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EXECUTIVE SESSION

The PRESIDING OFFICER (Mr. CHAMBLISS). The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I yield myself such time as I might consume.

Mr. WARNER. Mr. President, parliamentary inquiry: Can the distinguished Senator from Iowa—we were told to come here at certain times, and if he were to take as much as he wishes, that would preclude any other Senator speaking in the time period.

Mr. GRASSLEY. I yield to the Senator whatever time he needs.

Mr. WARNER. I withdraw my parliamentary inquiry.

Mr. GRASSLEY. I yield the Senator whatever time he wants.

Mr. WARNER. I will sit down. The Senator may go ahead.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I rise today to discuss the Democrats' filibuster of President Bush's judicial nominees. The Senate Democrats still think it is Halloween and are trying to spook us into believing that President Bush has nominated a bunch of extremist individuals that cannot be good judges. The Democrats are claiming that these nominees are ''outside of the mainstream''. The truth is that these individuals will not implement a liberal agenda on the bench. The truth is that these individuals will follow the law, rather than bend to the will of the political left. But these inside the Beltway, left wing groups have gotten the Democrats to do their bidding. They have hijacked the judicial confirmation process in an unprecedented filibuster of judicial nominees, and they are denying these good men and women an up or down vote. Federal judicial seats will remain unfilled, and litigants seeking justice from those courts can expect further delays.

The reality is that the Constitution of the United States gives the President the power to appoint individuals to seats on the Federal judiciary. The Constitution gives the Senate the responsibility to advise the President in this process. And the Constitution requires the Senate, by a simple majority

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ROBERT W. NEY, *Chairman.*

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vote, to give its consent to the President's choices for Federal judgeships, or to withhold that consent. But through an unjust abuse of the filibuster, a minority of Senators is preventing the majority of the Senate from taking an up or down vote on President Bush's judicial nominee. That is not right.

I have always been of the position that judicial nominees should be carefully scrutinized by the Judiciary Committee because they are life-time appointments. It is my opinion that judicial nominees should have intellect, experience, character and integrity. They should also have the right judgment and temperament for the job. But most importantly, they should understand their role on the bench, which is to interpret the law and to follow the law, not to make the law and legislate from the bench. That is the most important credential in my book. And I take that job of looking at judicial nominees very seriously.

However, once the Senate Judiciary Committee has had the opportunity to review these candidates and to approve them, these individuals should get an up or down vote by the full Senate. This is the right process. This is a fair process. During my tenure with the United States Senate, I haven't always agreed with a sitting President's choices for the Federal bench. I have voted against a number of judicial nominees because I didn't believe they were qualified to be a judge, or because I didn't believe that a seat needed to be filled. But I have never filibustered a judicial nominee.

But that is just what is happening right now. We are seeing the unprecedented use of the filibuster rule to stop judicial nominees from being confirmed. An exceptional group of men and women are being used for political gain by this minority group of Senators. The nominees that the Senate is considering right now, Janice Rogers Brown, Carolyn Kuhl, and Priscilla Owen, as well as Bill Pryor and Charles Pickering, two nominees that have been filibustered, they all are distinguished individuals that deserve an up or down vote. They all deserve to be confirmed.

Let me say a few words about the men and woman that are being filibustered. These men and women are being characterized as outside of the mainstream, extremist people. They are being characterized as ''bad judges'' that have to be stopped. Nothing is further than the truth. The reality is that some left-wing interest groups are skewering these nominees' reputations with baseless allegations because they don't have a liberal ideology. And the Senate Democrats are more than happy to do the bidding of these racial outside groups. And our nation will suffer dearly for it.

Priscilla Owen is currently a judge on the Texas Supreme Court. She was unanimously rated well qualified by the ABA and enjoys a steller reputation in her home state. She's been repeatedly reelected to the Texas Supreme Court by wide margins and has served that court admirably. Judge Owen enjoys the support of her two home state Senators and has been endorsed over and over again by elected officials, fellow jurists, and attorneys alike.

Janice Rogers Brown, the daughter of a share cropper who attended segregated schools, put herself through California State University and eventually law school at UCLA. She did all this while raising two children as a single mother. She served her state in a variety of legal roles, including Deputy Attorney General and then later as a legal affairs secretary to the Governor. Judge Brown has served on the California Supreme Court since 1996.

Carolyn Kuhl has been a judge on the Los Angeles County Superior Court since 1995. She served in a variety of positions in the Justice Department, and then was a partner at a prominent Los Angeles law firm. Judge Kurl received a well qualified rating by the ABA, and enjoys bipartisan support.

Three other highly respectable nominees have already been filibustered. Bill Pryor has earned the reputation as one of the most experienced states attorneys general in the country. He graduated from law school magna cum laude, and clerked for Fifth Circuit Judge Wisdom. We have seen that he enforces the law regardless of his personal convictions. General Pryor also has overwhelming support from across the political spectrum.

Judge Charles Pickering has been a lawyer and county prosecutor, and has served as a distinguished federal district court judge for the past 11 years. He received the ABA's highest rating, ''well qualified.'' He stood up against the Ku Klux Klan, and has been a leader for equal rights, integration and inclusion in his community. The people that know Judge Pickering best support him without hesitation.

Finally we have Miguel Estrada, who was nominated to the D.C. Circuit Court of Appeals. He become so frustrated with the process that he withdrew his nomination after waiting over 2 years for an up of down vote. Yet he is the true American inspiration story. Born in Honduras, he came to America as a young boy and through determination and hard work, elevated to the top echelons of the law profession. He was an Assistant Solicitor General of the United States in the Clinton Administration, and was a partner in a prominent law firm. Mr. Estrada received the highest rating from the American Bar Association, and is well respected by colleagues and friends alike.

It is a real shame that this fine man felt he had to withdraw his nomination from consideration because of the guerilla smear tactics of the far left and because of the guerilla smear tactics of the far left and because of the Democrats' unprecedented filibuster tactic. And it is a real shame that these other fine men and women, and their families, have to go through this same miserable saga. As I think about these nominees with their stellar reputations, outstanding intellects, and their compelling life stories, it saddens me to know that the Democrats have been so ready and willing to stomp all over their good names and to deny the American people quality jurists—all this in the name of carrying the sword for special left wing interest groups.

I have served in this body for many years. And I have seen the filibuster used to leverage a better bargaining position on legislative matters. But it hasn't been used to block a judicial nominee, and especially not where that nominee enjoys majority support by the Senate. This is the first time in history that the filibuster has been used to prevent a judicial confirmation, even though my colleagues on the other aisle say that isn't the case. It is wrong and probably unconstitional. It is an abuse of the process. The Senate is supposed to provide advice and consent. The Democrats are denying the rest of the Senate our responsibility under the Constitution to give our consent—or even to withhold our consent. It is a terrible disgrace and ought not to continue.

The Democrats are leading us down a path that is just going to make matters worse. The judicial confirmation process is already in an unhealthy state of repair—we don't need to destroy it altogether. The Democrats need to stop playing politics with the judiciary. They need to stop spooking people about the qualifications and ability of these nominees to be good federal judges. They need to stop spooking away qualified nominees like Miguel Estrada. We need to stop this unjust filibuster and give these worthy nominees what they deserve—an up or down vote.

I yield the floor. I yield whatever time the Senator from Virginia needs.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, I thank my good friend, my colleague from Iowa.

Mr. President, what is the parliamentary situation, and what time remains under the control of my distinguished colleague from Iowa who is managing this set of debates at this time?

The PRESIDING OFFICER. The majority controls 10 minutes, the minority has 30 minutes.

Mr. WARNER. So we have 10 minutes remaining.

The PRESIDING OFFICER. That is correct.

Mr. WARNER. I thank the Chair.

Mr. President, I commend my good friend from Iowa for a very statesmanlike coverage of the responsibilities of the Judiciary Committee on which he has served these many years.

I turn to the following. If we look back in history in the summer of 1787, 55 individuals gathered in Philadelphia to write our Constitution. It was a very hot summer, and it was a long and arduous debate, many drafts back and forth, but careful consideration was

given. Finally, in mid September, it was over. It was a monumental achievement. But the Framers did not know at that time what a great achievement they had made, one that would enable the United States, today, these 200-plus years later, to become the oldest continuously surviving Republic form of government on Earth today.

Almost every other government in existence at the time of the Constitutional Convention has fallen into the dustbin of history. So we must ask ourselves, why? It is very clear to this humble Senator that it was due, in part, to the wisdom of the Framers to have three coequal branches of the Government. I view this debate as one to determine the survivability of the coequal stature of the three branches.

I am not going to argue about all the things that have taken place back and forth, but just go to this magnificent document—the Constitution. The Presiding Officer has placed a copy of it on every desk in the Senate chamber, and many of us daily carry it in our pocket. The Constitution very clearly states that a simple majority vote is the regular order of business, with the exception of a few instances specifically enumerated in the Constitution that require super-majority votes. Had the Framers decided that we should require 60 votes for the confirmation process of the Senate, they would have explicitly written in such a requirement.

It is quite interesting to note that:

Two-thirds of the Senate must vote to ratify a treaty; two-thirds of the Senate must vote to convict on an article of impeachment; two-thirds of a House of Congress must vote to expel a Member of that body; two-thirds of each House of Congress must vote to override a President's veto; and two-thirds of each House must vote to propose an amendment to the Constitution. With regard to the advice and consent, clearly enunciated in the Constitution, and given to only one body of Congress, the Senate, there is no mention of a higher than simple majority vote. It is there to protect, again, the checks and balances. It is there to protect against an executive branch nominee which, in the fair judgment of the Senate, does not meet the high standards to become a member of the judicial branch.

The case here is very simple: Are we going to abide by what the Framers laid out, what has kept this great Nation together these 200-plus years? Or are we going to devise and contrive in our own words some system by which to prevent a simple vote up and down on a judicial nominee?

The Constitution does not include that super-majority. If the bar is to remain at 60 votes, as my colleagues on the other side have so vehemently argued in favor of, I say then the Senate would have far more power on questions of judicial nominees than was intended by the Framers. The checks and balances concept of our Constitution would be changed. And how would that affect our Republic?

Well, when the Constitutional Convention was over in September 1787, Benjamin Franklin emerged and was greeted by a crowd, some were reporters. He was questioned, ''what have the Framers wrought?'' He replied, ''a Republic, if you can keep it.''

And that is what we are doing here in this historic debate. We are determining the rules by which we keep that Republic.

Throughout this historic debate, this Chamber has resonated with the use of the word ''filibuster.'' I ask: Can any Senator point to use of that word in any of the rules of the U.S. Senate? In every desk, every Senator has their book on the rules of the Senate and procedures of the Senate. You can't find the word ''filibuster'' in that book because it is not there. But, should I be wrong, parliamentary inquiry to the Presiding Officer, can the Parliamentarian find the word ''filibuster'' in the rules of the Senate or any definition in the rules of the Senate?

The PRESIDING OFFICER. The word ''filibuster'' is not contained in the standing rules of the Senate.

Mr. WARNER. I thank the Presiding Officer. It is not in the rules. Where do you go to look for it? Webster's Dictionary. This dictionary has been in my office these 25 years since I have been privileged to serve in this body. And I use it often. I say to my colleagues, this is an interesting bit of history. The dictionary defines ''filibuster'' as, ''An irregular military adventure especially one in quest of plunder, a free-booter, applied to buccaneers infesting the Spanish American coast, later an organizer or member of a hostile expedition to some country or countries with which his own is at peace in contravention of international law.''

Go all the way down to the last definition, and you will find a reference that is most appropriate to this debate. I read:

> A member of a legislative or deliberative body who, in opposition to the proposed action of the majority, obstructs or prevents action by the extreme use of dilatory tactics such as speaking merely to consume time and so forth.

It is about the fifth definitional use of this word.

I say, most respectfully, that it is a word that is a slang word. It probably has been used to cover many types of procedures that both sides have followed under the rules for many years.

I went back and did some research in this wonderful book. It is entitled ''Senate Cloture Rule, Limitation of Debate in the Congress of the United States, Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate.''

I do not find in this excellent treatise, put out in 1985 by the Library of Congress, printed by the direction of the Rules Committee and Administration of the United States Senate, any instance in which the situation we are faced with today with these nominees is covered. They do refer to the use of the word ''filibuster,'' but loosely.

Ultimately, with all of the confusion surrounding the word ''filibuster,'' I think you have to come down to what it was the Framers intended, what is in this book—the Constitution, which has held this Nation together these 200-plus years, this great Republic of our's.

I say to my colleagues, as Ben Franklin said, we have a Republic, and this debate is determining the ground rules by which we can or cannot keep it.

Clearly, the President has the authority to nominate. Clearly, this body has the authority of advice and consent. But remember, it is to be in a balance of powers between the executive and the legislature. I say if we are to set a precedent here that it requires 60 votes to act upon a nominee, three nominees—

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

Mr. WARNER. I ask unanimous consent for 1 additional minute.

Mr. LEAHY. Then I ask for 1 additional minute on our side.

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

Mr. WARNER. If we were to set a precedent that nominees reported out of the Judiciary Committee were subjected to a 60 vote requirement, this precedent would disrupt the carefully crafted system of checks and balances embedded in our Constitution by giving the Senate far more power in the judicial selection process than the Executive Branch, the President. These nominees deserve a simple up-or-down vote as provided in the Constitution by the absence of any reference to a super-majority or a 60 vote requirement.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. CARPER. Mr. President, I am honored to follow the Senator from Virginia. I want to return to the Constitutional Convention that he spoke of from 216 years ago. Among the last issues resolved at the Constitutional Convention was the question of whose job it is to select the members of this third branch of Government that was to be created.

We have an executive branch, the legislative branch with the House and Senate, and a judicial branch. At that time in this country there was a great concern on the part of those framing the Constitution and trying to craft a framework of our Government. Foremost among the concerns they had was the concern that somehow we would unintentionally invest too much power, too much authority in one person. Having dealt with the King of England and not wanting to have to deal with another figure of authority with the kind of powers of a monarch, there was a great debate over what would the powers be for this new President and how would we constrain those powers.

Among the last issues resolved at the Constitutional Convention was the

question of who selects the judges, who selects the members of that third branch of the judiciary. There were plenty at the Convention who thought that in order to make sure we didn't end up with another monarch in this country, a king, the power of selecting the judiciary should lie with the legislative branch. There were those who thought the Senate or the House or some combination thereof should select who the judges would be. There was another school of thought that said, no, maybe we should give the President, our Chief Executive, the power to select who our judges would be. As we all know, the compromise that was struck was one that says the President may nominate with the advice and the consent of the Senate.

Yesterday, as our youngest son came home from school, he shared with his mom and me some good news. He shared with us that while he won't get his report card for another week or so, he had learned the results of his scores, his grade in English language arts. He is in the eighth grade. He came home and he said: I got a 94 for English language arts in this grading period, dad. I get an A. I get an A.

We were delighted. He has a tough teacher. He has worked real hard, and he earned a 94. He is going to get an A. We hope he does as well in his other courses.

On the scorekeeping for how this President is doing with respect to getting his nominees confirmed, I think of the 172 we voted on so far; 168 have been confirmed, 4 have not. That is 98 percent. In my book, in my son's book, that is an A. That ain't bad.

Before I came here to serve in the Senate with my colleagues, I was a Governor. I know some people get tired of hearing me talk about that. But it was a great privilege to be Governor of my State. In our State, Governors nominate people to serve on the bench. The Senate can confirm. Whether it was a judge, supreme court, magistrate court, any commission, I would like to have had every single nominee confirmed. I suspect that most other Governors who similarly make nominations for appointments in their States would like to have all their nominations confirmed as well. Not all of my nominations were confirmed.

There is a give and take with the Senate in my State, just as there is a give and take with the Senate in this city for our National Government. I don't often quote Mick Jagger and Keith Richards, but there was an old song from my youth they used to sing: ''You can't always get what you want, but if you try sometime, you get what you need.''

We need from this President good nominees. I expect they are going to be Republicans. I expect they are going to be conservative. My guess is that of the 98 percent who have been confirmed, they were all Republicans. For the most part they were all conservative. I don't think it is realistic of this President to expect that we are going to confirm 100 percent of his nominees.

It sure wasn't the expectation of his predecessor, Bill Clinton. He got a majority of his nominees confirmed but not 100 percent, not 95 percent, not 90 percent, not 85 percent, but about 80 percent were actually nominated, had hearings, and their names actually ended up on the floor for a confirmation vote. That is a B-minus. Compared to the A-plus that this President is getting with respect to confirmations, I am not sure I understand fully the great dissent and the great disappointment and the great frustration our friends on the other side have shared.

Here is my frustration. I didn't come here to be about partisan politics. I didn't come here to be about gridlock. I didn't come here to pursue that agenda. I came here as one who wants to work with people on the other side of the aisle. I want to get things done.

I have voted with this President more than 75 percent of the time. I am told that only 7 Democrats have voted with this President more than I have in the last 2 years. I have tried to provide leadership on issues that both of my colleagues are concerned with, Senator LEAHY and Senator HATCH: class action, asbestos reform, bankruptcy, welfare, a comprehensive energy policy.

Meanwhile, while we are standing here tonight debating on whether or not 98 percent is good enough, we don't have an energy policy. Over half the energy we get that we use in America comes from foreign sources, a lot of it controlled by people who don't like us. We don't have an energy policy. We should be debating an energy policy and adopting it.

Standing here tonight we have a legal system that has lost its sense of balance, whether the issue is class action litigation that is being heard in small, remote courthouses around the country or whether the issue is asbestos and folks sick and dying getting the help they need. Meanwhile, the people who will never be sick will get money from those who need it. We should be debating those issues here tonight.

We have too much sulfur dioxide or nitrogen oxide and mercury in our air, putting out too much carbon dioxide, causing global warming. We should be addressing those issues.

We had a trade deficit last year that exceeded $400 billion. It is getting worse. We have a budget deficit that this year will approach $500 billion in 1 year alone. We are paying today on our national debt, just today, $800 million—plus just in interest on the debt. We ought to be debating how we rein in those budget deficits and trade deficits, not deciding is 98 percent enough or is 97 percent high enough in terms of success in nominations.

As former Governor and someone who was once privileged to chair the National Governors Association, we looked at the States as laboratories of democracy. We looked at the States to provide best practices, whether it was moving people off welfare, helping to make sure people coming out of prison didn't recidivate and go back to prison, what could we do to raise student achievement.

I want to talk about one model that works real well with respect to judicial nominations, and one I know the most about is my State of Delaware. Since 1897, the constitution of my State has called for balance with respect to our judiciary. We have year after year a legal climate and a judiciary that is acknowledged by some of the foremost attorneys who practice in this country as the best—the best legal climate, the fairest of any State in America. We are proud of our judiciary.

In the 8 years I was Governor, I nominated as many Republicans to the bench as I did Democrats. MIKE CASTLE, my predecessor, now a Congressman, when he was Governor, he nominated as many Democrats to the bench as he did Republicans.

In our State, there has to be a symmetry. Essentially, for every Democrat you nominate, the next one has to be a Republican. We have done that for over 100 years and have ended up with a terrific judiciary, widely respected at home, across the country, and even beyond our borders. There is a saying, ''If it ain't broke, don't fix it.'' That is not what we ought to say. We should say if it is not perfect, make it better.

The way we nominate judges in our National Capital for our Federal Government is broken and it needs to be fixed. Whether George Bush is President or Bill Clinton is President, we waste more and more time on judicial nominations. We are bogged down in that. We still haven't passed our spending plan for the new fiscal year, which started a month and a half ago. We are still wrestling with our appropriations bills. This system is broken.

My friends, the solution may be in Delaware, it may be in Vermont, or it may be how they nominate judges in Georgia or in Iowa. There is a better way to do it than what we are doing here. We have to find it and we have to come to some kind of closure around a better plan. When we do, instead of facing the prospect of leaving here without action on class action legislation, action on asbestos, or action on an energy bill, or without action on transportation policy, or early childhood programs, maybe we can do our jobs and even pass appropriations bills on time instead of the kind of mindless—oftentimes mindless debate we devote to judicial nominations.

That having been said, I yield to the former chairman of the Judiciary Committee, the ranking Democrat, Senator LEAHY, with my thanks.

Mr. LEAHY. Mr. President, I thank the Senator from Delaware for what he said. He has a distinguished record in the other body, as Governor and now here. We listened to him in this Chamber. I wish they would listen to him on the other end of Pennsylvania Avenue

because the person who makes the nominations is the President. I have been here with six Presidents. I have never known a time when a President is less willing to engage the Senate in advise and consent. President Ford did, President Carter did, President Reagan did, former President Bush did, and President Clinton did. I hope this White House would begin to do that also.

Interestingly enough, today I was given a petition signed by 310,000 Americans from all over the country. This petition supports a filibuster of extreme judicial nominees of the President. In fact, in the last 72 hours, 172,000 Americans signed these petitions. I went through them, thanks to the ability to search electronically, and picked out some from my State of Vermont.

In Moretown, VT, someone wrote:

It is a disgrace how this administration is attempting to pack our Federal courts with right-wing extremist judges that seek to undermine the hard-fought pillars of legal precedent that reflect the values of a vast majority of Americans. I wholeheartedly support the efforts of the Senate Judiciary Committee Democrats to oppose this blatant abuse of the majority power. . . . The Senate GOP leadership should be ashamed of wasting precious legislative time to engage in what amounts to a publicity stunt. . . ..

Shame on them. They don't deserve the seats that the people have entrusted in them.

Moretown, VT, is a little town a few miles away from where I live. It is straight down the valley; you can look straight down the valley from the front lawn of my home. We used to go to mass there on Sunday. It is where one of my grandmothers was born. So I was pleased to see that.

I received this petition from West Townshend, VT:

Thank you very much for all your hard work and valuable work. We appreciate it.

West Townshend is a very small town in Vermont. People are very independent there.

This one is from South Burlington, VT:

I support any measure to prevent Bush's extreme judicial appointments. Keep up the good work.

This is from Barre, VT:

Please be strong and stand against the Republicans. Ashcroft has already taken away too many of our civil liberties; we cannot have judges doing the same.

Barre, VT, is considered the granite center of the world, with the largest granite quarries in the world. My grandfather, Patrick J. Leahy, was a stonecutter in Barre, VT. My father was born in Barre, VT. The people of Barre, VT, are as strong and independent as the beautiful granite in their quarry.

I have one from South Ryegate, VT:

You must protect the cherished rights of women to control their own bodies. Do not approve judges whose records show that they do not believe in women's rights.

South Ryegate, VT, is a beautiful little town on the eastern side of Vermont. I know it well. When my maternal grandparents immigrated to this country from Italy, not speaking a word of English, they came to South Ryegate, VT, where my Italian grandfather was also a stonecutter. My mother, a first-generation American, was born there, her first language was Italian, but she learned English at school. I remember my grandfather, so proud of the judicial and constitutional system of this country, and so proud of taking the oath of citizenship. My father, in Barre, VT, was so proud of the separation of powers in this country—the legislative branch, an independent branch of Government, equal to the other two; the executive branch, independent and equal to the other two; and the judicial branch, independent and equal to the other two.

I remember him sitting in the gallery when I was first sworn in as a Senator, knowing I was part of that triumvirate of powers in this country, which is why our democracy has lasted this long. But throughout it all, it was so important that one branch was outside of politics, that one was independent of either of the political parties, and that is the judiciary. It should not be a Democratic judiciary or a Republican judiciary.

The battle we are having now is because this White House does not want it to be an independent judiciary. They want it to be the most extreme possible. They want it to be an arm of the Republican Party.

One hundred sixty-eight to four. We have confirmed 168 of President Bush's nominees. We stopped four of the most extreme. Lordy, the crocodile tears that have been shed here, at great cost to the American taxpayers, over the last 24 hours—the crocodile tears that have been shed for that.

I do not remember one single Republican standing on the floor and saying how terrible it was when the Republicans blocked 63 of President Clinton's nominees, but, oh, my, it is like Niagara Falls, the crocodile tears, when we blocked four of theirs.

I received another one from Burlington, VT:

The courts need to represent all Americans. Keep extremists out. Thank you for fighting for representation of all Americans by blocking the extremist judge nominees. Shame on President Bush.

I mention Burlington because I was married there 41 years ago. I still vote there. My children were raised there. I know the people in Burlington, VT. They are independent, good people—people who care for an independent, not a political, judiciary.

Little Hardwick, VT, stands at that junction between Montpelier and St. Johns and Barre. They say:

Stay awake. Stay vigilant. Protect civil rights, a woman's right to choose, public education and worker's rights. We stand with you.

Hardwick, VT, let me tell you, I stand with you, and I will stay awake and be vigilant. The people on this side of the aisle will stay vigilant and we will protect an independent judiciary. We will not allow the judiciary to be an arm of any political party.

The President said that he wanted to be a uniter and not a divider. Oh, how much I wish he were. If there was ever a time that this country needs a uniter, not a divider, it is right now. But, instead, in deference to groups on the far right, the President has nominated judicial activists about whom one cannot help but raise questions regarding their ability to act impartially, with justice for all. We need an independent judiciary.

We are fortunate in Vermont because we have the most independent Federal judges you can imagine—people with total integrity, who will treat whoever comes into their court with impartiality regardless of whether they are Republican or Democrat or independent. That is what all courts should do.

Time and time again, Democratic Senators have acted in good faith to fill vacancies Republicans kept vacant by blocking a Democratic President's judicial nominees. After Republicans blocked 63 of President Clinton's nominees, when a Republican President came in, they said: Look at all these vacancies. My God, we have to move as fast as we can to fill them. This is terrible. This is a crisis in the judiciary. How could this possibly have happened? How could this possibly have happened; there are 63 vacancies here. My Lord, the sky is falling down.

Where did those vacancies come from? They came from one person, one Republican, holding an anonymous filibuster. If one Republican said, I don't want this judge of President Clinton's, the nominee went no further. Notwithstanding that, some of them had the highest qualifications this country has seen. Notwithstanding that, some of them were the most brilliant judges. Notwithstanding that, they were Hispanics, women, African Americans, people of faith, and people of great conscience. They were not allowed to go forward because one member of the Republican Party said he or she did not want them to go forward. But notwithstanding that the Republicans created all those vacancies, notwithstanding that, the Democrats said, we will help you fill them.

Notwithstanding the arrogance and the one-person filibusters on the other side, the Democrats started filling those vacancies with President Bush's nominees. We have filled 168 vacancies. We stopped four of the most extreme nominees. And now, lordy, lordy, lordy, the Niagara Falls of tears comes from the other side—crocodile tears, hypocritical tears, from those who said not a word, not a word when they blocked 63. Not a word. Not a word. They blocked 63. Not a word. We stopped four of the most extreme, and you would think the world was coming to an end.

What Democrats have done is that we have stood up for our principles and for the independence of the Senate in its constitutional role in the judicial confirmation process. The Republican leadership has decided to spend, I am

told, upwards of a quarter of a million dollars of the taxpayers' money to have this debate. I apologize for that. I am not the one who wanted to do this. I apologize to all the staff—the police officers, who should be home with their families, the doorkeepers, those who keep the journal of these proceedings—who are some of the finest men and women I have worked with in nearly 30 years here.

But that quarter of a million dollars the Republican leadership is spending on this charade of crocodile tears could almost be worth it if one thing comes out of it. If the President would realize that this whole process begins with him, not with the Senate. The President has an absolute right to nominate anybody he wants. The Senate has an absolute right to advise and consent, to determine whether nominees are confirmed, especially to lifetime jobs.

I ask him once again, work with the Senate. Every President through history has sought the Senate's advice and consent. In those instances when they did not, they did not get their way. There was another President named George, the greatest President in this Nation's history, George Washington. He was the most popular man in America in the time he lived and probably the most popular person America has ever had. He was a man who brought us together as a country, who set the precedent to make this a great democracy. But George Washington nominated judges the Senate felt he should not have. The Senate exercised its constitutional authority, and not all of George Washington's judicial or executive branch nominees were confirmed. President Washington knew he had to come back and seek the Senate's advice and consent before his nominees would go through.

A great hero of mine, not just because I am a Democrat but because I remember what he meant to people like my parents, who owned a small business in Montpelier, VT, was Franklin Delano Roosevelt, also one of the greatest Presidents to ever serve this country. He kept this country together, kept the world together at the time of naziism and fascism, and the Japanese attack on Pearl Harbor. He brought us out of a recession, and he did this even though he was physically crippled. He worked so hard for this country, it finally killed him. But even Franklin Delano Roosevelt, when he tried to pack the court and change the independence of our Federal judiciary, a Democratic-controlled Senate said he could not do that. In fact, not only did Franklin Delano Roosevelt not get every one of his judges confirmed, but his court packing plan was filibustered.

No matter how partisan anybody is here, I don't think anybody is going to suggest the problems began here. The Senate said no to Washington. The Senate said no to Franklin Roosevelt. The Senate can say no to George Bush. Tradition is there. The Constitution is there. Our rights are there.

Basically, we have taken all this time spending a quarter of a million dollars of the taxpayers' money to talk about this because we don't want to vote on minimum wage, or workman's compensation, child programs, or the appropriations bills that, by law, we are required to have voted on by September 30. We still haven't. We don't want to vote on veterans benefits even though the administration seems hellbent on cutting veterans benefits.

We don't want to do any of those things. We will spend a quarter of a million tax dollars on the Republican's charade. I say the same thing today that the Senate said to George Washington and said to Franklin Roosevelt: We are going to ask for advice and consent. The Senate is going to stand up for its rights. I yield the floor.

The PRESIDING OFFICER. Does the Senator yield back his time? He has 56 seconds.

Mr. LEAHY. Mr. President, let me say this. Again, I have been here with six Presidents, Republican and Democrat. Presidents have always sought advice and consent. They have not always liked what they have heard. Five of the six Presidents have been willing to work with us on judicial nominations: Presidents Ford, Carter, Reagan, former President Bush, and President Clinton. I urge the current President to follow their example. Things will go far more smoothly. I do yield the remainder of my time.

The PRESIDING OFFICER. All time has expired. Who yields time? The Senator from Alabama.

Mr. SESSIONS. Mr. President, I appreciate the remarks of the distinguished ranking member of the Judiciary Committee. He has been around the Senate and the confirmation process for a long time.

He said he wanted to apologize for people staying here and having to work tonight. It is unfortunate that we are here. We are here because we have a filibuster organized and sustained by the Democratic leadership against six nominees. We have more in the pipeline to be blocked, so it is not just four. I want to ask, would the Senator want to apologize for his remarks that he made in 1998 when he, Senator LEAHY, in the CONGRESSIONAL RECORD, said:

> I cannot recall a judicial nomination being successfully filibustered. I do recall earlier this year the Republican chairman of the Judiciary Committee and I noted how improper it would be to filibuster a nomination.

That was when President Clinton was in office and Chairman HATCH, a Republican, was chairman of the Judiciary Committee. Chairman HATCH said on the floor of the Senate and in committee and in private Republican conferences that a filibuster was not good. Senator LEAHY and the Democratic leadership all said filibusters were not good. We did not have those filibusters.

So it is amazing to me, now that within a year or two after making statements such as that, and taking that position, we now have those very same people leading a filibuster. I would say apologies need to come from the other side.

Let me mention a few basics about confirmations under President Clinton: 377 nominees were confirmed, 1 was voted down on this floor in an up-or-down vote, not blocked by a filibuster, and no filibusters were had against those nominations. That is what happened.

There were 41 left pending and unconfirmed. Many of those were nominated late, after the August recess. Some of them had FBI background problems, including drug use or other unresolved issues. So there were 41 left pending and unconfirmed; 18 nominees were withdrawn by President Clinton before the final term. So I guess that is how they get 59, 60 nominees who they say got blocked. But that is what happened.

When former President Bush was President and he left office and the Democrats controlled the Senate, they left 54 of his nominations hanging. So under Senator HATCH's leadership and under TRENT LOTT's leadership, only 41 were left unconfirmed when President Clinton left office.

They say you blocked them with holds. Holds were put on nominations, just as they are today. Senator LEVIN has a hold against four circuit judges for the Sixth Circuit. They say they are only holding up four; this is not truth; with the nominees being blocked by Senator LEVIN they are holding at least eight. In fact, there are 13 circuit judges who are being held up and blocked by the Democrats right now. It just so happens we are only in full-blown filibuster of five, one having withdrawn, making six.

I will say one more thing. My colleagues on the other side of the aisle just blithely and consistently and repeatedly say these nominees are extreme, extreme, extreme. ''Most extreme,'' I believe is the phrase I have heard: Most extreme possible; extreme judicial nominees. As if saying this can make it so.

When we talk about judges, each judge is a human being. Each judge is entitled to a fair and decent consideration on the floor of this Senate and in committee. If they are not extreme, they ought not be called extreme. That is wrong for us to do that.

I know these attack groups, People for the American Way, the Alliance for Justice, the National Abortion Rights League and that crowd are the extremists.

They accuse and call our nominees extreme. That is for sure. These groups are not accountable. The problem is when these extreme notions are picked up by Senators. This should not happen. Senators are the ones who are elected. Senators are the ones who have taken the oath. Senators in this body have a responsibility not to call a nominee such as Priscilla Owen extreme. She got 84 percent of the vote in Texas and was given a unanimously

well-qualified rating by the ABA to be a judge—she is not extreme.

Judge Janice Rogers Brown from California, who got 76 percent of the vote in the State of California, not a conservative State, for justice of the supreme court in that State, is not extreme. And neither is Carolyn Kuhl, who rated the highest rating possible by the American Bar Association, who has received incredible bipartisan support from the hundred or so judges in her area where she practices as a State judge. She was editor of the Duke Law Review and clerked for Justice Anthony Kennedy and is a brilliant nominee of the highest order. These are outstanding nominees. They are not extreme.

The extremists are the groups and the people calling them extreme. These nominees teach Sunday school. They serve on the Altar Guild. They are involved in civic groups in their communities. They have held important positions in their States. They are the kind of people we ought to have on the bench. It is wrong for them to be accused of being out of the mainstream.

President Bush knows what the people want in Federal judges. He has nominated that kind of Federal judge. The people will support him on that, and it is very disturbing to hear them called extremists when they are mainstream and effective judges and nominees.

I now recognize the Senator from Colorado. I believe he is prepared to make some remarks.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. CAMPBELL. Mr. President, this evening I am pleased to join my fellow Senators—including my good friend from Utah—Judiciary Committee Chairman HATCH—for this ''Justice for Judges'' Marathon. I doubt if anyone will change their minds, but the debate is one we need to air.

First of all, I would like to thank Senator HATCH for the excellent work he has been doing—just as he consistently does day after day and hearing after hearing—as the Chairman of the Judiciary Committee.

I also thank Chairman HATCH for his support for another bill I am sponsoring this year, the Law Enforcement Officer's Safety Act of 2003. Every one of our Nation's leading law enforcement organizations—including the Fraternal Order of Police—consider this bill to be one of their top legislative priorities. I am especially pleased that this bill now enjoys the strong bipartisan support of 66 cosponsors—including 41 Republicans and 25 Democrats. I also want to point out that Senators LEAHY and HATCH are lead original cosponsors of this important legislation, and thank them for their support. Unfortunately, this bill is a perfect example of how the intent of the U.S. Senate can be subverted by the few opposed to a bill.

I also want to point out that even though this bill enjoys bipartisan support, and easily enough to get it passed by the Senate in an up-or-down vote—or even to invoke cloture—it is still being held hostage by a few Senators who have dug in their heels and refuse to let it pass.

It is not fair nor just in a body where fairness and justice is paramount that a minority of a few can hold up the will of 67 Senators.

I want to let my fellow Senators know that I will be pushing for the passage of the Law Enforcement Officers Safety Act early next year.

The challenges we are now facing in the form of the unprecedented filibustering of Circuit Court judicial nominees is in no way the result of Senator HATCH's ability as a Chairman or as one of the Senate's great gentlemen.

Unfortunately, we are now facing a situation in which judicial nominees that clearly have the bipartisan support they need to be confirmed by the Senate in an up-or-down vote simply cannot get the vote they deserve.

Repeated refusals to allow Circuit Court nominee Miguel Estrada the straight up-or-down vote he deserved unfortunately led to him withdrawing his nomination.

As a Coloradan, I am not alone in my assessment that an injustice was done, and not just to Miguel Estrada, but to our finely balanced system of Constitutional government as handed down by our Founding Fathers.

We all know the history of Miguel Estrada. He is a great American success story. He is a man of impeccable credentials dedicated to upholding the law. Unfortunately, he has committed the high crime of being a conservative. He does not deserve the insult of being called a ''lemon'' as one Senator has done today. Whether to vote against nominees is each Senator's decision, but they do not deserve insults. On September 10, 2002, the Pueblo Chieftain editorial stated:

> One would think that Democrats in the Senate, who claim to hold diversity in such high esteem, would be amendable to Mr. Estrada's nomination. But he committed the political sin of being conservative.

The Pueblo Chieftain went on to say:

> For the first time in the Nation's history, Senate Democrats filibustered the nomination. By doing so they turned the Senate's historic practice of advice and consent into a litmus test for liberal interest groups. The Democrats also have launched filibusters to stall the nominations of a half-dozen other candidates.

The editorial continues:

> Mr. Estrada asked President Bush to withdraw his nomination, which had languished in the Senate for nearly two years. Mr. Bush did so, with regret.
>
> Mr. Estrada should have been confirmed. He was just as qualified as a dozen other judicial nominees who were eventually confirmed.
>
> But Democrats have resorted to the filibuster to stop those judicial candidates feared to be opposed to abortion. But when asked about the Roe v. Wade abortion ruling during confirmation hearings, Mr. Estrada said, ''It's the law. I will follow it.''
>
> In the long run, Democrats may have hurt themselves and their outreach to Hispanic moderates and independents by denying all Hispanics a historic moment—the first and highest-ranking Hispanic on the Federal bench who also had strong backing from a wide range of Hispanic groups.

Mr. President, let me speak about a towering figure in Colorado history. Byron White, a football star and then a conservative U.S. Supreme Court Justice who retired in 1993 after 31 years on the Federal bench. After having lived a long and fruitful life, Justice White passed away on April 15, 2002. I met Justice White. His many achievements made most but not all Coloradans proud.

Justice White was appointed to the Nation's highest court by President John F. Kennedy in 1962. I knew Justice White—he had a handshake that would make you wince, even in his 80's.

Byron White combined physical prowess—as a nationally acclaimed football star in the 1930's who went on to become a Rhodes scholar and, eventually, a leading jurist.

In 1937, Byron ''Whizzer'' White was an All-American football player with the University of Colorado Buffaloes. He led the nation in both scoring and rushing yards while leading an unbeaten team. He never liked his nickname ''Whizzer''. But sports writers did so he was stuck with it.

He also was an outstanding football player in the earliest days of professional football, playing running back for both the Pittsburgh Steelers and the Detroit Lions.

He used his professional football signing bonus to pay his way through Yale Law School. He graduated first in his class.

During World War II he served as an intelligence officer with the U.S. Navy. It was Byron White who wrote the official report on the sinking of John F. Kennedy's patrol boat, the PT–109.

White ''had excelled in everything he had attempted'' President Kennedy said admiringly when he appointed his long-time friend and the Deputy Attorney General as our Nation's 98th Supreme Court Justice in history.

However, despite the outstanding strengths and qualifications, as articulated by President Kennedy, Justice White had some views that most likely would have led to filibuster by today's Senate. In fact, if it had been a Republican President who nominated Byron White in 1965 instead of a Democrat, he probably would not have been confirmed even then.

For instance, he dissented from the historic 1973 ruling that declared that women have a constitutional right to an abortion.

In 1986, he stirred a storm of controversy by writing the Supreme Court's opinion that constitutional protections of privacy do not extend to homosexual conduct.

Justice White consistently opposed restrictions on law enforcement officers, which led him to dissent from the famous 1966 Miranda ruling that police

officers inform a criminal suspect being arrested of their rights.

Justice White also dissented from rulings that outlawed voluntary prayer for children in public schools.

By the late 1980's, Justice White had joined conservatives in opposing ''affirmative action'' programs on the grounds that they amounted to reverse discrimination.

The point is that he was appointed by President John F. Kennedy—but even so—under today's atmosphere, including political correctness and in-your-face special interests—with litmus test approaches to public policy—Justice White would have almost certainly been relentlessly filibustered and would probably not be confirmed.

I am not sure that I would have voted for his confirmation had I been here, because I disagree with some of his decisions, but I would have been given the chance.

The way that today's Senate is treating judicial nominees stands in even starker contrast when it is pointed out that Justice White was confirmed by the Senate by a voice-vote, and without objection. Not one Senator objected—''D'' or ''R.'' That was on April 11, 1962.

A lot has changed since then. Some for the better and some not. One thing that has certainly not gotten better is the way judicial nominees are being treated. Questioning has given way to badgering. Civility has given way to discovery. Playing ''Got Ya'' is a poor substitute for an impartial hearing.

The question is not whether the President's nominees should or shouldn't be confirmed. That is a smokescreen. The question is should we, as duly elected Senators be accorded our constitutional responsibilities of advise and consent by voting on each nominee. The minority is denying me the right to an up-or-down vote through their filibusters—and thereby are denying the people of Colorado the right to be represented through my vote. I have heard time and again from our colleagues on the other side of the aisle that 168 nominees have been confirmed and only four have not. What are they talking about? I haven't been given the chance to even vote on those four. Not a question of numbers. It is a question of fairness.

We need to do what we can do to reverse and correct the emerging practice of filibustering judicial nominees.

There is no question in my mind that many deserving and well-qualified people will refuse the call of public service after watching the kangaroo court they might now face in getting confirmed. It doesn't make any difference who is in the majority. No nominee should have to be verbally flailed in the confirmation process.

Mr. President, it is not too late to turn back, reverse course, and give all judicial nominees the up-or-down votes they deserve.

I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. I thank the Senator from Colorado for his remarks. It is true, we need to treat these nominees with civility. That is the least we can do in this body.

I believe we have one more Senator to speak, the Senator from Wyoming, and we have about 14 minutes.

Mr. ENZI. Mr. President, first, I wish to concentrate a little bit on some of the comments I heard during the 3½ hours I chaired last night.

A lot has been made of this number, 168 to 4. But you cannot compare district court judges with circuit court nominations. Instead, you should look at the situation for what it is, an attempt to obstruct the confirmation of circuit court judges.

Since January 2003, President Bush has nominated a total of 29 circuit court judges. Of those judges, only 12, or 41 percent, have been confirmed. Of the remaining 17, my colleagues across the aisle have obstructed or threatened to obstruct 11 qualified and talented judges. In other words, almost 50 percent of the circuit judges ready to come to the floor for confirmation have been held up by the Democratic side for political purposes.

