side believe very strongly in a living and breathing constitution. They also believe that the rule of law should not be confined to the mere words of the document and the Framers' intent. To them, those are anachronistic concepts. I was truly surprised, however, to read what a panel of the Ninth Circuit had tried to breath into the Constitution.

Three-time felon William Geber is serving a life sentence for, among other things, making terroristic threats. Unhappy with how prison life was interfering with his social life, Mr. Gerber alleged he had a constitutional right to procreate via artificial insemination.

A California district court rejected Mr. Gerber's claim. A split-decision of the Ninth circuit, though, reversed. Infamous Carter-appointee Stephen Rhinehardt joined President Johnson's appointee, Myron Bright, to conclude that yes, the farmers had indeed intended for ''the right to procreate to survive incarceration.''

In his dissent, Judge Barry Silverman—a Clinton appointee who was recommended by Senator KYL—wrote that ''This is a seminal case in more ways in one'' because ''the majority simply does not accept the fact that there are certain downsides to being confined in prison.'' One of them is ''the interference with a normal family life.''

Judge Silverman noted that while the Constitution protects against forced sterilization, that hardly establishes ''a constitutional right to procreate from prison via FedEx.'' The Ninth Circuit, en banc, reversed this decision, but only barely. And it did so against the wishes of Clinton appointees Tashima, Hawkins, Paez and Berzon, who dissented from the en banc ruling.

If anyone wants to read more about this case, I'd recommend George Will's piece entitled, ''Inmates and Proud Parents.'' If there ever was a circuit in need of some moderation, balance, and ideological diversity, it is the Ninth Circuit. It is made up of 17 Democrat appointees, but only 10 Republican appointees.

It is the Nation's largest circuit, covering nine states and 51 million people. It is also reversed far and away more than any other circuit. Indeed, it is reversed so often—from 1996–2000, the Supreme court reversed it 77 out of 90 times—it is known as a ''rogue'' circuit. This has forced its representatives to introduce legislation to allow their States to secede from the Ninth Circuit.

But my Democrat colleagues probably won't give Ninth Circuit nominee Carolyn Kuhl the simple dignity of an up or down vote. Evidently she is not as ''mainstream'' as all these Democrat judges.

If these Democrat judges represent the ''mainstream,'' then quite frankly, I am glad the Democrats think that Priscilla Owen, Carolyn Kuhl, and Janis Rogers Brown aren't in it. Unlike these Democrat judges, I am confident these women will follow precedent and act with commonsense.

The Senate should, as it did with Judge Paez, Judge Berzon, and other controversial Democrat nominees, give these women the simple dignity of an up or down vote.

I yield the floor.

The PRESIDENT pro tempore. The Senator from Nevada.

Mr. REID. Thank you very much, Mr. President.

I talked quite a bit on Monday about this matter dealing with jobs. We should be talking about jobs. We should be talking about unemployment, not four people who have jobs.

What I am talking about, what we are talking about on this side is absolutely valid. One needs only to go to the Web site of the majority leader, Senator FRIST, prior to his pulling from his Web site the information to the following question: Should the President's nominees to the Federal bench be allowed an up-or-down vote on confirmation as specified in the Constitution? Sixty percent, no.

Even the majority leader's Web site indicates that what is going on here is absolutely wrong. The majority of the people who responded, almost 10,000 people, said this is the wrong approach. This is from the majority leader's own Web site.

I also say that this has been referred to as a carnival—I don't know if that is an exact term. But as an indication that it is circus-like, one need only get

an e-mail that was sent to various Senators on the majority side saying:

It is important to double your efforts to get your boss to S–230 on time. Fox News channel is really excited about the marathon. Britt Hume at 6 would love to open the door to all our 51 Senators walking on to the floor. The producer wants to know, will we walk in exactly at 6:02 when the show starts so we can get it live to open Britt Hume's show? Or, if not, can we give them an exact time for the walk-in start?

Mr. President, we have said this should be about jobs, about unemployment. Even Senator FRIST's people who respond to him on his Web site say yes. Is it a circus? Absolutely. You can see from this it is a circus.

Mr. DURBIN. Will the Senator yield?

Mr. REID. I am happy to yield.

