

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 So without embarrassment to the individual, that nomination was withdrawn.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

his nominees. Then, of course, there were 4 who were not approved—168 to 4. So 98 percent of this President's nominees have been approved. By any reasonable standard, this President is doing very well. Most people would agree, except for the 51 Senators on the other side of the aisle. They believe unless the President gets every nominee, this is a miscarriage of justice.

Sadly, though, they are ignoring the obvious. The obvious is the Constitution of the United States gives this Senate the authority to say yes or no, to advise and consent. Article II, section 2: Advice and consent of the Senate. Some of these Republican Senators would like to see this phrase go away and make their argument at least a little plausible, but it is a fact. We have the authority under the Constitution we swear to uphold to make these decisions; and we have made them.

Of course, not only is the Constitution on our side, but the rules of the Senate are on our side. It reminds me in law school, they told you early in a trial advocacy course—and this a cliché, I know—they used to say: If you have the law on your side in your trial, beat on the law. If you have the facts on your side, beat on the facts. But if you do not have the law or the facts on your side, beat on the table. That is what is happening in this 30-hour marathon. Our Republican colleagues are beating on the table. The law is not on their side.

The Constitution says we have the authority to say no. We have said no 4 times out of 172 opportunities. It is constitutional to do so. Are the facts on our side? Are we being unfair to stop 4 judges, approving 168 and stopping 4? I do not think so.

Frankly, if you look at the record of the Republicans in control of this same committee with a Democratic President, you will find some 63 nominees were never given the decency of a hearing. They never had a chance to even appear and introduce themselves to the committee. The decision was made by the Republican leadership, with a Democratic President, not to even let them in the building.

I have been through this. Three of my nominees that happened to. Do you know what it consisted of? If any one Republican Senator objected to any nominee, end of story. They effectively had a filibuster by one Senator. They stopped these nominees in their tracks.

I can recall going to Senator John Ashcroft, our Attorney General, with one extraordinarily talented nominee, and pleading with him, after the man had waited for a year for a hearing, pleading with him to at least meet the man. Let him come before the committee. No way. The answer was no. End of story. End of nomination.

That was the treatment accorded to three judges from my State during the short period of time when I was here and President Clinton was President, as the Republicans ruled the Senate Judiciary Committee.

I lost 3 nominees. Did I rally my Democratic colleagues: "Let's all get together and hold our breath and turn blue for 30 hours because I have lost 3 nominees"? No. Maybe I could have. Maybe I should have. But I did not. I understood it. I thought it was fundamentally unfair, and I still do.

What we have done to these four nominees is not unfair. Each and every single one of them has had a hearing. Each and every one of them has been able to come to the committee and present their credentials. That never happened to 63 nominees offered by President Clinton.

This President has a pretty good batting average when it comes to the Senate: 98 percent of his nominees have gotten through. But for the 2 percent, we are meeting this evening.

I might add here, if you take a look at the issues at hand, the Senator from Nevada raised an interesting one. Almost without fail, the majority of the 168 nominees were all members of this Federalist Society. It sounds like a secret handshake society. It is something else. I am not sure exactly what it is. I will tell you why I am not sure.

I do know this. If you are an aspiring law student who one day wants to be a Republican nominee for a judgeship, my recommendation to you is to join the Federalist Society today and do not miss a meeting because, frankly, that is a requirement if you are going to make it into the ranks of judges in the future.

What is it about this society? I don't know. But if you scratch the DNA of all these Republican nominees, you are going to find that Federalist Society chromosome. It is in every one of them. Time and again, I have said to these nominees: What is the Federalist Society? What does it mean to you? Some people say it is a rather extreme organization that views the law and the Constitution in a manner that most Americans do not. But when I ask these nominees—I can remember a Professor Viet Dinh of Georgetown Law School where I went to school many years ago. I said: You belong to the Federalist Society. Why? He said: Because I get a free lunch in Chinatown once a month.