Last night I heard this 98-percent factor, and I heard it said that if my child came home with a test and he got 98 percent, I should congratulate him and work hard to get the other 2 percent.

I will tell you what ought to happen if your kid comes home with only 50 percent, and that is what we are talking about when we are talking about circuit court judges, we are talking about failure of the system, a total breakdown of the system.

You have to look at the concentration that there is on the circuit court. That is because those circuit court folks could become Supreme Court Justices. And Lordy, we don't want to pass any who might make it to that.

Every day the Senate is in session we begin with a prayer and the Pledge of Allegiance. I know my colleagues on both sides of the aisle are firmly committed to this country, and that as we say the words of the pledge, like me, they mean every word of it and they honestly pledge their alliance to the flag and to this Nation. But I have to wonder if they haven't forgotten the meaning of all of the words in the pledge, especially when I hear them put forward the argument that we do not need to vote on all the judicial nominees because we have already voted on most of them.

The last six words in the Pledge of Allegiance, ''with liberty and justice for all,'' mean we do not preserve justice or liberty for just a few people or for most of the people and leave a few or even an individual behind. It means we have justice for all, for everyone. That is 100 percent. We pledge that and we don't make exceptions because we have a high percentage of success.

In fact, this is one of the situations that the courts were created to protect: the rights of the individual. I think it is a little ironic that there are those in the Senate who would be willing to withhold justice and rights from some, in this case four highly qualified individuals, and the cases they could be hearing, if they were confirmed.

That is justice being denied as well. That is justice only for a few, or maybe most, but not all—just because the individuals don't have the same political philosophy as those across the aisle.

While it may be true—the percentage of judges we have voted on—when you are the one who is left out and are not allowed justice, that is 100 percent of your life—the one who is being affected, and 100 percent of justice that is being denied as an individual.

I think this is wrong. I sincerely hope we move off this obstructionism and have an up-or-down vote on the highly qualified individuals with talent, experience, and integrity, and who could be considered as the ideal we want in all judges.

I think everybody knows about the qualifications.

The comments made last night are what we are seeing here for the first time—a change in the way we do judges. The problem with it is it probably will continue and at some point there will be a reversal of roles. We will spiral down and down until we are not approving judges. It won't be 2 percent counting all of the district judges and not doing the true statistics on just the circuit court judges. It will not be approving a majority of them.

I have to tell you, I have been through that spiral once before. When I first got here, there was a judge nominated. She would only sentence a person to 90 days in jail who had raped a minor because she didn't like the rehabilitation system of the prisons in her State. I was appalled by it. In our State, there are a lot of people who would think that maybe he should have been shot. He raped a minor.

I put a hold on that person so we could have a debate instead of a unanimous consent. I eventually got the debate.

I had an unrelated piece of property that some people had been paying taxes on for 70 years which they had bought from the BLM but the title had never changed. It took an act of Congress to change the title. Because I put that hold on, it took me 3 years to get that piece of property transferred to the people. Do you know what those people said? They appreciated what I had done on that judge.

But I have to tell you that unless an up-or-down vote happens on that judge, that is the way it is supposed to be.

It was exactly 200 years ago, in 1803, that the Supreme Court and our Nation's judicial system went through its first and most dramatic change since it was established by the Judiciary Act of 1789. This change occurred when then Chief Justice John Marshall issued his decision in the landmark case, Marbury vs. Madison. In that decision

Marshall established the responsibility of the Federal court to review the constitutionality of congressional actions. His action brought the courts out of almost obscurity, seen as the weakest and most timid of the three branches of government, and gave it a prominence and power that is not equaled by any other court system in the history of the world.

Before Justice Marshall was appointed to the court in 1801 the court seemed to lack direction. There was no clear idea of purpose or vision about whether or not the court could consider itself to be an important entity. The very first Supreme Court Session was held in New York City in 1790. It was almost postponed when only three of the original six justices arrived for the court's opening session. The court had to wait and put off doing business until a fourth justice arrived and they had enough judges to constitute a quorum.

Justice Marshall himself did not initially consider the court to be a prominent institution. At the time of his appointment to the court, he was also serving as Secretary of State for President John Adams and he had turned down an earlier appointment to the court in order to run for a seat in the U.S. House of Representatives. After President Adams finally talked him into serving as Chief Justice of the court, Justice Marshall served as both Chief Justice and Secretary of State for 2 months because he felt it wasn't worth giving up the position of Secretary of State to serve on the Supreme Court.

Over the next 34 years Justice Marshall reinvented the court and provided the leadership it needed to assume the prominent role it plays in our court system today.

One has to wonder what Justice Marshall would think about what is going on in the Senate today. Would he agree with my colleagues across the aisle that it is all right to put partisan politics and partisan bickering ahead of the rights of judicial nominees if those impacted are just a small fraction of society. Would he agree with them that justice denied for a few was acceptable? Or would he hold true to the basic tenets of the Constitution that all men are created equal and that everyone has the right to their day in court?

A lot has been made about the numbers 168 to 4. You really can't compare district court judges with circuit court nominations. Instead we should look at this situation for what it really is, an attempt to obstruct the confirmation of circuit court judges. Since January 2003 President Bush has nominated a total of 29 circuit court judges. Of those judges only 12 or 41 percent have been confirmed. Of the remaining 17, my colleagues across the aisle have obstructed or threatened to obstruct 11 qualified and talented judges, or in other words, almost 50 percent of the circuit court judges ready to come to the floor for confirmation have been held up by the Democrats for political purposes.

Every day that the Senate is in session we begin with a word of prayer and with the Pledge of Allegiance. I know that my colleagues, on both sides of the aisle, are firmly committed to this country and that, as they say the words of the Pledge, like me, they mean every word of it and that they honestly pledge their allegiance to the flag and to this Nation. But I have to wonder if they haven't forgotten the meaning of all the words in the pledge, especially when I hear them put forward the argument that we do not need to vote on all of our judicial nominees because we have already voted on some or most of them. The last six words in the Pledge of Allegiance, ''with liberty and justice for all,'' mean that we do not preserve justice or liberty for a few people, or for most of the people, and leave a few, or even an individual, behind. It means we have justice for all, for everyone, 100 percent and that we don't make exceptions because we have a high percentage of success.

In fact, this is one of the situations that the courts were created to protect, the rights of the individual. I think it is a little ironic that there are those here in the Senate that would be willing to withhold justice and rights from some, in this case four highly qualified individuals, and would not extend justice to all, just because those individuals don't have the same political philosophy.

While it may be true that the percentages of judges that have been voted on is high, when you are the one that is left out and are not allowed justice, that is 100 percent of your life that is being affected and 100 percent of justice that is being denied you as an individual.

I think this is wrong, and I sincerely hope we move off this obstructionism and have an up or down vote on these highly qualified individuals, whose talents, experience and integrity can easily be considered the ideal for what we want in judges.

We often talk about the ideal in our debates in the Senate. We hold up a picture of what things should look like and how things should be done in the hopes that someday, we can move our Nation forward to the point where the ideal is, more often than not, reality. One of those ideals that has been presented is a world where our judges and our courts are more representative of America. Our courts have often been accused of being elitist. The Bush Administration has been working hard to change that image by making sure our judges are more diverse. By nominating people like Miguel Estrada, Carolyn Kuhl, Janice Rogers Brown, Priscilla Owen, William Pryor, and Charles Pickering, President Bush has set an example of the ideal by selecting people from different backgrounds, with different styles, who share the same passion and enthusiasm for the law.

The list of judges that is before the Senate represents a group of candidates who are well educated, fully talented, and well qualified for the posts for which they have been nominated. Unfortunately, for some, this list also represents the unfairness of the system—a system which, in theory, guarantees each nominee a vote—but—in practice, can be used to deny a nominee a vote.

So here we are, well down the road, holding a list of candidates that still haven't received a vote. In spite of all their qualifications and the personal integrity they have shown throughout the process, these judges have been forced to wait as the Senate decides whether or not we can simply hold an up or down vote on them. Why? It's pretty clear to just about everyone. Because these are good nominees and in a fair and just world, they'd win the vote hands down. Therefore, the only way to avoid having these candidates confirmed is to deny them their constitutional right to an up or down vote.

What is most tragic about this situation is that these delays have not come without cost. These nominees aren't the only ones who are being denied their rights. Let's not forget the other victims in this situation who have been denied their right to a fair and impartial judicial process because there are not enough judges to hear all their cases. The real victims of these delays are not the nominees, or the Bush administration, or even the Republican Party. No, the real victims are the people whose rights have been denied to accommodate some increased partisan bickering.

There is a saying ''Justice delayed is justice denied.'' We make people with very real needs and very real issues wait while we try to score a few points in the game of politics. We drag out their court costs, their attorney's fees, and delay their restitution and damage payments all because we want to get one up on the other party.

We have a crisis in our courts that we can solve today. I urge my colleagues to step up to the plate and become a part of the solution. I urge them not to accept the belief that justice for some is sufficient. I urge them to allow the Senate to conduct its constitutional duty and hold an up or down vote on these judges. If you don't agree with them, or feel they are not qualified, then vote against them. That is your prerogative and duty as a Senator. But do not continue to deny justice for the nominees or the courts any longer.

Mr. SESSIONS. Mr. President, the Senator from Montana is here and I know he would like to finish up.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BURNS. Mr. President, a lot of questions are being asked about this debate as we roll along. We went late last night and there are probably some folks who have been short of sleep.

Let there be no doubt about it, as we close this half hour, this is obstruction.

A week ago tomorrow, we argued about definitions. Now we are worried about ideologies and how we appoint our judges. Here is one way you can have an issue and you can be on both sides of it and never worry about the consequences. That is healthy for us. We passed that through this Senate with strong bipartisan support and only 14 folks voting against it. Now we can't name conferees. ''Well, I voted for it.'' But we do not want it to get to conference.

I am fighting for two judges, Janice Rogers Brown and Carolyn Kuhl. Both of them are nominated to the Ninth Circuit. Why am I fighting so hard for them? Let me tell you why.

I am sponsoring legislation to split up the Ninth. It is too big. It covers California, Arizona, Nevada, Idaho, Washington, Oregon, Alaska, Hawaii, and my home State of Montana. It covers 14 million square miles—that is a fairly good sized pasture—with 45 million people. The second highest population is the Sixth Circuit with 29 million. It has the highest number of active judges with 28. The average number per judges per circuit, including the Ninth, is 12.

Let me tell you another reason why. The decisions that have been handed down by the Ninth lately—from 1996 through 1979—the Supreme Court heard 228 cases from the Ninth Circuit, and 27 of those decisions were overturned, 17 of them by unanimous decision.

From 2001 through 2002, 12 of the 17 Ninth Circuit decisions were reversed, and 7 of those were unanimous.

How would you like to have that track record? And we live in that circuit. Then you wonder why we get excited about the appointment of judges to that Ninth Circuit.

It is absolutely unbelievable.

I am an original cosponsor of S. 562. We must get it done.

What we are talking about here is people in a circuit who can't handle the work and come up with decisions that can't stand the test in the Supreme Court. That is pretty bad—1 in 27. That is almost as bad as 0 and 1 in a gunfight in judicial terms.

I am not an attorney. I don't think I will ever be one. But I will tell you that you can read and you know where the American people are, and those people are denied representation on the Ninth Circuit.

Definitions: We have heard it. If we cooperate, things would really get along good here. If we cooperate—we did—that is healthy for us. Now we can't name conferees to finish the job that is in front of us.

This is not my first rodeo. I know what is going on here. They should be ashamed—ashamed to contradict their own conscience.

Obstructionism: Give these judges a vote up or down. That is the way you got here. They deserve the same.

I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama has 3 minutes 30 seconds remaining.

Mr. SESSIONS. The Senator from Virginia.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. ALLEN. Mr. President, I wish to speak about some statements that have been made in the past and the inconsistency of these statements with the ones we are hearing today.

Let me quote for my colleagues some sentiments with which I very much agree, and I then I will ask you all to guess who said it: ''I find it simply baffling that a Senator would vote against even voting on a judicial nomination. Let the Senate vote on every nomination.''

Here is another quote. See if you can figure out who said this: ''I don't know how Members tell the Hispanic community we are being equally as fair with them as we are with all non-Hispanic judges when that simply is not true. Hispanic or non-Hispanic, African-American or non-African-American, woman or man, it is wrong not to have a vote on the Senate floor. What are they afraid of? What are they afraid of? What is wrong with a vote?''

Another quote from one of our colleagues who quoted Chief Justice Rehnquist: ''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 them up or vote them down. An up-or-down vote that is all we ask.''

Have you guessed the speaker yet? No, that is not ORRIN HATCH; it is not Senator SESSIONS; it is not Senator ENZI and it is not me. That is Senator TOM DASCHLE, the Democratic Minority Leader. These quotes are from October 5, 1999 and October 28, 1999.

Senator KENNEDY said nominees deserve a vote. He said: ''If our Republican colleagues don't like them, vote against them. But give them a vote. Don't just sit on them. That is obstruction of justice.''

My goodness. Senator DASCHLE and Senator KENNEDY certainly had the right idea 3 years ago.

Senator DASCHLE also said that Senators ''have a constitutional outlet for antipathy against a judicial nominee. Vote against that nominee.''

Senator DASCHLE, the Democrat leader in all of this obstruction and delay, said in 1998: ''All we are asking of our Republican colleagues is to give these nominees a vote and hopefully the fair consideration they deserve. We will press this issue every day and at every opportunity until they get the vote.''

Doesn't that sound familiar as to what we have been trying to do for the last several years?

Senator DASCHLE is also on record complaining about how long it took for some cases and decisions that had been pending for months. He said for ''anyone to be held that long is just an extraordinary unfairness not only to the nominees but to the system itself.''

The PRESIDING OFFICER. The time has expired.

Mr. ALLEN. If I may, with consent, have 2 minutes that is attributed to our time at 9 o'clock.

The PRESIDING OFFICER. Is there objection?

Ms. STABENOW. Reserving my right to object, my colleague, I appreciate the time, but in order for us to stay on schedule and given the fact I have been waiting here at this point, I would appreciate his wrapping it up. If he would like to take 1 minute to wrap up, I would not object to that.

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

Mr. ALLEN. I would like to close with a final quote from Senator DASCHLE that he made in September 1999: ''It is so incredibly unfair to me that they would continue to persist in the determination not to allow these very qualified people to even have a vote.''

Mr. President, that is what all of this is about. Tomorrow morning we will have a chance to end debate on these nominees and allow for fair up or down votes. In addition we will be able to determine the veracity, truth, and sincerity of our colleagues that I have previously quoted. If they were willing to tell the truth 3 or 4 years ago, they will have an opportunity to stop this spiral of unfair actions and delays which only bring more retaliation and more delays.

Senators will then be upholding the Constitution and will be accounting to their constituents, as well as giving fairness to the nominees.

I thank the President and I thank my colleagues.

The PRESIDING OFFICER. The Senator from Michigan.

Ms. STABENOW. Mr. President, as I said before on the floor, all the statements that are being made, and all the time we spend in relation to our values and our priorities, I also believe we get things done when we work together, when we work in a bipartisan way. That is what our constituents expect us to do.

I see the esteemed chairman of the Judiciary Committee on the floor. I thank him publicly for working with the senior Senator from Michigan as we work through difficult issues that relate to Michigan. I appreciate his willingness to do that. That is how we get things done—when we work together.

When we look first at the record of legislation taken up on this floor, I think it shows we work together. I think when we have worked together to confirm 168 judges, most of those I have voted for overwhelmingly, and when we see that we have only had a disagreement on 4, I think that shows bipartisan cooperation. I think that shows what the people of this country, and certainly the people of Michigan, want to see done. There is no question in my mind that this demonstrates our willingness to roll up our sleeves, to be fairminded, to look at the facts, to look at the nominees, and to work together.

It also shows, though, that we are willing to make a critique, that we are not a rubberstamp for this administration, nor should we be for any administration of either party. It shows we are willing to make a judgment. When the nominees go too far, we say no. That is what happened four times.

What I am most concerned about now, though, in this 30 hours—which now, instead of ending at midnight, is going to go until 9 in the morning—is that we are saying our values and priorities are spending time talking about four people who already have jobs and want to get a promotion that will last a lifetime. These are lifetime appointments.

My concern is that we need to be spending time on this floor not only talking but doing something about the 3 million people who have lost their jobs in the last 2½ years—3 million people. They do not have a lifetime job. They would just like to know they have a job tomorrow for their families. They would like to know that the job probably carries health care with it and will be there so they can put food on the table and they can pay the mortgage, the car payment, send their kids to college, and know they can have a good life in America that they assume if they work hard they will be able to achieve.

That is the debate I have said a number of times that we need to be having. One-hundred and sixty-thousand-plus of these 3 million are people who have lost their jobs in Michigan; people who have lost good-paying jobs, good-paying jobs with health care and pensions. They find themselves in very difficult circumstances and they are asking us to help them.

I am very proud of the fact that Michigan is the first in the production of automobiles. Thirty-one percent of all the automobiles in this country are produced in the State of Michigan.

My dad and my grandfather owned a Cadillac dealership in Claire, MI. We have been proud to be a part of supporting the Michigan automakers.

We also are first in the production of trucks, producing l7 percent of trucks. We have the three leading office furniture manufacturers in Michigan and produce nearly half of the office furniture.

Why do I say this? Because we have a crisis in manufacturing in this country that we need to be addressing in this Senate. Jobs can't all be in the service industry. We need to make things and we need to grow things. That is what we do in Michigan. We make things and we do it well. We will compete with anybody any time. Just give us a level playing field. We also grow things. We are willing to compete with anybody any time. Just give us a level playing field. We don't have that right now. We don't have that level playing field. We are not addressing that.

We are not addressing what is happening with the fact that China is violating the WTO or that China and Japan basically have put a tax on American goods and services sold in this country by manipulating their currency. We are not doing anything about that.

As a member of the Banking Committee, I sit and listen to the Treasury Secretary basically acknowledging that something is not right but not wanting to step up and take the tough action on behalf of American manufacturers and American workers.

We need to be talking on this floor and taking action on behalf of the men and women who have been the backbone of this country in manufacturing and have created the middle class that separates us from other countries around the world.

Why aren't we having that debate? Not a debate about 4 people who already have jobs, who want to get promoted. Three million people do not have a job and are now struggling with their families.

I want to share a few comments that I have heard. Earlier today I shared some headlines from newspapers in Michigan about what is going on. I want to share one of those this evening with my colleagues. It is from the Ludington Daily News, in northwest Michigan. It says: ''Tough Loss, Straits Steel closing sad news for plant's 180 employees.'' Then it starts out by saying:

> Despite the looming possibility over the past few months that their plant might close, workers at Straits Steel & Wire Co. kept their production quality high and their attitudes positive, said General Manager Tyndall.
>
> But on Friday, Tyndall was forced to tell his co-workers and friends that corporate officials decided to close the Ludington plant, 56 years after it began operations in 1947.
>
> Making the announcement twice—to the first shift in the morning, then the second shift in the afternoon—was not easy for Tyndall, who joined workers on the floor of the production plant as he shared the bad news with the group.
>
> ''People are down,'' he said Friday afternoon. But he stressed the plant's closing is not related to performance. ''When we walk out, we can hold our heads high and go chest to chest with anyone on the street and say we did our jobs well.''

They did their jobs well. But because of what is happening and the unfair competition around the world and the stress and struggle as it relates to cost, the plant closed.

Why aren't we dealing with issues that will help this Straits Steel and Wire Company in Ludington, MI? Those are the jobs I want to be talking about. Those are the jobs people in my State want us to be trying to fill.

Let me mention a few letters I have been receiving from people in Michigan that say it better than I can. First from a gentleman who says: I am writing you regarding the health of my business. I have a high tech business servicing industrial lasers, much like the ones that are no doubt cutting metal subassemblies for our armed services use as well as civilian businesses. My business has the flu. It is feverish and sluggish almost to the point of no business at all. Our country was initially built on small businesses providing services and employment. Our government encourages small business growth yet at the same time small businesses are being destroyed one by one because our economy is in such dire straits that business orders are essentially flat, which in turn is causing my business to fail. Occasionally I call the few customers I have left and ask questions about how they feel about the economy and what they think will happen in the near future. They say they are very concerned about the future. Some are laying off personnel. Others take pay cuts to keep their jobs. Still others feel they are sinking with no relief in sight. My business is now on the verge of collapsing and the only reason is the economy. I find it extremely difficult to believe that because of a few positive economic reports showing up here and there that our economy is getting better. The only real indicator of an improving, recovering economy, in my opinion, are reports coming in of companies rehiring people and putting them back to work. No other indicators, in my opinion, mean a thing until people start going back to work.

I agree with that. It is about putting people to work and having businesses recover from the flu.

Also from a Michigan resident: I am a tool die maker for over 40 years. I now find myself out of a job and unable to find one in my field. I have no health insurance. Why has America farmed most of our manufacturing jobs out to other countries? I think America has got to be not only the greatest thinking country in the world but we have to also regain our status as the greatest producing country in the world, as we did in World War II. That is, as you remember, the reason we won.

From Bridgman, MI: I would like to say I have worked in manufacturing for 20 years. This is the first time in my career that my hours have been reduced. I have a house payment, utility bills, children to feed and clothe, doctor bills, car payment, insurance, school lunches and preschool. This is just a few of my expenses. We are hanging on by a thread, day by day living. This is not the way Americans should have to live, especially in this day and age.

I agree. If people work hard, they get up in the morning and they go to work and they work all day, they ought to be able to know they are going to be paid a good wage, that they can count on that job being there, that we want them to be able to have health care. We want them to be able to put money aside for a pension, and we want them to know they will have the security of being able to take care of their families and plan for the future as part of the great middle class of America.

Our manufacturing economy has given us that. We are losing that. We

are losing that. We need to pay attention. We need to talk for 30 hours on the floor about jobs and how to help our manufacturing sector. We need to talk for 60 hours or 90 hours. More importantly, we need to act to do something so we can level the playing field. As I have said before, I will put our workers and our businesses up against anybody, if it is a level playing field. Just make it fair and we will compete. We need to address issues of health care. We know one of the biggest challenges right now for our manufacturers is the explosion in the prices of health care. I also know from talking to our automakers about half of that is because of prescription drug prices, the lack of competition, and the explosion in prices. We ought to be doing something about that.

We have bills in front of us right now in the Medicare conference where we could do something, if we wanted to, about that to lower prices. I would love to have a 30-hour debate on that because there is nothing right now more challenging to businesses and workers than the issues of health care. Workers are finding they are being asked to pay more in premiums and deductibles or their salary is capped in order to pay for health care increases or, worse yet, they are losing their jobs because of the increases. That is a debate worth having. That is a debate that would result in our focusing on something that means something very important to the people of this country. I would look forward to that debate.

Let me read a couple more letters: I've worked in manufacturing for 23 years, and this is the first time in my career I have had my hours reduced. I am worried about losing my job. My family is suffering because of my reduced income and planning for the future of my trade. I am a mold maker, and this has always been a solid trade. My trade is faltering, not only because of the economy but also because of foreign competition. How can we compete with countries that pay drastically reduced wages with no benefits?

We have to address that, not by saying you have to work for less, Michigan workers. You have to work for less and you have to take no health care and no benefits. We have to be fighting for our middle class and creating a way to raise the standards of living around the world instead of lowering ours, which is exactly what is happening right now. It is probably the most serious threat to our future in terms of maintaining our economy and our middle class. That is worthy of a 30-hour debate.

There are many more letters I could read that are the same. So where are we, when we are talking about 3 million jobs lost and counting just in the last 2½ years, a little less than 3 years. What is the response from the administration to this number? Are we pulling everybody together to figure out what we can do to lower health care costs? Are we figuring out what we can do to level the playing field and stop China and Japan from using advantages and manipulating their currency and creating a situation that is unfair to us? Are we looking for ways to stop the small manufacturers from going and moving their plants overseas? No.

What is the response from the administration? The first thing is to propose to cut people's overtime pay, people who already are working. We are going to cut their overtime pay. That is one of the major points the administration is fighting for right now in the appropriations process. They fight every effort to extend unemployment for the people who are currently unemployed. In the past, on a bipartisan basis, every President from Nixon and Carter and Reagan and Clinton, every President we have during times of recession, we have extended unemployment compensation for those who are unemployed. We have to fight now at every turn on behalf of the unemployed. I have mentioned earlier the administration has not been willing to get tough with China, has not been willing to deal with what is happening in Japan as well, that has so affected our automobile industry and our manufacturing economy.

We need leadership to step up and do more than just words to get tough on them, to create a level playing field. We have seen the administration not be willing to address the high cost of health insurance and do those things that will bring prices down. Earlier today I offered a unanimous consent request to increase the minimum wage $1.50 an hour so 7 million people, a large share of them women with children who are working for the minimum wage and trying to make it and don't have health insurance, paying their child care every day, trying to make it, trying to do what we are asking them to do in this country, could get a raise. It was objected to by colleagues. So we are seeing the people who earn the least can't get a raise. The administration won't support 7 million folks getting a raise. They want to take overtime away from the folks who are already working, not wanting to deal with those who are out of work with unemployment, not wanting to level the playing field so we can keep our manufacturers here and keep those good-paying jobs.

Over and over again, we see efforts that block what we need to turn this number around of 3 million jobs lost and counting.

That is the reality of what is happening. Frankly, I am disappointed we are not willing to spend time. If we are going to ask people to stay up all night and the staff to be here and so on, let's address something that affects them and their families and everyone who is listening and watching, and that is how we move this economy forward, how we protect manufacturing, how we support our businesses large and small, and our workers working harder and harder every day just to make ends meet, so we can make sure the quality of life and standard of living we want for our families is maintained in this country.

We are the greatest country in the world. But we are truly in crisis, I believe, as it relates to what is happening in our economy and with our manufacturing sector.

Let me take an opportunity to read a few more of the letters I get every day, unfortunately, from the people of Michigan. A letter that says: I have never written to a Michigan Senator before, but for me, now is the time. You see, I am one of the discouraged unemployed in Michigan. After over a year of fruitless searching for a nonexistent job in my field as a CAD designer, I have given up. It breaks my heart to leave the field I love. I must just ask you this: Where are all the automotive engineering jobs? Is it true that we in Michigan have lost much of our employment base as it relates to engineering through outsourcing? I know many colleagues who are also out of work and many who have left the field altogether, as I am contemplating. I just want you to know how one of your constituents is feeling about the employment situation here in Michigan.

Of the 3 million jobs that have been lost, over 2.5 million of them are in manufacturing. These are jobs that pay well, that bring health care with them, that bring a pension, that create middle-class America, those folks who can buy the houses and the cars—we want them to all buy them American made—who buy the boats and the snowmobiles and the cottage up north, who send the kids to college and believe in the American dream: that if you work hard, you can be successful in this country and you will have the opportunity to have the dignity of work.

From Union City, MI: I am writing this letter because there seems to be some confusion about our economy. Our government seems to think that a tax cut will help but I don't think so. Since the year 2000, there has been over 3 million manufacturing jobs that have been lost, gone to China. My wife and I own a small machine shop in Union City, Michigan. At one time we had 7 employees. Now my wife, my son and myself are all that is left. Most of the time we don't even have enough work for ourselves. I have watched as many of my friends and competitors have gone out of business and just closed their doors or filed bankruptcy. While we fight the war on terrorism, if we are not careful, we will lose a much bigger war to the rest of the world without a shot being fired.

From Clyde, MI: My husband, a 25-year mechanical engineer, designer of automotive special machines, has been laid off for seven months. The company he worked for was bought by Fiat and within two years, began outsourcing the engineering to countries such as Bosnia where engineers will work for $6 an hour. Our workers can't compete with that obviously. The engineering department is now closed completely,

everything is outsourced. He is 55, laid off, 2½ weeks short of his retirement, vesting at 100 percent, can't draw Social Security, and has been unable to find work. The market is flooded with engineers because outsourcing is happening all over. I work two jobs and a third when I can get the work. If we want to maintain the quality of our environment and keep our families fed, we need legislation to address the inequities in manufacturing standards globally, balancing tariffs, something. Our workers can't compete with the salaries outsourcing provides from other countries but for which foreign workers can maintain their own standard of living.

Again, I have received letter after letter after letter saying the same kinds of things. I also receive letters from furniture makers. I have had the opportunity to be in Grand Rapids, MI, and talk with furniture makers who have lost their contracts to Chinese contractors or subcontracting has moved over to China. They say: Well, it is because they can't compete. It is just the way the economy works.

Well, no, it is not. China manipulates their currency and it amounts to about a 40 percent tax on goods and services we send to China. They are not playing by the rules. They don't play by the rules. Why aren't we standing up for us? My constituents are saying: What about us? What about our jobs? We appreciate the fact that four people who wanted to be promoted as judges have not had the opportunity to do that. One hundred sixty-eight, yes; four, no.

But I hear from people representing this 3 million people saying: What about us? What about a marathon for us? What about spending time on the floor debating solutions that will create jobs for the people in this country that represent the majority who believe in this country, who work hard every day, who want to work hard, who want the dignity and respect of work? They don't want a handout. They want to work. They are finding their jobs are leaving, and they need our help.

Our manufacturers, large and small, and the people who work for them, need our help. They are asking us to work on a bipartisan basis. These folks are not Democrats or Republicans. They are Americans. They are Michigan citizens. They are asking us to turn our focus to those families, those people in our country who need our help. What we do is always about values and priorities—always. It is always about values and priorities.

I believe this debate is about misplaced priorities and we need to return to what is most important in the precious hours we have here and the time we have to get something done for the American people, because there is a lot at stake, including the quality of our way of life as a country. We cannot afford to lose our manufacturing base. We cannot afford to lose the middle class of this country, which has made us strong. If we are not careful, that is exactly what is going to happen.

I call on my colleagues to spend this time on how we move forward and take this number of 3 million jobs down to 2 million and to 1 million and get it down to zero, because that is the number that truly counts for all of us.

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. I inquire of the time. Where are we?

The PRESIDING OFFICER. The minority still has 41 seconds remaining.

Mr. REID. We are happy to yield 41 seconds to the majority.

The PRESIDING OFFICER. Does the Senator from Idaho seek time?

Mr. CRAIG. The chairman of the Judiciary Committee is on the floor. I will yield to him.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I apologize to those listening in and to my colleagues for having laryngitis.

Mr. REID. I want my 41 seconds back with that voice.

Mr. HATCH. Your voice is not much better than mine, from what I can hear.

Whenever you are losing an argument, you try to bring up something that might help you to win. This argument about jobs is very important, but I remember all last Monday being wasted by our colleagues on the other side. I can list all of the obstructions that have occurred this year, time after time, when we tried to do something that might be good in that area. This phony chart of 168 to 4, it doesn't take any brains to realize that is totally false.

Tomorrow, we are going to have two cloture votes on two more, so there are at least six. If you go through all those they really do plan to filibuster, you get up around 15, 16, or 17. This is the first time in history this has happened.

I rise to speak about the judicial nominees being filibustered by a minority of Senators. I have served in the Senate for 27 years, and I can honestly say President Bush's nominees are among the best I have ever seen. They are experienced, intelligent, ethical, hard working, respected in their communities, and they have given their lives to public service. We honor these great men and women for volunteering to serve their country. They have put forward their good names for evaluation by the Senate and they deserve a simple up-or-down vote—just the dignity of the vote. Our priority is to vote on these nominees. We owe them no less.

By June of this year, we had two well-qualified nominees blocked by filibusters. These filibusters were the first two in the history of this body. By the end of July, we again made history, adding a third filibustered nominee. By October, we had four nominees filibustered, another record. Shortly, we will have two more filibustered nominees, yet another record. The number continues to rise.

Those who are watching this, don't believe this phony chart. That has never happened before. Like you say, it is one thing to say we gave the 168 a trial. Most of them are district court judges now. So we gave 168 a trial, but we only lynched 4 of them—6 of them now, or 8 probably next week. It will be up to 17 before long.

I promise not to talk about the color of somebody's tie or my favorite fast food. I want to talk more about numbers tonight. I want to talk about President Bush's nominees to the Federal court. Ambrose Bierce defined nominee as a ''modest gentleman [or gentlewoman] shrinking from the distinction of private life and diligently seeking the honorable obscurity of public office.'' That may or may not be the case, but I want to highlight several of the distinguished and respected judicial nominees who are currently being filibustered by the Democratic Party members, Justice Janice Rogers Brown, Justice Priscilla Owen, and Judge Carolyn Kuhl. We can talk in terms of numbers, but I prefer to talk about why these three distinguished judges deserve a simple up-or-down vote on the Senate floor, and why they deserve to be confirmed as Federal judges.

We started hearing from the other side that, according to my colleagues, these nominees have despicable views, or are wildly out of the mainstream, or from the hard right, are mean people, have embarrassing records, are far out and off the charts, are unqualified, are activist, are extremists, or right-wingers who would like to take the country back to the 1890s, are deeply hostile to and actively seeking to undermine civil rights, women's rights, and workers rights—gee—seek to turn back the clock on constitutional rights, have records of not really helping women, seem to have little regard for the rights of women, and represent the ''worst of the worst,'' as one colleague on the other side put it the other day. Those were the nice things they have said.

Actually, Judiciary Committee hearings often remind me of an old Far Side cartoon showing three cowboys on Main Street in the Old West. One cowboy lies sprawled on the dusty street, with a revolver lying next to his arm. The cowboy on the left stands with a smoking gun, staring at the fallen man, and saying: ''OK, stranger . . . What's the circumference of the Earth? . . . Who wrote the 'Odyssey' and the 'Iliad'? . . . What's the average rainfall of the Amazon Basin?'' The cowboy on the right stands stunned, with his hands to his face, saying, ''Bart, you fool! You can't shoot first and ask questions later!'' In a similar vein, Ambrose Bierce wrote that to nominate someone was to ''designate for the heaviest political assessment. To put forward a suitable person to incur the mudglobbing and deadcatting of the opposition.'' I often fear we do not give

our judicial nominees a fair chance before shooting them down.

The other side, before they heard one word out of Janice Rogers Brown's mouth, was already shooting her down; they didn't give her a chance.

I hope we can move past applying labels to the fine men and women who have volunteered to serve their country through judicial service. Our duty under the Constitution is to determine whether judicial nominees possess the experience, intelligence, and temperament needed for judicial service. Our constitutional responsibility is to judge whether judicial nominees are willing and able to place the rule of law above all other concerns in rendering justice. The Senate cannot fulfill its constitutional duty when a minority of Senators refuses to allow an up-or-down vote for the President's nominees. As it stands, a bipartisan majority of U.S. Senators stand ready to vote on and confirm each of these excellent nominees.

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

Mr. HATCH. Yes, I am happy to.

Mr. COLEMAN. A concern we have with nominees is they are competent and able to do justice and do the right thing. There are ways to measure that. I ask the chairman, is it true the three nominees we are debating have been rated qualified or well qualified by the American Bar Association? Is that an objective standard by which nominees can be rated?

Mr. HATCH. That is true. Remember, all throughout the Clinton administration, on all their nominees, our friends on the other side were saying if the ABA approves them with a qualified rating, then they deserve to have an up-or-down vote. When they have a well-qualified rating, the highest rating you can possibly have, then there is no question they deserve an up-or-down vote. Like the three cowboys in the street I talked about, they shoot them down before they even get a chance to have that vote up or down.

Mr. COLEMAN. Sometimes the people can rate judges, when judges are up for election. I ask, is it true Justice Owen was elected to the Texas Supreme Court by 83 percent of the vote in Texas?

Mr. HATCH. Absolutely true.

Mr. COLEMAN. Is it true Janice Rogers Brown was retained to serve by 76 percent of California voters?

Mr. HATCH. Yes. I might add Justice Owen, to get back to her, had 84 percent of the vote in the year 2000. That is the highest support of any State supreme court justice that year. Most every major newspaper in Texas endorsed her. Our colleagues on the other side say she is out of the mainstream. Give me a break.

In the case of Justice Brown, she won 76 percent of the vote. I think there were four, if I recall correctly, supreme court justices up for election. She won the highest vote of all of them in a State not known for conservative politics. Yet they have tried to paint her like she is some sort of a rightwing nut. Well, just look at NBC News. They made it pretty clear she is no rightwing nut. She is a very good person.

Mr. COLEMAN. I ask the chairman, sometimes judges can be graded by peers, folks who served with them, who know firsthand the quality of the work they do. Is it true Judge Kuhl has the support of over 100 California judges across the political spectrum?

Mr. HATCH. Yes, of both Democrats and Republicans. She is one of the most highly rated judges in California. She is outstanding. Frankly, these are Democrats saying she made one of the best judges on the Ninth Circuit Court of Appeals.

Mr. COLEMAN. I ask one last question. How is it the opponents of these nominees can claim these nominees are extreme or out of the mainstream, or not qualified?

Mr. HATCH. Well, I suppose the overwhelming majority in the most populated State, in the case of California, is out of the mainstream. I guess the overwhelming majority in one of the largest States in the Union, Texas, is out of the mainstream. You know, I suppose having the support of her fellow judges, in the case of Carolyn Kuhl, across the board, Democrats and Republicans, is out of the mainstream. According to these people over here—I will tell you who is out of the mainstream, it is these people over here who are filibustering judges for the first time in history and really endangering this process. It is ridiculous. It is wrong. I think the American people have to rise up and let them know it is wrong.

Mr. COLEMAN. I thank the Senator.

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

Mr. HATCH. I am happy to.

Mr. ALLARD. I am a veterinarian by profession, and we have a code of ethics in our profession. I understand we are expected to abide by the code of ethics, and I understand the American Bar Association has a code of ethics for judges. My understanding is the code of ethics says you will not take a position, when you are in the process of seeking a position on the bench, that might prejudice your ability to decide a case. Every one of these individuals up for consideration is highly respected by their peers. I suspect it is because they are honorable and they live by the code of ethics.

I am disturbed by the specific questions that come from members of the committee when, in my view, it makes it difficult for the nominee to answer those questions because it would make it difficult for them to be objective in the way they look at a case that comes before them. I wonder if you would share with me about the code of ethics and the question on how is that practical, and do you have any reason to believe these are horrible individuals who would not measure up to the highest standards of the court, based on their peers who recommended them as highly well qualified?

Mr. HATCH. I have been on the Judiciary Committee for 27 years. I have to say I have not seen any better nominees in that whole time. As far as ethics, the only one the Democrats demanded an answer to every question—questions about future cases that will come before them—not the only one, but the main one, was Bill Pryor. The other one was Miguel Estrada. To make a long story short, it has been a very unfair process for these people. We have more than made the case that Miguel Estrada was treated completely different from John Roberts. Both of them served in the Solicitor General's Office. They asked these stupid questions about documents that are the most highly privileged documents in the Government today, and seven former Solicitors General said these cannot be given, and they used that as a phony excuse to shoot down Miguel Estrada, who is well qualified by the American Bar Association. When Bill Pryor answered all the questions, they said you answered too many questions. You are damned if you do, damned if you don't.

It is pretty clear, they just wanted to shoot these people down right from the beginning. To come out here and make such a fuss about jobs when they have been obstructive all year long is so phony that I have to admit, it almost brings tears to my eyes. Maybe it does bring some tears to my eyes because phony things tend to do that.

Mr. ALLARD. I thank the Senator for responding to my question. I have one other followup question. You mentioned jobs and it seems to me we have an efficiently operating judiciary. We don't have a lot of lawsuits that help the economy. That means we need to move out of filibuster and get these nominees voted up or down and get them on the bench, particularly in the circuit courts where we have a lot of pending cases. One of the best things I think we can do is to get these nominees on the bench and fulfilling their duties. Do you agree?

Mr. HATCH. I do. Sometimes the district courts are involved and that is why we need the circuit court of appeals. Yet this President is treated different than prior Presidents, including President Clinton. About two-thirds of the circuit court nominees haven't even had a vote. Usually by this time in a President's career about 90 percent have had a vote.

Ms. COLLINS. Will the distinguished Senator yield for a question?

Mr. HATCH. I am delighted to.

Ms. COLLINS. The Senator from Utah is an extraordinary lawyer, and he also has a distinguished history in the Senate and has served so ably as the chairman of the Senate Judiciary Committee. I wonder, given the Senator's breadth of experience, if he happens to know the origin of the word filibuster and could he enlighten the Members of this body and those who

are watching tonight as to its origin and meaning.

Mr. HATCH. I was hoping somebody would ask that. We have a chart prepared. They put it up. Filibuster comes from a Spanish word ''filibustero,'' meaning a pirating or hijacking, one word for obstruction. That is what it is. Look, I have no problem with filibusters on the legislative calendar because the Senate can set its own rules. But when it comes to the Executive Calendar, that calendar depends on your exercising restraint by advising and consenting, which means a simple majority vote up and down.

In the Clinton years, every Clinton nominee who came to the floor got a vote up or down. We did have a few who wanted to filibuster Clinton nominees. I personally stopped that because I recognized it would be disastrous for the Senate if we went down that road. As you can see, it is disastrous. We are in the middle of going down that road. We have already gone down it because our colleagues on the other side just don't seem to understand how important it is for them not to filibuster Federal judicial nominees. But I thank my colleague for bringing it up.

Ms. COLLINS. I thank the Senator for his clarification. That is indeed fascinating and we have learned a great deal here this evening.

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

Mr. HATCH. I will be happy to.

Mr. SESSIONS. Addressing the distinguished chairman of the Judiciary Committee, who has served so ably for so many years on these matters, I would like to follow up on that question that was just asked.

During your tenure as chairman of the Judiciary Committee when President Clinton was President, and he was nominating judges that sometimes would not have been our choice, or your choice for a judge, did you have occasion to express your opinion as to whether a filibuster was appropriate or not?

Mr. HATCH. As the Senator will recall, right in the middle of a couple of very controversial nominees, Judge Paez, now Judge Berzon, there were some on our side who legitimately felt they should filibuster both of those——

Mr. SESSIONS. I hate to interpret the Senator, but his microphone is distorting pretty badly. Maybe the cord is broken?

Mr. HATCH. Maybe I can bring it down here. Maybe it will work better here. I have it too close to my mouth. I am glad the Senator corrected that.

Judge Paez had been an activist judge in the eyes of many of our colleagues on the district courts out there in California. Marsha Berzon was one of the leading labor lawyers in the country. We had some who wanted to filibuster them. I stood up in caucus and said that is not going to happen. To his credit, the then majority leader TRENT LOTT stood up and said that is not going to happen.