Mr. DURBIN. Is it possible for us to get an update during the course of the evening on what Fox News is going to be looking for during this marathon? This opening about the march into the Chamber clearly was priority for the ''fair and balanced'' network. Will we get updates from time to time how Fox News would like to orchestrate the rest of this?

Mr. REID. I say to my friend, perhaps so. If not, maybe we could check with the Federalist Society, which, coincidentally, is starting their convention tomorrow.

The PRESIDENT pro tempore. The Senator is warned to speak through the Chair and not risk the probability of being interrupted and losing the floor.

Mr. REID. Mr. President, I don't understand. I was speaking through the Chair, answering the Senator's question.

The PRESIDENT pro tempore. The Senator from North Dakota must address the Chair and ask for permission.

Mr. DURBIN. There is no Senator from North Dakota.

Mr. REID. I respond through the Chair to the distinguished Senator from Illinois.

The PRESIDENT pro tempore. It protects the Senator's right to the floor.

Mr. REID. I say to my friend that the Federalist Society, as we know, is not mainstream dealing with judicial issues, but extreme, and indicate that may be the case. One of the lead speakers, of course, is Mr. Bork. To even compound the political nature of the operation, Attorney General William Pryor of Alabama is speaking there.

For everyone within the sound of my voice, it sounds to me rather unusual that someone who has the nomination and is trying to get confirmed to be a member of a very high Federal court—I cannot imagine it would be appropriate for that person to appear at an organization that is not in the mainstream, but extreme.

So what we have here, even by Senator FRIST's standards, looking at his Web site, we have the facts as I have indicated previously.

Mr. SESSIONS. Will the Senator yield?

Mr. REID. Not right now. I will not.

We have here from Senator FRIST's own Web site the fact that 60 percent of the people—about 10,000 responded before it was pulled from the Web site—say that the procedure being sought here is wrong.

I also say it is very clear this is a carnival-type atmosphere as indicated by the e-mail setting up the various presentations to satisfy Fox News.

Finally, the Federalist Society, coincidentally, is the typeset for this matter.

I yield 12 minutes to the Senator from California, Mrs. FEINSTEIN.

The PRESIDENT pro tempore. The Senator from California is recognized for 12 minutes.

Mrs. FEINSTEIN. Mr. President, what I was trying to do was essentially trace changes in committee procedure with the difficulties the Judiciary Committee seems to be countenancing in present days. A good deal of it has to do with blue slip policy because it was the second tradition to fall by the wayside when President Bush took office.

Under the Clinton administration, nominees were often blocked not only by home State Senators but by any single Republican Senator. At the very least throughout the years preceding the Bush administration, a home State Senator's objection to a nominee would effectively stop that nominee from moving forward.

Let me show a copy of a blue slip used during the Clinton administration, starting in January of 1999, and sent to each home State Senator. The document itself specifically states that no proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home State Senators.

That policy was followed without fail and without question. Even before 1999, during the Clinton Presidency, the blue slip said ''unless a reply is received from you within a week from this date, it will be assumed that you have no objection to this nomination.''

But still, if there was an objection from a home State Senator, that nominee simply did not move, did not get a hearing, did not get a vote, did not get confirmed. It was, in fact, a filibuster of one.

Today, there is a new blue slip policy, one in which the objections of one or even both of the home State Senators is no longer dispositive. That is part of the problem. This keeps changing, dependent on who is President. This latest policy puts Democrats on the committee and in the Senate in a difficult position.

In the past, if a home State Senator objected to a nominee, that nominee did not proceed; there would be no committee vote and no filibuster on the floor. Fifty-five Clinton nominees did not receive a hearing. This well could have been a filibuster of one. The blue slip is secret; nobody knows.

Let me name some of the Clinton nominees who were filibustered by one or two members of the Judiciary Committee. Elena Kagen, nominated to the District of Columbia Circuit, nominated by Clinton, June 17, 1999. The nomination was returned December 15, 2000. She waited 547 days without getting a hearing or a vote in the Judiciary Committee. She is currently the dean of Harvard Law School.