Well, I think it is more than that. If you go to their Web site and ask the Federalist Society what they believe, what they put on their Web site is they talk about how we have lost control of the law and the liberals are taking over—all the stuff you expect. Then when you ask each of these nominees: Well, do you agree with that? "Oh, no,"—with one exception: Mr. Pryor. William Pryor of Alabama says, yes, he does agree with it. If you got to know Mr. Pryor, you would understand he is rather unabashed in his political beliefs.

The fact of the matter is, the nominees we are receiving from the White House are not mainstream nominees. Sadly, of the 168 we have approved, many could be challenged as outside

the mainstream, and that is not what America is looking for.

President Clinton knew if he sent up a real liberal, someone who, frankly, had the credentials of the left, he did not stand a chance before Senator ORRIN HATCH's Judiciary Committee. We would strive to find people with extraordinary legal credentials, people who really have made a difference in terms of their practice of law and what they have done; and they, too, suffered before that same committee.

This President has no qualms. The people he sends to us, whether it is Miguel Estrada or whether it is William Pryor or Priscilla Owen, each and every one of them have come back—Charles Pickering—with credentials that just do not pass the middle-of-the-road test.

Why are we doing this for 30 hours? Let's lay it on the line. This memo from Fox News tells you why we are here. We are here to grind raw meat for the Republican rightwing, so television networks like the fair and balanced Fox News network can rail on for days and weeks about this 30-hour tribute to the Republican point of view, so the radio talk show hosts, who blather on every single day from the right, will have much more to talk about. And instead of dealing with real issues, paying for the Veterans' Administration, so we can get that done, and meet our obligations, taking care of the unemployed across America, so they can feed their families and avoid bankruptcy, we do not have time for that. Our time has to be focused and dedicated to this debate.

I will say to my colleagues in the Senate, I think my friends on the Republican side will have to agree with this: Though they do not like the outcome of the four judges we have talked about here, we have given the nominees, even when Senator LEAHY was chairman, ample opportunity to explain who they are and what they stand for. I think what we have asked for is reasonable.

What we ask of every judicial nominee, from a Democrat or Republican President, is really basic. They have to be people who are honest, of high integrity. They have to understand the law. They should be people who do not come to this job with an ax to grind. That is not too much to ask. Four have failed that test; 168 have been approved.

THE PRESIDING OFFICER. The time of the minority has expired.

The Senator from Alabama.

Mr. SESSIONS. Mr. President, how much time is left in the first section for the majority?

THE PRESIDING OFFICER. Five minutes 45 seconds.

Mr. SESSIONS. Mr. President, in response to a number of things that have been said, first of all, I want to correct Senator DURBIN. I think he misspoke when he said the Senate has said no to these nominees. What the Senate has said no to is an up-or-down vote. They have denied these nominees a vote. In

each case, these nominees have proven they have a majority of the Senators in this body ready and willing to confirm them, if they are given the up-and-down vote. The systematic use of the filibuster that is occurring now has never before occurred in the history of this Senate.

As to the Constitution, I will just point out article II, section 2, quoted by the Senator—this is what it says—the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors [and] judges. . . .”

Historically, this body has felt that constitutional language meant treaties required a supermajority, two-thirds vote, and judges would be confirmed by a majority vote, and that is what we have done.

I would just like to ask—I was going to ask Senator REID early, the distinguished assistant Democratic leader—name one position taken by the Federalist Society that is extreme. He will not be able to give you one of those, and neither would Senator DURBIN. This is a society of people who meet and discuss ideas. For example, they have had, in recent weeks, Senator SCHUMER’s chief counsel speaking to the Federalist Society, as has Cass Sunstein, Marcia Greenberger, Laurence Tribe—three of the architects of the Democratic strategy for changing the ground rules of nominating judges.

This is really odd for me. I know Senator DURBIN said he has some legislation he would like to offer. Maybe he should have offered it Monday when the assistant majority leader was talking 10 hours down here about rabbits and cactus in Nevada and his book. That was all very interesting, but why weren’t we doing any work then? I did not hear any complaints then when we were not passing legislation. That would have been an outstanding opportunity, I submit, to move forward.