We are both leading conservatives, but we knew that was a disastrous thing to do in this body because it would lead to animosities you could never quite—that would remain. It would lead to partisanship. It would violate the Constitution, it would violate the very advice and consent clause, the great power we have been given by the Founding Fathers.

Frankly, as the distinguished Senator has pointed out, I stood up and said that is not going to happen and it did not.

Did we have some cloture votes? Yes. But the cloture votes were to get to the nominee so we could vote. Every Clinton nominee who came to the floor, who was brought to the floor, got a vote up or down. Only one was defeated and that was Ronnie White, on a straight vote up or down. But every other one, all 377 of them, the second highest total in history, passed.

Did I agree with all those judges? You bet your life I didn't. But they were qualified. The fact I didn't agree with them ideologically was irrelevant. What is relevant is, Are they qualified? I certainly would not take away the opportunity of serving in the Federal Government for an otherwise qualified person just because I disagreed with that person on abortion or on any other issue, for that matter.

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

Mr. HATCH. Yes, I yield.

Mr. SESSIONS. I remember that very well. I remember you speaking clearly that the filibuster was inappropriate. You both said it publicly and in the Republican conference when the issue was raised by people who did not have your experience in this matter. TRENT LOTT, the Republican leader in debate—I voted to end debate, TRENT LOTT voted to end debate, you voted to end debate and allow an up-or-down vote, and when that occurred I voted against the nominee. But I agree with your argument that a filibuster was not sound.

Let me ask you this. At that time, when Senator DASCHLE was the Democratic leader and Senator LEAHY was ranking member on the Judiciary Committee, did they take a public position that a filibuster of Clinton judges was not appropriate?

Mr. HATCH. Virtually every Democrat said it, took the position a filibuster should never take place. All they asked for was an up-or-down vote. That is all they wanted, if we would just be decent enough to give them an up-or-down vote. We did. We were decent enough.

What does that imply about what is going on on the other side? I will let the public draw their own conclusions. But we were decent. We did what was right. We gave them up-or-down votes. Frankly, what is going on here is just appalling.

Mr. SESSIONS. Let me follow up. Now that President Bush is in the White House and he is sending judges over, has your position on whether a filibuster is appropriate or not changed in any way?

Mr. HATCH. No, it has not, because a filibuster is inappropriate when it comes to judicial or even executive nominees, especially judicial nominees. Our ability to give advice and consent means if you don't like the nominee, vote against him or her. If you do, vote for them. But, above all, don't obstruct, which is exactly what they are doing here, obstruction, from the Spanish word, ''filibustero,'' meaning a pirating or hijacking. Just one more objection. Now we have six more objections, as of tomorrow—actually they require cloture votes to be filed on Janice Brown, and of course Carolyn Kuhl, so we now have six. I could name up to 17 they have threatened to filibuster and probably will.

To keep bringing that phony chart up here is an insult to everybody on this floor. It is an insult to everybody watching. It just shows they are void of any real arguments. To now try to change the nature of the debate to jobs, when they have obstructed all year long, is an insult.

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

Mr. HATCH. I will be happy to.

Mr. SESSIONS. Senator HATCH, so it is clear to me, it is your position, the position of TRENT LOTT, has not changed as to whether a filibuster was appropriate, and neither has that of our majority leader, BILL FRIST?

Mr. HATCH. It has not changed. But their positions have changed.

Mr. SESSIONS. Let me ask you with regard to TOM DASCHLE, the Democratic leader, and Senator LEAHY, the ranking member on the Judiciary Committee, who argued so aggressively against filibusters just 2 or 3 years ago, has their position changed today? Are they, in fact, participating in an unprecedented procedure, an unprecedented filibuster of judicial nominees?

Mr. HATCH. No question. They were very forthright and very strong that there should never be filibusters of judicial nominees. Now all of a sudden when it is to their advantage, they think—I think it is to their great disadvantage. They lost the 2000 election in part because of the way they are treating judgeship nominees. I think they are going to lose a lot of standing in this country. The way they are treating southern nominees is abysmal, like Bill Pryor. Like Charles Pickering.

It doesn't take any brains at all to realize they just don't think these two able people are worthy of being on the bench when in fact they are more worthy than many of the nominees we approved for them in the 8 years of the Clinton administration.

Mr. SESSIONS. I thank the Senator for his leadership. I asked those questions because it was suggested last night in debate that somehow those on this side had changed our view. I think it is quite crystal clear the only views that have changed and only positions

that have been changed are those on the other side. Unfortunately, it has changed the historical principles of this Senate with regard to filibusters of nominees.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, will the chairman of the Judiciary Committee yield for a question?

Mr. HATCH. I will be happy to.

Mr. CRAIG. The chairman in earlier questioning by the Senator from Minnesota alluded to the fact that NBC News tonight featured as their lead story Janice Rogers Brown, Supreme Court justice from California. I am a freshman on the Judiciary Committee so I have not had the experience you have had, going through numerous years of confirmation hearings. But I must tell you I was so impressed with this woman's talent and her clarity in answering questions.

What is her background? What was her beginning, if you will? I think it is the great American story, I am told.

Mr. HATCH. She was born a sharecropper's daughter. This woman had it rough all the days of her life. She put herself through college and law school as a single mother. She has worked in State government now for I think it is 26 years. And they are trying to say she is against government? My gosh, she has worked there and been supportive for I think 26 years. She is one of the best nominees I have ever seen.

If we had done to three woman nominees what they are doing to these three—Priscilla Owen, who broke through the glass ceiling, getting women a right to be partners in law firms; Carolyn Kuhl has the support of 100 of her fellow judges out there, Democrats and Republicans; Janice Rogers Brown, sharecropper's daughter, has risen to the top of the heap, who has fought her way all her life—if we had done this to any of their nominees they would be screaming about it right up to today. It is unbelievable they are trying to do this on these three women nominees. They want a regimented liberal approach to everything, and if it is not there, then they are out of the mainstream, according to them.

I think most people in this country are in the middle and, I think, the middle or moderate conservative. But, be that as it may, these are competent, qualified, well-qualified women, and they are treating them like dirt. I don't understand it, myself.

Mr. CRAIG. Will the Senator yield for another question?

Mr. HATCH. I will be delighted to.

Mr. CRAIG. It was also mentioned in that questioning by the Senator from Minnesota that Justice Brown had received—I think your response was—74 or 76 percent of the vote of the State of California in a reconfirmation of her position. We have heard a great deal about judges who dissent too much. She was criticized by the Democrats for some of her speeches, that she was ''out of the mainstream,'' even though she received this phenomenal vote in California. Didn't Justice Brown write more majority opinions than any other justice in the Supreme Court of California—in the last term, I believe is what they are saying?

Mr. HATCH. Yes, the distinguished Senator makes a good point. She was elected by 76 percent of the vote. I would have to say, she wrote a majority of the majority opinions, and joined in some 73, if I recall correctly, unanimous opinions. In other words, she is not only in the mainstream, she is one of the best justices, State justices in the country. They are treating her like dirt. I don't understand that kind of treatment.

The PRESIDING OFFICER. The majority's time has expired.

Mr. CRAIG. I thank the Senator for his answers to my questions.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. NELSON of Nebraska. Mr. President, I rise this evening to express what might be best described as my disappointment in what has occurred during the past 24 hours, now I understand perhaps another 12 hours. I ask we move the process forward.

Mr. HATCH. Will the Senator yield for a unanimous consent request? It will only take a few seconds.

UNANIMOUS CONSENT AGREEMENT

I ask unanimous consent at 8:30 a.m. on Friday the Senate begin an hour of debate equally divided prior to the first cloture vote; further, that the last 20 minutes be equally divided, the first 10 minutes under the control of the Democratic leader or his designee and the last 10 minutes under the control of the majority leader or his designee.

Mr. REID. No objection.

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

Mr. HATCH. I thank my colleague.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. NELSON of Nebraska. Mr. President, I rise tonight to express disappointment over what has happened over these past nearly 24 hours, or past 24 hours-plus, and perhaps another 12 hours. I just ask we move the process forward.

I would like to make very clear a few statistics I think are appropriate tonight. We have seen many statistics or many different versions of the same statistics over these past many hours. Tonight I would like to make very clear a few statistics with respect to my voting record on confirmation of judicial nominees, which is really based on the principles I hold as a Member of the Senate.

I voted to invoke cloture 13 times. That is a 100 percent voting record on judicial nominees. To date, I have never voted against invoking cloture on a judicial nominee, not one.

I have voted in favor of confirming all nominees except one, and I voted for cloture to move the process forward, even on a nominee I cannot support.

I have done all these things because I believe in moving the process forward. As Governor of Nebraska, I had the great privilege of appointing judges to the bench. I appointed the entire Nebraska Supreme Court and the entire Court of Appeals over my 8 years, and nearly 50 percent of the judges in Nebraska. I may not be good at it, but I have had a lot of experience.

I would hope we could move forward this process. If we cannot agree, then at least we ought to move on. What is happening right now during these hours of debate is not about moving the process forward. In fact, what is being accomplished seems to me to be just the opposite, setting us back. This debate has served only to further frustrate the work of this body, delayed action on critical legislation that must be addressed, and has further polarized the competing sides on these very controversial appointments.

The question I ask tonight is, Does using a tactic of delay to criticize and attack another tactic of delay cause you to make the point or lose the point?

To add further frustration to this matter, this delay occurred only after we were forced to choose between missing votes on Tuesday, Veterans Day, or cancelling the many obligations most of us made to our constituents to participate in events to honor veterans back home. The leadership basically decided having these hours of debate seemed to be more important than honoring those who fought and died while protecting the freedoms that under ordinary and normal circumstances are debated and defended in this very Chamber every day. By having votes on Veterans Day, I could not participate in that exercise, and I didn't appreciate having to choose between Nebraska veterans and votes on legislation before this body. Like others, I chose to be with my veterans. I missed two votes. I would do it again in a heartbeat.

But it is not only our veterans who were not given the consideration they deserve. It is also our seniors, who are anxiously awaiting a prescription drug benefit. What do I say to George and Lee back home when they ask me, ''Why haven't you been able to get a prescription drug benefit but the Senate could debate on other issues for 30-plus hours''?

It is those who suffer from mesothelioma who desperately await an asbestos reform bill. What do I say to a widow of a recently deceased judge in Nebraska who was waiting to collect money because of the bankruptcy of a particular company? She is unable to collect it, but would have the opportunity, under an asbestos reform proposal, to collect on behalf not only of herself, but on behalf of her young children.

I am just one of 100 in this great legislative body, and I am very honored to be here. Even though I am relatively new to the scene, I think it is very

clear each of us is entitled to his or her own opinion. I have to say some of us are moving the process forward. I find it difficult to explain to others why we cannot be independent in our thinking about judges. Someone might say there is not too much of a difference about this judge or that judge. That is what this process is all about. But when we can't come to an agreement about a particular judge and we can't move forward, we cannot delay in this situation, but we must in fact move on.

I oftentimes try to impress upon myself and my family and my friends and others that reasonable people can and will disagree. But when they are unable to agree, it is unreasonable to expect the process to come to a halt regardless of the rules, but it is important to go ahead and move on. I embrace that philosophy because I too would always like to have everything go my way. I would like to see every bill read exactly as I wish and every nominee be the one I choose. Instead, I do embrace that philosophy because I believe we can have those differences of opinion, hold different views on the issues, serve different constituencies from diverse regions of this great Nation, and we can, in spite of all that, and in many instances because of that, achieve progress in addressing the critical issues of our entire Nation.

I don't believe these hours of debate have helped us move closer to resolving our differences on these 4 nominees. In fact, I am afraid it has achieved just the opposite. I fear this exercise may have poisoned the well, leaving this body with such stark disagreements, and any progress on the issues that matter to my constituents—a prescription drug benefit, an energy policy, asbestos reform, welfare reform—and the bills that run the Government may not be now attainable.

Many Americans question the motives of both sides as this spectacle continues. I am not going to suggest a motive for all of this, but I can surmise a conclusion: These hours have been needlessly carved out while the critical issues remain unresolved. My constituents sent me here to get things done—not to pander, not to be a partisan, not to disrupt, delay, object, or deny, not to waste 30 minutes or 30 hours.

In the interest of moving forward, making progress, and doing good work for the American people, I urge my colleagues, not in any partisan way, to think long and hard about what is being orchestrated here for these hours and what the American public expects of us during the final days of the session—so we can deal with the prescription drug benefit, so we can deal with the energy needs, so those folks who are today worried about the cost of natural gas and the high cost of energy sources in the future know there is a solution in sight.

Drought relief: I can go back to Nebraska and say, Well, we couldn't get a drought bill. I guess it was OK that we debated 30 hours on other issues, but in fact when you are losing your family farm as a result of the continuing drought, that isn't probably going to sell.

Highway reauthorization: Many States today are waiting for the highway reauthorization so they can continue to build and improve their infrastructure, because that relates to jobs—jobs in construction, but also jobs because of the improved infrastructure.

Many States are worried today about FAA reauthorization. I have airports in smaller communities in Nebraska that are worried about being able to build and expand and improve their airports due to part of the reauthorization.

What do I say to them if that doesn't get accomplished? What do I say to those who are waiting for asbestos legislation? What do I say about class action? When are we going to get that accomplished?

When are we going to say enough is enough? If these 30 hours-plus that are now going into more hours had been used to debate health insurance, the full funding of special education, dealing with the Federal unfunded mandates, or some of us had worked previously on State fiscal relief, or in finding more ways to create jobs and improve the jobs and the markets we have today, looking for ways to make trade not only free but fair so we don't export jobs but we do import and export our products at the same time—if we had spent the time on that, then this time could have been productive.

In many ways perhaps there can be a catharsis as we move forward on finding new ways to deal with the judiciary. I have looked back and forth over the years looking at the role of the judiciary to see if there is anything anywhere that ever gives the judge the right to legislate or to make law. The one thing I made clear with every judicial candidate was: Are you going to be in the position of a judge or do you want to be a legislator? Are you going to legislate or are you going to adjudicate? The position of a judge is not to legislate. It is to interpret law, to apply law, and to adjudicate.

To win constituency groups in Presidential elections, the unfortunate thing for some time has been to say I am going to appoint judges to do certain things, to rule certain ways on the Supreme Court bench, to rule in certain ways on certain issues that will appeal to a constituency or to win constituency groups.

Sometimes I think we politicize the judiciary, and that is why we are where we are today. We need to move away from worrying about ideology, political philosophy, and to make sure judicial activism is not a part of what we do. If Presidential candidates say they are going to appoint Supreme Court judges not to be conservative or liberal, but those who will fairly apply the law and those who will do what they think is right under the law, not to make the law, then I think it is important. Politicians do keep promises. In the view of many, maybe not many promises. But politicians do keep promises when they say they will appoint judges of a certain kind. Then they are obligated to constituency groups to do that.

That is the root cause of our problem—moving away from ideology and political philosophy so we only deal with judges who come to the bench with the idea they are there to apply, to interpret the law, not to legislate, not to make the law. Until we do that, we are going to be hopelessly bogged down from time to time. But I am here to move the process forward. If the rest of us can't get together to move the process forward as a body, then we at least ought to move on.

Thank you, Mr. President. I yield the floor to my colleague from West Virginia.

The PRESIDING OFFICER. The Senator from West Virginia.

UNANIMOUS CONSENT REQUEST—S. 1853

Mr. ROCKEFELLER. Mr. President, I ask unanimous consent that the Senate proceed to legislative session and that the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for displaced workers, 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.

Mr. CRAIG. Mr. President, reserving the right to object, I ask unanimous consent that the Senator modify his request so that just prior to proceeding as requested, the three cloture votes would be vitiated and the Senate would then immediately proceed to three consecutive votes on the confirmation of the nominations with no intervening action or debate.

Mr. ROCKEFELLER. The Senator from West Virginia will not do that.

Mr. CRAIG. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. ROCKEFELLER. Mr. President, I am extremely frustrated that the Senate continues this debate, or whatever it is. It is already more than a day. We are dealing with the nominations of a handful of judges. That is not trivial. I understand that. As a Senate, we have a responsibility to address the most urgent issues facing our Nation. Unemployment insurance for those who are unemployed, I think, happens to be one of them. Today we are, embarrassingly, failing to live up to that responsibility.

This morning I talked at some length about the crisis facing our Nation's manufacturing sector. I will not relent on that subject. As factories close down, people across this country are losing jobs, losing health care benefits and retirement benefits. As a country, we are losing the industrial base that is responsible for the greatness of this Nation.

Some of the statistics I mentioned this morning I am going to repeat.

Manufacturing employment is at a 41-year low, and more than 2½ million

manufacturing jobs have been lost in the last couple of years.

This morning I described legislation I introduced to address this manufacturing crisis. I happen to feel very strongly about that legislation. As I explained, the bill I crafted would offer relief to American manufacturers in three ways:

First, by lowering the effective corporate income tax rate by about 3 percent; second, by providing employers tax credit up to 75 percent to help cover the cost of health care coverage for retirees who had worked for that company; and, third, by strengthening our trade protection laws. There is a plan I laid out to help stem the terrible flow of manufacturing jobs from the United States overseas. I recognize other Senators have different ideas about the best way to help our Nation's manufacturing companies compete. I welcome the vigorous debate. I believe we ought to leave no stone unturned when looking for a solution to this crisis which is so vital to so many of our people. That is why, frankly, I am so frustrated and disappointed we are going through this 30-hour charade.

On the 1st of October, the Senate Finance Committee, on which I am proud to serve, approved legislation known as the JOBS Act. That stands for ''Jumpstart Our Business Strengths.'' The legislation enjoyed broad bipartisan support in the Senate Finance Committee and passed out of it. But 6 weeks later it is still awaiting action by the full Senate.

I do not necessarily agree with every provision of that bill, but that did not happen to be important to me because it represents a serious effort to help America's factories and the people who work in those factories. I care about those people. I represent those people and I will fight for those people.

The more important provision of the bill reduces the corporate tax rate, much the same as my own legislation would do. Unfortunately no debate has been scheduled for this important legislation. Some seem to believe we will not have time to consider the legislation before adjourning this year. That is tragic for the people who are not working. This Presiding Officer faces that in his own State, the State of Illinois.

I cannot understand that thinking. How can we possibly have 30 hours to air our grievances about judicial nominees when we all know exactly what the result is going to be? There is no time to debate a way to protect American factory jobs. I could pick on many other subjects and would be happy to do so, but I pick one subject tonight.

I believe if the Senate took up the JOBS Act, we could have a thoughtful, constructive debate and we could pass it. In fact, as I look about the Senate floor, I see the Senator from Nebraska, the Senator from Maine, and the Senator from West Virginia, and the last time we were on the floor together, we passed a bill which spread out to the States $16 billion of Medicaid assistance which they desperately needed—two Democrats and a Republican. It could have been two Republicans and one Democrat. It makes no difference. We got the job done. The bill passed, and the States benefited from it.

But what are we doing now? We are talking. We could pass legislation on all kinds of things. I would ask all of my colleagues to think for a minute about the Americans who right now as we speak are hard at work on the evening shift in factories around the country. They are making everything from cars to contact lenses. Many of these factory jobs are exhausting. They require concentration and heavy lifting. They cause injuries. They require concentration. When Americans are toiling away in our factories right now, we cannot help but be inspired ourselves to concentrate and to do some heavy lifting of our own. We must work hard and do our jobs. It is our job as Senators to look at the serious policies that make our country work or work less well. People having a job and putting food on the table is a very major part of that.

Much to my dismay, we are not engaged today in serious debate about ways to create and maintain jobs in America. That is the subject of discussion in my State. We are not a wealthy State. We are a good State. Our people are as good or better than anybody in any other State. I fight for then. But they need work. Instead, our factories continue to struggle and are forced to shut down. Millions of Americans are out of work. Because so many of our factories are leaving the country, it is more and more difficult for Americans to find new jobs.

People always think when you lose a job, you can get another job. There was a day when that was true. That is no longer true. Indeed, economic experts have concluded the vast majority of job losses suffered in the last few years are permanent, are not replaceable. Factories are closed and will not reopen.

Let me take a moment to discuss the economic situation in my own State of West Virginia. Our steel industry has been struggling to recover from years of unfair and illegal competition against steel that was dumped on our markets and sold in America at below the cost that it cost to produce it in the country it came from—dumped steel, illegal steel, breaking our national law.

What was once our State's largest employer, Weirton Steel, recently announced it will cut an additional 800 jobs. I can remember when 13,000 people worked at that company. If President Bush backs down on the steel tariffs, of course, it will hurt the industry just as it is poised to recover. Ending the tariffs early will cost many more Americans jobs and at a time we know that new factories are not being opened in steel. We have to protect those steel jobs we have. I mean ''protect'' in the best sense of the word by using the American law and by being faithful to our own conscience.

Employment in the coal fields is also affected. The coal industry has long supplied our steel industry with the finest quality coal in the world. That has continued to decline. There are not many coal miners left anymore in West Virginia. Indeed, the manufacturing base all over my State continues to shrink drastically, and, as it diminishes, so do jobs with good wages and good benefits. That is the American dream.

In the southern coal fields, two other established prominent manufacturers—EIMCO, a Norwegian company that manufacturers mining equipment, and the Dean Company, with which I spent most of my life, a maker of wood veneers—are closed; they went overseas.

The past year has brought the closing of two long-time manufacturers in north-central West Virginia, the Clarksburg Casket and Glassworks Company. In the Mid-Ohio Valley in Parkersburg, two long-time manufacturers, Johns Manvillle and Ames True Temper, closed plants. Just 3 weeks ago, it was announced another 50-year-old plant was scheduled to close in Parkersburg, putting almost 200 workers at Schott Scientific Glass out of work. Their jobs went overseas.

In the Kanawha Valley where this Senator lives, two well-established chemical companies are closing, Flexys in Nitro and FMC in South Charleston. These closings mean hundreds of jobs lost.

Where are these workers supposed to turn? Their average age may be 45 to 55. What are they meant to do? Take up computer sciences? Biochemistry, physics? They can't do that. There is no place for them to go. There are no replacement jobs. Some of them take temporary jobs where they don't get benefits and try as best as they can to work with their families.

I was extremely pleased at the recent news of the strong economic growth in the third quarter of this year in this country. This does not translate into new jobs in West Virginia. New jobs is what we look at. People do not feed their families and do not pay their mortgages with news of strong economic growth. They need paychecks. It comes from jobs.

This Congress has not done enough to protect the paychecks of hard-working Americans. We have failed to stem the flow of jobs overseas, a subject about which I could speak for 6 hours. We have not done enough to provide temporary assistance to workers who have lost their jobs. Currently, 9 million Americans are unemployed and almost 2 million Americans have been unemployed for more than 6 months. In West Virginia, almost 42,000 workers are facing the holidays without a job.

Today, the Senate ought to be addressing the needs of these workers. Therefore, I am pleased to be a cosponsor of legislation introduced by Senator KENNEDY that would extend the

unemployment compensation for those Americans of which I speak who are still struggling to find work in our so-called jobless economic recovery.

As factory after factory closes its doors, or freezes hiring, workers are unable to find new jobs. They are running out of unemployment benefits at an alarming rate. As many as 80,000 workers per week are expected to exhaust their unemployment compensation in December itself. Senator KENNEDY's bill would continue Federal unemployment benefits for an additional 6 months. The legislation would also provide 33 weeks of additional Federal benefits in States with especially high unemployment rates.

This bill provides crucial assistance for long-term unemployed workers. There are more than 1 million workers who have already exhausted their extended benefits but have not been able to find a new job.

Let me be clear. Men and women in West Virginia and across the country would rather have a paycheck than an unemployment check. We all know that. However, the jobs are not available. The choice is not theirs. They have families to feed. The Federal Unemployment Insurance Program was specifically created to help workers when the economy suffers prolonged downturns. Workers have paid into the unemployment compensation fund and they deserve to collect benefits from the fund during such a weak jobless recovery.

Currently, the unemployment insurance trust funds have $20 billion sitting in a bank. The benefits outlined in Senator KENNEDY's bill would cost $16 billion. To me it is unconscionable to leave the funds in the bank when they are needed by workers during hard times. Moreover, by making additional unemployment benefits available, Congress will also obviously be helping our economy.

I am afraid that the charade we are engaged in at the moment is a lose-lose proposition for the American people. I do not diminish the importance of judges, but I do not diminish the importance of unemployed workers whose self-esteem is destroyed and whose skills are ready to be put to work. It does nothing to help 9 million Americans who have already lost their jobs to have this debate. It does nothing to protect the jobs and factories that are currently struggling to compete to have this debate. I would also suggest that it hampers the ability of Senators to come together to address the urgent business of the Nation because of the nature of this debate.

There is certainly no shortage of important business before the Senate. We need to pass a prescription drug bill, and there are many other issues I could discuss.

I will end with simply this thought: I love America. I love my State of West Virginia. I love its people. I know they need to be well represented by judges. But I also know they have to work or else it probably doesn't make much difference to them.

What I am talking about tonight, what I talked about this morning is the ability for Americans to have jobs, to hold jobs and, if they lose them, to get unemployment insurance.

I yield the floor.

The PRESIDING OFFICER (Mr. ENZI). Who yields time for the majority?

Mr. HATCH. Mr. President, I appreciate our colleague's comments about the necessity of jobs. I agree with him. We are debating the third branch of Government, without which there wouldn't be any jobs for anybody, without which the Constitution wouldn't be alive today, without which we wouldn't have the freedoms we have.

In all this talk about jobs, I haven't heard any real ideas as to how we get more jobs. It is as though they think Republicans aren't concerned about jobs. Of course, we are. We are debating something that is equally important; in fact, over the long run, much more important than almost anything else we can debate. That is, are we going to have an honest, decent judiciary to uphold the Constitution?

I have seen this body and the other body pass unconstitutional legislation many times in my 27 years. I have seen Presidents act unconstitutionally a number of times in my 27 years, and before that. It has been the judiciary that has saved the Constitution. It has been the judiciary that has corrected matters. It has been the judiciary that has helped small business, where the jobs are. It has been the judiciary that has given justice to this country, that has protected Americans from criminals, that has done so much good for this country. That doesn't mean all judges are perfect or right. But by and large, it has worked very well. That is why we make these positions lifetime appointments, so they don't owe anything to anybody but the law.

Here we have a distortion for the first time in history, filibustering judges and phony, untrue charts of 168 to 4. Let me tell you, they wouldn't have allowed the 168 to go through had we not been fighting as hard as we could and forcing them to allow those judgeships to be brought up. We would have nowhere near 168.

With regard to the four, we are already up to six. We were there last night. We were there months ago when they indicated they were going to filibuster Janice Rogers Brown and Kuhl, in addition to the other four who have been mentioned. Then there are probably at least 13 others who I can name. There will be more, because there is an arrogance here, it seems to me, that goes beyond doing what is right for this country.

Very few things rise to the dignity of the importance of judges and getting a good Federal judiciary. I am for jobs like everybody else, but because they don't have any other arguments, that is why they are doing that.

I would be happy to listen to my colleagues on any suggestions they have with regard to jobs. Usually it is another big Federal program that literally doesn't create any jobs. It just creates another burden for taxpayers. That is what they think creates jobs.

I am happy to yield to the distinguished Senator from Virginia.

Mr. WARNER. I listened carefully as our distinguished chairman was referring to other nominees who have been acted upon by the distinguished members of the Senate Judiciary Committee. I have been studying extensively the very impressive record of achievement of a number of these individuals who are awaiting action on the floor.

You mentioned Justice Janice Rogers Brown, a distinguished jurist of 25 years on the California Supreme Court. The record shows that she was born to very proud parents but ones of modest means. Sharecropping was their profession.

This distinguished, hard-working young person worked her way through college, worked her way through law school, and has now served the people of California for a quarter of a century, including the last 7 years as a California Supreme Court justice. That is remarkable.

Further, we heard that she was elected or reelected to the California Supreme Court. I think the chairman should explain the distinction between our Supreme Court, which is subject to the process we have been discussing these several days. But in a number of States, they do have a State election. All of us in this Chamber are here by virtue of the support of people in elections. But how many of us have been elected to the Senate with 76 percent? I don't think my distinguished junior colleague from the State of Virginia got that.

Mr. ALLEN. Far from it.

Mr. WARNER. Well, I was pretty close to it, I mention to the Senator. But I don't claim 76 percent. That is quite a record. We have heard that she has ruled for the plaintiffs in many civil rights and consumer protection cases. She is supported by her colleagues in California, those who know her best.

But could the distinguished chairman advise the Senate with regard to his opinion with respect to the nomination as it is hopefully brought before the whole Senate?

Mr. HATCH. Well, of course, she is subject to the same advice-and-consent rule of article II, section 2 of the Constitution, as are all of these Federal judges. But she deserves the dignity of an up-or-down vote.

The senior Senator has brought out she is an African-American woman who has come from nowhere, in a sense, a sharecropper's daughter, to being a justice on the California Supreme Court.

Mr. WARNER. That is a dream of millions of students all across this country, to have that opportunity to

come up through our system, to gain their degrees, to take their place in society, to stand for the cause of freedom in this great country, and some few do manage to get on the judiciary of the States. I know that Presidents look to the jurists in States, because they have a proven record, to select them for the Federal judiciary.

Mr. HATCH. That is right.

Mr. WARNER. I do hope this distinguished nominee will fare well and be treated with fairness when that name is brought before the Senate.

Mr. HATCH. I appreciate my dear colleague. But we will find out tomorrow that the other side is going to vote against cloture. They are filibustering this terrific African-American woman justice who has made it on her own throughout life, who wrote most of the majority opinions in the California State Supreme Court while joining unanimously with others in over seven cases just last year.

They have tried to paint her as though she is out of the mainstream. I would like to suggest who is out of the mainstream. It is a high percentage of those on the other side of the aisle who think that only the left has any ideas in this country. Because she is a conservative black woman and she is not monolithically in step with what they think black people ought to be, they are against her. If we did that to one of their nominees, the whole world would come down on us.

Mr. WARNER. She is proud of her African-American heritage. I hope the Senate gives her fair treatment.

Mr. HATCH. I do, too. I hope the Senator is right. But from what I have seen here, she is going to be filibustered right along with the rest of them.

I recognize the distinguished Senator from Virginia, and then I will come to the distinguished Senator from North Carolina.

Mr. ALLEN. Mr. President, following up on my esteemed colleague from Virginia's comments and observations on Justice Janice Rogers Brown, she is the first African-American woman to serve on the California Supreme Court, having come from segregated schools in the South, worked her way up.

I find it very interesting that the following quote was made a few years ago: Whether it is Hispanic or non-Hispanic, African American or non-African American, woman or man, it is wrong not to have a vote on the Senate floor. What are they afraid of? What are they afraid of? What is wrong with a vote?

Tomorrow the person who made that statement on October 28, 1999, Senator TOM DASCHLE, Democratic leader, is going to lead a filibuster against Justice Janice Rogers Brown.

Mr. HATCH. That is my understanding.

Mr. ALLEN. Clearly, a prior inconsistent statement showing duplicity. I would ask, when you referred to some of their arguments that she is out of the mainstream, I was looking at the record from the hearings. I understand Justice Brown was criticized for a single ruling she made on a parental consent case. We have parental consent laws in Virginia. The vast majority of people, even some who consider themselves pro-choice, recognize that if an unwed minor daughter is going through the trauma of an abortion, that at least the mother or father ought to be notified, ought to be involved, because it is a medical procedure that even for ear piercing or tonsils being taken out, you need consent. So for something as traumatic as the surgery of abortion, which is physical obviously, but also something that is emotional, parents should know when their 17, 16, 15-year-old daughter is going through such a procedure.

She is being criticized for that. I don't find that, at least from Virginia standards, or if the Senator could share with us, do you consider that out of the mainstream? From what I can see from surveys, 80 percent-plus of all Americans, regardless of the color of their skin or their ethnicity or gender, think parents ought to be involved when their unwed minor daughter is contemplating such a procedure.

Mr. HATCH. Well, the Senator raises a good point. But not according to that side. It is out of the mainstream. Just think about it. The Senator is correct. Eighty-two percent of the people are for parental notification laws. Challenging the reasonableness of parental notification statutes lies somewhere between hard and impossible. That is why an overwhelming majority of Americans support those laws, including the parents of Holly Patterson. Holly was a young girl who died 7 days after taking RU–486, the abortion drug.

Her father learned about her abortion just hours before her tragic death. If there was a parental notification statute, Holly might still be alive today.

Parents do have some rights here. Most people acknowledge that. But that is one of the big reasons why our friends on the other side are against all three of these women nominees, I suppose. If there had been a parental notification statute, young Holly would be alive today.

It is ridiculous to criticize these two fine nominees for their opinions upholding parental notification statutes. Justice Brown's opinion on the parental consent statute is well within the legal mainstream. The U.S. Supreme Court has routinely found notification statutes constitutional.

So the Senator has raised a very important point. But that is considered out of the mainstream by our colleagues. Again, we know who is out of the mainstream. It certainly isn't Janice Rogers Brown.

I will just point to the side that is out of the mainstream. Yet they are trying to make everybody march in unison, in accordance with their liberal plan for America. That is not right. I turn to the distinguished Senator from North Carolina.

Mrs. DOLE. Mr. President, will the distinguished Senator yield for a question?

Mr. HATCH. I would be delighted.

Mrs. DOLE. I have heard that the Senate minority leader called Priscilla Owen unqualified. Yet I understand Justice Owen attended Baylor University and Baylor University Law School, graduating cum laude from both institutions. I understand that she finished third in her law school class and earned the highest score on the Texas bar exam. And she accomplished these remarkable achievements at a time when women were a distinct minority in the legal profession.

Isn't it true that 15 past presidents of the Texas State bar, both Democrats and Republicans who hold a variety of views on important legal and social issues, agree that Justice Owen is an outstanding nominee and should be confirmed as a Federal judge?

Mr. HATCH. Absolutely true. By the way, one of the arguments that the side across the aisle from us is out of the mainstream again is over parental consent, a dissent that she had written, upholding the finder of fact in the lower court. The majority just ignored those facts and overruled the right of parents to consult with their daughter before the daughter had an abortion.

She is not out of the mainstream. Guess who is out of the mainstream? I thank the Senator.

Mrs. DOLE. Senator, is it not the case that former Texas Supreme Court Justices John Hill, Jack Hightower, and Raul Gonzalez, all Democrats, say Justice Owen is unbiased and restrained in her decisionmaking?

Mr. HATCH. That is correct. These are people who know her or who have worked with Justice Owen on the Texas Supreme Court. They are all Democrats. They are all partisan Democrats, by the way. They think she would make a fine judge on the circuit court of appeals.

Mrs. DOLE. As I understand it, some of our Democratic colleagues oppose Justice Owen because she is too probusiness, her opinions are results-oriented. Didn't the leading tort law professor, Victor Schwartz, look at Justice Owen's opinions and find those opinions, those characterizations of the opinions to be untrue?

Mr. HATCH. Victor Schwartz is one of the law professors who wrote the book on torts. He is one of the most distinguished legal thinkers in the country. In fact, Professor Schwartz wrote:

> Any characterization of Justice Owens as pro-plaintiff or pro-defendant is untrue.

But we are getting used to that. The reason they are all talking about jobs, it is a political reason, of course. They are trying to get people to not pay attention to this debate. But the reason they are talking about jobs is because they don't have a good argument against Priscilla Owen, nor do they have one against Janice Rogers Brown, nor do they have a good argument

against Carolyn Kuhl. And three outstanding women who, if we treated three of their women justices like that or nominees like that, all hell would break loose.

In all honesty, Professor Schwartz said that just isn't true.

Ms. LANDRIEU. Parliamentary inquiry.

The PRESIDING OFFICER. Does the Senator from Utah yield?

Mr. HATCH. Not yet, I yield to the distinguished Senator from Texas.

Mrs. HUTCHISON. To follow along with what the distinguished Senator from North Carolina was saying, Justice Priscilla Owen, a personal friend of mine who I have known for years, isn't it true that she was endorsed by every newspaper in Texas when she ran for reelection to the Supreme Court of Texas, every single one?

Mr. HATCH. The distinguished Senator from Texas knows that is true. That is not easy in the State of Texas. There are some very liberal newspapers down there that scrutinized every aspect of her life.

Mrs. HUTCHISON. It was really phenomenal. In fact, isn't it true that she got the highest number of votes of any person running for the supreme court that year?

Mr. HATCH. No question about it. She is a terrific person.

Mrs. HUTCHISON. I heard one of my colleagues on the other side of the aisle say: There are not enough hours in the universe that would be sufficient for debating Justice Owen's nomination. I thought that was very interesting because, the fact is, if we had 1 more minute of debate, it wouldn't matter, because she already has a majority vote in the Senate. Isn't that true?

Mr. HATCH. That is true. In fact, all three of them do.

Mrs. HUTCHISON. If she has the majority vote on the floor of the Senate, and the Constitution says that advise and consent is not a supermajority, that is what it implies because it didn't ask for a supermajority, then why isn't she sitting on the Fifth Circuit bench right now?

Mr. HATCH. Well, I think it is because she is not a liberal. That seems to be the only mainstream the other side is interested in. I cannot say she is all that conservative either. But the fact of the matter is, she is not a liberal Democrat. Here is a woman who has every credential in the world, as the Senator from Texas pointed out, who broke through the glass ceiling for women so women can now become partners in law firms, when that was tough to do. Here is a woman who has fought every day of her life to excel, who has excelled. Yet look how she is being treated, like she is ''outside of the mainstream.''

Since they don't have any real legal arguments, any real philosophical arguments—they don't have any real arguments, and that is why we are getting a filibuster on one of the best nominees I have seen. By the way, she got the highest rating from the not-conservative American Bar Association, which during the Clinton years was called the gold standard. If you got a ''qualified'' from the ABA and you were a Clinton nominee, that meant you were OK, you were in the mainstream.

Here is a woman with a ''well qualified,'' the highest rating from the ABA, and they are trying to say she is outside of the mainstream. That is just another misuse of terms because they don't have a real argument against her.

Mrs. HUTCHISON. You know, the distinguished Senator from North Carolina is a graduate of Harvard Law School. She went through when it was very tough. I am a graduate of the University of Texas Law School, and there were five women in my class of 500. So we know what it is like to go through those hard times and graduate from law school. Frankly, we would have a hard time finding a job.

Priscilla Owen went through that. She has known the tough times. She has known herself to be superior. That is why I appreciate the Senator from North Carolina talking about my friend, Justice Owen, and why I am standing up for her today, because I know what she has been through. She has come out on top. She has come out on top in everything she has done, and she would have gotten a majority vote on the floor of the Senate. She deserves to be sitting on the Fifth Circuit today.

I will ask this final question. Why in the world would the Senate put a blemish on the record of a woman who has high moral standards, who has faced the electorate and won overwhelmingly, who has been endorsed by every newspaper in Texas, and got the highest number of votes the year she ran? Why would the Senate keep her from getting the appointment she is so qualified for?

Mr. HATCH. I cannot see a good reason. It is a mystery to me why our Democratic colleagues refuse an up-or-down vote. Like the distinguished Senator from Texas said—and I really admire the Senator from Texas, who is a lawyer, from the University of Texas, and the Senator from North Carolina, Senator DOLE, who is a lawyer, who graduated from Harvard Law School. I think the other side ought to be listening to the two of you, especially with regard to an eminent woman jurist named Priscilla Owen, and another jurist named Janice Rogers Brown, and another one named Carolyn Kuhl.

To make a long story short, if they don't like these nominees, then vote them down. The reason they are stopping them is because all three of them have a majority of the Senate willing to vote for them. They are flying in the face of the advise and consent clause, refusing to give them the dignity of an up-or-down vote. I think women across this country ought to be outraged by it—liberal women, moderate women, and conservative women. It is a slap in the face to every one of them, the way these three women are being treated by the other side. I have heard for 27 years how much greater they are for women. Don't believe it. If they were, they would not be arguing against these wonderful women nominees. Don't believe that for one second. It is all politics.

The only reason they are talking about jobs, in all honesty, is because they don't have the arguments against these eminent women lawyers and judges. It is pathetic.

Mrs. HUTCHISON. I thank the Senator from Utah.

Mr. HATCH. How much time is left?

The PRESIDING OFFICER. There are 6 minutes 15 seconds.

Mr. CRAPO. Will the Senator respond to a question?

Mr. HATCH. I surely will.

Mr. CRAPO. The Senator from Utah spent time responding to questions about the nominees we are going to vote on tomorrow. I note those who oppose this vote often bring up a chart that says 168 to 4, noting they have only filibustered 4 judges in this Congress. I think it is important to point out, though, that number 4 is the first time in the history of this country, in the history of the Senate, a filibuster has been sustained against a judicial nominee of the President of the United States.

I think it should be clarified to the American people that the fact we are now seeing a filibuster sustained against nominees of the President turns the Constitution on its head and begins a very dangerous precedent with regard to how the nominees for the judicial branch are treated by this Senate.

Mr. HATCH. No question about it. That 168 to 4 doesn't even begin to tell the story, because if it had been up to our colleagues on the other side, there would not be 168. We had to fight for every one of those people, and we had to fight hard fights. We had to force them to vote. They cannot vote against everybody. So there is not just four. We have already got six. We had to file cloture on Carolyn Kuhl and Janice Rogers Brown, which will be up tomorrow. I can name probably another 11 they are going to filibuster. So that is a blatant, outright lie.

Mr. CRAPO. Would the Senator from Utah tell us how many of the nominees of President Clinton to the bench were filibustered during his Presidency?

Mr. HATCH. Not one. Our side would not permit that because of the detriment to the Senate, the detriment to the Federal judiciary, the detriment to the Constitution, the detriment to just good reasoning. We didn't filibuster one.

Mr. CRAPO. Isn't it also true that out of the last 11 Presidents—and I think we used 11 Presidents because it was 1949 when the filibuster became possible—not one of their nominees, until today, until this Congress, not one of the President's nominees has

been successfully filibustered in the Senate of the United States because of the understanding of the fact that the Constitution gives the President the right to a vote?

Mr. HATCH. That is right. Once they hit the floor, they have had a vote up or down. And 377 Clinton judges are serving in the Federal judiciary today because we had the decency to give them the dignity of votes up or down—something not being accorded our nominees.

Mr. CRAPO. It is my understanding that 2,300 nominations have come to the floor since the filibuster was possible.

Mr. HATCH. It is 2,372.

Mr. CRAPO. Zero were filibustered this year, and this year four have been successfully filibustered, and what is it, five, six, or seven more are scheduled to be filibustered?