Lynette Norton, nominated for the District Court for the Western District of Pennsylvania. Nominated by President Clinton on April 28, 1998, in the 105th Congress. Her nomination, which was submitted to the 105th and 106th Congresses, was returned both times without a hearing. She waited 961 days without a hearing or a vote in the Judiciary Committee. Again, a successful filibuster by one or two Senators, in secret.

Barry Goode, nominated for the Ninth Circuit. Goode was nominated by President Clinton on June 24, 1998. After 3 years of inaction, President Bush withdrew his nomination, on March 19, 2001. Mr. Goode waited 998 days without ever getting either a hearing or a vote in the Judiciary Committee. A filibuster of one or two, in secret—no hearing, no opportunity to read a transcript, no opportunity to go back and read writings, speeches, or look into a nominee's background. Just because of one or two Senators, a hearing is denied; the filibuster is complete.

H. Alston Johnson, nominated for the Fifth Circuit, a Louisiana slot. President Clinton nominated Johnson on April 22, 1999. His nomination was returned December 15, 2000. He waited almost 697 days without getting a hearing or a vote in the Judiciary Committee.

This goes on and on and on.

Now, the nominees before us today had hearings. There was debate. There was a markup. There was a debate. There was a vote. We did read their background. And based on knowledge, the minority of this body made a decision that we do not wish to proceed to affirm them. We have over 40 votes to do so. This is not the vote of one person in secret preventing a hearing from taking place. Now that is as much a filibuster as this is.

You are looking at me strangely, Mr. President?

The PRESIDING OFFICER (Mr. TALENT). There is no reason for that. I am just inquiring of the Parliamentarian about the time remaining.

Mrs. FEINSTEIN. And I don't want to use the time because I know Senator DURBIN—how much time do we have remaining?

The PRESIDING OFFICER. The minority has 18 minutes, of which 5½ minutes, approximately, still remain for the Senator from California.

Mrs. FEINSTEIN. Thank you.

So my point is that much of what has been happening in the Judiciary Committee has been to make it more confrontational. The blue slips are an excellent case in point. Changing when the American Bar Association ratings are known is a good point.

I remember during the Clinton administration when the ratings were

done earlier and I had to call a nominee and tell them that because they had been out of the practice of law for a period of time, they were deemed unqualified by the American Bar Association and the President was not going to move their nomination. So without embarrassment to the individual, that nomination was withdrawn.

Today, you do not get the American Bar Association's qualified or partially qualified or unqualified rating until after the nominee is on the Hill.

Now there are those who do not think the American Bar Association's evaluation is worth anything. There are those on the committee who believe it is. So there is a difference in point of view. But at least have the qualification or nonqualification done early enough so that it can save the individual humiliation and also play a major role.

Let me talk for a minute about rule IV because I think rule IV again divided our committee in a way that it did not have to be. Rule IV has been a Senate tradition. It is a rule. It is a hard and fast rule. It prevents closing off debate on a nominee unless at least one member of the minority agrees to do so. Twice this rule has been reinterpreted, really violated, and votes have been forced on nominees well before debate has ended. The committee's rule in question contains the following language:

The chairman shall entertain a nondebatable motion to bring a matter before the committee to a vote. If there is objection to bringing the matter to a vote without further debate, a rollcall of the committee shall be taken and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with 10 votes in the affirmative, 1 of which must be cast by the minority.

That enables the minority to delay a matter. It is in the rules of the committee to give it more time. This rule is not being followed.

This is one of the only protections the minority party has in the Judiciary Committee. Without it, there might never be debate at all. A chairman could convene a markup, demand a vote, and the entire process would take 2 minutes. This is not how a deliberative body should function. More importantly, it is contrary to our rules. That is one of the reasons we are where we are today.

This rule was first instituted in 1979 when Senator KENNEDY was chairman of the Judiciary Committee. It has been followed to the letter until very recently.

This is a nation of laws. We expect these laws to be obeyed even if they are just Judiciary Committee rules.

Let me give another situation, and that is ignoring traditional State vacancies. There is also a willingness by this administration to simply change the playing field if they do not like a result. Fourth Circuit nominee Claude Allen is one such instance. He is from Virginia. He has been nominated for a position that has traditionally been filled from Maryland. Why? Because President Bush became frustrated that Maryland's two Democratic Senators would not sign off on the nominees he wanted for that position. So he decided to simply go where he could find more friendly company—Virginia's two Republican Senators.