Let me just say one thing about where we are on nominations. President Clinton had 377 judges confirmed. One judge was voted down on an up-or-down vote on this floor, a majority voted no—only one. When he left office, there were 41 judges pending and unconfirmed—only 41. President Clinton personally withdrew the nominations of 18. That is how they get 60.

When former President Bush left office, under Democrat control of the Senate, as Republicans were under Clinton, he had 54 nominees left unconfirmed. The record of the Republican Senate under President Clinton was superior under any standard of confirmations to that of the Democrats.

I believe we need to remember those numbers. We need to remember the Republicans rejected consistently the use of the filibuster. It was discussed by people. They said: Why don’t we fili-

buster? Senator HATCH and others would say: We do not filibuster judges. This is why you do not filibuster judges. We never filibustered judges. In fact, one nominee I felt strongly about, whom I voted against, I voted for cloture to bring that nominee up for a vote to overcome a hold that was on the nominee.

My colleagues complain about the Federalist Society. They say they are extreme. They take no extreme positions whatsoever. They are a society that believes in the rule of law and they discuss those issues in free and open debate. But they have moved forward here such as Marsha Berzon and Ruth Bader Ginsburg on the Supreme Court.

ACLU members, American Civil Liberties Union members—do you want to know what their stated positions are on a lot of issues? They oppose steadfastly the death penalty. They openly support partial-birth abortion. They are consistently hostile to law enforcement. They oppose pornography laws, all pornography laws, in fact, even child pornography laws. They favor legalization of drugs.

We have confirmed a lot of ACLU members, as the Senator knows. They have stated positions that are contrary to the mainstream of American thought—no doubt whatsoever.

Somebody such as Attorney General Bill Pryor, who has a record of following the law to the letter, whether he agrees with it or not, is castigated because he makes a talk to the Federalist Society. It is suggested that is an extreme thing for him to do and it is not correct.

Mr. President, I yield back the time.

The PRESIDING OFFICER. The Senator from Alabama has 15 seconds.

Mr. SESSIONS. I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, parliamentary inquiry: Are we now starting 30 minutes of time on this side of the aisle?

The PRESIDING OFFICER. That is correct.

Mr. SPECTER. I thank the Chair.

Tonight the Senate is engaging in a proceeding to call the attention of the American people to a very serious matter which exists on the confirmation of Federal judges. It is not a matter which occurs just when there has been a Republican President, but it has occurred also when there has been a President of the Democratic party, when the Republicans controlled the Senate. It has gone back at least to 1987, during the second 2 years of President Reagan’s administration.

When the Senator from Illinois calls this theater, he may be right, but it is factual theater, and it is worth the time of the Senate for the American people to focus on this important issue.

It is now a little after 8 o’clock Eastern standard time. Frequently, the Senate Chamber is dark at this time. It is true we could be conducting other

business, but there are many days when the Senate has tarried. For example, on Monday, the day before yesterday, when there had been a long-standing expectation that the Senate would not be in session because Veterans Day is traditionally not a day in session, but we came back specially to try to finish our work by the projected date of November 21, unexpectedly we were greeted with a 10-hour filibuster by Senator REID on the other side of the aisle. He has a right to do that—he is a Senator—under our rules.

It doesn’t lie in the mouth of somebody to say we are spending time where we could have been working very hard on the appropriations process. I do hope we finish that process. I have been an appropriator for my 23 years in the Senate, and we should move to complete that work as promptly as possible.

But the subject matter tonight is the confirmation process, and it is a very serious subject. When President Reagan was in office, during the first 6 years where the Republican Party controlled the Senate, President Reagan secured confirmation of 82 percent of his district and circuit court nominees. In 1987 and 1988, when the Democrats were in control, that percentage dropped from 82 percent to slightly above 63 percent. When President George H.W. Bush was in office, all 4 years had the Senate in the control of the Democrats. The Senate confirmed slightly more than 62 percent of President Bush’s nominees, and 54 percent of his nominees to both circuit and district courts were still pending in the Senate when his term ended.