Mr. HATCH. That is right. Actually, it is more than that. We have two more tomorrow. That gets us up to six. Then probably there are another 11 I can name. I won't take the time to do that now. There hasn't been one filibuster by us. There have been cloture votes, but they were used for time management purposes to get us to a vote. In every case, the Clinton nominee got voted up, except for one.

Mr. CRAPO. I thank the chairman. I think it is important to look at this and understand what this debate is about and why we are giving it this time, to focus on the threat to the Constitution that is being posed by the treatment of judicial nominations in this Congress. I thank the Senator.

Mr. HATCH. I thank my colleague. The real number, for the past 11 Presidents of judicial nominees confirmed versus the filibustering they are doing, is 2,372 that were confirmed. None were filibustered, until President Bush became President. He is being treated wrongfully. It is unfair to him, unfair to these nominees. I like what the Senator said earlier. I think he said we gave a fair trial to 2,372—actually 168. We gave a fair trial to them and with regard to the four, we just hung them. That kind of shows in that one sense it is great to give a fair trial, but we are not giving a fair trial to these four. They are arguing it is all right for four because it is only four. Well, it is not all right if people are hung without a fair trial. They are certainly not getting a fair trial.

Mrs. HUTCHISON. Mr. President, will the Senator yield for a question?

Mr. HATCH. I surely will.

Mrs. HUTCHISON. I think in hearing the debate, the most egregious misrepresentation I have heard is about Judge Carolyn Kuhl and a case she had, where there was a woman who was being examined who had breast cancer, and there was someone in the room who was not a doctor, a person from a pharmaceutical company. It was said she callously let the pharmaceutical company be dropped from the case. Isn't it true, though, there was also an action against the doctor who was negligent, and she kept the lawsuit alive so that woman could have a recovery?

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

Mr. HATCH. I ask unanimous consent for 30 more seconds.

Ms. LANDRIEU. I object.

Mr. HATCH. Let me just say that it is true.

Ms. LANDRIEU. I object. I know the distinguished chairman has been on the floor for a while making some truly offensive statements to colleagues on this side of the aisle that, in my opinion, are beneath the dignity of the committee on which he serves as chair. I ask the chairman if he recognizes the number on this chart. Could he state for the record what it is.

Mr. HATCH. I don't recognize the number. However, I do recognize the argument.

Ms. LANDRIEU. The Senator from Utah——

Mr. HATCH. Let me answer the question, if I may.

Ms. LANDRIEU. The distinguished Senator from Utah has answered the question.

Mr. HATCH. May I please finish?

Ms. LANDRIEU. He has answered my question. He said he didn't know what the number was. I would like to explain to him and to the other Members.

Mr. HATCH. Will the Senator yield?

Ms. LANDRIEU. No, I will not. The number is 98 percent——

The PRESIDING OFFICER. Senators will address other Senators through the Chair.

Ms. LANDRIEU. The number the distinguished Senator from Utah did not recognize—I don't know why he would not recognize it since he is chairman of the committee, but he says he doesn't recognize it. The number is 98. Ninety-eight percent of the judges that were sent to this Senate by President Bush we have approved—98 percent. There are not many people in America, not white people, or black people, or Spanish people, or women, or men, who think the Senate should approve 100 percent of any President's nominees. It is beyond the realm of reason, particularly a President who did not win the popular vote.

Earlier in the debate, the chairman, who also doesn't recognize this number, this 98 percent, also fails to recognize the numbers in the last election. The numbers of the last election were Bush 50,456,169; Gore 50,996,116. So 500,000 more people voted for Vice President Gore in the popular vote than President Bush. He won by a handful of electoral votes in Florida, and we know that. The Court decided it. I am not complaining about it, but numbers are important. Let me tell you another number——

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

Ms. LANDRIEU. I will not.

Mr. REID. Regular order.

Ms. LANDRIEU. I will not yield for a question.

Another number is 63. I want the public who is watching this—and I think a lot of people are watching this, and I am glad because this is what the next election is going to be about, and I am very excited to help lead this fight. Sixty-three nominees were blocked. It wasn't an open filibuster. It wasn't debated in the open, like tonight where there are no secrets and we can all speak about what we believe. This was done in secret, and not by many Senators who represent millions of people, but maybe by one Senator who just decided he or she didn't like the nominee, and so they would not sign the slip.

The chairman of the committee reigns over this. He understands this number 63. They didn't even have the decency of getting a vote or a hearing in committee because the chairman from Utah had a system in place that blocked them.

Mr. HATCH. Will the Senator yield?

Ms. LANDRIEU. No, I will not yield.

Mr. HATCH. I have a question.

Mr. REID. Regular order, Mr. President.

Mr. HATCH. I object to that, Mr. President.

Mr. REID. How rude that is.

The PRESIDING OFFICER. The Senator from Louisiana has the floor.

Ms. LANDRIEU. Thank you, Mr. President. I will not yield the floor, and we are not going to yield this point.

Technically, the majority is correct that there has not been a technical filibuster successfully completed. But there have been filibusters on this floor that have been tried, but they weren't strong enough to stand up to them because their arguments weren't strong enough. The only way a filibuster can survive is if the arguments and the truth is strong enough to stand up to lies. That is the only way a filibuster survives. That is why this filibuster survives, because the truth is always stronger than a lie.

This 63 people never could come out of committee. I am not even going to go into that. I am going to talk about something else.

How much time do I have remaining?

The PRESIDING OFFICER. The Senator has 24½ minutes.

Ms. LANDRIEU. Good. I am going to take every one of them.

I want to tell the Republican majority something quite simple. This country, no matter your best efforts, will not be divided. No matter your vicious rhetoric about Protestants and Catholics and blacks and whites and Hispanics and women, we refuse to be divided. In a time of war, which we are in, when the country is under assault and we have men and women dying in Iraq, it is the height of disrespect and un-Americanism to come to this great floor and talk about the pettiness and say this woman Senator, who has spent 25 years in public office, and every woman who has ever served, that there is something wrong if I don't want a woman as a judge or I don't want African Americans to be here.

The Senator from Utah must forget where I am from. I would like to remind him where I am from. I am going to fight for Louisiana. In the 63 years before Rosa Parks decided to sit down in her seat because her feet were so tired she could not move, a man named Homer Plessy decided he would get on a rail car that was entitled ''whites only.'' He got on it in New Orleans, my hometown. He rode on the train and he knew he would be arrested. But a group of lawyers, African-American free men of color, had decided that he would be the right one. Why? Because he was white enough to pass, to get on the train, and black enough to be arrested. And that is exactly what happened.

Forty years before the Civil Rights Act, Plessy rode that train and the great movement began to free people who had been slaves for 300 years.

I have to sit in the Senate Chamber and listen to the Republican majority argue that, in the whole country, they can't find a better African-American woman than this Janice Rogers Brown to serve on the bench, to hold up Rosa Parks, to honor the work of Louis Martinet, and to honor the memory of Plessy. The only person they can find to serve on the bench is a woman who says—and I want to read what she says so the people in this country can just decide for themselves. Don't listen to all the technical parts. I am just going to read to you what the woman said and you decide for yourself if you think this is mainstream or not:

Some things are apparent. When government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is families under siege, war in the streets, the precipitous decline of the rule of law, the rapid rise of corruption, the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

What do you think Rosa Parks thought when the Federal judge came down to Alabama and government intruded and said: Lady, you don't have to suffer anymore. You think that Rosa Parks thought that government was bad?

Let me go on to say what this mainstream woman thinks of all the grandparents in the United States.

My grandparents' generation thought being on the Government dole was disgraceful, a blight on the family honor. Today's senior citizens blithely cannibalize their grandchildren, because they have a right to get as much ''free stuff'' as the political system will permit them to extract.

Excuse me, but on behalf of all the grandparents I represent, this is an insult to every single one of them who raised their children, and then when some of their children got into trouble, raise the grandchildren and the great-grandchildren on their Social Security paychecks of $672 a month, which the Republican side refuses to raise, and a minimum wage which is $5.50, which they won't raise, and you are asking me to put a woman on the court that insults the grandparents of Louisiana? Take your dossier and go somewhere else.

Now, if these people are in the mainstream, then I don't know what mainstream we are talking about, because it is not mainstream in Louisiana. That is what this debate is about.

The Senate Democrats didn't want to have this filibuster. We are made to have this filibuster because the Republicans on that side think they can divide the country and split us up and cause trouble. I will tell you what people at home want. We are in a war. They want us to be united and fight together. But they have us fighting against Catholic, Protestant, rich, poor, young and old. It is a disgrace, and it is not the Democrats fault. It is the Republican majority.

I will just say this. I know the men and women who serve over there and individually they are fine. But, boy, collectively they can sure get themselves up into a lather. The country deserves better. The people want better.

We have an Energy bill to pass; we have appropriations bills to pass; I have 400,000 veterans in my State who are looking for help, and they turn on the television to see the chairman from Utah saying something about the women in the Senate don't want women on the bench, and we don't want Hispanics on the bench, and we don't want African Americans on the bench? Whoever heard of such ridiculousness?

I beg this body, let's stay on the facts. The facts are that we have approved 98 percent of President Bush's nominees. We have rejected people such as Janice Rogers Brown, and no matter how many times they bring her up, she will be rejected because she makes statements like this that are an insult. She is not going anywhere. We will vote on her 100 times. She will never get on the bench. Whether or not we have a vote on her, she is not going to get on the bench.

Let me say I just made a call—how much more time do I have?

The PRESIDING OFFICER. The Senator has 16½ minutes.

Ms. LANDRIEU. Good.

I just made a call to the National Bar Association, which is the most distinguished group of African-American lawyers in the country. I am sure maybe there are smaller groups that other people might think are, but this is the most well thought of group of lawyers. This group of lawyers, more than almost any other group, would surely know the history of the civil rights movement. They would surely understand the characters and people I have talked about, and all the stories and all the drama. You would think that President Bush, who ran on compassionate conservatism, and the Republicans who keep saying we are reaching out to African Americans—we want to reach out to African Americans, we want to go and put African Americans on the bench—you would think that sometime in the last 3 years they would have called the National Bar Association, or the President would have called the National Bar Association and said: Look, I'm a conservative. You all probably are more liberal as a group, although there are probably some conservative members. Why don't you give me a recommendation, knowing that I can't support a real liberal judge. But if you work with me we could get some really good African Americans on the bench that are highly qualified, that the Democratic majority would like. I would feel happy about that. We are in a war. It would be really important for us to unite our country.

Do you think he ever consulted with them? No. The President, this White House, or the Republican leadership never called the National Bar Association, which is the most prestigious group of African-American lawyers, to just ask them. Is there any conservative judge, moderate conservative judge you all would think would be good that I could appoint?

This is not about doing what is right. This is about winning elections and ginning up the far right in the wings. I understand that. It has been done before. But not during a war. Not when people are dying. It is just not right.

So we could stay on the floor all night, all tomorrow, all next week, but I tell you the people in this country are going to have enough of it pretty soon because they don't believe this is right. They can tell when something is not moving in the right direction.

I will end with this. No matter how hard the Republican majority tries to divide us, we will not be divided. We are going to stand united. We are going to speak the truth. We will debate in the open why these nominees do not deserve to sit on the bench and why we will filibuster these nominees.

We will continue to do that until the people decide in the next election what kind of America they want. In my heart I believe they want an America that is united, not divided.

I see my colleague from New Jersey is here. We have a few moments left. I thank him for his patience.

Mr. CORZINE. I thank the Senator from Louisiana. I think you have spoken brilliantly tonight, about the idea of trying to divide us over something that is basically a disingenuous issue to start with.

You talk about the 98 percent. Over the last 24 hours, we have seen this 168 to 4 over and over. No one could speak more eloquently about the facts; 98 percent is a hell of a number.

Ninety-five percent of judicial positions in this country are filled. When President Clinton left office and President Bush took office, it was at 75 percent. The reason was because those 63 that the Senator from Louisiana was talking about never got a hearing, never got a chance to get a vote in committee, never got reported to the Senate to get voted on. Sixty-three

judges were blocked. It is a different technique under the rules of committees as opposed to here on the floor, no committees, no votes, no reports—63 qualified judges, at least in the opinion of the then-President, never had a chance to fill that void, and 25 percent of seats went unfilled. Now 95 percent are filled.

When there is cooperation—I can tell you there has been cooperation in New Jersey. We have had five district court judges and a circuit court judge, we worked with the White House and the Judiciary Committee, and it has worked very smoothly. It can work if we reach out and work with each other, which we have to do in this society if we are going to get good things done—not by dividing us.

You know, it strikes me that we spent a lot of time talking about four judges or six judges. One of those 63 judges—by the way, who couldn't get a hearing, it went on for a year and a half—is now the dean of the Harvard Law School. It is hard to understand how he wasn't qualified to be considered for the bench but is qualified to be the dean of the Harvard Law School.

By the way, this shows it in a pictorial sense. This is the list of 63. This is the 4. It is very clear.

I want to dwell on something else. The real issue is not 4 people who are not being approved on this Senate floor. The real issue are the 3 million people who have lost jobs since 2000, the 9 million Americans who do not have a job, the 2½ million Americans who have lost manufacturing jobs, and the real agony we have in the country because we are not creating jobs fast enough in this country.

We have gone fast enough to get 98 percent of the judicial positions filled, but we have not gone fast enough to take care of the 3 million Americans and the 9 million unemployed and the 2.5 million manufacturing jobs lost.

I think we have our priorities wrong. We have been debating 4 people while there are 9 million Americans out of work. We have been doing that now going on 24, 26 hours. We are going to go on some more.

Americans know what impacts their lives: their ability to take care of their kids, their families, their grandparents, their future. They are interested in having a job. Jobs count. We are talking about 4 while 9 million are missing in action in our debates on the floor of the Senate.

I think it is disingenuous. I think it is clearly staged. I think we are off on the wrong target.

I point out today I went through some of the press reports that came out over the AP wire today. The U.S. trade deficit grew to $41.3 billion in September—$41.3 billion. We are going to have a $500 billion current account deficit in this country, and what we are going to have, more importantly, is a deficit in manufacturing jobs because they are all going overseas. We ought to have a debate here about economic policy that puts Americans to work—a $41.3 billion trade deficit this month. It is going to be $500 billion for the year.

We have had discussions in committee—which, by the way, we had to cancel all our committee meetings—about whether we have the proper trade policies, the proper positioning with China where we are losing jobs right and left across the manufacturing sector. We had the biggest trade deficit with China we have ever had in the month of September.

Why are we talking about 4 jobs when we are losing millions of jobs, 2½ million jobs, because we have an economic policy that is out of kilter with the needs of the American people?

If that is not enough, the poverty rate has grown 1 percent in this country in the last 3 years. That is about 1.7 million people. We have seen the uninsured in America, those without health insurance, go up a little over 2 million. We are having no discussion on issues that impact people's lives who are watching this debate. We want to have real debates that make a real difference in people's lives. We ought to be talking about these jobs. We ought to be talking about health insurance. We ought to be talking about that trade deficit, ripping out the heart of middle-class America's jobs.

I don't understand why we have our priorities on 4 people when we have a 98-percent positive ratio of confirming judges. It doesn't make sense, particularly when we can argue about whether they are mainstream or they have made the kinds of statements the Senator from Louisiana quoted from one of those individuals who is going to be considered tomorrow for confirmation. It doesn't make sense.

There are all kinds of things we could be doing right now. We could be raising the minimum wage. That would improve the lives of about 4 million Americans. We could pass a transportation bill that would create, by almost every estimate about 1 million jobs. It is lingering in committee. We don't want to talk about it on the floor, but it is a million jobs. It builds America; it invests in our future.

We could talk about increasing investment in higher education or maybe do something about making sure we don't take 8 million Americans away from having the opportunity to make overtime pay so they can operate and live in this community of America in a more secure way.

Then, the greatest tragedy, in the last 13 days we have had 42 Americans killed in Iraq. We have changing policies. We have generals in Iraq saying we are not living in the real world. We are not talking about it as if it is a war. General Sanchez today said we are not walking away from using the word; we are going to win this battle—no, we are going to win this war because the people back in Washington need a dose of realism in their debates about this issue.

Then we have a meeting to discuss the intelligence report that was leaked by someone with regard to what is happening on the ground in Iraq, and nobody shows up because we are debating 4 judges.

It strikes me we have our priorities wrong in this country when we are talking about 4 judges when we have 9 million people unemployed, when we have lost 2.5 million manufacturing jobs, when we have 2 million people losing their health insurance. We have a tie-up on the prescription drug benefit bill and the Energy bill and we can't get these bills out. We have generals in Iraq saying we don't have a realistic view of what is going on in the debates we have here in Washington. There are real issues that matter to real people across this country, in the millions—in the millions, not 4—not when 168 are approved and 4 are not.

I don't know where our priorities are when we turn our attention to such an issue when there are real debates about whether they fit into the mainstream or not, whether we ought to have a real debate. By the way, other people used other techniques at another time when it was convenient to do it. It is disingenuous to say, use the rules of the Senate which are authorized under the Constitution. I hear all this ''unconstitutional'' view. That is not unconstitutional. We should change the rules if we don't like the rules of the Senate, just the same way that we can change the rules in committees.

It is not sensible that we are not putting our priorities on the loss of jobs and taking care of the American people in the way they expect us to—to debate and put in the time and effort.

This whole debate, which has now gone on for 26 or 27 hours, should be about jobs—not 4 but 9 million. It should be about the important issues that impact people's lives, the people who are uninsured, the people who haven't had an increase in the minimum wage in 7 years—7 years. We can't get a vote on that. We can't get a vote on the Transportation bill that would create a million jobs. There are all kinds of things we can't get votes on around here because people don't want to have them. They use the rules for those purposes.

Four out of 172, 98 percent have gotten votes. It is very hard to see how we have our priorities straight in this area tonight and have had properly placed priorities for the last 26 or 27 hours.

I hope we can get focused on something other than 4 jobs. We should get focused on the 3 million people who have lost them, the 9 million people who don't have jobs. We ought to be talking about extending unemployment benefits to the 80,000 people a day who are going to lose those in another 30 days when we are not in session.

It is incredible—our priorities. It is incredible. I believe as much as anyone else that we ought to cooperate. We have in many, many places. That is how we got 168 judges approved. That is how we got to a 95-percent fill ratio on the number of judges' slots that have

been filled. But we have major problems with employment and the economics of this country. It is time we get our priorities straight.

I yield the floor.

The PRESIDING OFFICER. Who yields time? The Senator from Utah.

Mr. HATCH. Mr. President, it has been a good debate. But I have noticed the folks on the other side of the aisle want to shut down the debate on judges because they don't have an argument. Jobs is where it seems their only argument is, and more Federal Government programs. In fact, they don't even have very good arguments there. It is ''increase the minimum wage.'' I am not sure it will create jobs. And ''re-up insurance,'' which certainly doesn't create more jobs.

On the other hand, I am not saying they are not compassionate. They are decent people wanting to do those things. But when you do not have any arguments against the judges we are talking about, then you change the subject. That is exactly what they have done.

If the distinguished Senator from Louisiana were here, I would ask her why she took the number 129 because, of course, that is a number of confirmed judges that were left off her chart. We have had distortions of the facts. We have had distortions of the statistics. You can prove anything with statistics if you want to manipulate them. There are 129 judges left off that chart she was showing. We confirmed 377 Clinton judges—not 248. If you want to be factual, be factual. Don't distort the facts.

I was a little surprised that now at the 29th hour of debate an awful lot of Democrats come on the floor without any arguments that are really valid against these nominees we are talking about. They are changing the subject because their arguments don't hold water.

As for Democrat claims that they have been blocking only the most extreme Bush judicial nominees, let us look at the facts.

Priscilla Owen won 84 percent of the vote in her last election for the Texas Supreme Court. Bill Pryor won 58 percent in his last election for the Alabama attorney general's position. Janice Rogers Brown won 76 percent in her last election for the California Supreme Court. And Charles Pickering was confirmed to the Federal district court in 1998 by this body by unanimous vote. Yet he has been treated like dirt. You wonder why people in the South are getting sick of it.

By the way, the unanimous consent vote included the support of 24 of the Democrats currently in the Senate, 23 of whom now refuse to give him the dignity of an up-or-down vote. Why? Because they know he would be confirmed.

These nominees are hardly extremists as painted by the other side who claim that is what they are talking about. Give me a break.

Let us look at this a little differently. What is more extreme? Receiving 84 percent of the votes in Texas, the second most populous State in the Nation, as Judge Priscilla Owen did in her last election? They are filibustering a qualified nominee for the Fifth Circuit for the first time in American history. That is what they are doing, without any real arguments against her. They don't have any. They do not have the facts on their side so they change the subject.

I think jobs are important. I will tell you, there will not be any jobs in this country if we lose our freedoms because we don't have the Federal courts staffed by competent and decent judges.

Mr. COLEMAN. Mr. President, will the Senator yield for a question?

Mr. HATCH. I would be happy to yield.

Mr. COLEMAN. I listened to the Senator from Louisiana. She was talking about filibusters. I was glad to hear her say unequivocally that it was a filibuster. We will filibuster these nominees. There is no question.

Mr. HATCH. We are not going to let these people through.

Mr. COLEMAN. She also said, I believe the only way filibusters survive is the truth—truth. I have only been in this body for less than a year. I know there is history in this body. The history is not always the greatest history when it comes to filibusters. There were attempts on the floor of this Senate to make sure that minorities didn't have certain rights; that minorities had poll taxes; that anti-lynching laws were filibustered. I have a chart here that talks about filibusters.

I ask the distinguished chairman whether under F.D.R. civil rights was filibustered; under Truman, civil rights was filibustered; under L.B.J. civil rights was filibustered.

Again, would it be the Senator's belief that necessary laws that were filibustered is something to be ashamed of and they were not the truth; filibusters were not the truth; the attempts to provide civil rights and opportunities for Americans for good things and they were filibustered, and filibustered was not the truth?

Mr. HATCH. Absolutely right. In every case it was Democrats who led the filibuster. In every case, including this one. It is not the truth.

Janice Rogers Brown, 76 percent of the vote, State of California Supreme Court; Priscilla Owen, 84 percent; William Pryor, 59 percent of the vote.

What is more extreme, receiving 76 percent of the vote in California, the most populous State in the Nation, as Janice Rogers Brown did in her last election to the California Supreme Court—filibustering a brilliant nominee to the DC Circuit, the Nation's second highest court? If Justice Brown is so extreme and leftwing, California voters certainly would have recalled her, but they didn't. Three-quarters of them voted to keep her on the bench.

By the way, the late Justice Stanley Mosk on the California Supreme Court was the California Supreme Court's well-known liberal voice for decades. In that same election, she got 76 percent. He only got 68 percent of the vote in the last retention election.

Does anyone want to guess whether the Senate Democrats would call him more extreme than Justice Brown in left-leaning California if he were up for the District of Columbia Court? Of course not. He would be in the mainstream.

Once more, extreme—receiving 59 percent of the votes in Alabama, as Bill Pryor did in his 2002 election to the office of attorney general of that State. They are filibustering a nominee with broad bipartisan support across the Eleventh Circuit for a judicial emergency vacancy on that appellate court. In each of these cases, these unprecedented filibusters of qualified nominees to the appellate courts are undoubtedly extreme.

There is extreme action by our colleagues on the other side. There is nothing else you could call it. It is demeaning to this body. I don't care how excited someone gets on the other side. Sooner or later they run out of arguments and start talking about jobs because they have to change the subject and hopefully get the American people off of the importance of putting people on the Federal bench.

The Senator brings up a very important point. Every one of those unjust filibusters was conducted by Democrats. It was the Republicans who basically pushed through the civil rights law, along with some good Democrats as well. I want to make sure credit is given on both sides.

The fact is, the leaders of those filibusters were Democrats. But in this case, 168 to 4, virtually all Democrats—not all. I know one or two who do not believe filibustering should be done to the judges. But all the rest of them are leading this unjust filibuster.

Mr. BROWNBACK. Will the distinguished chairman yield for a question?

Mr. HATCH. Yes, I would.

Mr. BROWNBACK. I want to follow up on a question by my colleague from Minnesota. I think this is the point. He points out that you have a couple of filibusters on major issues to change the country. The issues that were filibustered ultimately got through, and I believe these judges will ultimately get through when the public gets the RECORD and has a chance to read it. These issues were things that were changing the country—when you talk about the law, civil rights laws, things that were being brought forth. Isn't that what is really being addressed here today? We are not talking about 4 judges or 29 who are being blocked on circuit courts. This is really about a group trying to block a certain set of individuals who may, as some say, have deeply held beliefs being on the Federal bench and trying to purge that set of philosophies or thoughts from the Federal bench. Isn't this a much bigger

issue than the appointees? Those law changes were bigger than filibustering one law. This is about the impact on all of society, on a whole culture.

Mr. HATCH. That is right. Frankly, yes. It is as important as these four and tomorrow's six. Next week, who knows how many nominees are being filibustered. It is demeaning to the Senate. It is detrimental to the country. It is detrimental to the judiciary. It is unfair to the President. It is unfair to these qualified nominees who have been rated so highly by the ABA—their gold standard, by the way, during the Clinton years. If you got a qualified rating from the ABA, that is all you needed, you should be confirmed. We did confirm 377 of them, the second highest total number of confirmations in the history of this country—Bill Clinton's judges. We did it because we were fair. We didn't filibuster those judges. Every one of them got a vote. It was 377 to 0. We didn't filibuster them.

For all I have heard from the other side—I heard some of the emotional remarks—I was the one, along with Senator LOTT, who made sure we didn't filibuster their nominees. I don't think they are in a position to criticize me.

By the way, in the past, there were 11 Presidents' judicial nominees confirmed versus those who were filibustered, the past 11 is when the filibuster rule came into being in the current filibuster rule. We can go all the way back to the beginning of this country 214 years ago. We have never had a filibuster before these folks on the other side have been doing it this year, 2,372 judges have been confirmed to zero filibustered.

The history of the successful Senate filibuster, from July 4, 1789, to March 6, 2003, there is no question about the successful or unsuccessful because there were not any until March 6, 2003. March 2, to the present, we have had four so far as successful filibusters. We are apparently going to have two more tomorrow even though all six of these folks would win an up-or-down vote in the Senate.

One of the Senators said we are going to vote on these judges tomorrow. No, we are not going to vote on the judges. We will be voting granting the right to vote on these judges. Since only 41 Senators are necessary on this side to stop us from granting that right for these judges to have an up-or-down vote, there will be six of them tomorrow. I suppose when we go down the line there will be as many at 17.

Let me make a couple of other points that I think are important. Look at three of the President's nominees who have been accused by the Democrats of being out of the mainstream. They don't look to me like outside the mainstream. They have received overwhelming support in each of their home States. Apparently, these are not only a majority of the Members of the Senate outside the mainstream who support them but a vast majority of the citizens of California, Texas, and Alabama are all outside the mainstream, too, I guess.

Democrats seem very fond of their 268-to-4 chart and believe this number 168 of President Bush's judges who have been confirmed since he took office will distract people from the important fact that the Democrats have filibustered four appellate nominees, Miguel Estrada, Priscilla Owen, William Pryor, Charles Pickering, and now Janice Rogers Brown and Carolyn Kuhl for the first time in American history.

The point is that no raw number of confirmations means anything in and of itself while these unprecedented filibusters continue. While the number of filibusters as of today stands at four, Senate Democrats are virtually certain to add others to the list, including Janice Rogers Brown nominated to the District of Columbia Circuit and Judge Carolyn Kuhl nominated to the Ninth Circuit. That makes a total of six.

There are other filibuster targets on the horizon, a Fourth Circuit nominee Claude Allen and Terrence Boyle, North Carolina District Court nominee, James Dever and Bob Conrad. They are also potential for filibuster. These are just some of them who we have already been told will be filibustered.

That figure is extremely misleading, all the while more vacancies in our Federal courts continue to be classified as judicial emergencies.

Mr. SESSIONS. Mr. President, will the Senator yield for a question?

Mr. HATCH. I would be happy to yield.

Mr. SESSIONS. I notice the Senator, when this 98-percent chart was put up the Senator didn't recognize it and neither did I. Isn't it true that the President has nominated some 200 judges and 160 or so have been—and the idea that the 98 percent of his nominations have been confirmed is certainly not accurate; is it?

Mr. HATCH. The President has nominated 209 judges; 168 have been approved. So 20 percent of his nominations have not made it.

Mr. SESSIONS. I do not know where the eight came from.

Mr. HATCH. I don't know. I knew what the distinguished Senator from Louisiana was driving at. Again, a distortion of the facts.

Mr. SESSIONS. I ask another question: They show a chart that says 168 to 4. Is that the 4 they were filibustering last week or is that the 4 who have been held hostage? What 4 are they talking about? There are well over 10 nominees who are being actively filibustered or obstructed at this point.

Mr. HATCH. That is right.

Mr. SESSIONS. I do not know how that chart comes about, either.

Mr. HATCH. This chart is just the beginning of what they intend to do to the Federal judiciary. Democrats have also implied that it is just fine to prevent an up-or-down vote on at least these four nominees because we blocked 60 or so of President Clinton's nominees. That is extremely misleading. I think their number is 63.

Let me briefly break that down. First, 18 of those nominees were withdrawn by Clinton himself—18 of them. Second, 25 of these nominees were either nominated after the August 2000 recess, do not have home-State support because the Clinton administration did not consult at all with the relevant Senators, or there were confidential investigative reasons that prevented the nominations from moving forward. At most, there were about two Clinton nominees who the Republican Senate did not confirm.

The numbers are even more stark. If you look at the difference between 168 and 209, you can see that it is about the same. The numbers are even more stark when you compare the number of nominees left hanging at the end of the first Bush administration by Senate Democrats with the number of Clinton nominees awaiting confirmation at the end of the Clinton administration.

Let me refer to this chart. There were 54 judicial nominations not confirmed at the end of Bush 1. That is when the Democrats controlled the Senate. Fifty-four of the first President Bush's nominees were unconfirmed at the end of 1992.

In contrast, at the end of the Clinton administration, only 41 nominees remained unconfirmed. But 9 of those were put up so late there was no way we could have confirmed them. There were really only 32.

At almost the end of the Presidencies you have that or more who just can't get through the system. Looking at that, according to the Senate Democrats, they don't even deserve the dignity of an up-or-down vote. Contrast this with the prior 3 Presidents' confirmations for their first 11 circuit nominees.

In every case, less than 100 days, Senate Democrats in the 107th and 108th Congress have been the most obstructionist of the President's judicial nominees in recent U.S. history. It is that simple. Confirmation times for the first 11 circuit nominees, Reagan-Bush, it was one. George Bush, look at how much that has gone up, and it is growing. This President is not being treated fairly. Neither are his nominees.

Furthermore, there are more Federal appellate vacancies today, 18, during President Bush's third year in office, than there were at the end of former President Clinton's second year in office, where there were 15. Over half of President Bush's appeals court nominees in this Congress have not been confirmed. There are 41 total vacancies on the Federal district and appellate benches, 22 of which are classified as judicial emergencies by the nonpartisan Administrative Office of U.S. Courts. A staggering 67 percent of the vacant appeals court slots are judicial emergencies.

There is a different scorecard that I find more significant. That is the 377 to

zero. President Clinton, with 6 years of a Republican Senate after 1994, had 377 of his judicial nominees confirmed without a single filibuster by Republicans, even though Republicans had to swallow hard on a lot of them. Only President Reagan, with 382, had more of his judges confirmed, 5 more than President Clinton. But Reagan had 6 years of a Republican Senate to help him. Clinton only had 2 years of a Democrat Senate. Yet he came out with almost the same number as Ronald Reagan. He was treated fairly. Clinton is No. 2 in U.S. history, even though his opposition controlled the Senate for 75 percent of his term.

Just to give you a sense of how unprecedented Democrat current filibusters are, here is another scorecard we have talked about: 2,372 judges have been confirmed in the last 11 Presidents and zero were filibustered. The 11 Presidents that precede the current President Bush, back to President Franklin Delano Roosevelt, never had a judicial nominee filibustered and had 2,372 nominees confirmed. So these filibusters are empirically unprecedented.

How about this scorecard? Years since the Judiciary Act in 1789 that we have gone without filibustering judges until this President. Since the beginning of the year, beginning with Miguel Estrada, there have been four, and there will no doubt be two more tomorrow. How many more? Up 10 percent, 15, 17? Up to 10 percent as Senator SCHUMER suggested last week in the Judiciary Committee? If there is some filibuster percentage the Democrats have in mind, what is it? The majority of the Senate and President Bush would really like to know. I think the American people would really like to know, too.

One final word on the Democrat scorecard. Even one filibuster of a judicial nominee is too many, because every judicial nominee who reaches the Senate floor should be afforded the dignity of an up-or-down vote. We owe our third branch of government no less. By way of analogy, would it be acceptable to enforce all but four of our criminal laws? Would it be acceptable to defend all but four of the constitutional amendments that comprise the Bill of Rights? Of course not. It is no more acceptable to allow up-or-down votes on all but four and counting of the President's judicial nominees. Vote them up or vote them down. But just vote. That is all we are asking.

The Democrats have a right to consent. They have a right to advise. If they don't want to give their consent, then they have a right to vote against any of these nominees. That I will find no fault with. I might disagree, but they have a right to do that. What they don't have a right to do is to subvert the Constitution for the first time in history and allow 41 Senators to prevent an up-or-down vote of these judicial nominees.

The distinguished Senator from Minnesota, with his chart on the terribly wrong filibusters, brought out a very good point. I don't want to compare rankings or anything, but this one is just as important as the others because without a good Federal judiciary, our civil rights would not be enforced. Explain the chart one more time, because I think people need to hear it. But in all four of those, those filibusters were conducted by Democrats, and every one of them was wrong, especially this 168 to 4 we are going through right now, but especially the other three as well.

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

Mr. HATCH. I am happy to yield.

Mr. COLEMAN. Again, I listened to the words of my friend from Louisiana, where she made the comment that the only way a filibuster survives is if it is the truth.

I was reflecting on the history of filibusters. I read about it when I was a young man. Certainly preceding my youth, going back to the times of Harry Truman and FDR, unfortunately, there is a terrible history in this body of opposing efforts to provide civil rights opportunities, opposing efforts to ensure that there were antilynching statutes, opposing efforts to get rid of things like the poll tax. This is a sad part of the history of this body. I ask the distinguished chairman, who has a much better sense of history than I, is it true the tool that was used to oppose those efforts, oppose good things, the tool was the filibuster, and the filibuster did not represent the truth? Would that be a fair statement?

Mr. HATCH. The Senator is absolutely correct. Here we have a situation where we have a terrific African-American justice on the California Supreme Court who won 76 percent of the vote, who came from nowhere to somewhere, who fought her way throughout life to be what she is, who has ruled in favor of plaintiffs, civil rights claimants, the poor, the disadvantaged throughout her career, who is being treated in this shabby fashion with a filibuster.

Mr. COLEMAN. Would it be the truth in regard to these nominees, in regard to Owens and Kuhl and Pickering and Estrada, who we haven't talked about, that in each and every case the measures of their competence, be it the bar association, the gold standard my colleagues across the aisle have talked about for so long, be it the recommendations of their colleagues, other judges with whom they have worked, be it the recommendations of the voters when they put themselves up for a vote—in each and every case, they received the highest recommendation; that is the truth, is it not?

Mr. HATCH. That is right. And let me just say this: Filibusters are not the only means the Democrats are using to obstruct. During the 3 years of the Bush administration, the Senate has taken 108 rollcall votes on judicial nominees at Democrats' insistence. Eighty-seven percent of these votes have been unanimous, 87 percent, calling into question why we needed these rollcall votes at all. Contrast that to 8 years of the Clinton administration during which the Senate took only 46 rollcall votes out of 377 judges, only 39 percent of which were unanimous. Couldn't we have been passing appropriations bills or creating jobs instead of wasting the time on unanimous votes?

Look at this chart. Clinton, 18 votes, 2.25 average votes per year, 486 minutes were consumed, 8.1 hours, 61 average minutes per year; Bush, 104 votes, 34.7 average votes, these are unanimous rollcall votes, 34.7 average votes per year, 2,808 minutes were consumed, 46.8 hours, 939 average minutes per year. In this body that is delay, obstruction, complete shutdown of the body while we have these votes everybody knows will be unanimous. It is just another illustration of how far they have gone to obstruct on these judges.

Finally, who is wasting time? Unanimous rollcall votes on judges, compare Clinton; we didn't require rollcall votes on unanimously to-be-approved judges. Look what they have done to the Bush administration. This President is being treated very unfairly.

When you hear them talking about jobs, look, I am as interested in jobs, and so is every other Republican, as they are. The only reason jobs is coming up is because they know they can't handle the criticisms that are coming their way for the way they are treating these judicial nominees. They just can't. They can distort the facts. They can distort the statistics. They can distort the record. But they really can't justify what they are doing.

Again, go back to your chart, the distinguished Senator from Minnesota. Every one of those unjust filibusters that took away rights from people and kept people enslaved to a large degree, every one was led by Democrats.

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

The Senator from New York.

Mr. SCHUMER. Mr. President, I yield myself 15 minutes and the remaining 15 minutes to my colleague from New Jersey.

I have enjoyed these debates. I said at the very beginning these debates would be good for our side. They have proven to be. One little chart here, this chart seems to be under all of my colleagues' skin because they are debating it and coming with up with their own numbers, et cetera. But let me tell you, this one chart has won this debate. You can come up with as many others as you want, and tonight what have we debated, why 168 to 4 is not true? That is what the other side has said.

I said at the beginning of this debate this would help us. Because this one chart was equal to 30 hours of palaver. To my good friend from Utah, he is a good man. He is my friend. But do you know what he just said? Rollcall votes are a form of obstructionism. I would just like my colleagues to have recalled the words of my good friend

from Utah: Rollcall votes are obstructionist.

My goodness. What are we called on to do here if not vote. And letting people know how you voted, isn't that the whole mark of democracy?

I realize my colleagues on the other side of the aisle are frustrated, and so they have had to come up with all kinds of sophistic arguments. But this one tops the cake. The fact Democrats have asked for rollcall votes on judges is a means of obstructing. Maybe we should just, when the President nominates somebody, not have a hearing and not have asked questions and not have any votes and just let the President appoint all the judges. Next we will be hearing from my colleagues on the other side of the aisle that is what the Founding Fathers really wanted.

Again, to all of those who are listening, I hope there are a few left, 168 to 4. That fact is immutable, unchangeable, irrefutable. The reason it has such resonance is because the other side fails to mention it. Whether it be our colleagues when they speak, whether it be the rightwing radio shows when they say we are obstructing all of the President's judges or most of the President's judges, whether it be the editorial pages that try to kneecap us, 168 to 4, 168 to 4, 168 to 4. Don't forget it. There is no judiciary in crisis. There is no obstructionism.

There are some judges—whether they be Black, Hispanic, women, Catholic, Jewish, Muslim, Baptist, southern, northern, eastern, western—who are so far out of the mainstream that they should not be on the bench, and we are upholding the Constitution by doing that.

Now the arguments of my good friend from Minnesota, these charts, are getting to the point of ridiculous. They are what logicians and lawyers would call ''outcome determinative.'' We want an outcome so we put together numbers. Successful filibusters. I ask my colleagues, if a filibuster is against the Constitution, why is an unsuccessful anymore unconstitutional than a successful filibuster? Why is a filibuster of an executive branch nominee any different than a filibuster of a judicial nominee?

Do you know what the other side is saying? We are just going to take judges in green shoes and give you the numbers on those and not judges in pink shoes or purple shoes.

They are differences that don't make a difference. What we are talking about here, again very simply, is how many judges have come before this Chamber and how many have been approved. One hundred sixty-eight to four. No denying it. No refuting it. No getting around it. The truth hurts because the American people know—30 hours, I guess now it is 39 hours, you can debate this for 390 hours, 3,900 hours, 39,000 hours, and all your words are not equal to 168 to 4.

For those who watched this debate, this has been elucidating, because what the hard right and their allies tried to spread throughout America is, we were holding up all the judges, most of the judges, a judiciary in crisis, a huge number of vacancies. My colleagues, do you know what answers all of that hyperbolic falsity? One hundred sixty-eight to four.

We are going to keep that chart up. I realized when I first put the chart up, one of my colleagues objected. I understand it gets under your skin. I understand it pulls the rug out from the argument.

Now, do you want to talk about judges rejected? Do you want to talk about judges who didn't get a majority vote? Then talk about them. Here we have two charts. Sixty-three of President Clinton's judges didn't get a majority vote. It doesn't matter whether they didn't get it by filibuster or by not bringing them up for any vote. Again, that is like green shoes versus pink shoes. They are all judges.

Here are some names. Did every one of these people twist in the wind? You bet. Some longer, some shorter. Were some withdrawn by the President? Of course. Some withdrew their names themselves. My good friend from Utah, who I dearly love said: Well, some of the names were withdrawn by President Clinton. Does that mean we can erase the name of Miguel Estrada from this debate? He was withdrawn. That is not going to work. He was blocked. So were the others.

One final thing I would say, because I do want to spend about half my time now, or less than half, talking about one of the nominees. The Senator from Louisiana was correct. We are opposing judges because of their views, not their ratings by the bar association, which talks about their education and legal training, and not their sex, ethnicity, or religion.

The other side seems to think that should be a determination of who becomes a judge. Shame on the women because they won't just rubberstamp any woman. Shame on the Blacks or on the rest of us because we won't rubberstamp every Black, shame on everybody, me. They called me because I didn't agree with Miguel Estrada, but should I have let him go because he was Hispanic? That is un-American. It is not right. It is un-American. It is below the belt.

My good friend from Louisiana—I have never heard her more eloquent—had every right to be angry and upset. To say the women should be ashamed of themselves because they are not voting for another woman. What do you think the American people would think if they thought that ought to be our norm? Every Baptist should vote for every Baptist and every Catholic should vote for every Catholic and every Jew should vote for every Jew. What kind of logic is that?

Let's get back to the reality here. The reality is a handful of these judges are way out of the mainstream, at least in the opinion of a good number of us. Enough to block them. The one that I would like to talk about for the little bit of time I have left is Justice Brown.

I don't agree with her views on affirmative action, but that is not dispositive to me in this case. What is dispositive to me is that we have not seen—I have not seen, in the 18 years I have been here, a judge further out of the mainstream than Justice Brown. I want to read to you what she said in a case called San Remo Hotel v. City and County of San Francisco:

> Turning a democracy into a kleptocracy does not enhance the stature of the thieves, it only diminishes the legitimacy of government.