This stark determination to simply fill the bench with conservative jurists at all costs is what gives the minority in the Senate pause when considering whether to simply approve every Bush judge who comes our way or make a stand on some. We have chosen to make a stand on some. There are other attempts to ignore the minority. There are little things as well, things that add up over time to give the clear impression that the majority does not care about the needs or the will of the minority. That simply serves to create, increasingly, a bunker mentality among Democrats in today's Senate.

For instance, earlier this session, the Judiciary Committee scheduled a hearing with three very controversial circuit court nominees on a single panel for an appellate court.

The PRESIDING OFFICER. The Chair needs to inform the Senator from California she has used her 12 minutes.

Mrs. FEINSTEIN. May I finish my statement?

Mr. REID. I yield the Senator 2 more minutes.

Mrs. FEINSTEIN. The point is, these were all controversial nominees. A controversial nominee's hearing can run 8 hours. If you schedule three, you truncate the hearing for each, and you do not allow the minority to do their due diligence in terms of their homework.

I thank the Chair and I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, I yield the remainder of our time to the distinguished Senator from Illinois, Mr. DURBIN.

The PRESIDING OFFICER. The Senator from Illinois is recognized, and he has 11 minutes 45 seconds.

Mr. DURBIN. Thank you, Mr. President, and I thank the minority whip.

First, for those who are following this debate, if it can be characterized as such, you should understand we had an opportunity to finish the appropriations bill for the Veterans' Administration, a $62 billion bill to fund veterans hospitals, clinics, and health care across the United States. We tried.

Senator BYRD of West Virginia came to the floor and said: Can we postpone what we are doing tonight here to finish this important appropriations bill so we can go to conference and get ready to adjourn this session in a timely fashion? Sadly, the Republican side objected to finishing the appropriations bill for the Veterans' Administration. It is their belief what we are doing now took precedence, is more important. It will be up to the voters and the public to make a judgment as to whether they were right.

I would also say that instead of addressing some issues families across America might tune in to follow, such as the unemployment in this country, and what we are doing about it, we are here debating a situation where 4 judges have been held out of 172 submitted by President Bush.

I would think, frankly, we ought to spend a little time really addressing the problem of unemployment in this country. This President has witnessed, in his administration, a loss of more than 3 million private-sector jobs. That is a record. Unless something changes dramatically, this President will be the first President since Herbert Hoover to have lost jobs during the course of his administration. Over 3 million Americans unemployed. Sadly, we have 9 million unemployed across the country today and their unemployment benefits are running out.

UNANIMOUS CONSENT REQUEST—S. 1853

In the interest of at least trying to do something constructive and legislative this evening, rather than just exchanging our comments back and forth, I am about to make a unanimous consent request that the Senate proceed to legislative session, and the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for displaced workers, that the Senate proceed to its immediate consideration, and that this bill be read a third time and passed, and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Is there objection?

Mr. SESSIONS. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. DURBIN. I am not surprised because what we are about tonight is not the issues families care about. We are about a political script. Senator REID of Nevada read to us this all-points bulletin that was sent out to the Senators saying: Be sure and get over here exactly at 6 o'clock. It said: The Fox News channel is really excited about this marathon. Britt Hume at 6 would love to open with all of our 51 Senators walking on to the floor. The producer wants to know, will we walk in exactly at 6:02 when the show starts so they can get it live to open Britt Hume's show, or, if not, can we give them an exact time for the walk-in?

That is what this is about: It is about theater. The theater we are witnessing tonight is one where, frankly, the curtain should come down. We ought to start talking about things people really care about across America. I can tell you, it is not about 4 judges out of 172. We have approved for this President 168 of his nominees. I think it is a new record. I do not think any President in that brief a period of time has had 168 nominees approved. Lest you believe the Democrats dragged their feet, we approved 100 of these judges during the 17 months PAT LEAHY was chairman of the Senate Judiciary Committee. The remaining 68 came through under Republican Chairman HATCH. I think there has been a concerted and conscientious effort to give the President