President Clinton had about the same experience. In 1993 and 1994, there was an average of 79 percent of his district and circuit court nominees confirmed when his party controlled the Senate. For President Clinton’s remaining 6 years, the percentage dropped to 54½ percent. So that the business of having the President of one party stymied or reduced in effectiveness on confirmation when the Senate is controlled by the other party has been really an apportionment of blame pretty much equally between Democrats and Republicans during the course of the Reagan, first Bush, and Clinton administrations.

The matter has come to a substantial decline, when, for the first time in the history of the Republic, some 216 years, there has been a filibuster of circuit court nominees.

I think it is important to note that we are not seeking tonight to break a filibuster. That would occur when we would seek to have those who were objecting to the judges continue to talk and talk until they ran out of energy or effort and stopped talking so that we could come to a vote. That was what happened in the filibusters on civil rights legislation in the 1960s.

The last time there was a filibuster in the Senate was 1987 when the subject was campaign finance reform. Senator

BYRD was the leader of the Democrats. Senator DOLE, the leader of the Republicans, called all of us into the cloakroom behind us in the Senate Chamber at about 2 o'clock one morning and said: I would like all Republican Senators to stay off the floor. The reason Senator DOLE asked everyone to stay off the floor was to compel the party in power, the Democrats, to maintain a quorum of 51 Senators because if there are not 51 Senators present, then any Senator may suggest the absence of a quorum, and the Senate conducts no further business.

When Republican Senators, including ARLEN SPECTER, absented ourselves from the floor at Senator DOLE's request, Senator BYRD, the leader of the Democrats, countered with a motion to arrest absent Senators. Sergeant at Arms Henry Giugni was then armed with warrants of arrest and started to patrol the halls, and the first Senator he found was Senator Lowell Weicker.

Sergeant at Arms Henry Giugni was a little fellow, about 5 foot 6 inches, 150 pounds. Senator Weicker was a big guy—still is—about 6 foot 4 inches, 240 pounds. This was at about 3:30 in the morning. Sergeant at Arms Giugni decided not to arrest Senator Weicker. I think he made a good judgment. Then he started to go around and knock on Senators' doors.

Senator Packwood foolishly answered his door. Senator Packwood was then carried feet first into the Senate Chamber. This is a true story. You don't get many out of Washington, but this is a true story. That incident attracted a great deal of attention. CSPAN became the channel of choice instead of Jay Leno.

In having this proceeding, it is more accurately called a marathon than a filibuster because it is not a filibuster. Republicans are doing most of the talking. We seek to attract the attention of the American people to what is going on in the judicial system.

We have at the present time judicial emergencies in four of the circuit courts of appeals in the United States: the Fourth Circuit, the Fifth Circuit, the Sixth Circuit, and the Ninth Circuit. When these judicial emergencies occur, people are denied their day in court, cases languish, the matters are not decided, and the fact of life is that justice delayed is justice denied.

Without burdening the record unduly, it is worth noting that in the Sixth Circuit where there is a judicial emergency, a 50-percent vacancy rate on that court, a death penalty case has been pending for more than 8 years. A plaintiff in a civil case on a job discrimination suit trying to get a job had to wait some 15 months before the case came up. That individual died before the case was ever heard.

The ultimate answer, I suggest, is that cooler heads are going to have to prevail, and we are going to have to establish a principle where it applies regardless of what party controls the White House or what party controls the Senate.

Three years ago, I proposed a judicial protocol to establish a timetable that 60 days after the President submitted a nomination to the Judiciary Committee, there had to be a hearing; 30 days thereafter, there had to be action by the Judiciary Committee on the nomination; 30 days later, the matter had to be brought to the floor of the Senate. Those times could be extended on cause shown by the chairman of the committee with notice to the ranking member or by the majority leader with notice to the minority leader. But those time parameters should be established.

If there were to be a strictly party-line vote in the Judiciary Committee, then that matter ought to be advanced to the Senate floor even without having the customary majority vote to bring it to the floor.