What does she mean by that? She was against zoning laws. Do most people think zoning laws are a kleptocracy in 2003? Maybe that went on in 1900, when we could have factories built next to homes and when workers' lungs would be polluted. But no more.

Here is what else she said in a speech to the Federalist Society:

> Where government moves in community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is [this is when government is around] families under siege, war in the streets, unapologetic expropriation of property, the precipitous decline of rule of law, the rapid rise of corruption, the loss of civility, and the triumph of deceit. The result [this is what government brings] is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

Many colleagues on the other side of the aisle believe in limited government. That is legitimate. I, for one, feel in certain areas Government goes too far. But this view? That is kind of disturbing, particularly for a judge on the DC Court of Appeals, which has more to do with Government than any other court in the land, with the exception of the Supreme Court. Please, you can find conservatives, you can find people who are against affirmative action who don't express these views; but these views are circa 1850, and even then would not be supported by most Americans. We are supposed to support a judge like that? Do you know what. I would guess if you asked my 51 colleagues on the other side of the aisle to nominate someone for the DC Court of Appeals and the record of Justice Brown were brought before them, they never would have nominated her.

Why is she here today? That is the question we ask. Is this to be deliberately provocative? Is it that the President doesn't believe he should nominate African Americans who are within the mainstream? I don't think so. He has nominated a few. I don't get it. The views of Justice Brown go so beyond what there is in a consensus in America, liberals and conservatives, that it is appalling to me she would be nominated for the DC Court of Appeals. There is only one reason: The extremists on the hard right are demanding something of the President. He is doing a prescription drug bill. He is talking

to the United Nations. He is not demanding Roe v. Wade be repealed at this very moment. By nominating somebody like Justice Brown, maybe he appeases them, even though he may know she will not be approved. I don't know. That is just a theory.

But I will tell you this. If Justice Brown were White, or Asian, or Hispanic, a man, or if she were Protestant, Catholic, or Jewish, or Muslim, or Hindu, I would oppose her nomination. If Justice Brown got 100 percent of the vote in California, I would oppose Justice Brown. Justice Brown does not belong on the DC Court of Appeals where over decades, over centuries, beliefs among Democrats, Republicans, liberals, conservatives, 99 percent of Americans about what Government should and could do would be totally rejected. Justice Brown will be defeated tomorrow, I hope and I believe. It will not be because of outside groups and it will not be because of any of the women not standing up for women. It will simply be because her views are so ideologically out of the mainstream that she does not belong on the DC Court of Appeals. It is that simple.

When we knock out Justice Brown, I believe the Founding Fathers will be smiling upon us. One of them might say to the other: That is why we gave the Senate some power to block the President's nominees. This is the kind of nominee who should be knocked out. This is the kind of role the Senate, as the cooling saucer, should play, and whether it be by filibuster or by not bringing her up for a vote, or by defeating her in committee, which are the various ways the Senate has to be the cooling saucer, none of them—51–49, none of them simple majority, the Senate will be fulfilling its hallowed, ancient, and continuing role as a check on abuse of power of the President.

The PRESIDING OFFICER. The Senator from New Jersey is recognized.

Mr. CORZINE. Mr. President, I thank the senior Senator from New York for making sure the fundamental issue is understood by the American public. The fact is, 172 nominations have come to the floor; 168 have been approved. Four have not been sustained under the rules of cloture. And 98 percent—you can talk about it any way you want. The numbers fit the commonsense judgment of the American people that something positive is going on here with regard to how we are dealing with the confirmation of judges. I go back to the practical reality that 95 percent of the judicial positions in the Federal courts, district and circuit and Supreme Court, are filled; 95 percent of them are filled. In 2000, at the end of the Clinton administration, only 75 percent of those positions were filled.

This is the lowest vacancy rate in 13 years. The reason is very simple—168 to 4. It is not a complicated issue. It is not a complicated issue. Then you have to look at the four. The Senator from New York read this statement about the judge we will be looking at tomorrow, talking about ''when government advances, freedom is imperiled.'' I don't think that is what the American people would think—those people who believe in Social Security, those people who might think we ought to have a prescription drug benefit for all Americans, people who believe we ought to pull together an army to protect the American people from terrorism, the folks who think we ought to build highways, bridges, schools, and other things, which are generally done by the public. When the government advances—what is this? I want to say this right. ''When the government advances, freedom is imperiled.'' There is one out of the four. One wonders whether that is the mainstream of American thought.

A couple of judges in this four have serious issues some people think approach or have gone over the line of ethical violations. I have heard almost everybody say at some level they believe integrity is an issue. There are serious concerns about actions of several of the people who are involved—aside from their views. I will not even mention the judge. One judge said, in talking about the role of Congress:

Congress, for example, should not be in the business of public education, nor in the control of street crime.

That may be a view that is mainstream for some in this body, but I have a hard time understanding where many of us believe the role of Congress would prohibit us from being involved in the business of public education or the control of street crime. It doesn't sound to me like a mainstream thought. That is one of the judges.

Then another judge we will be considering tomorrow talked about privacy rights, threw out a case where someone was performing an operation on a patient, and it happened to be a female. The doctor had a male drug salesman attend without asking for that right of the individual. Then the judge said that wasn't a violation of privacy rights. That kind of thing—I am not a lawyer and I don't know all the details of this precedent, but it is kind of like 168 to 4. You would think if somebody is undergoing surgery and somebody asks you a question about who the person was who was observing you going through surgery, if you had a drug salesman overseeing that, you might think that was an invasion of privacy. That is sort of common sense to me.

I think there are reasons to debate these four and maybe the two, if we are going to get people who are not necessarily following precedent, settled law—I hear a lot of arguments about activism on the court. It sounds to me like there is an active view that is different than settled law with regard to privacy. There is a view that is outside settled law and precedent with regard to the role of Government, with regard to schools and crime in our streets.

I think there is a reason to question some of these four. Therefore, it is not inappropriate, when you think people are going to be out of the mainstream and may have ethical issues that are legitimate questions that people raise, that somebody ought to exercise that judgment here on the floor of the Senate when we are asked to vote on it. From my perspective, that is what guides my vote and one of the reasons I have helped make this 168 to 4 happen.

By the way, I am proud of the 168 and while we now have the highest percentage of occupancy of judicial positions in the last 13 years—that looks to me like a pretty good track record. In most walks of life, it would be a pretty reasonable statement of cooperation and effort to make things happen. That is certainly, again, the perspective I want to start with, 168 to 4, filling up the judiciary.

Then we heard the argument raised that somehow we are trying to change the subject. This is changing the subject. We are talking about four folks, while we have 9 million people unemployed, 2.5 million manufacturing jobs lost in America, and we have the rampaging trade deficit, budget deficit, a rise in the poverty rate, declining insured and health insurance coverage in America, no prescription drug benefit for seniors, no passage of the Transportation bill, no consideration of a minimum wage increase for 7 years. We cannot get it to the floor.

We don't want to talk about four judges when we have a war going on and all these economic issues before the country. They say we are changing the subject? I think we ought to change the subject. I would imagine the people watching this debate are changing the channel because they want to know what the heck is going on in the fundamental parts of their lives, their jobs, what their kids are doing in Iraq, what is going on with regard to jobs that are going to be created for the rest of their families. They want to know what is happening to their health insurance. They would like to know whether school class size is going to be 18 or 26. Those are things that matter, and we are debating four judges who, as I read some of the most extreme comments here—again, we are debating whether it is appropriate to have a filibuster about somebody who says ''where government advances''—it says ''advances relentlessly''—''freedom is imperiled.''

We are debating that, as opposed to worrying about whether 9 million people can get extended unemployment benefits, whether we can get a jobs bill to build highways and bridges and other things in this country, whether we can have an honest debate over intelligence operations in this country. It strikes me we have our priorities out of place. It just makes no sense in the world we are living in that we are debating 4 judges out of 172 and they have views like ''where government advances, freedom is imperiled.'' I don't think the American people—anyone you sat down around the kitchen table

with and you talked about this issue, with this language, and this perspective on judicial philosophy—would say I would rather you be focusing your time on the floor of the Senate at 5 minutes to 12, 29 hours and 55 minutes into a debate, saying it is more important that we are talking about that judge than we are talking about what is happening with our men and women in Iraq, or whether we have appropriate investment in our intelligence operations that protect them, or the 9 million people are getting the proper attention on their unemployment benefits. I don't get it. There is no comparison of the importance. It is not changing the subject. It is getting to the subject the American people want us to do. At least that is the way it is in New Jersey. I have not had one single person ask me about a judge, until today when we got a call-athon calling in—the first time we got a call with regard to whether the filibuster was holding up these rights. I had my people read back this: ''When government advances, freedom is imperiled.'' About half of the people said I don't know whether that is somebody I want to stand with because I don't know that that is a position that really fits with the American Constitution, in my view, of what the American democracy is about. It is very hard for me to understand where we have our priorities.

Lastly, I want to bring up a point that filibusters weren't only used to stand in the way of civil rights acts by Democrats back in the 1930s or 1940s. On February 3, 1991, a filibuster was executed on this floor on the Family and Medical Leave Act. There were no Democrats who voted for that cloture. Let's see. Handgun violence prevention on November 19, 1993. I think that is the Brady bill. Let's see. Goals 2000, to educate America on March 24. I have a list of about—something that approaches about 50—maybe a little more than that—60 filibusters that were executed, including a couple with regard to judges, where judges withdrew their nominations that were executed by the other side of the aisle.

Filibusters have been used. No one was calling them unconstitutional when you were trying to deal with family and medical leave, or nobody was calling them unconstitutional when we were talking about the Hatch Act. Funny how that comes up. No one was calling them unconstitutional when we were dealing with judges at an earlier time when they withdrew their names. I want to make sure we keep the right perspective here because we are making all kinds of statements. Frankly, I think all of it is irrelevant. It makes no sense when we should be talking about the 9 million Americans who don't have jobs and we are talking about the 2 million people who have lost health insurance in the last 2½ years, when we are talking about the 1.7 million people who slipped into poverty in the last 2½ years, when we have gone from a $250 billion budget surplus to a $375 billion budget deficit, a $550 billion negative cashflow swing in this country because we are not handling our finances right, and we have a war going on and the generals are saying we are having unrealistic views about it back here.

I don't know, maybe we should not change the subject. We should just talk about these four judges. I wonder if the Senator thinks that is the right prioritization. It strikes me it is out of touch with America, and we are now 29 hours and 59 minutes talking about 4 judges.

The Senator from New York is right; 168 to 4 actually expresses what the debate about judges is all about. But one could think we ought to be talking about the 9 million Americans or, by the way, the 130,000 troops we have on the ground who are in harm's way. It strikes me, the discussion we have had for these 30 hours is missing a very major point to the American people.

I yield the floor.

The PRESIDING OFFICER (Mr. BROWNBACK). Is there further debate? The Senator from South Carolina.

Mr. GRAHAM of South Carolina. Mr. President, we got to the bewitching hour. It is midnight. I am going to enjoy the evening the best I can because I have a chance to engage with two of my colleagues. I don't know how long it will last, but I really enjoy the give and take of dealing with Senator SCHUMER. It may come to surprise people, we actually have been working on a couple of things. We had some successes in the past and we will have some in the future. I believe with a great deal of certainty, if the shoe were on the other foot, if my party were engaged in filibustering nominees of a Democratic President, that Senator SCHUMER would be right out here fighting for his cause. Senator CORZINE and I are getting to know each other. We will have all night to get to know each other. I have enjoyed working with him, also.

This is unusual for the Senate. I don't know if this has ever been done before. I hope it is not necessary to do again. But here we are. We are here at midnight. We are talking about whether or not there is a filibuster. Has there ever been one in the past? Who shot John? Who has been the meanest and the baddest in the past?

I guess what I am trying to focus on for the next few minutes is, What about the future? I guess that is my biggest concern. We have had all kinds of charts about how nominees were treated in the past. I have been here a year. Since I have been here, it has been like pulling teeth to get certain people on the floor for a vote. But that is OK. The process is what it is. The Constitution says what it says and we will all have our chance to express what we think is right versus what we think is wrong.

This is a big deal. It is a big deal for the Senate. There are a lot of other issues that need to be talked about. Sure, Iraq is certainly one of them, people out there in harm's way. We have 9 million people unemployed. I am the first to admit there are a lot of issues in this country that need to be talked about and addressed.

But this is one of them. One of the reasons Senator CORZINE has not had too many calls is Americans are able to walk around with a pretty secure feeling that the system works. I think it is a blessing we are not nervous every day about whether or not you can go to court because we expect, if we have a problem, a legal problem, there will be a place to go to get it resolved. That is just part of our mindset. We don't worry a whole lot about that and I think that is great.

But, really, that is a luxury. There are a lot of countries in this world where there is no venue to go to settle disputes. You have to go by force or violence, or you have nobody to help you out when you are down.

We have a pretty good legal system. God knows it needs to be fixed in some respects, but the idea of a rule of law nation caring about how you appoint judges is a big deal. Imagine if you had a system where it would be almost impossible to confirm somebody who had an actual belief or opinion. What you would find is there would be a lot of vacancies and there would be a backlog of cases. The things we assumed were always there for us would no longer be there. So this really is a big deal.

If you believe in a system where the weak can hold the strong accountable, then you ought to be listening to this debate because only in a rule of law nation, a courtroom, is that possible, because in a political environment the strong always win over the weak. In a confrontation of resources, the strong always win over the weak.

But America is a little bit different. You can hold anybody accountable. You can have your day in court. Even the President of the United States can be sued by an average, everyday person, if the President of the United States is claimed to have violated their rights.

That is a big deal. That is something worth fighting for. Some people believe that is worth dying for.

Now, that is very much at risk. The way we do business with our legal system is very much at risk. Because you can put up all the charts you want to put up and you can play all the number games you want to play, but the truth is, and I challenge someone to prove me wrong, that this is the first time in the history of our Nation that nominees have come out of the Judiciary Committee with a majority vote and have been blocked by a filibuster from being voted up or down. This is unprecedented. This is dangerous. We find ourselves in political and constitutional quicksand.

Of all the conflicts we have had in this Nation, of all the fights between the Republican and Democratic Parties, of all the likes and dislikes that

have happened politically, no one before has chosen to go down this road. The road our friends on the other side have chosen to go down really is the road to oblivion, in terms of trying to get good men and women to be willing to serve their country as a judge.

My friend and colleague, Senator COLEMAN from Minnesota, is new to the Senate like myself. The strength of this Nation is people with accents have a chance to get ahead in life. I am the first person in my family to go to college. My dad was a World War II veteran and came out of the war and started his own business and married my mom and neither one of them finished high school. But they impressed upon me and my sister the value of an education. Because of the good, sound, strong public school system of which we partook, I was able to do things I never dreamed of doing. Now I find myself in the Senate.

I am a lawyer. If you can't take a joke, you should not be a lawyer, because there is a lot of lawyer jokes out there. But I have always enjoyed the role of being an attorney because I like representing people and I like representing causes. The law to me was not just a job; it was a passion.

The ultimate ascendancy for somebody in the law is to become a judge. You will make less money but you will get authority and respect, and you will have a chance to mold the law. To many people that is much more important than money.

To me it is a shame, if you are willing to apply for the job, that you have to be treated so poorly as these four people we are talking about have been treated. But make no mistake about it, they are not four people; there are going to be at least a dozen in the next couple of weeks. They are being treated differently than anybody in the history of the Nation. They are having some very hard things said about them and all they want to do, and all they are willing to do, is to serve their country in the Federal judiciary.

Our friends on the other side have pulled out a chart, 168 to 4, with an illustration: 168 apples represented those people who were allowed to go forward. The Senator who had the chart said, I like apples, so I picked apples to represent the 168. And the four, well they were called lemons. I thought that was pretty cute at the time. But the more I thought about it, that is really not fair. If you don't like these people, if you disagree with their philosophy, if you disagree with their view of the world, you have a chance to express it. You have a chance to vote them up or vote them down. But I don't think it helps anybody to label them as lemons. We are going to have a long talk about the people they have labeled as lemons. Between now and 9 o'clock in the morning, we are going to have a long talk, eventually, about the individual nominees.

You can decide whether or not you will vote for them. You can kind of be a Senator for a day, if you would like. That would be an exercise that would be interesting for those who want to watch. If you don't like them, you can vote against them in the Senate. But I think you have an obligation to vote them up or down.

As I talk about these individuals I will tell you why I am willing to vote yes. I don't expect anyone on the other side, or my side, to vote because of my reasoning. I do expect the people at home, in South Carolina, to be able to judge me and hold me accountable for my reasoning. I will tell you, with a deep sense of pride, that I think the four people who have been called lemons are very fine Americans and deserve more respect than they have gotten.

The thing I like most about serving with my colleague, Senator COLEMAN from Minnesota, is that his race was one of the most watched and unusual races in the Nation. It was full of triumph and tragedy. His opponent, Senator Wellstone, who I knew fairly well and certainly respected for his strong beliefs, tragically died right before the election. Senator COLEMAN ran against former Vice President Mondale.

The thing that impressed me most about his race, as I watched the debate, was the sincerity he had when it came time to present the reason he wanted to be a Senator for the people of Minnesota, along the lines of: I would like to go to Washington and do something. I watch you from afar and you seem to be fussing and fighting about everything. People are hurting out here and I would like to be a Senator who could go to Washington and work across the aisle and actually do something.

Tonight, at almost quarter after midnight, I would argue to the people who may be listening in Minnesota that your Senator is doing something. It is not what he envisioned. It is not what he hoped for. It is not what I hoped for. I hoped to be home right now. And we passed some legislation long overdue. But I argue the Senator from Minnesota is doing something that needs to be done; that is, standing up for his beliefs and his view of the Constitution.

I am confident that over time this exercise will be judged well in history. When there is an accounting in this period of the Senate, it will be one of the darker periods of the Senate and my hope is it will be a period that will not have lasted long. Because the future is why I am here. The future is why I and Senator COLEMAN ran. We have a lot of problems with Social Security and Medicare and a budget and a war to fight and many obstacles facing this country. We are dying to get on with it. We really do want to help win this war on terrorism and make the economy better and stronger and fix the retirement problem the Nation faces.

We didn't ask for this. But it came our way. It happened on our watch. I think this may be one of the most important things we will ever do as Senators.

With that, I will yield to my good friend, Senator COLEMAN from Minnesota, and let him know in my opinion that he is doing something that is very important to the country by participating in this debate.

The PRESIDING OFFICER. The Senator from Minnesota is recognized.

Mr. COLEMAN. Mr. President, first, I thank my friend and colleague, the Senator from South Carolina. We came in in the same class. He served in the Congress. He is more experienced and understands the ways of Washington. But he understands the ways of South Carolina. He is about as real as he can be. People think of Washington as a phony town. I look at my colleague, my friend from South Carolina, and he is very real. That is a good thing.

In the discussion we have had tonight—now past 30 hours—I appreciate his effort to humanize the four individuals whose lives have been, in some ways, put on hold, their future put on hold, certainly by the actions of this body. No, they are not lemons and they are not simply numbers. They are people. They are moms, dads, fathers, daughters, sons. They are folks who have the capacity to have an incredible influence on our lives.

I was a former prosecutor. The Senator from South Carolina had that experience of doing some prosecution in his time. I can tell you, courts have an impact on your lives, on your family's lives in many ways. So I appreciate it, if as we move now into the morning hours, there will be votes coming up this morning—not tomorrow morning, this morning—to put a human touch on what this is about.

I think there was a mood or a feeling in the country at the time that we got elected that really did focus on getting something done. I was running for office and disaster assistance bills were being debated in the Congress. The House was passing bills but the Senate was not. I can tell you my constituents were unhappy. They were concerned.

Last year there was a debate over a prescription drug benefit. I was running for office. There were still seniors forced to make the choice between prescription drugs and food. That is a bad thing. That is not a good thing. Hopefully, this year we are close and before we get out of here, assuming folks come together, we can get something done.

I think that was the tone. That was the message. By the way, I hope, certainly the message I heard—it should not be a partisan thing. There are a lot of things I heard in the debate tonight from my colleagues on the other side. I don't disagree with all of it. My colleague from Louisiana made a comment that we can't be divisive. She is right. I can tell you we are not trying to be divisive. Being divisive is when you do something that is unprecedented, and that is really what we are talking about today.

The fact is, one of the things we did kind of settle tonight is the filibuster.

There was a discussion all along about whether they are really filibustering nominees, a lot of discussion about filibusters.

First, I say again I was disappointed what I heard tonight. If anything, it was the comment of my colleague from Louisiana saying filibuster was the successfulness of the truth. No. With filibusters we have stopped some very good legislation. We have used the filibuster in a very terrible way in this body in its history. We have filibustered to try to prevent antilynching laws coming into effect. We have filibustered civil rights legislation. We have filibustered against the poll tax. We filibustered about a lot of things and not often good. A filibuster is often to be ashamed of and this one is to be ashamed of.

My colleague asked what is the difference between filibustering legislation and judges? The difference is this little book. It is called the Constitution. That is the difference. The Constitution laid out very clearly when the President has certain powers. The President, by the way, doesn't get elected unanimously. He gets elected following the laws. Not everyone votes for him but he then becomes the President. Once you become the President, you have certain powers and the Senate has certain powers and responsibilities. So it is a matter of seeing there is a difference between what one can do legislatively, using filibusters, and what the Constitution provides.

There is a reason why, in the history of this country of 214 years, up until this Congress, this body has never used a filibuster to stop circuit court nominees once they got through committee. That is the reality.

You can put all the charts up and all the statistics; that is the reality. If folks are listening, they have to be thinking there has to be some reason in over 214 years why folks have not done what is being done today. In part, it is because of the consequences. If we do that, what we do is we let a minority—that is what we have here because in each of these cases the judge is being filibustered, a majority of the Senators, Democrats joining with Republicans—yes, they are going to vote for them. We know that. That is why the minority is filibustering, stopping the vote.

So what you have here is a situation where the minority stands up and says: We don't support a person. Maybe it is because of a particular issue. Maybe the issue of abortion comes up again and again, which, by the way—and we will have plenty of time to talk about this—what is so interesting if you look at the record, the nominees who have been criticized or attacked because of their position on abortion, to a person have said that they would follow the law, that they would put personal beliefs aside.

You choose a judge and what you ask of them over here is can you put your personal beliefs aside and make a judgment. That is what these folks have all said. Because they have those beliefs, the minority comes together and blocks them. What is the outcome?

This, I know, frustrates my friend from South Carolina and it frustrates me. We all look into the future. I campaigned and I wanted to be a charter member of the ''Let's Get It Done Coalition.'' Let us figure out a way to solve problems.

The Senator from New Jersey is right. We have to get an energy bill through. I hope we get it through. We have to do something about prescription drugs. We have to do something about jobs, and something about medical malpractice. We should do something about class action. Those efforts are not going to be allowed to come to a vote. Those are the jobs bills. Let us get it done. Let us put the bickering and partisan stuff aside and figure out a way to get it done.

The problem we have as we look to the future is who is going to get confirmed. If anybody with deeply held views is going to be filibustered by one side, now the Democrats are in the minority, there may come a point in my time where my friend from South Carolina is sitting in the minority and a Democrat President may propose a judge, and I will say to the body that I intend to use the same standard with a Democrat President. Are judges qualified? Will they commit to uphold the Constitution? I will not support folks who will use the Constitution to create laws of their own beliefs. But if they agree to follow the Constitution and are qualified, then you support them. The President has that authority.

If you look at the history of the judiciary, it is kind of a balance. There have been Democrat Presidents and Republican Presidents going back over the last 12 years—8 years of Bill Clinton, 8 years of Reagan, 4 years of Bush, Jimmy Carter. There are about almost equal numbers of Democrats and the Republicans on the judiciary. It is balanced. What is happening here today is we are changing that balance. When we allow minorities to take hold, we change that balance. That is what happens.

In the future, you are going to get folks with strongly held beliefs and there may be a Ruth Bader Ginsburg, a liberal who went to my high school, James Madison in Brooklyn, NY. I disagree with some of her reasoning on decisions. She is a good judge. She is bright. She exercises her judgment. I don't think in this environment if the Democrats are in charge that Ruth Bader Ginsburg would be confirmed. That would be sad for America. The same would be true with Scalia and a number of members of the Court.

What are you going to get? The best and the brightest are going to be cast aside because they may have a strongly held belief, which is what you see in some of the nominees here because a minority says we don't want them to come forward. A minority then filibusters in a way again in contradiction to article II of the Constitution. That is why we are raising this. That is what we are talking about and doing something that has not been done in history.

It is interesting. In terms of the Constitution, it is very clear. The President has certain powers—unlike, by the way, in European countries and in contrast to monarchs who would simply make treaties. Leaders in Europe could make treaties. Our folks said, no. The President's power of making treaties is going to be contingent upon two-thirds of the Senate present and concurring. That is in the Constitution. We wanted to limit the powers of the President. When it came to appointment of judges, it is not two-thirds. Two-thirds is only for treaties. Very clearly there is a delineation.

For some reason to date, 214 years into our country's existence, the standard has been changing. That is an important thing. Jobs are important. As a former mayor, I have said 1,000 times the best welfare program is a job; the best housing program is a job; the best health care comes with jobs. Jobs are important. I understand that. What is interesting is my colleagues on the other side of the aisle are crying economic—by the way, never once mentioning 9/11. If you talk about what has happened to this economy, you have to talk about the impact of 9/11. You have got to talk about the recession that occurred before the President came into office. You have to talk about the impact of WorldCom and the impact of Enron.

The reality is now because of the policies, many of which this Congress passed, policies which cut taxes, which put money in the pockets of moms and dads which give businesses the incentives to invest, the economy is starting to move forward. The last numbers report 7.2 percent gross domestic product growth, and over 200,000 more jobs in the last couple of months. The number is revised upward. Business investment is moving forward, in part in large measure because of the tax cuts. Yet the other side of the aisle says we want to talk about jobs. I am looking forward to that debate. But it is all important. The judiciary is important. What we do with judges is important. In order for businesses to operate and for families to operate, you have to have a judiciary that works.

What is fascinating here—and I love that chart of 168 to 4. I love seeing that chart. When the other side puts up a chart showing 168 to 4, that is their argument. They keep coming back with the underlying supposition of, It is false. Their argument doesn't carry weight. Let us talk about 168 to 4. The real discussion here and what is going on here is the President of the United States has the power to appoint district court judges.

A little lesson, for those listening, a first impression in the Federal system: What happens when the district court

judge issues an opinion, there is a review process. It is reviewed by the circuit courts. The courts of appeal level, by the way, is right below the Supreme Court, which is one of the things I think comes into play here.

When you pick judges who may be on the circuit court, what happens is they then became a candidate for the Supreme Court. That is the real deal. They are all the real deal. Being a judge on the court of appeals is an incredible honor. It is a higher court than the district court. What is happening is the President has had 29 circuit court judges confirmed. We as of tomorrow will have six who have been filibustered. There are more in the hopper. That is very clear from my colleagues on the other side of the aisle. They will be filibustered. Out of the circuit court, the other side is saying 168 to 4, and some judge like wearing pink shoes and green shoes—no. The difference between circuit and district court judges is not the color of their shoes. The difference between circuit court and district court judges is these judges are on a higher court. These are the judges who are right below the Supreme Court.

District court judges sit in a particular district. Circuit courts sit in a multistate area. They have a broader range and geographic jurisdiction. It is the higher court.

What has happened here is it is not 98 percent. Even 98 percent of the time, adherence to the Constitution is wrong. When we took our oath, when the distinguished Senator from Kansas took his oath, and the Senator from South Carolina took his oath on that floor, we swore to uphold the Constitution of the United States 100 percent. It wasn't qualifying.

I find it absolutely startling that folks take pride in upholding the Constitution 98 percent of the time. The first amendment, freedom of the press: If there are 172 newspapers in the country and 168 of them are going to have freedom of the press and not the other 4, they wouldn't be very happy and very American.

The reality here is we have 29 circuit court judges who have been approved and we have 12 who are being filibustered. I think we are talking around 30 percent, 25 or 30 percent. That is a big number. I believe that is the largest number certainly since World War II. I have to go back in the history books. That is wrong. That is the number here.

The other side keeps coming back saying 168 to 4; therefore, no problem. The problem is you can put up all the numbers you want, but the difference is not the difference, whether it is green shoes or pink shoes; these are courts of highest jurisdiction.

What has happened here and what is happening is unprecedented in 214 years of the history of this country. This hasn't happened.

All we are asking is for these 12 judges to simply have a vote. We are talking about a vote. A cloture vote tomorrow is not a vote on the judges. We are simply saying give—Miguel Estrada, by the way, withdrew.

My time may be coming to an end. I want to get back to talking about him—an immigrant, incredible record, education record, incredible performance record, a brilliant man, and withdraws.

Priscilla Owen, give her a vote. William Pryor and Pickering, give them a vote. If you do not support them, you vote them down. Your voice is heard. It is not about a rubberstamp. I am not asking my colleague, the Senator from New York, to vote for these folks. Vote them down. If you do not like Judge Brown, vote her down; Judge Kuhl, vote her down. Vote these folks down. But give them a vote. That is what the Constitution requires.

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Searchlight, NV.

Mr. REID. Thank you, Mr. President.

First of all, I want to extend my appreciation—and I speak for the Senate, both Democrats and Republicans—to the staff which has been supporting us the last few days. People are working very long hours. The Capitol Police are working a 16-hour shift. Their shifts are very important. There are some people from all over the world who target the Capitol of the United States where we now stand. These men and women who guard us, protect us, make us secure, have to be vigilant. They are among the best trained police officers in the entire world. I extend appreciation from all Senators to them for the work they do, not only during the time in the past few days but all of the time—having been a Capitol policeman in the day when things were much more calm and deliberate than they are now.

I also extend the appreciation of all Senators to all the staff, Parliamentarians, clerks, the enrolling clerks, the court reporters—I don't think I have done that—and the pages. We have juniors in high school who are here tonight. I haven't mentioned everyone. But my compliments go to everyone who supports this great institution. I am sorry they have had to work another night, but that is the way it is.

The reason you have seen all the charts on the other side of the aisle change is because this number Mr. SCHUMER talked about bothers them a lot. Now they have come up with judges who haven't even come before the Senate. They know only four have been turned down. But now they have the other thing, that there is going to be 12. Well, we might wait and see what is going to happen. Why don't we wait?

I say this: The 30 hours we have spent so far has been totally wasted. There isn't going to be a single vote changed. Nothing is going to change. This has been an effort to toss meat to the rightwing extremists. Many Senators—and I say many—certainly at least a dozen Republican Senators approached me and made different excuses and apologies for what is going on on the other side. They know this is very nonsenatorial. But we are involved in this and we are going to proceed in the best and most dignified way we can.

There is something else I would like to spend some time talking about tonight, and that is jobs.

Let us talk about what is happening in the last 30 hours. What has happened? We can start at a number of different places. During the last 30 hours, 2,833 Americans—men women, teenagers, old people, married, unmarried, grandparents—have been laid off. They have lost their jobs.

In America today, things are so difficult dealing with jobs. For the 2,833 Americans who have lost their jobs during the last 30 hours, the average time for them to find a good job will be 5 months. Five months, 2,833 Americans will wait an average of 5 months to find another job.

It seems to me it would be good for us rather than spending 30 hours plus on 4 people and not a single vote has been changed—4 people who have jobs, good jobs—that we would spend some time talking about how to create more jobs, thirty hours of debate here in the Senate about programs.

For example, I think what we should have is an infrastructure development program where the Federal Government is involved in putting out money so the contracts can be let in the private sector so companies can build roads, they can build dams, they can build bridges, they can do water systems, sewer plants. We could spend some time here debating where it should go and how much we should spend. We know for every $1 billion spent, we would create 47,000 jobs as compared to 2,833 Americans who have lost jobs in the last 30 hours—47,000 high-paying jobs. Of course, the spinoff from these jobs would be significant and magnificent.

As I indicated, 2,833 people have lost their jobs in the last 30 hours. The four people who have been dwelled on by the majority have jobs—good jobs. Who are the people who have lost their jobs? I have already talked about parents, single parents, families. It is really sad to understand that 2,833 people are going to have to wait on average 5 months to find another job.

During the last 30 hours, 8,698 people have lost their health insurance.

A man flew in from Arizona to meet with me today. He graduated from Utah State University where I did. He was a star football player at Utah State University. He is a big man physically and a big man emotionally. He flew back here because he is now a physician. He is terribly concerned about the 8,698 people who have lost their health insurance. He understands what it means for people to come to him and have no health insurance. He talked to me and my staff about what we can do about it. He felt so strongly about it that he came back and talked to me.

How does a mother feel, how does a father feel, who have children or no children, how do they feel going to bed at night recognizing if something happens to them or their family, they have no health insurance. What do they do? They do not get the treatment and care they need. They only go when something desperate has happened to them. An automobile accident, they go to the emergency room. Preventive care, forget about it. During the last 30 hours, 8,698 people have lost their health insurance. I think we should talk about that. We need to do something about that. There are 44 million Americans who have no health insurance.

In addition to 44 million people who have no health insurance, there are millions of people who are underinsured, meaning they have insurance but it isn't very good. That is what I talked about today among other things with my friend from Utah State University, a wonderful man, who is a young physician who cares about his community and his country.

We have 44 million Americans with no health insurance, and we are here, and we have been here for the last many hours talking about four people who not only have jobs but they have health insurance. Every one of the four have health insurance. And they have jobs.

What does it mean not to have a job? Does it take away someone's dignity? Does it cause divorce, dissension? Does it cause kids not to be able to go to school, to college? Of course it does. Does it cause crime? Of course it does. Does it cause our welfare rolls to go up? Of course it does.

But the 4, the 168 to 4, those 4 have jobs. They have health insurance. Why are we not here talking for 30 hours of constructive debate about doing something in this Nation about health insurance so people when they get sick can go to a doctor, people when they need preventive care can get it. In the long run it would save the country lots of money.

In the last 30 hours, the trade deficit of this country has gone up $300 million. In 30 hours, the trade deficit has gone up $300 million. What does that mean? It means we have bought more into this country and sold less outside our country to the tune of $300 million. That is not good.

I have heard my friend from North Dakota, Senator BYRON DORGAN, give lectures in this Senate about the need to do something about our trade policies because the trade deficit continues to rise, causing this country lots of problems. We are doing nothing about it. We have a trade deficit with China. They jiggle their money, and it is continuing. We are afraid to take that issue up here.

My friend, the distinguished Senator from New York, Mr. SCHUMER, has attempted on several occasions to bring forth an amendment to stop the Chinese from playing with the numbers so that the trade deficit continues. But we have been unable to do that. Why? Because we are talking about four people who have jobs, who have health insurance, and could care less about the trade deficit.

In the last 30 hours, focusing away from some problems that to some may not seem important—the trade deficit—we could talk about something that is real important. During the last 30 hours when we have been here talking about four people who have jobs, who have health insurance, and who have nothing to do directly with the trade deficit but are keeping us from talking about it, during that 30 hours the food stamp rolls in this country have gone up by 6,237. During the last 30 hours, 6,237 desperate people have signed up for food stamps saying, in effect: We are hungry. Government, will you help us buy food for our families? We have never done it before. But these are new people signing up for food stamps.

I could say without any qualms or reservations, the four people I have talked about here tonight and the majority has talked about here for a long time, they have not lost their jobs. They have not lost health insurance. They don't even have to consider food stamps. But wouldn't it be good for us as a nation to spend some time talking about food stamps?

I can remember when I was a new Senator, the great Senator Pat Moynihan—his chair was right back there. There was a vote going on about the homeless. Senator Moynihan said to me: We have helped create the homeless by Federal policies where we have, in effect, emptied out our mental institutions, but we have done nothing to have community health centers. A lot of the people who are homeless are people who need medical attention.

Well, food stamps, we need to do something about that.

About poor people, in America today, as sad as it seems, the rich are getting richer. The rich are doing fine. The wealthy are doing fine. The elite of America are doing great. The poor are doing real bad. The middle class is narrowing all the time. We need as a nation to figure something out to do something about that. We don't want to live in America like many countries where you have the rich and the poor and no middle class. Why don't we spend 30 hours doing that? Not spending 30 hours talking about four people who are well educated, have jobs, have health insurance, are not on food stamps.

During the last 30 hours, when we have been here in the Senate talking about these four people, we have had in America 36 mass layoffs. Employers have had 36 experiences where they said: We have to lay off more than 50 people. A mass layoff, by Department of Labor standards, is more than 50 people. During the last 30 hours, we have had 36 of those.

Why are we having so much trouble in America today keeping people working? Why is it taking so long for people who lose a job to find a job? I would think this Nation would be better served talking about jobs, not about four people who have jobs, who have health insurance, who are not on food stamps, who have not been part of a mass layoff in the last 30 hours.

On this Senate floor, during these last 30 hours, there have been seven attempts by the minority to extend unemployment benefits for people whose unemployment benefits have run out. Is that important? During the last 30 hours, while we have been here talking about four people who have jobs, who have health insurance, who are not on food stamps, who have not been part of mass layoffs, 13,194 people have had their unemployment benefits run out. The people who have lost unemployment benefits are real. These are not statistics that somebody made up.

Let me read to you a letter I received from a woman in Las Vegas, NV. We will just call her Margo. I won't give her full name. She writes, October 10, 2003:

> Dear Senator Reid:
>
> On July 2, 2003 I became a displaced airline worker after 38 years as a TWA (now American Airlines) Flight Attendant. As a result of union concessions given to American Airlines, I received no severance pay.
>
> My Unemployment Benefits will expire on January 2, 2004.
>
> Congress has passed new legislation which made December 28, 2003 the cut-off day for Temporary Extended Unemployment Compensation. After that date, there will be no more extensions. I will miss the deadline for Extended Unemployment Benefits by 5 days.
>
> I am a single woman and a sole supporter. I have no skills applicable to this difficult job market and my age makes an already bad job market even more limited. It will take time to learn skills and find a suitable job. Extended Unemployment Benefits will be needed for my very survival.
>
> I ask you—

She has it in bold type—

> to please support S1708—

The one we have tried to move seven times to the floor in the last 2 days, objected to by the majority—

> which will extend the TEUC [benefits] and provide additional Unemployment Benefits to those who cannot find jobs.

This is a real person. This is not someone who is made up. This is descriptive of the 13,194 people who, during the last 30 hours, have lost their unemployment benefits. That is sad.

I have another letter here from another woman. I will read the last paragraph:

> I am not writing this letter to get a hand out or sympathy. For every job that is open, 50 people apply. I have faith in God that he has a perfect job for me and that he will provide for us.

I ask unanimous consent that these two letters be printed in the RECORD, and with the permission of the Chair, I would ask the clerk to block off the names because I have not spoken to them for permission to make their names public.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

JULY 31, 2003.

To: President George W. Bush, Congressman John Gibbons, Senator Harry Reid.

Re unemployment benefits.

GENTLEMEN: I really don't expect that any of you will actually read this letter. It will probably go to an aide and if I am lucky I may get a response. So why I am writing this letter? Because there are many other people in this country who are unemployed and have run out of unemployment benefits. Man people like me, feel that writing a letter like this is a waste of time. Many have no hope, but I believe that one person's voice can make a difference.

I live in a small community in Northern Nevada. There are at least 50 people applying for every job opening. We have thought about moving to other cities, but the job market is tight every where. My husband is disabled and receives a small social security check each month. It pays all but $15 of our first mortgage on our house. I have to supply the money to pay a second mortgage and all of our living expenses. Three years ago we had to file for bankruptcy. With a job and a new start we have been rebuilding our credit, but have not been able to refinance our home.

In December of 2001 I had to quit my job. I quit for cause. My doctor wrote a letter and I was eligible for unemployment benefits. Less than 6 months after I left that company, the position that I had held for 6 years was eliminated company wide. Some people moved up into management, but many were laid off. It took me five and a half months to find a job. My training and experience has mostly been in the accounting field. I took a job as an outside sales rep. for an office supply company, because that was what was available. The job lasted 8 months. Then the company that I was working for updated their computer system to make it easier to purchase items off an internet web site. As a result they laid off some sales people including me.

Here in lies the problem. Because I was on unemployment from January to June 2002 it affected my base period for benefits. When I got laid off on March 2003 I was only eligible for 13 weeks of unemployment benefits not the full 26 weeks. My lack of employment in the base period was not by choice. I was on unemployment, but because I was on unemployment and had no job earnings it shortened the amount of weeks that I was eligible for benefits. When I applied for the federal extension the same thing happened. I was eligible for 7 weeks not 13 weeks. I have sent out hundreds of resumes with little response.

I am not writing this letter to get a hand out or sympathy. I have faith in God that He has the perfect job for me and that He will provide for us. There are many thousands of people who do not have this hope. They have been laid off multiple times, and were eligible for little or no benefits. I have friends that were laid off over a year ago and are still trying to find work. Unemployment should not be a free ride. There has to be a limit on benefits or it would turn into another welfare situation. People would get on it and have no incentive to better themselves and get off it. But the way the current system is setup, it paralyzes people who have been laid off multiple times over several years. All I am asking is that people, who are truly trying to find work, get a fair chance to provide for their families while they seek employment. I would work a part-time job or 2 part-time jobs in lieu of a full-time job if I could find them. So the solution is two fold. Get the economy going so that people like me can find a decent paying job or jobs. And revise the current system so as not to penalize people who have already gone through one or more layoffs in a short period of time.

Gentlemen, this is the greatest country in the world. The middle class needs a break. I don't want a free ride. I just want a job or jobs that will supply the basic needs for our family.

OCTOBER 10, 2003.

Hon. HARRY REID,

U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR SENATOR REID: On July 2, 2003 I became a displaced airline worker after 38 years as a TWA (now American Airlines) Flight Attendant. As a result of union concessions given to American Airlines prior to my furlough, I received no severance pay.

My Unemployment Benefits will expire on January 2, 2004.

Congress has passed new legislation which made December 28, 2003 the cut-off date for Temporary Extended Unemployment Compensation (TEUC). After that date, there will be no more TEUC extensions. I will miss the deadline for Extended Unemployment Benefits by 5 days.

I am a single woman and sole supporter. I have no skills applicable to this difficult job market and my age makes an already bad job market even more limited. It will take time to learn skills and find a suitable job. Extended Unemployment Benefits will be needed for my very survival.

I ASK YOU TO PLEASE SUPPORT SENATE BILL S. 1708 which will extend the TEUC bill and provide additional Unemployment Benefits to those of us who cannot find jobs.

Thank you for your consideration in this matter.

Respectfully submitted.

Mr. REID. I would also say that this woman says she would take two jobs at minimum wage just to make things work. She has a husband who is disabled. That is what this is all about.

We know that during the last 30 hours people in America have had some problems. Two thousand eight hundred thirty-three people have lost their jobs; 8,698 have lost health insurance; food stamps increased by 6,237; the trade deficit has gone up $300 million; 36 mass layoffs, 13,194 people lost their unemployment.

During the last 30 hours, we have 65,357 people who applied for unemployment benefits for the first time. We have had, during this 30 hours, desperate people; 5,137 people have filed for bankruptcy.

I did general practice. I have had interviews with people who told me they had no choice but to file bankruptcy. Usually it is some problem with medical expenses, but these people are desperate. We don't have a bunch of deadbeats out there. We don't have 5,137 deadbeats. We have 5,137 desperate people.

What are we talking about here? Not doing something about the bankruptcy law when we came that close to passing it. There was one provision in it that because of the ideology of certain people it didn't pass. We came so close to reforming the bankruptcy law which would have helped a lot of these people. We should spend some time on bankruptcy.

I have talked to the distinguished senior Senator from Iowa on many occasions about the need to do something about this. And by the way, he is a Republican. We need to do something about it. But what are we doing? Spending 30 hours talking about people who have jobs. They have not lost their health insurance. They are not drawing food stamps. They have not been part of mass layoffs. They have certainly not lost their unemployment. They have not had to file for unemployment benefits for the first time, and they have not had to file for bankruptcy.

During the last 30 hours, to get real personal about this, 80 people have committed suicide. While we have been here talking about these 4 people, 80 people in America have killed themselves. These are real people. The distinguished junior Senator from Oregon lost a 22-year-old son about 2 months ago as a result of suicide. In this Senate Chamber, there are lots of people who have suffered as a result of suicide. My father killed himself.

We need to learn more about suicide. More than 31,000 people in America a year kill themselves. We don't know why. It is one of the leading causes of death for teenagers. Why are we spending time on these four people? Why couldn't we spend 30 hours trying to find out why people kill themselves? We don't know. And we, as a Congress, have trouble even having a hearing on it. The first hearing on this was held less than 10 years ago. We have done a little since then but not very much. There are desperate people out there trying to decide are they going to kill themselves today.

I met up here in my office today with a prominent person, a prominent name in Washington, DC. She proceeded to tell me when she was 17 years old she tried to kill herself. She took a lot of pills. She described to me how she believed she went to the other side and came back. This isn't some nut. This is a good friend, someone who a lot of people know, a wonderful person. We need to learn more about suicide. But we are not going to do it talking about these four people, these four people who have jobs, who have health insurance, who are not on food stamps, who have not been part of mass layoffs, who have not filed for unemployment benefits or bankruptcy.

During the last 30 hours—and this is very difficult to comprehend—during the last 30 hours, 10,000 people have died in Africa because of AIDS; 10,000 people in 30 hours have died in one continent because of AIDS; 70,000 people in a week. There are no vacations. Christmastime, Thanksgiving, Easter, it doesn't matter, they keep dying. What about a debate for 30 hours recognizing what we can do to approach the needs of this worldwide problem which has an affect on America?

During the last 30 hours, Nasiriyah, Iraq, a suicide bomber, 31 killed; during the last 30 hours in Baghdad, Iraq, 2 of the 1st Armored Division killed; during the last 30 hours in Iraq, 37 attacks by terrorists, many of our troops not dead but injured; during the last 30 hours,

seven funerals of American servicemen killed in a helicopter downing in Iraq, seven funerals.

I understand how strongly people feel about these four people. I know how strongly people feel about this. But as I said yesterday, I don't in any way suggest we are wrong. I believe as strongly as I can that we have done the best thing for America in turning down these people who would be bad for the judiciary.

I have been to juries lots of times. I have tried over 100 cases with juries. I have the greatest respect for our justice system. I have tremendous respect for judges who try cases themselves. But I also have some idea in my own mind, having been a trial lawyer, how important it is to have good people on the bench, especially the Federal bench. These are appointments for life. I think no matter how strongly people feel about this issue, and assuming for purposes of this discussion that we are wrong, which I disagree, but let's assume for purposes of discussion, don't you think we have carried this thing a little too far? Don't you think the same points could be made?

I have tremendous respect for my friend from South Carolina. I sat right here, just like this, scared to death 5 years ago. It was the first time I had ever sat this close, first time I ever had the job as the assistant leader of the Democrats. I was afraid to be here. The first big thing was the impeachment trial of the President of the United States. The Senator from South Carolina was one of the managers. He is a fine lawyer. I have great respect for him. He is a man of courage. He breaks from his party on occasion. I admire him for that.

But I say to my friend, I think we have made our points. I mean, you make a good case. But for Heaven's sake, everything has been said by your side, and everybody has said it. On our side, I think everything has been said, and everybody has said it.

Enough is enough. I think during the last 30 hours we could have been discussing issues that are more important, such as jobs, not the four people who have jobs, who have health insurance, who have not had to go on food stamps, who have not been part of mass layoffs. They have not lost unemployment benefits. They haven't had to file bankruptcy. There are just so many problems we need to deal with that we have not done because of these 30 hours.

I say to my friends, we have had an equal discussion. I think that is good, that the two leaders worked that out, because it could have been a real nasty situation here without allocating the time in a balanced fashion. Maybe history books will look at this as something that has been important to the country. I hope so. But I have my doubts.

I think the more important issues are not those dealing with these four people. The more important issues are those dealing with the personal lives of other than those four people.

I would ask that we recognize that. I know the content of the character of the Senator from South Carolina who is leading the debate on the other side. I know he will lead a civil debate. I appreciate that. But I just say: Why don't we all just wrap it up and go home. Come back and vote at 8:30. That is what the schedule is anyway. I think that would be better for the whole body.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. REID. Whatever time we have remaining, I yield to the majority.

The PRESIDING OFFICER. Time is yielded back from the minority side. The Senator from Minnesota.

Mr. COLEMAN. Mr. President, I have great respect for the Senator from Nevada and the deep concerns he has for a range of problems and concerns that he talked about. They are real. We are talking about more than just four people. We have to recognize that. It is not just about four people. For people who were confirmed and should be confirmed as court of appeals judges, we will have a tremendous impact on the lives of the folks about whom the Senator from Nevada was talking. That is what the courts do. It is not a personal thing. This is not a measure of whether these nominees have jobs, don't have jobs. It doesn't take away from anyone else. This is about the third leg of the stool of Government: legislative branch, we are part of that; executive branch; and judicial. Those are the three legs of the stool that uphold the system we have.

It is not about four people. The Senator is right. There are so many important issues to talk about, such as AIDS. I came back from a trip to Africa with the majority leader and a group of my colleagues. We saw the devastation and destruction. We were in South Africa where 5 million people are HIV positive, and 20,000 of them on treatment. We looked into the eyes of people who were dying and into the eyes of the doctors treating them. We are doing stuff about that; we are acting. We passed in this body a bill that provides over $2 billion—$2.4 billion, and you add in our commitment to the global fund. The President made a commitment of $15 billion, which is unprecedented, and overwhelmingly we are acting on it.

It is not enough to simply lay out a litany of problems. Maybe I am more of an optimist and a realist. My favorite quote is from the first Prime Minister to serve Israel, who said that anybody who doesn't believe in miracles is a realist. Goodness gracious, the world is not falling apart. There is a lot of hope and optimism. It is not just enough to talk about problems, as my colleagues on the other side of the aisle do. We can talk about the economy and jobs. What are you doing about it? That is the question. What is the plan? Their plan has been to roll back the President's tax cut. That is what their nominees for President are talking about—rolling back the tax breaks we are giving to moms and dads, that we are giving to small business, accelerating depreciation, increasing the opportunity to expense capital investment to generate more investment. The latest survey shows that business investment is up by 15 percent. So it is not simply to lay out a litany of woes, how terrible the world is. What are you going to do about it?

That is what my colleague from South Carolina and I talked about in our campaigns. We want to do something about it. It is not enough to lay out just how the sky is falling and how the world is falling apart. We are trying to do things here.

We will have time to debate the economy. We have debated it, and we passed the third largest tax cut in the history of this country. And what do you see? The GDP is estimated at 7.2 percent, down in the third quarter of 2003. Employment increased by 126,000 in October, while the number of jobs added in September was revised to 125,000 from the previous estimate of 57,000. The unemployment rate decreased from 6.1 percent in September to 6 percent. It is still too high but it is decreasing. There is a downward trend in jobless claims. The stock market, on November 3, jumped to a new 17-month high. We have trillions of dollars of new investment in this economy.

The tax cuts we passed here, which were opposed by our friends across the aisle, are responsible for the accelerated growth in opportunity. Spending by businesses grew at an annual rate of 11.1 percent in the third quarter, following an impressive 7.3-percent gain in the second quarter. Again, these are things we have done that have encouraged investment and, in the end, generated opportunity and are generating jobs. That is what it is all about. We have a ways to go, absolutely. But it is not enough just to lay out the litany of how terrible things are. What are you going to do about it? One of the things we do about it is why this debate is important—it is to make sure we have a strong Government, that we have a strong judiciary. That is what this is about.

The fact is, when the President of the United States has 30 percent of his circuit court judges and court of appeals judges filibustered, it is unprecedented in 214 years of the history of this country, and it is wrong. The fact is, we should talk about upholding the Constitution.

I am a former solicitor general in Minnesota. I had the opportunity to argue before the highest court of my State many times. I have great love and appreciation for its constitution and history, and it is important. To the person who is unemployed and is getting a job, that is important.

I say to that person that I am committed to doing everything I can, with every breath that I have, to make sure

you have opportunity. I am going to do that. At the same time, we have the ability to do more than one thing at a time in this body. I can tell you, we are debating at 1 in the morning, but to those listening, I hope this is an educational experience.

Let's talk about the Constitution now. By the way, to my friends across the aisle, I noted his conversation with the doctor from Utah State, that he was concerned about health insurance, as he should be. One of the keys to getting health insurance is jobs, small business. The things that we have done to generate new investment and grow jobs, that helps people get health insurance. I ask my colleague, the distinguished minority leader, assistant minority leader, whether the doctor talked to him about medical malpractice, whether he talked to him about the impact that medical malpractice has on his ability to practice and to provide quality health care. The cost of that, by the way, on businesses makes it more difficult for them to grow jobs. That is another issue that was filibustered by our friends across the aisle.

I think we came within a vote or two on class actions—within a vote of changing that. The fact is, it is not enough just to talk about it. So it is important to talk about the Constitution. That is what we are going to do.

The fact is that all of us, when we got sworn in, raised our hands and swore to uphold it. The Congressional Oath of Office is: I solemnly swear that I will support and defend the Constitution of the United State against all enemies, foreign or domestic, that I will bear true faith and allegiance to the same, that I take this obligation freely, without any mental reservation or purpose of evasion and that I will well and faithfully discharge the duties of the office upon which I am about to enter, so help me God.

That is a pretty strong commitment. It is not a partial commitment. It is not a 98-percent commitment, and it sure as heck isn't a 70-percent commitment. That is what we are dealing with today. My colleagues seem proud of that. You are even using the 98-percent figure.

Again, the reality is we are dealing with circuit court judges, and close to 30 percent have not been confirmed and have been filibustered. The fact is that right now it is four but tomorrow it will be six. We know the other six are there. Unless my friends from across the aisle would say we are not going to filibuster another six, I will run the names by them. We will change the chart and say something different. We all know the reality. Let's lay it out here at 1:10 in the morning.

Twenty-nine nominees were confirmed and 12 were not. Just think, if we took the approach that it is not important, you know, 98 percent—as I said before on the floor, if the airline that got me to St. Paul told me that I had a 98-percent chance of getting there and a 2-percent chance I would crash, I would not be flying.

The Constitution is wonderful. The first amendment says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacably assemble, and to petition the Government for a redress of grievance.

I want those listening to think why is it that in the 214 years of the history of this great Republic, this great country, the Senate has not done what we are doing now. We are changing the system. It is very dangerous.

The second amendment says:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, not be infringed.

Minnesotans are pretty strong about the second amendment. We like to hunt and we like our firearms. That is OK. Imagine if I went to a group of 172 using my colleagues' chart and said 168 of you are going to have the second amendment, or if I went to 41 and said we are going to give these rights to 29 of you. There would be a revolution.

The third amendment says:

> No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Can you imagine if I went to 41 Minnesotans and said 29 of you are going to have a third amendment right, but 12 may be forced to quarter without your consent. I don't think they would do it. They would say, where is America? There is a reason why we have fidelity to the Constitution.

The fourth amendment says:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

Can you imagine going to 41 Minnesotans and saying 29 of you will have the right not to be subjected to unreasonable search and seizure but 12 of you don't have that right? There would be a revolution. On and on.

The fifth amendment talks about the right against self-incrimination.

The sixth amendment says:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Can you imagine if out of 41 defendants, 29 were told you would have a right to speedy trial? Even if you told 168 they would have that right, but not the other 4, there would be a revolution.

We are not just talking about four individuals here. We are talking about one of the foundations and the underpinnings of this Government.

I tell the young people listening in the Chamber, this is your future. The greatness of this country is built on its fidelity to the constitutional principles. It has allowed us to kind of grow into the greatest nation in the world with the freedoms we enjoy, and those freedoms we have enjoyed have triggered great entrepreneurial opportunity—growing jobs. It is tied together and it is about growing jobs.

You grow jobs when you have a constitution that is adhered to and you have stability. I am chairman of a subcommitte of the Foreign Relations Committee on which we both serve. I can tell you that the concerns I have about some of the countries in Latin America have to do with whether they have rule of law. The reality is, if there is no rule of law, we see there is no investment, you don't grow jobs. So they are related. They are related.

In the end, I want to get away from just talking about the principles, these sorts of abstract constitutional principles. They are important and that is why we are here, because we must have fidelity there. We have to get things back in sync. We have to get away from this process, this unprecedented filibuster. By the way, those are not my words. Those are the words, as I understand it, of JOHN CORZINE, the chairman of the Democratic Senatorial Campaign Committee. In an e-mail he had—we have a chart here—it says:

> Senate Democrats have launched an unprecedented effort by mounting filibusters against the Bush administration's most radical nominees. Senate Democrats have led the effort to save our courts.

Unprecedented filibuster, that is what this is about. There has to be a better way. This is about being divisive. We have to get away from divisiveness, from everything being a battle. We have to get back to a fidelity to the principles that founded this great country. They are pretty clear. You don't need a Ph.D. or a law degree to understand the Constitution. It is pretty clear, pretty easy reading.

So that is what this is about today. In the end, it is not simply about four people; it is not about whether they have a job. It is whether, in fact, we uphold the obligation that we have, that we do our duty, that we do our job. In the end, we should simply give people a vote. If you think that they are good nominees, vote for them. If you think they are bad nominees, vote against them. But you give them a vote. That is what we have done for over 200 years. To fail to do that will have terrible consequences.

One last story before I turn the floor over to my colleague from South Carolina. It is about this building and a little bit of history from a number of years ago. There is an old Senate Chamber down the hall. When you walk out of here, it is maybe about 50 yards away. When we get sworn in in here in the official ceremony, we then have a ceremonial picture taking with the Vice President. It is a very special moment for all of us, especially for kids from humble roots. I am one of 8 kids,

and to have my mom and dad there was very special.

In that old Senate Chamber, in the old days the Supreme Court actually operated on the floor above the Senate. At one time, they were planning on remodeling the Supreme Court chambers. Some enterprising young architect decided that one of the pillars that was kind of holding it up didn't need to be there. So they said don't worry about that. What happened was that the Supreme Court crashed into the Senate, disrupting its work.

There is a moral to that story. If you displace or undermine one of the pillars of Government, which is what we are doing here, beware of the consequences. We cannot let that happen. These nominees—100 percent of them—deserve what we have done for 214 years: give them a vote, vote them up, vote them down, but give them a vote.

With that, I yield the floor to my colleague from South Carolina.

Mr. GRAHAM. I thank the Senator. The Senator did an excellent job of trying to put into perspective what we are trying to do. Senator REID from Nevada has left. If anybody deserves a break, he does. A couple of days ago, he spent about 8 hours-plus on the floor trying to prevent some legislation from coming forward that he thought was inappropriate. He was committed to making sure that the activity of the Senate did not go forward. He used his right as a Senator to speak. I applaud him for that. I don't agree with him, but the worst thing I think I can say about Senator REID is that sometimes I disagree with him. He is a very nice man. I have enjoyed getting to know him over the years and serving with him. I appreciate the nice things he said about me.

The point is that we disagree on this, and I don't question his motivation. I just question the judgment of what we are doing here. He described the United States problems in very graphic terms. God knows we have problems in this country, but I think it was used to try to illustrate or trivialize what we are doing tonight. If we have all these problems, why are we talking about this? I don't think it is healthy to trivialize the constitutional process of nominating judges. Whatever problems we have in this country—and there are a lot of them—none are going to be made better by hijacking the Constitution. If you expect us to just lay down and forget about it, then you have mistaken who we are. If you feel strong enough to stand up for 8 hours to stop something from happening, God bless you; if you think other people are not going to do the same, you have made a huge mistake. We are going to talk until 9 o'clock and do other things.

I announced today that if this doesn't change, I am going to ask the Supreme Court to decide whether or not the tactics of the minority have violated the Constitution, because I believe they have. If you are into numbers, I can tell you this. In the past 11 Presidents, on their judicial nominees confirmed versus those filibustered, we have had 2,372 people confirmed. We have not had one person filibustered. Now we have 4, and in just a couple weeks we are going to have a dozen. Some things were said. If nothing changes, nothing will change.

I can stand here, talk until I am blue in the face, and I have no illusions about my ability to change anybody's vote on the other side. I feel a real need to let history know, and my constituents back in South Carolina know, I think this is a lousy thing that is going on. I think this is a change for the worse, that you are taking the country down a road no other group has ever taken it in the Senate. You are doing it for political reasons you believe are just, but I think history is going to judge you poorly. I think it is going to be one of the darkest chapters in the history of the Senate. You have started something you can't stop, and most likely we will answer in kind down the road and you have taken 200 years of history and thrown it in a ditch. That is a big deal.

There are a lot of problems in this country, but you are about to create one that is very bad. You are adding to that list of problems the fact the Constitution has been changed in a way I think is illegal. Certainly it violates the traditions of the Senate. And we have to deal with it and we are going to deal with it. We are going to talk about it and we are going to try to get you to vote and we are not going to let this go.

I am going to ask the Supreme Court to look at this case that is going on before the Senate and see if the filibuster, requiring 60 votes, violates the terms of the Constitution because the Constitution requires a simple majority vote to confirm a judge sent over by the President.

Since we are going to have about 8 hours, I will save some of the time to talk about the history of the constitutional debate that went into that clause, why they picked a majority versus a two-thirds requirement that you have for ratifying treaties and impeaching the President. There is absolutely a rhyme and a reason for everything in this document.

There is no rhyme or reason for what is going on now, other than politics of the moment.

If you listen to Senator REID, you would want to leave the country. I mean it is an assessment of the problems of the country, given to try to trivialize our objection to the Constitution being changed in an improper way. But it also is a distortion of who we are as Americans, because Americans, given all of our problems, are still the most hopeful people in the world. After listening to this rendition you would just wonder why everybody is not moving to Canada or Mexico.

We are not leaving the country. Other people are trying to get into our country. One of the biggest problems we have that he did not talk about is illegal immigration. People are literally risking their lives to get to be part of the American dream.

I would rather focus on some of the positive aspects of our country, one of them being a courtroom available to everybody and anybody, regardless of your status in life, where you can go have your day in court, and that requires a judge. Judges are picked by the President and confirmed by the Senate. The advice and consent clause for the Senate has never meant a minority telling the President what to do. It has always meant a vote on the nominee with a majority being required to put you on the bench, until now.

Let's talk a little bit about some of these people, the four names. But there are many more affected by this than just four. This is the America I like to talk about, and relish.

Justice Brown: Janice Rogers Brown is one of the four who is being filibustered. She sits on the California Supreme Court. Senator SCHUMER said she is out of the mainstream. She is not of the temperament and the thought process, in his opinion, that makes her a mainstream person, so she would do harm to the country if she served as a judge.

President Bush disagrees with Senator SCHUMER because he chose her to go on the court of appeals. Senator SCHUMER has an obligation under the Constitution to give his advice and give his consent and eventually vote. He doesn't have the right, in my opinion, to band together with 39 other Senators and bring us to a screeching halt. No one has ever done that before. It is called a filibuster. The number of filibusters in the last 11 Presidencies is zero up until now.

Let me tell you a little bit about Justice Brown. No. 1, she lives in California and she got 76 percent of the vote. In California you get to vote on a judge. You get to decide. You, as a citizen, get to vote to retain a judge once they become a judge. You actually get to express yourself. I am going to go out on a limb here and say no rightwing nut is going to get 76 percent of the vote in California. I am going to stand firmly behind that statement. I don't believe 76 percent of the electorate in California would vote for somebody described as Senator SCHUMER has described this lady. I believe 76 percent of the people in California see Judge Brown like the President sees Judge Brown. This whole argument that she is somehow out of the mainstream just does not pass the smell test because the people of California get to vote on Justice Brown.

We finally got a Republican Governor of California. Arnold is an interesting figure, Governor Schwartzenegger is a larger-than-life figure—literally. But I don't think anybody would ever accuse him of being a rightwing nut. California's political makeup is such that the person described by Senator SCHUMER

would never, ever make it. This is just one example of the cut-and-paste job on all four of these judges, with more to follow.

Let's talk about the America she came from. Only in this country can you do what Senator COLEMAN and myself have done. I grew up in a pool hall restaurant—beer joint is probably a more accurate term—and made it to the Senate. I am very proud of my parents. They worked hard. They are small business people. I feel I am the luckiest person in the world.

She is the daughter of a sharecropper. She was not born in California; she was born in Greenville, AL in 1949. She attended segregated schools. I attended segregated schools up until I was in the sixth grade. I was born in 1955.

I can remember, I think it was the sixth grade—about 1967, somewhere along that period of time—showing up and for the first time in my life having African-American students attend my class. It all worked well back home where I lived. In other parts of the State it was more dramatic. In Alabama it was more dramatic. This is the State where George Wallace stood in front of the door of the University of Alabama and said, No, you are not coming here if you are an African American. It took the Alabama National Guard, federalized by President Kennedy, to open that door.

That is where she grew up. She talked about listening to her grandmother's stories about the NAACP lawyer Fred Gray, who defended Dr. Martin Luther King, Jr., and Rosa Parks, and her experiences as a child of the South, and that motivated her to become a lawyer.

Senator SCHUMER said she is not very good on affirmative action. Maybe her view of affirmative action is not what Senator SCHUMER's view is, but I would argue if she was somehow in the right ditch on affirmative action, 76 percent of the people in California wouldn't have voted for her and somebody would have informed them otherwise.

This lady's story is compelling. She moved to Sacramento when she was a teenager. She got a BA in economics from California State in Sacramento in 1974, her J.D. from the UCLA School of Law in 1977. She received an honorary doctor of law degree from Pepperdine University Law School, Catholic University of America School of Law, and Southwestern University School of law.

Prior to more than 8 years as judge in the State courts, she served from 1991 to 1994 as the legal affairs secretary to California Governor Pete Wilson, another known rightwing crazy person, where she provided legal advice on litigation, legislation, and policy matters. From 1987 to 1990 she served as deputy secretary and general counsel for the California Business, Transportation and Housing Agency, where she supervised the State banking, real estate, corporations, thrift, and insurance departments.

She was deputy attorney general in the Office of the California Attorney General. She began her career as a legislative counsel of the California legislature and more will come about Justice Brown.

The PRESIDING OFFICER. The time of the majority has expired. Who yields time? The Senator from Minnesota.

Mr. DAYTON. Mr. President, I was on the floor the second time yesterday, 4 or 5 in the afternoon. I observed, then, the time we devoted to this had already become excessive as indicated by the fact the statements being mailed were becoming increasingly repetitive and redundant. Now I see the added problem is, as we go even further, they become less and less factually correct and reliable, which is bad enough under normal circumstances. But the accusations that are being made are the most serious accusations that can be directed toward another Senator.

One point of factual agreement is we all do take an oath of office when we are sworn in here in this Chamber by the Vice President of the United States and we do swear to uphold the Constitution of the United States. When I took that oath 3 years ago, that was the most solemn oath I have taken in my lifetime. There is nothing I ever committed to that I take more seriously, and I do my best, as I can possibly see to do so, to uphold that. I have never had occasion in my almost 3 years here to question or certainly not to cast aspersions on any other Member for failing to uphold that solemn oath as he or she believes it is best performed.

We have information available to us through the Library of Congress and the Congressional Research Service that has been in existence since just about the time the country began. We use it as a learned and nonpartisan and, as much as possible, nonbiased source of information about the 216-year history of this body. It is not hard to get this information. You just pick up the phone and call and ask to get it. So I did the other day.

They list the chronological history of efforts to limit debate in the Senate. It goes back to the Journals of the Constitutional Congress in 1778. It references the very first session of the Senate in 1789, which started adopting these rules of various sorts. You can read, and over and over in the summaries, I am sure you can go back to the Journals and read in greater detail, how this has been discussed, considered, debated, argued, voted upon, modified, turned down by Members of this body for 216 years.

When people are accusing us of acting outside the rules and the procedures of this body in doing what has been done here and debated about here for all that time, they either are woefully ignorant of the facts or they know the facts and they are being, I think, extremely irresponsible to the American people, if they have the misfortune to be watching this at this hour, to lead them to believe we are doing something here which is anything other than our right, well established in 216 years.

If the Members on the other side want to disagree with what we are doing, or why we are doing it, or who we are doing it for or against, they are perfectly within their rights to do so. But to say we are violating the rules of this body is not true. To say we are violating the Constitution of the United States is a heinous fault and I will go with the Senator from South Carolina, I will join with him going to the courts of this country, right up to the Supreme Court and let's get the ruling he wants. Because I guarantee what it will be. Courts have ruled for the last 216 years the House and the Senate have the right under the Constitution to establish their own rules. That is what we have done. That is what this book is about.

This book is 1,524 pages, called ''Senate Procedure.'' These are all the precedents and changes in the rules and modifications and the like. It only goes up to about 1992 because over the last 11 years the chief Parliamentarian, who is the editor of this book, hasn't had the time to add to it. There are probably another 500 pages or whatever that have not been added to this that are all the different precedents, all the different changes. Any time any one of us thinks anybody else here is acting in violation of those, we have somebody right there. Every minute we are in session we have somebody we can ask and get a factual answer, an impartial and nonpartisan answer, and that is the Parliamentarian.

I ask the Parliamentarian if anything in these books for 216 years precludes our right to do what we are doing and if it is not within the rules of this body. I think it is shameful that anybody states otherwise.

One important rule, in 1902, was adopted. Rule XIX was amended by inserting at the beginning of clause No. 2 the following:

> No Senator in debate shall, directly or indirectly, by any form of words impute to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator.

I can't think of any imputing of any conduct or motive more unworthy to a United States Senator than the violation of the U.S. Constitution, violation of the Constitution that we each took the oath of office to uphold. To do so without basis in fact is just beyond the pale.

The Senator from Mississippi, the chairman from Mississippi, earlier today said he had his disagreements, he thought we should review these matters in the Rules Committee. I laud him for saying so. He doesn't have to agree with what we are doing. He has every right to disagree and he has every right as the chairman of the committee to go through that process and I welcome the opportunity for him to bring in constitutional scholars, the

Congressional Research Service, the Library of Congress authorities, and go through all this and consider other questions about whether the minority should be able to hold up the nominations of some 60 nominees of a President of the other party when they are in the majority; as the Senator from Florida suggested, whether these should be lifetime appointments. By the time he passed away, Thomas Jefferson was opining that they should not be, to the Federal judiciary.

Let's get the facts. Let's ask the Library of Congress, the Congressional Research Service, to tell us if this is wrong. It's on their stationery that up until 1917, when the Senate first adopted a cloture rule, until 1949, I read directly:

. . . cloture could be moved only on legislative measures and nominations could not be subjected to cloture attempts.

But then the Senate rule was changed, by the Senate. Following the rules and procedures of Senate they changed it so these steps could be taken with regard to nominations.

I am on page 3, reading again exactly:

Even after Senate rules began to permit cloture on nominations, cloture was sought not until 1968 on a motion to proceed to consider the nomination of Justice Abe Fortas which was debated at length.

Moving ahead:

Cloture was sought on no other nomination until 1980. Subsequent to 1980, of the 12 nominations on which cloture occurred during the 103d Congress, ten were for executive branch positions except in that Congress most nominations on which cloture had been sought have been to judicial positions.

They have a table which says between 1967 and 2002 on judicial nominations cloture was invoked by the Senate 11 times; cloture was not invoked 6 times. Executive branch nominations, cloture was invoked 10 times, not 8 times.

It is pretty easy to get this information. If somebody thinks they are just making it up, they are wrong. They should make that case. But otherwise people are making up misrepresentations and misinformation. It is outright false. They are doing a great disservice to this body and to the credibility we all strive to maintain.

One of our predecessors from Minnesota, a man I worked for back in 1975 as a legislative aide, Walter Mondale, former attorney general of Minnesota, served for 11 years as a Senator. He said one of his proudest accomplishments was modifying the procedures under rule XX from two-thirds to three-fifths of Senators. On behalf of the change, Senator Mondale said at the time as sponsor of this resolution the proposal was a reasonable accommodation of the right to debate and the right to decide. We believe this might be harmonized in such a way as to protect action.

Anybody in this body has a perfect right to disagree with that statement by Senator Mondale with the actions of the majority of his colleagues in that session to make this modification and to leave this rule as it essentially is today. But to just imply it is a violation of the rules in what we are doing—implying we disrespect the body and the purpose of the established procedures and upholding the best interests of this country for 216 years—by people who have been here less than a year themselves I think is an abomination. Then to go beyond that and say we are in violation of our oath to uphold the Constitution of the United States is I think a disgrace.

I yield to my colleague from New Jersey the balance of our time.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. LAUTENBERG. Mr. President, I thank the Senator from Minnesota. It is obvious he is outraged at the triviality that is being thrown out here about how we are violating our oath and violating our standards.

Think about this. We are now in the 32nd hour of this talkathon on judicial nominations, brought to you by the Republican Party. I guess the first 30 hours were so successful they decided to extend the hours. But instead of helping anyone promoting a good cause, Republicans are using this staged event to push for job applicants who are unfit to take the job. They are unfit, they are unqualified, they have shown they are likely to abuse their authority as circuit court judges who advance an extreme rightwing agenda and not in the best interests of America.

The Republicans so desperately wanted this talkathon to be a made-for-television movie they attempted to coordinate their efforts with FOX News, the providers of fair and balanced Republican television. It comes from the distinguished majority leader's office, one of his staff people. It says: ''It is important to double your efforts to get your boss to S. 230 on time. FOX News channel is really excited about this marathon. Brit Hume at 6 would love to open with all of our 51 Senators walking onto the floor. The producer wants to know we will walk in exactly at 6:02 when the show starts so they can get it live to open Brit Hume's show. If not, can we give them an exact time for the walk in start?''

That hardly sounds like a sincere effort to me to get something done.

I hear the outrage about how we are playing politics on this side. What is this? If that is not raw production, I have never seen it. Line up. I wonder if the suit colors and ties were described at the same time. It is good to see a bunch of penguins walking down here 51 deep.

FOX News presents—it says 30 hours. They made a mistake. They didn't know how enjoyable this was, that we were going to go on with this.

The passions are so high there are things said that are just not accurate.

I point to this hallowed document, Senate Manual, which talks about the Constitution of the United States. It is part of the book. It talks about the powers of the President. He ''shall have power by and with the advice and consent of the Senate to make treaties et cetera and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of United States.''

Advise and consent—it doesn't say consent and advise. It doesn't say just approve them and we will talk about it later. We are maintaining our responsibility to the Constitution to a ''t''. It is our friends who want to ride roughshod over it and perhaps maybe find another way to curtail the appropriate dissent of the minority as has been evidenced so many times in the past.

I think about what is going on here after a visit I made yesterday along with others to Walter Reed Hospital, and I met a young man there. I knew he was in a ward in an area—a single room but in an area where the amputees are cared for. I didn't want to really inspect him with my eyes. I reached out my hand to shake his hand, and I wound up feeling a cloth and nothing in the cloth. His hand was missing. On the other side his arm was missing. He is about 23 years old, full of life. My guess is 23. I know he is young. He was positive and said, I am going to get on with this. We had the good fortune to have former Senator Max Cleland from Georgia who lost three limbs in Vietnam and was made out to be unpatriotic in the last election. Figure that one out. But he had the good judgment to ride in there in his wheelchair and look at this young fellow who had been, by the way, 3 weeks in Iraq, and about 4 months in the Reserve; no hand on either side, and no arm on one side. He told this young man, Have courage. There is life for you. And then he gets visited by Danny Inouye, Congressional Medal of Honor winner, missing an arm. He comes in to say to this young fellow, There is life out there. You can accomplish something.

And here we stand on this nonsense. Why aren't we talking about what the problems are in Iraq and how we solve them?

Let me read to my friends on the Republican side what a very distinguished Republican Senator said, John McCain. Few had his experience in military matters in a war. He said:

The Pentagon's proposed withdrawal of U.S. troops in Iraq would be an irrational move. ''If anything,'' said McCain, a senior member of the Senate Armed Services Committee and an outspoken critic of the administration's postwar policies in Iraq, ''the United States needs to increase its troop presence in Iraq, specifically special forces and Arabic-speaking intelligence officers. The attacks are up. The wounded Americans are up. Killed Americans are up, and the Pentagon announced a withdrawal or decrease in the number of American troops. It is not reasonable or rationale,'' says John McCain.

I agree with him. Why aren't we discussing that? Why aren't we having a marathon, 30-hour marathon, and talking about the war, talking about what

is going on and talking about what we do to make it easier on those to make them safer, and send the 10,000 or 20,000 additional troops John McCain says are necessary and I believe are necessary? I am no military expert. I spent 3 years in the Army. I was a corporal during World War II. But I know we need more there. We have to help our troops.

Do not talk about whether we are violating the Constitution. Where is your oath? Is it in your heart? It is the process we are talking about. Go to the Supreme Court and have a great trip. We will escort you there. Take and read the Constitution—just like you can, just like I can. Forgive me—just like the Senator from South Carolina can.

That is what we ought to be talking about and not talking in front of the American people about the process and about how fair we have to be with judges we think are unfit and we are going to talk about it. Just as we were threatened by the debate that went on, we are not going to go away, as I heard the Senator from South Carolina say. We are going to stay here. We are going to do this, and I am going to the Supreme Court. Have a good visit. The fact of the matter is it is very clear what our responsibilities are.

I talked about my trip yesterday to Walter Reed. On Monday, I made a trip to the Sacred Heart Cathedral in Newark and watched a young man who was on a Chinook helicopter. By the way, the fellow I saw in Walter Reed was not the American amputee. The other fellow, burned, broken bones all over his body, he was in the Chinook helicopter also. It wasn't many days ago this fate befell them, and they were already in the hospital here.

But Sergeant Joe Parez—25 years old, wife, little baby girl, mother, father, brothers—was buried at the Cathedral in Newark. He was one of the 16 who perished when the Chinook helicopter went down.

We had a brief moment of conversation. I said we would try to be of help to the widow and the family. She is a very young woman totally overcome by the loss of her husband.

This was a week for me that brought home reality. I saw it when I served in Europe during World War II, and I saw it here, and I saw it when I went to the hospital that took care of Vietnam veterans.

There is a price, a terrible price people are being asked to pay. They are there. They are worried about their families. They are worried about their jobs. They are worried about this country. They are worried about how they are going to adjust back into society after being away too long. We are stretching this rubberband so tight. We have reservists who signed up for duty that included weekends and a couple of weeks a year out in field exercises. Their job primarily was to be there in the case of emergency, floods, natural disasters, riots, those kinds of things that happen. But we do not talk about those. As a matter of fact, what has happened here I find quite shocking is there is a deliberate attempt by this administration to conceal the fact that these dead guys are coming home in caskets, and they deserve the honor of being acknowledged and not hidden off in some obscure air terminal and shipped quietly in trucks to get them out of the way. Stand up, Mr. President, and stand up, my friends on the Republican side, and demand we have an inquiry about this instead of fooling around with 30 hours here to prove nothing.

The Constitution tells you how it goes. Read it. Read it and tell the truth to the American public. Stop talking about politics because that is exactly what you are doing. You think the TV perhaps is going to get your brave message out to the rest of the country. Yes. Our heroes stood up and they stood up for a process. The rate, I think, is something like $80,000 an hour it costs to put on this not very good circus, I would say.

I say to the critics on the other side, stand up, talk about things that affect people, tell us how we are going to get out of Iraq without losing more of our young people. We are over 400,000. There are far more casualties than we had in gulf war 1.

I managed to be the first legislator to be there in 1990. We had 540,000 people on the ground and we lost far fewer than we have lost in Iraq II. Why? Maybe we were better prepared. Why? Maybe we had enough people to make sure they couldn't maraud our troops and our units there and decimate them, and not only break their lives but break the hearts of the Americans across the country because they do not understand what is happening.

This is a colossal waste of time. Face up to it. The minority disagrees with the selection. You have seen the statistics—168 to 4. I think the number is a very small percentage of those who have been challenged. More judges have been confirmed in this Senate than we saw in the entire years of the Clinton administration. We have done our job, and we have done it well. Tempers fly high. I think they ought to. I don't like losing my temper. But I dislike losing my mind.

That is what is happening here. This is a loss of purpose. This is raw politics. To call it anything else is unfair and false. The Constitution says advise and consent. It doesn't say consent and advise. It says nothing in the Constitution, no matter how many attributions, that we have to lay down and simply accept what the President sends down. There are checks and balances, just as a reminder, in case one doesn't understand that. This is a perfect example of what it is about.

No, we will not accept people who we think are unfit. This has not been an unreasonable Senate. We have done what we have to. We have watched appropriations bills language all over the place. We have seen there is hardly a serious long day of work to get the job done. But this falsely heroic effort to make a difference in the way our society functions is I think see-through politics. I think it is obvious what we are watching—someone called it theater. I call it a circus. It is not fair to the people we serve.

I hope we will be able to get on with the business of the people soon. We have our votes tomorrow morning. I would like to see us turn to the war in Iraq and have a serious debate about it and hear from the high-posted officials, the Secretary of Defense, the National Security Adviser.

I was at a briefing today. I don't know whether any of the other Senators here were in the room. It was a relatively junior staff presentation. The news didn't particularly have much insight attached to it. But we went to try to find out.

We ought to make a pledge right now that we will do another 30 hours, maybe start tomorrow night and talk about the Iraq war, talk about our people, talk about how we are going to get them home and talk about how we are going to end it; talk about how we are going to justify to the American people why we are spending $20 billion for the reconstruction of Iraq but we can't rebuild schoolhouses filled with asbestos or otherwise.

The PRESIDING OFFICER. The minority's time is expired.

Mr. LAUTENBERG. I yield the floor.

Mr. GRAHAM of South Carolina. Mr. President, I thank Senator LAUTENBERG for his services to this country. Serving in World War II is a big deal no matter your rank. My dad was a corporal, too. If you think it is a waste of time, have your say. This is a huge deal. The Democratic leadership and the members of the Democratic Party have set in motion something I don't know how to stop. I had a chart that says in the last 11 Presidencies we had 2,372 people confirmed and not one person filibustered. You decided to do something different. It bothers me as much as our response bothers you. The people being filibustered are very qualified people, in my opinion, and you certainly have your right to disagree.

I don't believe the Constitution gives the minority of the Senate the right to advise and consent. We have 214 years of history where the advice and consent clause has been the Senate speaking as a majority. What hurts the most about the filibusters, which are unprecedented and are harmful to the country, is every nominee that is being filibustered by our friends on the other side has enough votes to become a judge. Literally a minority of Senators have taken it upon themselves for the first time in the history of the country to make sure a majority of the Senate cannot vote to confirm a judge by using a rule of the Senate.

I would like the Supreme Court to hear that case because I don't know of any other way to make this go forward.

Chances are the Supreme Court may very well say this is not something we decide because you are the Senate. We are the Court. These rules are your rules. They may well say that, but I feel a need to push this as far as you can to get an answer and try to move on and have a better future.

The future of the Senate when it comes to judges is going to be lousy. We have four filibusters going on with another seven or eight to come. But if we behave with each other like this, we will have hundreds before long. As time marches on, we will have a lot of people caught in this vise.

Senator COLEMAN from Minnesota made a great point, I thought. Justice Ginsburg would not have a prayer because she has a liberal view of the law and a lot of people on this side voted against her. But they voted and she won the day. Justice Scalia is vilified by the left. He would never have a shot. A lot of people on the Democrat side voted against him. But he won the day and he is sitting on the Court. That is the strength of the Nation. When you have someone like Ginsburg and Scalia in a room having to talk to each other trying to find a way to move forward in terms of judges, it is going to be very disappointing because good people are not going to put themselves through this.

Justice Brown will be filibustered just as sure as I am standing here. She is an African American who sits on the Supreme Court of California. She has authored more majority opinions in California than any other justice. I gave a rundown a while ago about her story coming from a sharecropper family in Greenville, AL, going all the way to the Supreme Court in California, getting 76 percent of the vote in her last election. And you have to vote on judges in California. My argument is that no one would get 76 percent of the vote in California if they were the rightwing ideologue that the other side is describing.

I am not here to convince Members that I am right. I am here to set the record straight in terms of why I believe President Bush picked a good person. If you disagree, vote against her. Don't allow the Constitution to be changed in the way you are doing because you are putting the country in constitutional and political quicksand. Members will regret it down the road. I know the country will regret it.

Now, there is politics going on here. I will put a human face on this. Justice Brown has had a pretty rough time of it in committee. She has been very successful with her career in California. She has been successful in every endeavor she has engaged in, serving in a variety of capacities to the point that people want to promote her and the three-fourths of the citizens of her State think she has done a great job. But she comes to the Senate and she runs into a buzz saw because she is conservative. Apparently that is a crime.

This is a cartoon by the Black Commentator, a paper. The first amendment allows people to talk about public figures. This is just a little bit of what it is like to be in the environment our friends on the other side have created. This cartoon has ''Welcome to the Federal Bench, Ms. Clarence, I mean, Ms. Rogers Brown. You'll fit right in.''