One of the grave problems which may confront the Senate is what is going to happen next when there is a Supreme Court vacancy. The filibusters conducted up until the present time constitute an effort to elevate the confirmation process which under the Senate rules calls for 51 votes, or a majority, to 60 votes which it takes to end a filibuster.

For those who may not know what a filibuster is, that is when one party keeps talking and talking and talking endlessly. But that may be brought to a close under the rules of the Senate with 60 Senators voting to cut off debate. That then leaves 100 more hours to debate, plenty of time even after cloture, even after debate is ended or limited, before the matter comes to a vote.

It does not require a Nostradamus to predict or to understand that the current approach on imposing an ideological test is a precursor for the Supreme Court of the United States. When the Senate is constituted as it is at the present time, it is easy to project that we will find a Supreme Court nominee, who does not satisfy the standards of the other party, subjected to a filibuster and to have a vacancy on the Court. What we are moving toward is deadlock.

Right now, there still remains an aura of some civility in this Chamber, notwithstanding our disagreements on the tactics that one side or the other may use in the Senate. We know that the next vote is the most important vote. Notwithstanding the rancor of the arguments, we do understand that we are here to conduct the business of the people of the United States. The judicial system is limping along—still in motion but limping along.

We face a grave potential problem. If the current course of conduct continues so that when we have a nominee for the Supreme Court of the United States, we have this deadlock, and then with so many 5-to-4 decisions by the Supreme Court deciding the cutting-edge questions in our society, we may look to 4-to-4 decisions, and that means no ruling by the Supreme Court of the United States.

One additional thought. Senator SANTORUM and I use in Pennsylvania a judicial nominating panel under an arrangement where the President has three nominees and the Democrats have one nominee. During the 24-year period from the time President Nixon was elected until the time President Reagan was elected, Republicans controlled the White House for 20 of those 24 years. It seemed to me it was an undue balance of judicial nominees without having the Democrats with any nominees in the district courts, so an arrangement was made when Senator Heinz and I were the Senators, carried on by Senator SANTORUM and myself, to allow the party out of power, the Democrats, to have one nominee out of three for the President—one for the party out of power. That has had a very salutary effect in bringing a little bipartisanship into the process.

I do not suggest that for the Supreme Court. I do not press it for the court of appeals. But I think it is an idea worth considering for the U.S. district courts.

In conclusion—the two most popular words of any speech—it is my hope that something constructive will come out of this marathon. It is my hope that there will be some attention attracted to it. When the Senator from Illinois characterizes this as theater, I don't think that is especially derogatory because it is fact theater. The American people would be well advised to watch this theater than some of that which is on the national networks tonight. This is real. Those sitcoms go on and on and are repetitious. More important than the factual theater is that we are on a vital issue.

I hope the Senators hear from the American people. I hope the American people tell us what they would like to have done: Whether you would like to have this kind of projected stalemate where nominees wait endlessly and where it takes 60 votes, a supermajority, to cut off debate and bring it to a vote, or whether you would like us to follow the constitutional mandate of 51 votes in confirmation so that these judges may be confirmed, may take their places to see that justice is done in an equitable way within a reasonable time period.

I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mr. CORNYN. Mr. President, I want to focus on a chart that was displayed earlier by the Senator from New York where he proudly displayed the numbers 168 to 4. I think it is important we ask the question: what is that chart designed to prove?

On one hand, our colleagues on the other side of the aisle in the Judiciary Committee and here in the Chamber rail against the President's judicial nominees, calling them out of the mainstream and, even worse, mean-spirited, right wing. But if, in fact, our colleagues on the other side of the aisle have voted to confirm 168 of President

Bush's nominees, it refutes that allegation because they have to agree that at least 168 of those nominees met their definition of mainstream.

I would like to associate myself with the outstanding comments of the Senator from Kentucky, the assistant majority leader, Mr. McCONNELL. I wonder what their definition of mainstream truly is.

The second number of 4 is a number they want to be congratulated for blocking. I submit that just because you observe a stop sign 168 times and comply with the law, you are not to be rewarded for running that stop sign four times. It is still a violation of law, and you are still likely to get a ticket from the police officer.

This is more than just about breaking the law. This is about violating our Constitution, the fundamental law of this Nation.

We know really, rather than 168 to 4, the true number we ought to be focusing on is 0 to 4, and let me explain.

From 1789 to 2002—that is, for all of our Nation's history up until this year—the number of filibusters against judicial nominees of a President was—*you guessed it*—zero. But this year alone, because of this tactic that our colleagues have devised, to deny a bipartisan majority of this body its right under the Constitution to vote up or down on a judicial nominee, this number is 4.

So rather than 168 to 4—and as I explained, I think that repudiates and flies in the face of some of their arguments about President Bush's judicial nominees, and I deny that they are to be congratulated for unconstitutionally obstructing only 4. The real number we ought to be focusing on, and I hope the American people are focusing on, is zero to four because never, ever, in the history of this Republic has a minority in the Senate denied the right of the majority the vote up or down on judicial nominees. It is just not right. It is not fair. It has resulted in a degradation and a downward spiral in the judicial confirmation process of which no one should be proud.

I submit that four unconstitutional filibusters of these distinguished nominees is four filibusters too many. If we want to look at maybe a little bit of a history lesson, as this chart demonstrates, when Franklin Delano Roosevelt was President of the United States, 4,473 laws were enacted, 4 civil rights laws were filibustered—hardly something to be proud of. But I guess if our colleagues across the aisle are proud of their four, the argument would be that the people who filibustered these civil rights laws during FDR's term ought to be proud of that number.

When President Truman was in office, 3,414 laws were passed, 3 civil rights laws were filibustered. Is that something to be proud of? What our colleagues across the aisle say, because 3,414 laws were passed and only 3 were filibustered, that these folks who fili-

bustered those three civil rights laws ought to be congratulated. I think not.

Then when President Lyndon Baines Johnson was in office, 1,931 laws were enacted, 3 civil rights laws were filibustered. To this hall of shame, I would add the 168 to 4, which is nothing to be proud of; it is something to be ashamed of.

Unfortunately, some people have lost their sense of shame in this process, which has become so degraded and so destructive. Indeed, I submit that the filibusters we have of the President's nominees are an abuse of the process. How can they justly claim that a 60-vote requirement to close off debate can somehow trump the Constitution?

As we have heard before on this floor, everyone knows, who has studied the Constitution, that there are supermajority requirements for certain things, and they are stated in the Constitution: To ratify a treaty or to pass a constitutional amendment, the Constitution is very clear that it requires a supermajority. Everything else requires majority rule.

Indeed, majority rule is fundamental to the democratic form of government. Majority rules: We fight our best fight; we make our best argument. Then we have a vote up or down. If we lose, well, we come back to fight another day. We try to persuade others that we were right and the majority was wrong. That is what our form of government is all about; not denying a majority their right, as stated in the Constitution, to let majority rule.

Believe it or not, that is what is happening and that is the reason we are standing here tonight trying to let the American people know that a terrible abuse of this process is occurring and an abuse of the Constitution, indeed a violation of the Constitution, is occurring. It is a disgrace. It is nothing to be proud of.

The other thing I would point out in the few minutes I have remaining, before I turn the floor over to the senior Senator from Texas, is this process is not only abusing the Constitution and creating a downward spiral in the judicial confirmation process that is very destructive of relationships in this institution, of our ability to get things done, it has made it too partisan, too bitter, too angry, and it is destructive.

I would also point out that the tactics that are being used against some of these nominees are despicable. Unless we stand up and repudiate the tactics of some of those who are opposing the fine nominees of President Bush, such as Janice Rogers Brown, I believe those who have joined cause with them in opposing this fine nominee ought to examine their conscience. I think they ought to reconsider their tactics. I think they ought to reconsider whom they associate with, whom they are joining cause with to tear down some of the fine nominees of this President, such as Janice Rogers Brown.

This is a cartoon that was posted on The Black Commentator on September

4, 2003, with President Bush, a racist caricature of Janice Rogers Brown with Justice Clarence Thomas, Colin Powell, Secretary of State, and Condoleezza Rice standing there. The caption says: "Welcome to the Federal bench, Ms. Clarence—I mean, Ms. Rogers Brown. You'll fit right in."