And it is a caricature of President Bush and a racial stereotype, an offensive drawing, of Miss Brown. The people in the choir are clapping, as Justice Clarence Thomas—a very distorted picture which is offensive, I think—Colin Powell, African American, Secretary of State, a great general and somebody I admire, and Condoleezza Rice, our national security adviser, another African American who I think will help us do a good job in Iraq. This has been a miserable experience for this lady. I am very sorry she has had to go through this.

Over 50 percent of the Senate will vote for her when the cloture vote comes. Pickering, Owens, Pryor, all have received over 50 votes but we cannot get to passage because the filibuster rule requires us to get 60 votes. Therein is my problem. The Constitution does not require 60 votes to confirm a judge. There are several places where two-thirds are required. The Constitution says you will advise and consent by majority vote in the Senate.

They are using a procedural device, the Democratic Party is in this case, to block a vote on what I think are well-qualified people. No one else in the history of the country has done this before, Republican or Democrat. This is the first time someone has come out of the Judiciary Committee with a majority vote who cannot receive an up-or-down vote. There are four of them with a bunch more to come.

I give no apology for wanting to try to do something about this because, as sure as we are all here tonight, there will be a Democratic President come later on and that person will make a recommendation to this body, a nomination to this body, and if we do not change the way this trend is going, it will be a miserable experience. We will get bogged down and we will never be able to move forward as the Constitution has envisioned. This has worked well for 214 years. This is not time to change it.

Senator LAUTENBERG was right, there is a political dynamic going on here. I am sure Republicans have been abusive in the past in terms of the way the judges have been treated. I have heard a lot about that. Like Senator COLEMAN, I am new to the Senate. I would rather not perpetuate that problem. I would like to be someone who solved that problem.

We have some quotes from the past that I will read quickly. Senator LEAHY, the ranking member of the Judiciary Committee, said in 1998: I stated over and over again on this floor that I would refuse to put an anonymous hold on any judge—that is a way of keeping a judge coming through the committee—that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported, that I felt the Senate should do its duty. If we don't like somebody the President nominates, vote him or her down.

Very wise advice. We are not doing that at all. I don't know why we changed but we have.

Senator LEAHY, 1998: I cannot recall a judicial nomination being successfully filibustered. I do recall earlier this year when the Republican chairman of the Judiciary Committee and I noted how improper it would be to filibuster a judicial nomination.

I will read before the night is over many statements in the past where our Democratic colleagues were absolutely against the idea of doing anything other than giving a person an up-or-down vote. That has changed in an unhealthy way.

E-mails were talked about before. Let me read an e-mail that I think says a lot. This came from Senator CORZINE, the chairman of the Democratic Senatorial Campaign Committee, November 3, 2003, not very long ago, and it was sent out to raise money. I am sure we have sent e-mails and letters saying: Help us. The Democrats are destroying all of President Bush's nominations. That is the political environment we have gotten ourselves into. Like Senator COLEMAN, I would rather not perpetuate this. I would like to end it and move on and get it right.

Based on the prior statements of Senator LEAHY and others that we will read later on, they have changed for some reason. Now they are going into the past and saying, we are doing this because you did that. Where does this end? The truth is, no one has done what they are doing now. That is just a fact.

From the e-mail:

Senate Democrats have launched an unprecedented effort.

I will stop right there. I think that is a true statement. I don't believe Senator CORZINE is misleading the donor population. I think he is trying to tell them, folks, we are doing something nobody else has done before. This is unprecedented. You need to pay attention. You need to look at your Democratic Senators, pay attention to what we are doing, because we are taking a step no one has ever taken before. What is that step?

By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.

This e-mail is designed, quite simply, to let people in the Democratic Party know that the Senate Democrats have done something different, something unprecedented, and they are filibustering the President's nominees because they are radical. You cannot send this e-mail out to collect money and spend 32 hours denying you are filibustering anybody. You are filibustering judges in an unprecedented way.

And they are the Bush administration's nominees. The question is whether or not they are radical.

If you think they are radical, vote against them. I don't believe Justice Brown is radical. I don't think 76 percent of the people in California who have voted would have voted for her if she was radical. I think the attacks against her have been radical. But that is just my opinion.

This e-mail clearly establishes the fact that the Democratic Party has made a calculated effort in the Senate wing of the Democratic Party to do something different, to stand up against President Bush. They are blinded by the political moment. If we continue down this road, there will be more e-mails such as this on both sides of the aisle and it will be a disaster for the Constitution.

There are men and women serving in Iraq. There are people putting their lives at stake for this country. God bless them. We all did take an oath. They have their opinion and I have my opinion about what the oath means. But it will not withstand the filibustering of these nominees. It would be irresponsible on my part, given what I believe my oath is, to just let this go and make like it is no big deal because I think this is a huge deal.

I yield to the Senator from Minnesota.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. Mr. President, following up on the comments of my friend and colleague from South Carolina, you have to ask yourself, 214 years and the Senate has not done this, has not stopped a judicial circuit court nominee by filibuster. That is a fact. My colleagues on the other side can argue with charts but that is the reality.

You have to ask yourself, for 214 years was the Senate a rubberstamp for the President? I don't think so. I don't think anyone could make that argument. What you have is the reality that the Senate was exercising its constitutional responsibility. And doing it in a constitutionally responsible way.

That is what is important, doing it with respect for the Constitution, respect for the authority of the President to set forth the nominee, respect for the obligations upon the Senate to advise and consent, by a majority vote. Again, the Constitution, article II, says treaties need a supermajority, not a simple majority vote. What we have here is the minority saying we are not living by majority votes when it comes to judicial nominees regardless of what is in the Constitution. That is unfortunate. It is more than unfortunate. It undermines the principles upon which this democracy is based.

My colleague from Minnesota, the senior Senator from Minnesota, talked about this not being unprecedented. We have done it before.

Here are the facts. This is a listing of judicial nominations subject to cloture attempts from 1968 to 2003. I will go through every one of them. The first one is Abe Fortas, Chief Justice. Cloture was rejected. I will come back to whether that was even a filibuster. That was not a partisan filibuster. In fact, it was a bipartisan effort because of ethic complaints about Fortas but it was not a partisan filibuster.

A letter was sent to JOHN CORNYN, chairman of the Subcommittee on the Constitution from the former Senator from Michigan, a predecessor of my colleague, Mr. LEVIN, who is sitting there, talking about the Fortas nomination and basically saying that it was not a filibuster.

What happened, in a letter he says, while a few Senators might have contemplated use of the filibuster, there was no Republican Party position that it should be employed. Indeed, the Republican leader of the Senate, Everett Dirksen, publicly expressed his support for the Fortas nomination shortly after the President announced his choice. Our position in 1968 to the Fortas nomination was not partisan. Some Republicans supported Fortas; some Democrats opposed him.

Go through every listing on this chart. Outcome of cloture attempt, may have been rejected, may have been invoked, may have been withdrawn, but every nominee got a vote. That is what this is about. Vote them up or vote them down but give a vote.

We have a minority for the first time in the history of this body basically saying, regardless of what is in the Constitution, regardless of the language of the Constitution that makes it clear that the advice and consent is based on majority, they are changing the rules of the game. The argument is that these candidates, these nominees are outside the mainstream.

What is the mainstream? Who is the mainstream? Priscilla Owen received 84 percent of the vote in the last election for the Texas Supreme Court.

I have to tell you, I would love to see an 84 percent in any election. Just about anybody in this body would love to see 84 percent. They would tell you that is mainstream. That is mainstream. That is the ''wholestream.'' What is left is extreme. And that is what you have.

Bill Pryor, 59 percent in his last election for Alabama Attorney General—59 percent.

Janice Rogers Brown received 76 percent in her last election to the California Supreme Court.

I would note one of the Senators from California, Mrs. BOXER, received 53 percent. Who represents the mainstream in California? Seventy-six percent of the vote. The other Senator from California, Mrs. FEINSTEIN, by the way, former mayor of San Francisco—I am a former mayor. I have great respect and appreciation for mayors. It is a tough job. She is a great Senator. I do not always agree with her, but she is a great Senator. She got 56 percent of the vote. Janice Rogers Brown, who supposedly is the extreme, got 76 percent in her last election for the California Supreme Court. That is mainstream, not extreme.

Charles Pickering was confirmed to the Federal district court in 1990 by this body by unanimous consent. What that means is no one objected; everybody agreed. And today he is described as extreme?

If I could go through some of the candidates, Priscilla Owen—a whole bunch of these nominees are out of the mainstream? I am not sure what they are talking about. She has served in the State of Texas on the highest court. She has been given the support of 15 past presidents of the State Bar of Texas, a bipartisan group. We are talking about the folks who know them best.

Justice Owen was unanimously rated as well qualified by the American Bar Association. Apparently, this unanimous rating of the American Bar Association is out of the mainstream as well. I would submit, by the way, the American Bar Association is not a conservative interest group. I do not know who the members are, but I have to guess it is a bipartisan group. I have to guess there are some Democrats in that group.

It is clear the so-called mainstream being portrayed by some in this body is not only an incorrect reflection of the average American but a single-issue extreme which flows only in the direction of special interest groups. That is really what this is about.

You have to go through the records of these folks. I went to law school. Senator GRAHAM went to law school. I went to the University of Iowa, did fairly well, and served 17 years in the attorney general's office, and solicitor general, chief prosecutor of the State of Minnesota. But you would love to have the qualifications and credentials of the folks here, the folks the President has nominated. These are quality, quality, quality folks.

Then you read the statements of some of their supporters. Mary Sean O'Reilly, lifetime member of the NAACP and a Democrat:

> I met Justice Owen in January, 1995, while working with her on the Supreme Court of Texas Gender Neutral Task Force. . . . I worked with Justice Owen on Family Law 2000, an important state-wide effort, initiated in great part by Justice Owen. . . . In the almost eight years I have known Justice Owen, she has always been refined, approachable, even tempered and intellectually honest.

That is what you want from a judge. That is what you want from a judge. You do not want fidelity on a single issue. What you want is the judge to be tempered, to be intellectually honest, to apply their best judgment, to interpret the Constitution.

Raul Gonzalez, former Democratic justice on the Supreme Court of Texas. In Texas they elect their justices. In the elections, Democrats run, Republicans run. Senator CORNYN, one of our colleagues, also elected with us, is a

former member of the Texas Supreme Court, former attorney general.

Raul Gonzalez, former Democratic justice on the Supreme Court of Texas:

I found her to be apolitical, extremely bright, diligent in her work, and of the highest integrity. I recommend her for confirmation without reservation.

John L. Hill, former Democratic chief justice on the Supreme Court of Texas:

After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well reasoned, and that her integrity is beyond reproach.

That is what it is about: integrity beyond approach, opinions that are fair, well reasoned. That is what you look for in judges. You cannot allow a minority of folks in this body to toss about the label mainstream, fueled by folks with special interests. They are kind of pounding the drum, and people follow that drum.

But you have to ask, who is in the mainstream? Folks who get overwhelmingly elected by the people of their State, who receive bipartisan support.

Another former Democratic justice on the Supreme Court of Texas, Jack Hightower:

I am a Democrat and my political philosophy is Democratic, but I have tried very hard not to let preconceived philosophy influence my decision on matters before the court. I believe that Justice Owen has done the same.

That is what you want. The reality is, judges are people. They have heart and soul like everyone else. If you are a defendant in front of them, you may worry about that. But they are people. They bring a life experience. They bring a perspective. They bring a philosophy. You cannot divorce that. You do not divorce that. Some may have been active in politics. There is no question about that. They bring positions on issues. They are not issue neutral. They have not been lobotomized. They bring a life experience and perspective.

What we ask of them is to do what these folks—their colleagues, by the way, are from a different political perspective—say they do. We look to their ability to be well reasoned. We look to their ability to have integrity. We look at their ability to put aside the preconceived notions and simply say they will examine each case on the facts, and apply the law, the law that is done by—yes, that is what we do. That is what legislators do. That is what you are looking for.

Former law clerk of Justice Owen, Lori Plager:

During my time with her, I developed a deep and abiding respect for her abilities, her work ethic, and, most importantly, her character. Justice Owen is a woman of integrity who has a profound respect for the rule of law and our legal system.

That is what it is about: respect for the law and the legal system. To be described as extreme, when you have this body of opinion of folks who know you, who have worked with you, who have been your colleagues, who sit side by side, who have watched you process and reason, and then to render judgments, when they are willing to put aside their political predisposition—and what we are asking for is our colleagues to put aside the politicization of this process, put aside what we have done. Do not go back on a history of 200 years. We have not allowed this to happen on the floor of this Senate. We have not rejected judges on the floor of this Senate by virtue of filibuster for 214 years.

Hector De Leon, past president of Legal Aid:

As the immediate past president of Legal Aid of Central Texas, it is of particular significance to me that Justice Owen has served as the liaison from the Texas Supreme Court to statewide committees regarding legal services to the poor and pro bono legal services. Undoubtedly, Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit.

That is what you are looking for. You cannot do any better than that. Do not allow folks to wave a flag and say ''extreme'' when you have folks who in their own community, overwhelmingly—overwhelmingly—voted, reelected her to the Supreme Court of Texas in overwhelming numbers, and her colleagues coming forth and saying: Hey, this is a woman who is right. This is a woman who is talented. This is a woman who will not put the life experience she brings, perhaps preconceptions about issues—you have folks saying she will do what judges need to do. That is what it is about.

Before the night is over, we will talk about others. We will talk about Bill Pryor. We will talk about Judge Kuhl. We will talk about Miguel Estrada, who has withdrawn. We will talk about Judge Pickering.

But the common denominator in all of these, what the President has done is he has exercised his authority under the Constitution to nominate people who have integrity, who have the qualifications, who have the support of those with whom they have worked, and who, in many cases, when they have had to go before the people of their State, have been overwhelmingly endorsed as being part of the mainstream, not the extreme.

The PRESIDING OFFICER. The Senate majority's time has expired.

The Senator from Michigan.

Mr. LEVIN. Mr. President, how I wish we could take a week's worth of time to debate the issues which are of some critical importance to the people of my State; namely, the loss of manufacturing jobs and the problems we have in Iraq. These issues, the economy in general, job loss in particular, and loss of our troops abroad dominate the minds and the hearts of my constituents.

But the majority has the power to take the Senate on a fruitless cruise. That is what we are about: rehashing the merits and demerits of 4 of the 172 candidates who we have voted on in this Senate. I know these numbers are numbers which are very troubling to the majority. I can tell that by the fact they have attempted to come back with a whole bunch of other numbers.

When this debate is over, when the dust is settled, what I think most people will remember, at least in terms of the calls to my office, is, Is this Senate being tied up, night after night, with complaints that 4 of 172 judges have not been confirmed.

Mr. President, 168 is a number now which is impressed on the minds of people who have watched this debate and heard this debate. The number four is a number which people now understand. Maybe the 98 percent confirmation rate is not quite at the same level as these 2 numbers, but those numbers—168 of President Bush's nominees confirmed by this Senate, 4 have not been confirmed by this Senate—those 2 numbers are very much emblazoned in the minds of people across this country.

In rejecting these four, the Senate has exercised its advise and consent function according to our rules. It has carried out the checks and balances role according to the Constitution that gives us a check and a balance, according to the rules of the Senate.

I want to go back a little bit in history. We have heard quite a bit tonight that this is the first time a filibuster has been used against a judge on the floor of the Senate. I will get into this in a little more detail. I hope to have a little time to talk about the economy and manufacturing job loss, and other things which are very much on the minds of my constituents.

But since the majority has decided to set aside this time, mainly to debate the fact that only 98 percent of the judges who have come before us have been confirmed, and have now suggested, over and over and over again, that filibusters have never been used relative to judges, this is the New York Times headline of September 25, 1968 relative to Abe Fortas: ''Critics Of Fortas Begin Filibuster. . . .'' This is what the Senate Web site says about that filibuster. This is not a Democratic Web site. This is the Senate Web site for the date October 1, 1968: ''Filibuster Derails Supreme Court Appointment.'' That is a Senate Web site.

Folks on the other side, our colleagues on the other side, are saying: Well, what about circuit court nominees? We sometimes hear those words put in there when the statement is made that filibusters have not been used to derail judicial nominees. Sometimes the words ''circuit court nominees'' are put in there instead of ''judicial nominees,'' sometimes the words ''circuit court'' are left out, sometimes they are included.

If circuit court nominees have not been derailed by filibuster, it is not for

a lack of trying. The complaint of our colleagues on the Republican side, it seems to me, more accurately would be: Well, we have tried filibusters many times, but we have not succeeded. You folks are succeeding.

That is the complaint when you strip away the rhetoric and look at the reality. If filibusters have not succeeded in derailing circuit court nominees of Democratic Presidents by Republican Senators, it is not for lack of trying. Because the effort was made over and over and over again with Clinton circuit court nominees. The difference is, the filibuster effort did not succeed because the supermajority, which was required during those filibusters, was achieved for those circuit court nominees. That is the difference.

This is not at all unprecedented. This use of extended debate requiring a cloture vote on judicial nominees has been used repeatedly. It has not succeeded repeatedly, but it has been used repeatedly.

One of our Republican colleagues, during a debate on a nominee—this is not a judicial nominee, but this is a nominee which is subject to this exact same language of the Constitution about advise and consent as our judicial nominees are—when a Clinton nominee to be Ambassador was before us, and there was a filibuster underway and that nomination was blocked, this is what one of our colleagues said. Now this was in 1994, and the Senate was controlled by Democrats. The White House was controlled by Democrats. The House of Representatives was still controlled by Democrats. Our Republican colleague here in the Senate was pointing out the only power that was left to Republicans was the use of a filibuster and forcing a cloture vote. And I emphasize, this is on a nominee who had exactly the same rights or lack thereof to an up-or-down vote as a judicial nominee because the nomination is governed by the same advise and consent clause of the Constitution as our judicial nominees. Here is what our colleague said:

> In considering the nomination of Mr. Samuel Brown to be Ambassador . . . I have reflected on the latitude which ought to be accorded the President in making this decision for the Ambassadorship, reflecting as well on the constitutional responsibility of the Senate for advice and consent as a check. I am troubled by a situation where the only pressure point Republicans have in the U.S. Government is on cloture. Once cloture is obtained, there are more than enough votes on the other side of the aisle to cover the day. While the House is not involved in this matter, the House is overwhelmingly Democratic. There is a Democrat in the White House. The only place that Republicans can assert any effective, decisive action is by stopping somebody from coming up. We have 44 votes and we have more than enough, if there is unity among the Republicans, to do that. I think Mr. Brown's nomination and the responsibilities of the Conference on Security and Cooperation in Europe are sufficiently important to preclude his nomination.

That is what our Republican colleague said in 1994:

> The only place that Republicans can assert any effective, decisive action is by stopping somebody from coming up. We have 44 votes.

That has been the case not just with ambassadorial nominations but with other nominations subject to the advice and consent clause. The only difference with the circuit court nominees of President Clinton, for instance, who were filibustered is that there was not a supermajority to stop the confirmation of the judges. That is not a distinction which I would think the Republicans in this debate would want to emphasize, but it is a distinction in fact.

Mr. President, 168 of this President's nominees have passed the test; 4 have not. When the filibuster has been used relative to those four, the rules of the Senate which provide for that to occur, and there was not a supermajority, then those nominees have not been confirmed.

What is at stake here is the functioning of the Senate as a check and a balance on executive power. Our Republican colleague who spoke that way in 1994 was exactly right. He was using the rules of the Senate in a totally appropriate way and saying that the only way we can stop this, the only way the minority has a voice, if we feel so deeply that there are 41 or more of us who wish to stop this nominee from being confirmed, we must use the filibuster, and we must force a cloture vote. Checks and balances are what are at stake here. The historic role of the Senate is what is at stake here.

Then-Senator Lyndon Johnson, in March of 1949, said the following relative to these checks and balances:

> A man elevated to the Office of the President has virtually unlimited powers of influence over his country. His own personality is a force of great impact upon all the people of the Nation and, in fact, upon the people of the world. Add to those powers directly all those less conspicuous powers of his aides, his administrative agencies and the multitude of channels which feel his influence, and you have a force no other representative government has even trusted for long to one man.
>
> If on occasion you grant to this titular head of government the further intoxicant of an overwhelming majority of loyal supporters in the legislative branch, then you have a force well nigh irresistible. The distinctions between legislative and executive are difficult to preserve under such circumstances. Mere memorandums become laws and laws become mere memorandums. In such a situation, which happily is more hypothetical than historical, the entire theory of our Government system of checks and balances dissolves and evaporates. The right to check and balance was not granted to the majority because a majority rarely seeks control over itself. Those rights were conceived and installed in the Constitution solely as safeguards for the minority.

He said:

> I am no historian, but as I have studied the history of governments gone before us, I have been impressed by the fact that the freedom of unlimited debate in legislative chambers has been given up many times by members themselves who are irritated or frustrated by a minority. But so far as I have found, once that freedom was yielded, it has never been returned. If we now give up this freedom in the Senate, I, for one, do not expect to live to see its return.

Much has been stated here about filibusters on the floor of the Senate. Too little has been said about stealth filibusters which occur in committee. Political scientist Sheldon Goldman of the University of Massachusetts, who is a neutral observer of the process, said the following in a Los Angeles Times article on November 6:

> The Bush administration has been spectacularly successful in getting the overwhelming proportion of its judicial nominations confirmed. There are only a relative handful being filibustered and held up, and this contrasts with the dozens of Clinton nominees who were held up by the Republicans in the last 6 years of the Clinton administration.

Professor Goldman expressed it this way:

> The Republicans obstructed quietly in the committee. If they didn't want to approve you, you just didn't get a hearing.

Here is one example. Kent Markus was nominated by President Clinton for a seat on the Sixth Circuit. He testified to the Senate Judiciary Committee on May 9, 2002, as follows. To their credit, Republican Senators told him two things.

> There will be no more confirmations to the Sixth Circuit for the Clinton administration.

Two:

> This has nothing to do with you. Don't take it personally. It doesn't matter who the nominee is, what credentials they may have, or what support they may have.

Mr. Markus went on to testify that one Republican Senator told him the following:

> This is bigger than you, and this is bigger than me.

Senator KOHL, who kindly championed his nomination in the Judiciary Committee, encountered a brick wall. The fact was a decision had been made to hold the vacancies and see who won the Presidential election. With a Bush win, all those seats could go to Bush, rather than Clinton nominees.

That is what happened. That is exactly what happened to Kent Markus and his nomination. A hearing was denied to him. A vote was denied to him. And if there is some constitutional right which is being created here on the floor, I assume Kent Markus was denied his constitutional right to a vote, as were the dozens of other nominees of President Clinton who never got a hearing, much less a vote.

I can't believe for one minute that any court, even if it reaches the merits of this case that is going to be brought, would say there is a constitutional right to have your nomination voted on when there are so many ways of blocking a nomination from getting a vote, starting with not having a hearing, starting with not having a markup, starting with not reporting a nomination to the floor, starting on the floor not reaching a vote up or down.

When the Republican Senate denied committee hearings and votes for 63 judicial nominees and more than 200 executive branch nominees, they blocked

a vote on those nominations. That was their right. They may have done the wrong thing in doing so, but they had a right to do so. I wish they hadn't. I wish they had allowed those to come to hearings. At least have a cloture vote, if nothing else, on the floor, but that was not to be.

There are a lot of ways you can have a vote on this floor. One of them is a cloture vote and one of them is a vote up or down. But these 63 judicial nominees never even got to a cloture vote, never even got to see if there could be a supermajority put together for them under our rules on the Senate floor.

It is remarkable to me that our colleagues on the other side of the aisle make the claim that blocking nominees from having an up-or-down vote on the Senate floor is unprecedented, given the actions during the last administration.

Republicans filibustered several Clinton nominees on the floor of the Senate, including Richard Paez, Marsha Berzon, Rosemary Barkett, and H. Lee Sarokin. Cloture votes requiring supermajorities were required to be produced for each of them.

Our colleagues say these nominees were not blocked by a filibuster, which is an artful way of saying that the effort at the filibuster failed. That is very different from saying that the filibuster was not tried. It was. Cloture votes were required but supermajorities were obtained. That is the difference between those Clinton nominees and these four nominees. Here supermajorities have not been obtained. Therein lies the difference. Same cloture votes, same type of cloture votes required, but cloture was invoked for Berzon, Barkett, Paez, and Sarokin. Supermajorities supported those nominations, and the opposition had a right to force those votes. That required a supermajority. They had a right to filibuster, and, in fact, did so.

Two of President Clinton's nominees, not judicial but nominees, still governed by that same advice and consent clause in the Constitution, were defeated by filibusters. One was Henry Foster nominated to be Surgeon General, and the other one was Sam Brown nominated to be ambassador. The argument relative to that nomination was quoted by me at some length a few moments ago where a Republican colleague within his rights using the rules said: We have only to put together 41 Republican Senators and we can block this nomination. It is the only way to block a nomination with which we fervently disagree.

Given the fact that the Democrats didn't control the White House, the Democrats controlled the Senate, our Republican colleague pointed out accurately that the only way to block that nominee was by use of the filibuster. Were his constitutional rights violated? I don't think so. I think he was given consideration by the Senate in the way that the Senate decides to consider nominees, and it can consider nominees in many ways.

It can decide never even to give a nominee a hearing should it choose. I don't think that is a wise course, in most cases, but should the Senate choose not to give a nominee of the President a hearing, that is the Senate's decision. Or after a hearing, if it decides not to have a markup to vote that nominee either out of committee or to defeat that nominee, that is the Senate's decision. Should a chairman, acting alone, decide not to put a name on a markup, that may be that chairman's power.

So the suggestion that requiring a supermajority vote by filibuster is new to the Senate is just simply wrong. We can argue—legitimately argue—and disagree over whether or not the Senate should give up this important check and balance on Presidential power, but we cannot argue, it seems to me, that it is unprecedented in its exercise.

Here are the words of one more of our colleagues during a filibuster of a Clinton nominee on March 3, 2000. During the filibuster of the nomination of Judge Richard Paez to the Ninth Circuit, this is what our colleague said:

> I say to the American people who may be listening right now, judges impact our lives big time in the decisions they make. Citizens complain about violence and the criminals getting out. There are bad judges making bad decisions that cost Americans their liberties, cost them their lives sometimes. That is wrong. We have an obligation in the Senate to take a good hard look at a lifetime appointment to the circuit. The members are there forever, even when they get real old. It is pretty hard to get rid of them. This is a lifetime appointment. We have a responsibility to make darn sure these judges are going to represent the views of a majority of the American people in terms of the law. I intend to do that as long as I can stand here to do it.

He didn't have 39 others or 40 others to stand with him. As a result of that, there was a supermajority for that judge, but it was despite the filibuster. It wasn't that there was no filibuster. It was despite the filibuster which the Republicans had a right to stage and did stage. But most Republicans decided, or at least enough Republicans decided not to continue that filibuster but, rather, to invoke cloture.

To suggest the filibuster has never been used flies right in the face of history and recent history, as well as the history of Abe Fortas.

Historian Robert Caro wrote the Rules Committee of this Senate as follows:

> In short, two centuries of history rebut any suggestion that either the language or the intent of the Constitution prohibits or counsels against the use of extended debate to resist Presidential authority. To the contrary, the Nation's Founders depended on the Senate's members to stand up to a popular and powerful President. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role, providing both advice and consent to the President. That shared authority was basic to the balance of powers among the branches.

He continued:

> Surrendering such authority is not something which should be done just because of a Senator's point of view on the particular issue of the moment—because much more than the particular issue is involved. What if a Senator—let us say a Senator from a small population state without any other means of defense votes to support a new limitation on debate today. What will he [or she] do in some future year when he is trying to stop a bill or a nomination that a bare majority of the Senate supports, but that he and 40 colleagues believe would be terribly detrimental to their states or to the nation. . . . What will he feel when he suddenly realizes that his right to hold the Senate floor against that action has been so greatly reduced that the bare majority can silence him before he is finished making his case? What will he do when he realizes that, without the right of extended debate his cause is ultimately helpless?

Finally, I ask unanimous consent that the letter from Senator CORZINE, which has been referred to, apparently a fundraising letter, be printed in the RECORD in full because I think the words which were quoted by my friend on the other side had some very critical dots in there, and I think the dots should not have been there. The two sentences should not have been pushed together as though they were one. The document of Senator CORZINE says the following:

> Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial.

That is the unprecedented effort. The next sentence is:

> By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.

The suggestion that the words read ''an unprecedented effort to mount filibusters'' is not an accurate reflection of that letter. The dots which were in the chart, it seems to me, take the place of some very critical words making two sentences look as though it is one sentence.

I ask unanimous consent, just so we can have full disclosure of this letter, that this letter be printed in the RECORD.

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

> Despite the administration's desire to ignore the Constitution's rule of ADVICE and CONSENT, Senate Democrats are holding Republicans accountable.
>
> Why must the Democrats continue their fight against Charles Pickering?
>
> While in law school, Mr. Pickering wrote an article suggesting ways the state of Mississippi could better enforce its ban on interracial marriage.
>
> As a state senator in the 1970's, Mr. Pickering worked to repeal important provisions of the Voter Rights Act.
>
> In 1994, he went out of his way to seek a more lenient sentence for a convicted cross-burner.
>
> Once defeated when Democrats had a majority in the Senate, President Bush nominated Charles Pickering for a second time after the 2002 elections and now two successful filibusters launched by Senate Democrats have kept him off the bench!

The Bush Administration is devoted to using the courts to its political advantage. Time and again, this administration has nominated ultra-conservative candidates who are zealously devoted to advancing corporate interests, taking away reproductive freedom, smashing the wall of separation between church and state, and dismantling equal opportunity.

But the Administration has got a big problem: Senate Democrats. Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.

Help the Senate Democrats keep fighting. Support the DSCC efforts to help elect more Democrats to the Senate—and keep the proven leaders we have. Help the DSCC send a message to the Bush Administration—Senate Democrats will NOT rubber stamp extremist judicial candidates. Help us fight to maintain judicial integrity by sending more Democrats to the United States Senate in 2004.

Contribute Now!

Sincerely,

Senator JON CORZINE.

Mr. LEVIN. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER (Mr. ALLARD). Forty seconds.

Mr. LEVIN. I thank the Chair and thank my colleagues. I am happy to share with them the feeling that somehow or another hopefully we can find a way some day to get over the place we are at, not just on judges but on all of these nominees.

I look forward to that Supreme Court case which my friends are going to file. I think it would be just fine to have the Supreme Court rule on this issue to clear the air on it. I have great confidence that they will support the right of the Senate.

The PRESIDING OFFICER. The minority's time has expired.

Mr. LEVIN. I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. Mr. President, I have the greatest respect for my colleague, the Senator from Michigan. He serves as the ranking member on the Subcommittee on Investigations, which I chair, and serves this body as ranking member of Armed Services. He is a credit to this institution.

I disagree with him, however, in his interpretation of the reality of the history of this body. It is very clear that this body has not successfully filibustered a circuit court nominee in its history. The one case that is mentioned again is Abe Fortas.

As I indicated earlier, this was a bipartisan effort. It was not a partisan filibuster. So what we have here on the floor today is the first partisan filibuster, and the purpose is clear. My colleague has said this is the only tool that the minority thinks they have to stop the President from exercising his authority, but I think that he is right when he says the historic role of the Senate is what is at stake here.

I say that because we have to reflect upon how our colleagues who preceded us—by the way, some of them are still here in some of the cases he talked about—what was going through their minds when they were faced with the same circumstances we are faced with today; that is, a group of folks in the majority in many cases who objected to a particular nominee.

We can use the Clinton years as an example. There was a Republican majority for 6 years of President Clinton's term. No judicial nominee, not one judicial nominee, was ever deprived of a vote on the floor of the Senate. That is what we are talking about, a vote on the floor—not one.

My colleague and friend from Michigan made reference to the cases of Marsha Berzon and Richard Paez in the year 2000, Ninth Circuit. Although most Republicans opposed their confirmation—and we heard some of my colleagues earlier tonight. Senator SESSIONS talked about that case. Senator LOTT talked about that case. He was majority leader at the time. They also opposed any effort to prevent the full Senate from voting on their nominations. They did so and they told you it was because of their reverence and respect for the historic role of the Senate. That is what is at stake. That is the principle that has guided us for 214 years before today, before this 108th Congress.

Colleagues had the opportunity to invoke cloture only if the Republican majority said we were to go along, and it was not because, as my colleague from Michigan somehow inferred, that they could not kind of put together the necessary votes to block it. No. What happened is that they were not willing to ignore the history and the tradition, and I think most importantly what the Constitution says, and that is that supermajorities are not required to confirm nominees for circuit courts.

Debate on each of these nominations, Berzon and Paez, lasted only 1 day and a majority of Republicans joined all Democrats in supporting cloture motions for debate on each nomination, including over 20 Republicans who would eventually vote against confirmation and a majority of the Republican members of the Judiciary Committee. Senator HATCH talked about that.

So our colleagues at that time faced two candidates in the Ninth Circuit. By the way, that is the same circuit that ruled the phrase ''under God'' unconstitutional. That is the same circuit that initially was going to prevent the California recall from taking place until finally en banc the entire circuit had to come together and change that.

In neither case did Republicans mount a party-line filibuster effort to prevent voting on a nominee. In fact, Majority Leader LOTT filed the cloture motions for the above debates. So what we have is not what my friend and colleague from Michigan would infer, that somehow before there was simply an ability—yes, there were cloture motions and either they were invoked or they were rejected, and that somehow they were invoked and that is why you were able to vote on it. No. Here you had the Republican majority leader file the cloture motions for Berzon, for Paez. My colleague, Senator SESSIONS, said: I opposed them. I voted to support cloture. I voted against the nomination, and that is what we are asking for.

Follow the history. That is what is at stake, as Senator LEVIN said, the historical role of the Senate. If it has changed it, it has changed it at great risk.

The situation was similar in 1994 when some Republicans voiced objections to President Clinton's nomination of H. Sarokin to the United States Court of Appeals of the Third Circuit. A majority of Republicans supported a cloture motion after a relatively brief period of debate and cloture was invoked by a vote of 85 to 12. Judge Sarokin was then confirmed by a vote of only 65 to 35. Twenty-three then of my colleagues supported cloture. The majority supported cloture. Yet at the same time they voted against the candidate. That is the history of this body. That is what the Constitution requires.

I am told that the only judge nominated by President Clinton who faced a partisan filibuster was that of Brian Theodore Stewart, a nominee to the Federal district court in Utah. However, it was Senate Democrats who filibustered the nominee in protest over purported delays in bringing other judicial nominees to the floor. A cloture motion was voted upon on September 21, 1999, and failed, falling short of the 60 votes by a vote of 55 to 44, with all Democrats except Senator Moynihan opposing cloture.

Once again, Democrats' objection was not to Judge Stewart himself and on October 5, 1999, the Senate confirmed him by a vote of 93 to 5. So for all the handwringing that we heard about the treatment of President Clinton's nominees, one is very clear: Every single one of them got a vote.

The fact is that what happened here is that my colleagues followed the history and tradition of this body and said they would make sure they got a vote because that is what the Senate is called upon to do, advise and consent. There is a principle of majority rule, a principle, again, espoused in this document, in this Constitution, of the United States.

My colleague also implied that it is just fine to prevent an up-or-down vote on at least 4 of these nominees because we blocked 60 of President Clinton's nominees. I have two observations about that, and I know this is what frustrates me and my colleague Senator GRAHAM. The fact is that there is and has been a tradition in this body, shortly before the end of the President's term. What happens is that folks kind of say, well, let's see who the new guy is, see what happens, and they slow it up.

The numbers are even more stark, by the way, if we compare the number of

nominees left hanging at the end of the first Bush administration by Senate Democrats with the number of Clinton nominees awaiting confirmation at the end of the Clinton administration. The Democrat-controlled Senate left 54 of the first President Bush nominees unconfirmed at the end of 1992. In contrast, at the end of the Clinton administration, 41 nominees remained unconfirmed.

Let's stop that practice, unless a game is being played, unless these are clearly unqualified nominees, unless there is some reason to suspect we are not having qualified folks coming before us and we are playing politics.

On the other hand, well, they did it to us and we are going to do it to them. It is like the Hatfields and McCoys, like Montague and Capulet. It is like a family feud. It is futile and it needs to stop. It needs to change.

I appreciate the comments of my friend Senator LEVIN at the end saying maybe we can get beyond this. I hope we can get beyond this. I hope we can do what Senator GRAHAM talked about when we started this conversation a little over 3 hours ago and he said let's look to the future.

The future is only going to be a bright future if we, one, follow the dictates of the Constitution, understand that there is this concept of majority rule, that the Constitution dictates that these nominations be dealt with on a majority basis, and that this body respect the history and tradition. That is what we have.

Then, of course, it is the responsibility of the President to bring forth qualified nominees and get past the rhetoric of extreme. I dealt with Priscilla Owen. Let me talk about Bill Pryor, for example. Alabama Attorney General Bill Pryor, nominee to the Eleventh Circuit, has earned a reputation as one of America's most experienced and esteemed State attorneys general. His nomination has received overwhelming support from across the ideological and political spectrum. Mr. Pryor was appointed attorney general of Alabama in 1997 and was overwhelmingly reelected; outstanding credentials. He was a law clerk for civil rights legend, the late Judge John Minor Wisdom.

Senator LAMAR ALEXANDER, also one of our newer brethren, fraternity of those who just got elected this year, had an opportunity to work with Judge Wisdom, who is, by the way, one of the great civil rights legends. Attorney General Pryor worked for him. Pryor graduated magna cum laude in 1987 from Tulane University School of Law and was then chief of the Law Review. What is interesting is that Attorney General Pryor is being attacked as being extreme. He is a man, by the way, who does have very strong beliefs. He is human. He has strong beliefs. That is not a bad thing. That is a good thing.

He is a person who has shown that he is willing to put his beliefs to the side to look at the law and to interpret the law, and that is what we expect a judge to do.

My friend Senator GRAHAM and I have talked about this. We talked about Bill Pryor. There is the chief judge in Alabama, who was involved with the case about the Ten Commandments in court. The courts have said that is unconstitutional.

Now, I suspect General Pryor believes that is probably a good thing, but General Pryor then leads the effort to challenge—in effect, to prosecute—the chief justice saying the law has to be enforced. That is what it is about.

Bill Pryor has also been a moderate voice in the partial-birth abortion debate. By the way, that is a mainstream position, but a court decision came down and challenged the Alabama law. General Pryor, in accordance with his duty to defend the statute, that is what he did. He then exercised that authority putting aside what I am sure are personal opinions to enforce the law. That is not extreme. That is mainstream. That is what we want on a court.

Yes, we have people of character, principle, and strong beliefs. What the other side has done is they take folks who have these strong beliefs, who then espouse them. Along the way they may give a speech, they may give a writing, and then they wave that around to see how extreme they are, but we have to judge people by their actions. We have an attorney general who puts aside his personal beliefs to say he will enforce the law. That is what you do.

My distinguished colleague who will take the floor after me, Senator PRYOR, was a former attorney general. I know he operated in the same way. That is what he would expect of his colleagues, put aside personal beliefs to enforce the law. That is what makes a good judge. Vote them up, vote them down. Give them a vote.

I yield the floor to my colleague, Senator GRAHAM.

Mr. GRAHAM of South Carolina. I thank the Senator for yielding. I think he did a very good job of trying to explain the best we can that this has never been done before, that this is truly a new era for the Senate. We are filibustering judges who have been reported out of the Judiciary Committee for the first time in the history of the country. That fact will never go away. It has never happened before. Abe Fortas was not a partisan filibuster. Republicans and Democrats thought the man was not qualified to be chief judge because of some ethics complaints, and the President withdrew it. But you had Republicans and Democrats banding together trying to send a message to the President that they did not think this person was promotable. They had 4 days of debate. It was not a filibuster. It wound up being a bipartisan effort to come together to send a message to the President.

There is nothing bipartisan about this other than the fact that every nominee who is being filibustered has Republican and Democratic support to sit on the bench in a majority fashion. That is the problem here, that if all of these people who are being filibustered had their day on the floor, an up-or-down vote, they would be judges and they would have Democratic votes. One of them has 55, we believe, because 55 people have voted to allow a vote on the floor. That is important.

These people would be judges, just like the two Senator LOTT intervened on. The two Democrats who were being opposed by some Members of the Republican Party, Senator LOTT stepped in and stopped it. He filed a cloture motion and it passed overwhelmingly to end debate, and they are sitting on the bench today. Good for him. I am glad he did it.

I want to be fair, too, to Senator CORZINE. There is nothing wrong with people talking about issues before the Senate in trying to get money sent to the parties. Both parties do that. I have never suggested that Senator CORZINE has done anything wrong. I am just trying to put in perspective what this debate truly is all about, because when you are out there talking to your base about what you are doing that can be a pretty good evidence of what is in your heart and what you mean to do.

Now I have the whole document. This chart is an excerpt from a November 3 fundraising e-mail sent out by Senator CORZINE, the head of the Democratic Senatorial Campaign Committee. It says:

> Senate Democrats have launched an unprecedented effort . . . By mounting filibusters against the Bush administration's most radical nominees, Senate Democrats have led the effort to save our courts.

I have been saying for days now that this e-mail indicates that they view this to be an unprecedented effort by Democratic colleagues and the unprecedented effort is mounting filibusters. But this dot, dot, dot, now I have the whole e-mail and I do want to be fair. I do not think it has changed a thing. Having looked at the e-mail, I think it reinforces my point.

This is what the actual paragraph says in full:

> Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters . . .

I think a fair reading, a fair interpretation of the English language, is that the unprecedented effort refers to the filibusters. They are throwing in some nice language about being fair in there. Nothing has changed.

This was an e-mail sent out to try to tell Democrats that we are up here fighting Bush in an unprecedented way by filibustering his judges because we think they are radical. This e-mail is about a particular judge, and I am going to read the whole thing. This is the way it is entitled:

> Senate Democrats protect our courts again. Dear Erin, Senate Democrats have stopped another judicial extremist who

wants nothing more than to turn back the clock on fifty years of progress on civil liberties. Reproductive freedom, equal opportunity, and corporate accountability again.

What a lousy person that is—that is me stating.

After being defeated under a Democratic controlled Senate, controversial judicial nominee Charles Pickering was defeated again on Thursday by Democrats in the Senate.

For the first time in history, a President of the United States re-nominated a judicial nominee that the committee had already voted down but the Senate Democrats stopped the Bush Administration in its tracks.

That is true. When the Democrats had control of the Senate, Judge Pickering was voted down on a party-line vote. The President has a right to resubmit the nominee. I am very glad he did because this time he came out of committee on a party-line vote.