It is easy to see why this process has gone downhill and needs a wake-up call from all of us, because we need a fresh start. We need to disavow tactics such as this. Those who are opposing Justice Brown and other nominees should not be proud of that association any more than they claim to be proud of an unconstitutional filibuster of four of these nominees, including Justice Brown, because if, in fact, we do not get a fresh start, we do not have a clean break with this destructive process, if we do not quit tearing down people who want nothing more than to offer themselves to the American people by serving in positions of honor, such as Federal judges, who will answer the call? If they know that answering the call of public service means that they are going to have their reputation destroyed, they are going to be besmirched, they are going to be painted into a caricature that bears no resemblance to who they really are, who will answer the call? We will all be poorer for it.

I yield the floor.

THE PRESIDING OFFICER. Who seeks recognition?

The Senator from Texas is recognized. The Chair informs the Senator from Texas that there are 2 minutes 20 seconds remaining on the Republican side.

Mrs. HUTCHISON. Mr. President, just to get an understanding, after that 2 minutes 20 seconds, then it goes to the Democratic side for 30 minutes and then back to the Republican side? Is that the way it is?

THE PRESIDING OFFICER. The Senator is correct.

Mrs. HUTCHISON. Mr. President, in the 2 minutes that I have, I say I think the junior Senator from Texas made a very important point and that is the importance of the delicate balance of powers that was put in our Constitution. I think it is important that we do not say, well, 98 percent of the time we adhere to the Constitution. We need to adhere to the Constitution 100 percent of the time.

The Constitution has always said, from its beginning, that we would have a majority required to confirm the judicial nominees of the President. Now, this is by implication, because when the Constitution meant to have a supermajority, it so stated. We have always had a majority, and that is what, by its silence, the advise and consent part of the Constitution has required for judicial nominees, until last year.

In fact, I think the President is losing his constitutional right to appoint Federal judges. I think this whole situation is going to deter good people from offering themselves for the bench,

and the judiciary must have good people if we are going to keep that very strong separation of powers with three separate but equal branches of Government.

In his first 2 years of office, President Bush was able to get 53 percent of his circuit court judges confirmed. The previous three Presidents each had 91 percent in the first 2 years of their office in the very important circuit court judge appointments.

Now, the circuit court, of course, is the next step below the Supreme Court. So a 53 percent record in the first 2 years is something that I think should not be accepted. It is very important that we try to get votes on these judges.

The PRESIDING OFFICER. The time of the Senator has expired.

The Senator from Nevada.

Mr. REID. Mr. President, I yield 15 minutes to the Senator from Indiana and 15 minutes to the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Indiana.

UNANIMOUS CONSENT REQUEST—S. 1853

Mr. BAYH. Mr. President, I ask unanimous consent 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; the bill be read a third time and passed, and the motion to reconsider be laid upon the table.

Mrs. HUTCHISON. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator is recognized.

Mr. BAYH. Mr. President, this is an unfortunate debate, and I regret that all of us are here this evening. This debate will do nothing to speed the confirmation of judges about which this session has been called to consider. It will do nothing for the economy, for health care, for education, to protect the environment, or to advance the interests of our Nation's security.

It will, however, at least in small part, bring this august body, about which we care so much, to additional disrepute with the American people, making us look ineffectual and irrelevant.

In some respects, the Senate is being reduced to something close to a farce. It is becoming rapidly not the world's greatest deliberative body but instead the world's greatest Kabuki theater, a place where speeches are given to which very few people listen, no minds are changed, and votes are then held with complete predictability of results.

The search for principled compromise, which has always been a long and honorable part, distinguishing this body from other legislative bodies, has been abandoned in favor of sterile, ideological warfare, satisfying to only the most fervent of partisans. After this debate, I suspect that the far right will

be satisfied, I suspect that the far left will be satisfied, and that the rest of the American people will be left scratching their heads, wondering, what on Earth are they doing?

I am reminded of nothing quite so much as some lines from Shakespeare when he characterized another instance as: Great sound and fury that signifyeth nothing.

That is tonight's debate: Sterile, empty, barren of results.

This debate, unfortunately, is a microcosm of everything the American people have come to not like about both the Congress and Washington, DC, something that is all too often all process and partisanship, with no progress on matters of substance and importance to the American people.

Too often the American people view Washington as totally self-absorbed, indifferent to their real concerns, and ineffectual in accomplishing much of value on the things that do matter in their daily lives: Health care, jobs, education for our children and grandchildren.

We must stop this cycle of constant recrimination, a process in which the minority obstructs to gain power and then turns around and complains about obstruction once power has been obtained. It makes us all look bad.

If hypocrisy had a monetary value, we could easily erase the Federal deficit because of debates such as the one we are engaged in tonight.

What is this all about? What are the facts that the American people deserve to know? Is it true that judges are being obstructed solely because of their partisan affiliation? That obviously cannot be the case. One hundred and sixty-eight of President Bush's judicial nominees have been confirmed. I assume that all of them, if not almost all of them, are good card-carrying Republicans or he would not have nominated them. Obviously, there cannot be some stonewall to object to Republicans being appointed to the Federal judiciary. This simply is not the case.

Are judges being rejected up to a point based solely upon ideological concerns? This also cannot possibly be the case. Of these 168 judges who have been confirmed, I assume that all, if not almost all, are in fact fairly conservative jurists, or hold out the prospect of being fairly conservative jurists. Otherwise, they would not have been nominated by this President.

So up to a point, it is obvious that conservatives are not being denied their place upon the Federal judiciary. This is all about power, the balance of power between the executive and legislative branches and whether the advise and consent function should be abolished whenever the Senate is controlled by the party of the President. It is all about the balance of power between the minority and the majority caucuses in this Senate and whether the right to debate should be limited in the case of judicial nominees, unlike any other business taken up by this body.

It is also about tipping the balance of power within the Federal judiciary and setting the stage for a Supreme Court vacancy to be filled by someone of even the most extreme ideological conviction and views.

Is that possibly what the Constitution had in mind when it established the right of advise and consent in this Senate? Is that something for which we should abrogate the right to unlimited debate in this Senate, selecting judicial nominees in exclusion to all other topics in this regard? Of course it is not.

We are ignoring the issues this evening that are of most importance to the balance of the American people. When I go home, I hear great talk about the economy and job losses. In the last 3 years, we in the State of Indiana have lost approximately one out of every six of our manufacturing jobs. One hundred fifty-nine thousand jobs, nonfarm jobs, have been lost during this period of time. That is what I hear people talking about. Small business men wonder how they are going to compete in the global economy today. Large business men and women wonder how they are going to make ends meet, particularly with the skyrocketing cost of health care. Many people ask how we are going to compete with China, India, and other countries that all too often seek to abuse the rules of international trade to seek unfair economic advantage. Those are the subjects we should be debating tonight.

Those are the topics that are on the minds of Hoosiers to whom I talk. Very rarely am I asked about vacancies in the Federal judiciary.

When I was returning from Indiana just last evening, one of the security guards, a gentleman who looked somewhat advanced in his years, called out to me as I was going through security, saying: Senator, what about the Medicare drug benefit? Is something going to get passed?

I said: I hope so.

He said: Well, it probably will not be structured the way it ought to be anyway.

I said: Well, I hope not. We are going to go back and see if we cannot hammer out a reasonable compromise.

I see some of my colleagues, including Senator GRASSLEY, who are laboring mightily toward that very end, and I salute him for that. That is what we should be debating tonight, how to reconcile our differences on providing drug coverage to senior citizens who are asking about it; how to make health care available to the American people in a way that is accessible and affordable. That is what is on the minds of Hoosiers to whom I talk. That is what we should be debating this evening in this body.

What about our education standards and what about providing our children and grandchildren with access to quality affordable education? When I think about the economy of the future, more than anything else it is going to require advanced levels of education,