We just have a different view of whether or not this man is a racist, because there is no other way to interpret what this e-mail is saying about this man.

Continuing:

Despite the administration's desire to ignore the Constitution's rule of advice and consent, Senate Democrats are holding Republicans accountable.

Why must the Democrats continue their fight against Charles Pickering?

While in law school, Mr. Pickering wrote an article suggesting ways the State of Mississippi could better enforce its ban on interracial marriage.

As a State senator in the 1970's, Mr. Pickering worked to repeal important provisions of the Voter Rights Act.

In 1994, he went out of his way to seek a more lenient sentence for a convicted cross-burner.

They have described somebody who is not what you would want to have on the bench. There is no other way to say it other than this e-mail is directly and indirectly suggesting Charles Pickering is racially motivated. What a horrible thing to say about somebody if it is not true.

Once defeated when Democrats had a majority in the Senate, President Bush nominated Charles Pickering for a second time after the 2002 elections and now two successful filibusters launched by Senate Democrats have kept him off the bench!

The Bush Administration is devoted to using the courts to its political advantage. Time and again, this administration has nominated ultra-conservative candidates who are zealously devoted to advancing corporate interests, taking away reproductive freedom, smashing the wall of separation between church and state, and dismantling equal opportunity.

But the Administration has got a big problem: Senate Democrats. Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.

Help the Senate Democrats keep fighting. Support the DSCC efforts to help elect more Democrats to the Senate—and keep the proven leaders we have. Help the DSCC send a message to the Bush Administration—Senate Democrats will NOT rubber stamp extremist judicial candidates. Help us fight to maintain judicial integrity by sending more Democrats to the United States Senate in 2004.

That is the e-mail in its entirety. Now the accusations in that e-mail are strong, they are direct, and I think vicious. Judge Pickering, according to this e-mail, is someone who wanted to keep the interracial marriage statute alive when he was in law school by writing law school papers in support of this. He went out of his way in 1994 to make a sentence more lenient for a convicted cross burner.

The only thing a rational person would receive from that litany is Judge Pickering is friendly to a cross burner. If that is true, he should never have been a judge for 30 seconds. If the other things are true, it was a huge mistake to ever advance this man forward.

But here is the problem I have with believing what is in this e-mail. Number one, I have met the man. I have talked to him. I served in the House with his son, Chip, who is one of the nicest, brightest young men I have ever met. This e-mail describes him as a very intolerant, racially insensitive person. But I can tell you without a doubt from personal experience he did a great job as a father because his son is anything but racially intolerant. His son is a wonderful young man.

If that e-mail is true, then you explain to me how the American Bar Association could give him the highest rating possible, well qualified. Did they miss this racial past? Or do they condone it? How about this, maybe this is a cut-and-paste job and they didn't buy it. He graduated first in his class; 99.5 percent of the cases were affirmed or not appealed. His reversal rate is below the national average, two times lower than the average district judge in the Fifth Circuit Court of Appeals. He has never had a voting rights case appealed or reversed. He has never had a formal discrimination case reversed in 170 cases and is endorsed by the current president and 17 past presidents of the Mississippi State bar. Maybe they are all racist, too. He is endorsed by all major newspapers in Mississippi. He is endorsed by all statewide elected Democrats and the chairman of the Mississippi legislative black caucus. He was endorsed by former Democratic Governor William Winter, Bill Waller, former Democratic lieutenant governor, and the list goes on and on and on.

Other people object, but I assure my colleagues this e-mail is a distortion of this man. Here is the Judge Pickering I have come to know. In 1967 when Mississippi was red hot and racial tensions were very high in the South, particularly in Mississippi, he served as an elected county prosecutor. He was asked to testify against the Imperial Wizard of the Ku Klux Klan of Mississippi. He took the stand against the Imperial Wizard successfully but lost his job. He was not in the mainstream; he was swimming upstream.

In 1967, when schools were integrated in Mississippi—and I have told the story about integration in South Carolina—he chose to keep his children in public schools at a time when White flight was the dominant way of dealing with the problem in that part of Mississippi. You will see class photos in that era of a lot of African-American children and a smattering of White kids. Among those White families, White kids, were Judge Pickering's kids.

He chose at a time, when others did not in large numbers, to try to make Mississippi better. He has been head of the Mississippi Baptist Association. He has been on the Federal bench for a dozen years, rated well qualified by the American Bar Association.

Of all the events that have occurred in the Senate since I have been here, this one bothers me the most because southern White males are very open to the accusation that we are racially insensitive, due mostly to the way the South has conducted itself.

When I grew up, my family had a restaurant and African Americans came to get their food and to buy a beer and they had to leave because there was no mixing of the races until I was in high school. That is not something to be proud of. Judge Pickering was part of the solution.

What they are trying to cast this man as being is unfair to him; it is unfair to his family. If you believe it to be so, you can vote against him. But he is the best example of how sick the Senate has become.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. I ask unanimous consent we use 5 more minutes of the majority's time and we subtract it from the next hour.

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

Mr. COLEMAN. Mr. President, I will continue the Pickering story because I think it is important.

My colleague, Senator GRAHAM, has done a tremendous job of laying it out. I don't know Judge Pickering's son as well as Senator GRAHAM does, but I have met him. I have to go beyond that.

Senator GRAHAM mentioned when he was in law school that he wrote an article on interracial marriage. That was in 1959. He was assigned to write an article. It was required, not voluntary. It was an academic exercise. The article evaluated various State laws on interracial marriage. He took no position on the moral nature of these laws nor did he advocate or condone the ban on interracial marriage. He was given an assignment and required to do it.

In the case of the cross burning—and I am a former prosecutor and I have seen this happen—he simply sought precaution in sentencing. There was a bad investigation done by the Clinton Justice Department. They recommended a plea bargain to the guy in the cross burning who was the ring

leader. So he gets off. There is a trial then for the other guy. Judge Pickering is there and he sees it is simply not proportioned. He told the guy he tried, who was not the ring leader—but the other got was off the hook. He said what he had done was heinous and dastardly and would not be tolerated and someone would have to spend time in the penitentiary for his act and ruled according to the sentencing guidelines. On and on.

This is an individual who, again, sent his kids to interracial schools in the 1970s. This is a guy who testified against the KKK. This was a death sentence.

In 1985, he was president of the Mississippi Baptist Association, and he presided over the first convention addressed by an African-American pastor.

I could go on and on and on. Again, what we have here is mainstream, not extreme. This is a person who was supported by the folks who know him best. Many African-American judges have written in support of Judge Pickering, including Justice David Keith, the first African-American Federal judge in Mississippi, Henry Wingate, the first African-American Supreme Court judge in Mississippi, Rubin Anderson, and Mississippi court judge Johnny Williams.

What we have is a case where the people who know him best see this is a decent man. This is a man without prejudice. We have special interest groups with their own agenda from outside looking to shoot him down. In doing so, what we have is this Senate undermining the Constitution and our obligation. They are doing something that has not been done before, without legitimate base. Vote them up, vote them down, give them a vote.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. PRYOR. As I understand what just transpired, his additional 5 minutes or so will be applied to the next hour so I still have 30 minutes.

The PRESIDING OFFICER. That is correct.

Mr. PRYOR. Mr. President, I thank my colleagues on both sides of the aisle for their zealousness on the issues that are present here with regard to these judicial nominations. I know my colleagues on the Republican side have very strongly held opinions and viewpoints they are very sincere about holding. I may differ with them on some of the particulars and some of the conclusions, but I respect their opinions and I respect their zealousness and their commitment to their cause.

Likewise, on the Democratic side, I have a number of colleagues over here who have done a very good job of poignantly discussing these issues and trying to present the other side of the story. I think they are equally passionate.

In some of the finest traditions of the Senate, this august body, this Chamber, is like an arena where maybe two great competitors come in, hash it out and fight it out. That is how the Senate is designed. It is almost like in the Bible, the Book of Proverbs, as iron sharpens iron, one man sharpens another. I just hope that is the process we are going through, that we are sharpening the other, that we are making this engine better and we are progressing as a people and as a nation.

I appreciate the Presiding Officer being here. It is the second night in a row the Senator has had the graveyard shift. Someone with your seniority, I am surprised to see down here two nights in a row. I know you are doing your duty for your colleagues and for your Nation. Certainly there are untold numbers of staff people who work for the various Senators, who work for the Senate itself, the Capitol Police, the C–SPAN team. I have been watching some of this at home or in my office and C–SPAN has done a great job. Periodically when a term will come up that may be unfamiliar to the viewers around the country, they will flash up a definition of that term, such as what a filibuster is, what a hold is, whatever the case may be. They have been taking this opportunity to use this as an instructional time for viewers back home to help understand their Government and help understand their Congress.

I thank the cloakroom staff on both sides. I could go down the long list. The stenographers are doing double duty. There are so many people who should be thanked for allowing this marathon to go on. It has put strains on people. I am very sensitive to the fact they have families they need to get home to and they have lives outside of what goes on here on Capitol Hill. I express a deep and sincere debt of gratitude to those people.

Let me talk about the judicial nomination process. Both my colleagues across the Chamber know I signed on to a letter with them this spring about trying to make this process work better. One thing I was concerned about in signing that letter is we might come to this point today where we would lock horns and have some gridlock on a few nominees. I hope we do not get to the point of gridlock overall in this process.

As to the numbers, since we have been here this Congress, I believe we have confirmed 68 of President Bush's nominees and 4 have been blocked. Last Congress, there were an additional 100, so I believe the grand total is 168.

We have seen a lot of charts with numbers and percentages, but I hope the whole process does not bog down. So the people around the country understand, we are talking only about a select few of the nominations, not the overall nomination process.

One thing I was concerned about and one reason we wrote that letter several months ago was because we wanted to try to make the nomination process better.

We want to try to make it more constructive and more productive. To me, a lot of that responsibility rests with the White House. We talked about that very briefly in that letter. I feel strongly that since the President, under the terms of the Constitution, is the one who begins the process of nominating, he and the White House staff need to try to get the Democratic and Republican leaders involved and sit down to try to work through some of these controversial nominations and try to figure out how we can do this better as we move forward.

One thing I am concerned about is we, around here in the Congress, particularly in the Senate, probably more than the House, are so focused on tradition and history and how things have been done in the past that it is human nature, I guess, that we oftentimes cannot put aside the things that happened in the past. Sometimes those things are perceived to have been ill-willed or for whatever reason perceived to have been unfair, unjust, whatever the case may be. Of course, I have said many times that I have a concern that in this judicial nomination process there is sort of partisanship and gamesmanship, and it is just counterproductive for the people.

So, again, I hope we can move forward. I want to try to continue to work with President Bush on his nominations. I believe I voted for 66 of his nominations of judges. In fact, I was talking to my staff the other day, and I said: Well, the people who are calling in about some of these controversial judgeships, what are they saying to you? They say they want Senator PRYOR to vote for candidate X, whoever that may be. The staffer will say: We appreciate your call. But we also want you to know he voted for 66 or 67 of President Bush's nominees. Invariably, the person on the other end of the line says: No, he hasn't. Because they are not hearing the other side of the story, that, again, we are only talking about a small percentage of the nominees who are not getting through.

If you look at the numbers and the percentages that President Bush has accomplished since he has been President, they are historically high numbers.

So I want to continue to work with the President and find that common ground. I believe we all have the constitutional responsibility to advise and consent on judicial nominations. Mostly what I am hearing on the other side—mostly—people believe the Senate should not be a rubberstamp. I think the vast majority of Senators believe the Senate should not be a rubberstamp and an automatic approval process for the President.

I think we have a responsibility to the Nation to look at these—again, the concept of iron sharpens iron, the President and the Senate sharpening each other, because he knows we will review and look very carefully at the nominations he puts forward. He puts

forward a higher quality nomination than if it was just a rubberstamp. That accountability is a positive thing for the people and for the Government. I take this responsibility seriously. I know all Members of the Senate do take their responsibility very seriously.

Another thing I wish to say is that when I look at judges I kind of have a criteria. I have kind of broken it down into four parts. We try to be consistent in our office when we look at these four factors.

One is just a starting point: Is the nominee qualified? Most of the people who make it through the committee are qualified. I think, again, there is a weeding out process there, but I start with the presumption that if they get to this stage in the process they are qualified.

The second thing I ask myself is, can they be fair and impartial? I think that is an extremely important criteria. Admittedly, it is somewhat subjective. Reasonable minds can differ about if someone can be fair and impartial, and reasonable minds do differ.

Again, that is one thing we get back to in the Senate. Someone like either of my two colleagues, who have spoken here in the last few minutes, who are so articulate and so good, they look at some of those nominees and there is no doubt in their minds, they are going to be fair and impartial. I look at them and I have some doubts. Again, that is how the process works. I am proud that their two States have sent them to the Senate. They are here to do their duty as God gives them the right to do it. I feel like I am here to do the same.

So reasonable minds can differ about being fair and impartial. But regardless of how you come out on the conclusion, that is one of the criteria I use. I think it is extremely important for a judge.

There is another, a third, element I look at; that is, has the nominee demonstrated an ability to exercise and to show the proper judicial temperament? For all the lawyers out there, and all the parties out there, if you have been in court before, you understand how important the judicial temperament can be in cases. Literally these judges oftentimes hold life or death in their hands for a criminal defendant. Or they may hold a business's solvency or whatever the case may be. It is very important. Their temperament oftentimes is determinative in how the case will come out. So again it is subjective, but I try to look at their judicial temperament.

Then the fourth criteria is sort of the elastic clause. The Constitution has an elastic clause, so part of my criteria is kind of an elastic standard—and I don't say standard but elastic consideration—and that is, are there other factors or other circumstances, when you look at these nominees, that should be considered? And, boy, that is just openended.

But I think, as Senators, we should consider the totality of the circumstances. We should look at these nominees in a historical context; it may be a social context; it may be something unique to that region or that State or that person. I think it is incumbent on us to look at those carefully.

Here again, it is subjective. Is that something you can really write down as criteria of how it is going to work in every single case? No. Maybe it should not be. Maybe it should be left elastic so it can be changed and be looked at from different perspectives with each particular nominee.

But regardless of that, I do take my role and my duties as a Senator very seriously. One of those roles that I believe very strongly about is the people of Arkansas sent me here to work with everybody else who is up here. If the people of this country want to elect George Bush as President, I am here to work with President Bush. Mississippi sends their set of Senators and Texas sends their set of Senators, and Massachusetts and California, and I believe my responsibility, as a Senator for Arkansas, is to work with who is here. That is what I have tried to do, and I will continue to try to do that.

One thing also we need to keep in mind is that these judicial nominations we are talking about today and that we always have under consideration here in the Senate are lifetime appointments. Only under extreme circumstances will these people be removed from office. It is very rare that happens in American history, but it can happen. But these are lifetime appointments.

I think it is critical that our judiciary is independent. I think that is the way our Founding Fathers set it up. We better get these nominees right on the front end because these people will serve for life.

Like I say, they hold justice in their hands. Their application of the law will be determinative for so many things during the course of their careers.

I think, simply put, people are entitled to know what nominees think. I think people are entitled to know about the qualifications. They need to have the assurance that these nominees under consideration by the Senate—the people need to have an assurance that if these people do put on the robe, do serve on the bench, that the integrity of the system will be there and that these people will do justice, as their responsibility requires.

I personally believe the people of America want a moderate and balanced approach. Personally, I think most Americans do not want to see the courts packed with judges with a conservative agenda or judges with a liberal agenda. I think most Americans want to see moderate, fairminded people on the bench. Because people understand that if you go into this with an agenda, then the courts will not be balanced and that judge and the court will have one dominant point of view. That is not good for our justice system.

I do think there has been a lot of discussion about some of these judges' records. Again, I think those are subject to interpretation. I am not going to try to get into all the particulars of those. We do not have time tonight, plus my colleagues, for the last several hours, the last 30-plus hours, have tried to do that. Many of them have done a very good job.

What I would like to do, if I can, is talk about one thing that does bother me, and that is the fact we are getting toward the end of our calendar year in the Senate and this is crunch time for the Congress to get its work done. In fact, right now our colleagues in the House, down the hall, basically are only meeting about 1 day a week, maybe 2, for votes because they have taken care of a lot of their legislative business—not all. They still have some things pending. But they have gotten theirs down to the point where they do not have to be in very many legislative days. In fact, a lot of what they are doing is waiting on us to accomplish and to finish our business.

Well, here we are spending 30-plus hours in a talkathon about these four judicial nominations that have been blocked. I think we need to keep it in perspective. Some of the Democrats have talked about 3 million jobs that have been lost in the last 3 years and what we are arguing about here are four judicial jobs. Well, that may be fair; that may not be. But I think there is some merit to that.

To keep it in perspective, 98 percent of President Bush's nominees have been confirmed. That is a pretty good percentage. You try to find another percentage like that in history, I am not sure you will find it. Also, when you look at Government and we look at anything involving human events, 98 percent is a pretty high percentage.

So again, I would encourage all of us to try to keep this in perspective. I heard one of my colleagues last night talk about 98 percent of this and 98 percent of that. In fact, it was Senator CHAMBLISS of Georgia. He had a very humorous monologue about that. But the truth is, 98 percent in politics and in Government is a pretty doggone good success rate. In fact, I would go so far as to say I am not sure anybody in Washington ever gets 100 percent of what they want. Most people are happy to get 50 percent of what they want, if they can just get that done.

But regardless of that, I think most people I talk to back home understand that judges are important, and they understand that it is important that we have an independent judiciary, but they also perceive that these four nominations are not urgent to the welfare of our Nation. So that causes me to question why we are doing this right now. If this is a big issue, can't we put it off until another time? But regardless, we find ourselves here. That is just where we are right now.

I want to talk about one other thing that is a concern to people all over the

Nation; that is, losing jobs in the manufacturing sector of our economy. It was announced the other day that one of the great companies in the world, I guess—Michigan-based Whirlpool—plans to move some of its refrigerator production, which is made in Fort Smith, AR—they plan to move those jobs from Fort Smith down to Mexico. Very sad news.

Jim Pickens, who was, until very recently, Arkansas' economic development director, said that it is clear that some of the 4,500 Whirlpool jobs in Fort Smith will go.

The problem with this is it is not an isolated incident. It is a trend. It is something to which we in the Senate should be devoting our time. It is something that folks back home are very concerned about, losing these manufacturing jobs.

One thing that is of particular concern in the Whirlpool case is it was just a few months ago—about a year ago—when Whirlpool made an announcement they were going to actually add 700 jobs in Fort Smith. Of course, there was a lot of excitement about that announcement. Now there is a lot of disappointment about what Whirlpool has decided to do. I am not saying this to be critical of Whirlpool, but I am saying to my colleagues instead of spending this much time on these four judicial positions, let's spend this much legislative time in trying to figure out how to save our manufacturing sector. Because I think long term when you look at what is good for technology and good for this Government, good for this country, saving those manufacturing jobs is probably more important than these four judgeships we are talking about.

Another thing that I must tell you I experienced today is I went to Walter Reed Hospital, the Army hospital here in the DC area, and talked to men and women who had come out of Iraq and Afghanistan. Very sobering, very serious. These are patriots of the first order. Some of them will have lifelong injuries due to their service to this country.

One thing that was emphasized with us over and over is that Iraq is a very dangerous place right now. There again, I hope, and I sincerely hope, the Senate will spend this much time in deliberation and in consideration of how we should move forward in Iraq and what that future looks like for Iraq.

Mr. President, it does not bother me to work late. This is the second night in a row that I have had a late night slot. But it does bother me a little bit that we may have lost some perspective in that we need to keep these other important issues in perspective. No question that our judiciary is important. That is our third branch of Government. But we also need to keep it in perspective.

Mr. President, may I inquire, how much time do I have remaining?

The PRESIDING OFFICER. Four and a half minutes.

Mr. PRYOR. How much time?

The PRESIDING OFFICER. Four and a half minutes.

Mr. PRYOR. Let me read part of a letter from Robert Caro. He is the man who wrote the Pulitzer Prize winning book, ''Master of the Senate.''

''Master of the Senate'' is the story of Lyndon Johnson when he was a Senator. In June of this year, Robert Caro wrote a letter, not to me, but to TRENT LOTT and CHRIS DODD, the two leaders of the Rules Committee.

Mr. President, I ask unanimous consent to print this letter in the RECORD.

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

ROBERT A. CARO,
June 3, 2003.

Hon. TRENT LOTT, Chairman,
Hon. CHRISTOPHER J. DODD, Ranking Member,
Senate Committee on Rules and Administration, Russell Senate Office Building, Washington, DC.

DEAR SENATORS LOTT AND DODD: Several members of the Senate have asked me whether my research on the history of the Senate sheds light on the current debate over the role of the Senate with respect to President Bush's judicial nominations.

Defining the right of extended debate is always tricky. If it is being used against you, it is a vicious weapon of obstruction, whose use in a democracy is unconscionable. If it is you who is using that weapon, it is a great one to have in your arsenal.

Many times in America's history, the right of extended debate has been used to defend causes with which I profoundly disagree. In Master of the Senate, I tried to show how it was a last-resort, but very effective, barrier thrown up in the most ignoble of causes: the continuation of racial segregation.

Nonetheless, great care should be taken in placing new restrictions on that right. Senators who are considering doing so should understand that they will be taking a step that has significant implications for the balance of powers created under the Constitution, and also for another very fundamental concern in a democracy: the balance between majority and minority rights.

The writings of the framers of the Constitution make clear that Senators, whether acting alone or in concert with like-minded colleagues, are entitled to use whatever means the Senate rules provide to vigorously contest a President's assertion of authority with which they strongly disagree. One could say, in fact, that under the fundamental concept of the Senate as envisioned by the founding fathers, it is not merely the right, but the duty of Senators to do that, no matter how popular the President or how strongly the public opinion polls of the moments support the President's stand on the issue involved.

I said in Chapter 1 of Master of the Senate that ''. . . in creating the new nation, its Founding Fathers, the Framers of its Constitution, gave its legislature . . . not only its own powers, specified and sweeping . . . but also powers designed to make the Congress independent of the President and to restrain and act as a check on his authority, [including] power to approve his appointments, even the appointments he made within his own Administration. . . . And the most potent of these restraining powers the Framers gave to the Senate. . . . The power to approve Presidential appointments was given to the Senate alone; a President could nominate and appoint ambassadors, Supreme Court Justices, and other officers of the United States, but only 'with the Advice and Consent of the Senate.'''

I also pointed out that ''the Framers wanted to check and restrain not only the people's rulers,'' but also the possibility that the majority will would be used, in Madison's words, ''to oppress the minority.'' The Framers, he said, established the Senate as the body ''first to protect the people against their rulers; secondly to protect the people against the transient impressions into which they themselves might be led. . . . The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch.'' The Constitutional Convention adopted the two-House Congress with almost no dissent.

To give the Senate strong protections from transient public passions or executive pressure, the Convention kept the Senate small so that it would have, again in Madison's words, less propensity ''to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.'' To make the Senate more stable, to keep it ''firm,'' and ''to insure their independency'' [Edmund Randolph], the Framers gave Senators terms three times as long as House members and half again as long as the President's. As a final layer of armor, only one-third of the Senate would be elected every two years, so that the Senate would change only gradually over time.

As I wrote, since the power of the President and the power of the people would be very strong under the Constitution, ''to enable the Senate to stand against these powers—to stand against them for centuries to come—the Framers of the Constitution made the Senate very strong.''

I have pointed out that one of the first acts of the Senate was to write the 1789 statute setting up the federal judiciary system. Sixteen years later, the Senate was called upon to preserve and protect the independence of that system by standing up to Thomas Jefferson, a popular President with a majority in both Houses. Jefferson wanted the Senate to help him tilt the Supreme Court in his own direction, by convicting Justice Samuel Chase after the House had impeached him on a party-line vote. Jefferson had more than enough of his own party members in the Senate to convict Chase, but enough Senators from *both* parties voted against the President to sustain the independence of the Judiciary from the Executive. As your colleague Senator Byrd said some two centuries later, ''The Senate exercised in that fine moment of drama the kind of independence, impartiality, fairness and courage that, from time to time over the years, it has brought to bear on the great issues of the country.'' The independent Senate had vindicated the Framers' hope that it would stand against the tyranny of presidential power and the tides of public opinion.

The Founders, in their wisdom, also gave the Senate the power to establish for itself the rules governing exercise of its powers. Unlike the unwieldy House, which had to adopt rules that inhibited debate, the Senate became the true deliberative body that the Framers had envisioned by maintaining the ability of its members to debate as long as necessary to reach a just result. For more than a century, the Senate required unanimous agreement to close off debate. The adoption of Rule XXII in 1917 allowed a two-thirds cloture vote on ''measures,'' but nominations were not brought under the rule until 1949.

In short, two centuries of history rebut any suggestion that either the language or the intent of the Constitution prohibits or

counsels against the use of extended debate to resist Presidential authority. To the contrary, the nation's Founders depended on the Senate's members to stand up to a popular and powerful president. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role, providing both advice and consent to the President. That shared authority was basic to the balance of powers among the branches.

Surrendering such authority is not something which should be done just because of a Senator's point of view on the particular issue of the moment—because much more than the particular issue is involved. What is a Senator—let us say a senator from small-population state without any other means of defense—votes to support an new limitation on debate today? What will he do in some future year when he is trying to stop a bill or a nomination that a bare majority of the Senate supports, but that he and 40 colleagues believe will be terribly detrimental to their states or to the nation—an action that he feels a few members of the senate may change their view about if only he has enough time to explain the full consequences to them and to the public? What will he feel when he suddenly realizes that his right to hold the senate floor against that action has been so greatly reduced that the bare majority can silence him before he is finished making his case? What will he do when he realizes that, without the right of extended debate, his cause is ultimately helpless?

I am not attempting to say that the right of extended debate should not be modified. I am, however, attempting to say as strongly as I can, that in considering any modification Senators should realize that they are dealing not with the particular dispute of the moment, but with the fundamental character of the Senate of the United States, and with the deeper issue of the balance between majority and minority rights.

As I told a group of Senators last month, you need only look at what happened when the Senate gradually surrendered more and more its power over international affairs to learn the lesson that once you surrender power, you never get it back.

Respectfully,

ROBERT A. CARO.

Mr. PRYOR. Mr. President, basically what Robert Caro points out in this letter is:

Several members of the Senate have asked me whether my research on the history of the Senate sheds light on the current debate over the role of the Senate with respect to President Bush's judicial nominations.

Defining the right of extended debate is always tricky. If it is being used against you, it is a vicious weapon of obstruction whose use in a democracy is unconscionable. If it is you who is using that weapon, it is a great one to have in your arsenal.

I think right there we see the tension Mr. Caro captured so well in his book, but here again he has captured it and framed up the issue very well for us. The right of the filibuster or unlimited debate is something that is viewed very differently, depending which side of the filibuster you are on.

It has historically in this country been used time and time again for almost everything under the Sun—sometimes successfully, sometimes not successfully. One thing he talks about is:

Nonetheless, great care should be taken in placing new restrictions on that right. Senators who are considering doing so should understand that they will be taking a step that has significant implications for the balance of powers created under the Constitution, and also for another very fundamental concern in a democracy: the balance between majority and minority rights.

I have no doubt some of my colleagues on the Republican side genuinely feel the Democrats are out of line in using the filibuster in this context. Also, I have no doubt many of my colleagues on the Democratic side feel we are perfectly within our rights to use the filibuster. Here again, I encourage my colleagues to look at this letter from Robert Caro dated June 3, 2003, which brings a historical—not a political, not a partisan, but a historical—perspective to what we are talking about tonight and what we will be voting on in the morning.

Again, I thank all my colleagues for being here. It is late-night duty. It is not easy. The staff has just done a fantastic job. My legislative director, Walter Pryor, has been with me every step of the way. I know he would like to get some normalcy back in his life, as do so many of us.

Has my time expired, Mr. President?

The PRESIDING OFFICER. The Senator has 40 seconds.

Mr. PRYOR. Mr. President, again, I thank you and thank my colleagues on both sides of the aisle for all their hard work in bringing these issues to the forefront. I see my colleague from Rhode Island, Senator REED, walk in. We went to Walter Reed Hospital today. I know he has had a long day. I look forward to listening to his remarks.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM of South Carolina. Mr. President, I wish to acknowledge Senator PRYOR's commitment to moving this process forward. He did write a letter a while back trying to find a way to better handle the problems we are having with judges. I think he has a very good heart about this. I respect him as a person. He has truly become a friend.

With that kind of attitude, maybe we will find a way out of this down the road. Right now, unfortunately, we are stuck in the quicksand, not mud. The more we fight each other, the deeper into it we get. The atmosphere in the Senate right now about judges I think has taken a turn for the worse.

There are probably many things one can point to in the past on the Republican side. I am not here to defend the past. I am here to talk about the future, and we have to deal with the present. Here is what about the present bothers me the most.

There is an effort to filibuster judges in a way that has never occurred before in the history of the country. I think it is very unhealthy and constitutionally impermissible and will only be answered in kind. We are going to set the future course of the Senate down a road where it will be hard to get good men and women to apply. Let me tell you why I think they will not apply.

I read a fundraising e-mail that concerned Charles Pickering. As one can tell when I spoke, it bothered me greatly what they are trying to do to Judge Pickering because I come from the South. I know how easy it is to be associated with the sins of the past, to be, for lack of a better word, sometimes stereotyped. Here are the accusations in the e-mail:

Why must the Democrats continue their fight against Charles Pickering? While in law school, Mr. Pickering wrote an article suggesting ways Mississippi can better enforce its ban on interracial marriage.

That statement clearly tries to make the reader believe this is a person who has supported interracial marriage bans and is racially insensitive. I ask the country to look at it in these terms. He was unanimously confirmed by this body 12 years ago. Not one person objected. I can't believe the whole body was asleep at the switch and this law school article was not known. He didn't advocate the ban on interracial marriage. It was under attack, and he wrote a scholarly dissertation about it.

If you believe what the statement says, the entire Senate either didn't know about this or ignored it because the entire Senate unanimously approved Judge Pickering 12 years ago, long after he got out of law school, to sit on the Federal bench as a district court judge.

The second point:

As a State senator in the 1970s, Mr. Pickering worked to repeal important provisions of the Voter Rights Act.

The reader of this e-mail who is being asked to give money to help Democrats fight President Bush's nominees—what is the message you are trying to convey to the reader of this e-mail? That yet again in the 1970s this same person, while holding public office in Mississippi was working to undermine laws that protected African Americans in the State of Mississippi. There is no other fair interpretation of why that is in this e-mail and trying to cast him in that light.

Again, it is beyond my understanding and real belief, if that were true, if this man used his office in Mississippi in 1960 to undermine the Voting Rights Act, that this body 12 years ago would have unanimously approved him to be a district court judge.

I believe these two statements were designed to emotionally charge the reader and to unfairly label Judge Pickering in a way that is not deserved and flies in the face of the fact that the Senate confirmed him unanimously 12 years ago.

The last point:

In 1994, he went out of his way to seek a more lenient sentence for a convicted cross burner.

My colleague from Minnesota very eloquently spoke about that case. I am on the Judiciary Committee. When I heard that accusation, it really did pique my interest. I wondered what was going on because none of us want a judge who is going to be sympathetic to such a horrible crime.

Here is what actually happened. There were three defendants, not two—three defendants. The ringleader and the second oldest man, I believe, received a probationary sentence. The youngest of the three was charged with a crime of arson.

What this judge did is he looked at the way the prosecutor handled three defendants, and he said: That is not fair. You are letting two of the worst guys go and impounding the youngest guy.

That is what I want a judge to do. I want a judge to make sure the people who come before his court are treated in an apportioned manner.

The third person, the youngest one, was given a speech and a lecture by Judge Pickering about the act of cross burning that should make us all very proud. The youngest defendant went to jail, but his sentence was adjusted in light of what happened to the other two people who basically got away with it because the prosecutor did a deal I don't understand myself.

I do understand why Judge Pickering wanted to adjust the sentence, but if you listened to the words and read the transcript, he didn't go out of his way to do anything other than to make the sentences apportioned. He went out of his way to let the defendant know what a sleazy person he was by engaging in this activity, but he brought balance to the people before him.

The reason I keep talking about this situation and Justice Brown is I am trying to let the record reflect for future review that I believe very sincerely these judicial nominees are having a tremendous hatchet job done on their lives. They are trying to make up reasons to justify a filibuster, and there is no good reason to have a filibuster.

Senator PRYOR is a very fairminded person. If he disagrees with me about Judge Pickering or anybody else, that is just life; he is right. All I am asking him and other Senators to do is to follow the Constitution, and the advice and consent clause for the entire history of the country when it comes to judges has been interpreted in a manner that the majority of the Senate will advise and consent, not a minority.

What is happening to these four people—and we will talk more about the others—is very unhealthy for the country. The reason I say that is they are taking statements and articles, speeches, and letters to their church out of context, and liberal special interest groups are trying to oppose conservatives coming on the bench in an unfair way.

These four individuals' lives have been distorted. That is what bothers me the most. If you don't like their philosophy, vote them up, vote them down, just vote, is the saying. If we continue what we are doing today into the future, no reasonable person is going to feel good about wanting to go on to the Federal bench given what is happening to these people, and that will be a huge loss to the country.

The process we are engaged in today has no upside; it only has downsides, and the downsides I think are extremely dire for the country. Not only are you going to drive good people away because nobody is going to want to go through this—and I assure you it will be answered in kind, and that is sad because I know politics.

The other downside is special interest groups, liberal or conservative, are going to have more power than they deserve over individual lives because all they need to do is get 41 votes.

Special interest politics is part of our political landscape. The Constitution has checks and balances against each branch. One of the checks and balances I like the most about the way the judicial nominating process works is if a majority of us feel a person is qualified, they get to sit on the bench.

Please, let's not as a group empower special interest groups to the point that 41 of us can stop somebody from sitting on the bench because we will have rewritten the Constitution, not only in its letter but its spirit.

I end with this. Federalist Paper No. 66 has the following comment:

> It will be the Office of the President to nominate and, with the advice and consent of the Senate, to appoint. There will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the executive and oblige him to make another, but they cannot themselves choose. They can only gratify or reject the choice of the President.

For the sake of the future of law in this country, for the sake of the future of the Senate, let's not let a small group make it impossible for good people to serve.

I yield the rest of the time to my good friend from Kansas, whom I have known since I have been in politics at the Federal level, Senator BROWNBACK.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. Mr. President, I appreciate my colleague from South Carolina carrying the comments and the load for several hours in the early morning as we approach 4:15 in the morning. We are talking about something of great importance. He has real wisdom in his words, too, about the point that the process on which we are embarked has no upside to it. When you have good people, qualified people blocked from the Federal bench not by majority vote but by filibuster, you are headed down a bad path. This bad path doesn't have a good ending.

We will continue to have division in this body. I don't doubt we can be blocked on these for some time, but that is certainly going to carry over into the next election cycle, and this doesn't have an upside to it. Plus, we have good people waiting. We have people who are qualified and are not going to be serving on the Federal bench.

We have a lot of hurt feelings. We have a lot of accusations made without truth. We have harsh words, harsh comments, and that all leads to a downward cycle. There isn't an up cycle here.

I wish to take a few minutes to describe why I think we got to this point. We didn't used to be here. We have approved people of strong judicial opinions in recent times. They have generally been from the left, and those have been approved during the Clinton years.

Lord knows we are talking about circuit court nominees now. What if we got a Supreme Court nominee? Does the body get tied up for 2 years? We have actually had one Supreme Court Justice who has been filibustered in the past.

Why did we get to this point? It used to be if people had a litmus test on candidates, that was seen as a terrible thing and they were castigated. I don't know if the Presiding Officer or others remember when Ronald Reagan was accused of having a litmus test. That was just a horrible thing. His administration denied it. They didn't put forward people under a litmus test, and we were moving forward.

Now people are being subject to a litmus test. They are being blocked. They are qualified, and they are being stopped. How did we get to this point? I want to take a shot at that and develop it from the standpoint of a case that is currently before the Supreme Court. It is the case of Michael A. Newdow v. The U.S. Congress, United States of America, George W. Bush, President of the United States, State of California, Elk Grove Unified School District. That would be the operative group in the Newdow case, the flag suit case. It is the case most people are familiar with where the Ninth Circuit Court of Appeals determined it was unconstitutional for our children in school to say the Pledge of Allegiance. The reason it is unconstitutional is because of something Dwight Eisenhower signed into law when he was President of the United States in 1954, and that is where the Congress of the United States added the phrase: ''One Nation under God.''

That phrase was so offensive to Mr. Newdow or his child who was in the school that he said: I can't stand this any longer. He was joined by some other people and took this case to the Court.

The Ninth Circuit said you are right. You should not have to. This is not right for our children to say one nation under God. That evoked quite a comment across the country. It evoked quite a comment by this body. I believe this body voted 99 to 0 to say that the flag salute is right; we should say this; it should be allowed by our children.

There were a lot of protestations and the people commented that it was terrible that the Ninth Circuit would be so out of whack, so lacking of mainstream thought, so out of context and touch with the American public that they would rule against something that 98 percent of the American public is for, the flag salute.

The problem with the public outpouring on Newdow and the problem facing the Supreme Court now on this Newdow case is that they were following precedence being developed over a period of 40 years, that the Supreme Court, circuit courts, and others had been working for a period of 40 years to remove the recognition of a higher moral authority from the public square. They were saying this is something we do not want in the public square.

It started in 1962 that these series of cases is built upon. In 1962, Engel v. Vitale was the case that really started this whole string going. That was when our children were allowed to say a prayer at the beginning of the schoolday, and Engel v. Vitale said that was unconstitutional. It was followed by School District of Abington Township v. Schempp. There the Court held that the Bible readings in public school also violated the first amendment. It was followed, in 1992, by Lee v. Weisman, a case about prayer that was being held at a graduation exercise. The Court held that was unconstitutional. It was followed, in 2000, by Santa Fe Independent School District v. Doe where prayer was being removed from being said at a football game. That is followed by the Newdow case now before the Court. I predict it will be followed by a case that will call for this body to remove ''In God we trust'' off the mantle that is here. I predict it will be followed by a case that will call on us to remove off of our money any reference to a higher moral authority, ''In God we trust'' being taken off of the back of the one dollar bill. It will follow, follow, follow.

Well, people do not agree with that. Massive amounts of people in this country do not agree with that. People have mounted up now. Actually, some people do agree. Some people say, yes, we should remove the recognition of some higher moral authority, of God, from the public square. So we are engaged in this great ideological fight.

I contend that this battle, this fight, of blocking these justices started about 40 years ago. Some of us participating in this form of debate feel as if the last couple of days have been along that 40-year line. What we are seeing is the courts injecting itself here into a societal issue that many people feel deeply about and immersing itself in this. Then both sides get fired up and we get good people such as Charles Pickering and Priscilla Owen and others—particularly a guy like Charles Pickering. He is probably the most instructive of the cases here.

We have gone through ad nauseam his qualifications, but I want to make this point of him: First in his law school class, highest rating by Martindale Hubbell, unanimously approved by the Senate for a district court judge in 1990, affirmed on appeals 99.5 percent of the time, reversed only 26 times out of approximately 5,300 cases, received the ABA, the American Bar Association, highest rating, well qualified.

So what is the problem with this picture? Mr. Pickering was president of the Southern Baptist Convention for Mississippi, so he is a man of faith. As such, when we have these 40 years of cases coming up that say we have to remove God from the public square and run into a guy such as Charles Pickering who says, I will uphold the law—and he has upheld the law because, if he had not, he would have been overturned many more times—he says I will uphold the law but I really think this line of cases and some of these discovered rights the court has done in just these last 40 years, I think they are wrong personally. I disagree with these. I will uphold the cases. But they run into people who are saying we are trying to remove God from the public square and we are going to try to remove people who believe in God from serving in the public square.

You run into this clash, and you get this great clash in the civilization and you get this great clash in the culture. Now you have the courts injecting themselves in a great culture conflict that we are involved in in this country today. One of the key division issues in our country today is issues of culture. People ask what is that?

Culture, it is difficult to say what that is, but people are concerned about it. There is not a company in this country that is not deeply concerned about its corporate culture. There is not a family in this country who is not concerned about its family's culture. There is now in the country itself concern about what its culture is going to be.

The central issue is, are you going to recognize a higher moral authority or not? Is the motto ''in God we trust'' true or not? You get a guy qualified such as this who would say, yes, that motto is true. I believe it to be true. I will uphold the laws as ruled to date, but I do believe this motto is true. And it runs right smack into this series of cases and we are going to see it front and center again in Newdow. We will see it again and again.

That is the problem actually with this, because it divides us on something that should not. It divides us on something that should unite us. It divides us in a way that I do not think is healthy for the country. I do not think this is good at all. I think it divides us on something that as a policy matter is not good and that is why I think it is also bad politics when this happens. I think bad policy is bad politics. That is why we have this level of fighting today. That is why I am speaking on the floor of the Senate at about 4:30 in the morning.

We are going to continue to have this fight. Regardless of the vote that we take later this morning, how it takes place, probably really regardless of the dispensation of these four and future ones coming on, this is the cultural clash that we have. It is not healthy but it is going to continue.

Mr. SANTORUM. Would the Senator from Kansas yield for a question?

Mr. BROWNBACK. I would be happy to yield for a question.

Mr. SANTORUM. Mr. President, the Senator from Kansas points out that Judge Pickering, who is a sitting Federal court judge right now, was affirmed in 99.5 percent of his cases. What I have heard from the other side is that we do not want these judges out of the mainstream being nominated.

Now, would the Senator from Kansas say that someone who has been affirmed or not appealed in 99.5 percent of the cases since he has been on the Federal court is someone out of the mainstream?

Mr. BROWNBACK. Mr. President, the number speaks for itself. Absolutely, this is a mainstream judge. When you get approved on that percentage of your cases that you have ruled on—remember, this is at the district court level, so he is both finding fact and applying law. You have to be a really good judge, if you are going to be upheld by people reviewing you 99.5 percent of the time on both facts, that means there is wisdom there, and law, which means he is applying it correctly.

Mr. SANTORUM. I would ask the Senator from Kansas if he would look at maybe what the Senator from New York, Mr. SCHUMER, said yesterday he considers a mainstream judge. He referenced the Ninth Circuit and some of the judges that President Clinton nominated and were unanimously supported by Members on the other side of the aisle, a judge such as Richard Paez who was involved in the case the Senator just spoke of, the ''under God'' case in the pledge, who went in and tried to hold up the California election, ruled unconstitutional the California three strikes and you are out. This is a man that has been overturned—in fact the Ninth Circuit, with a majority of Democrat nominees, has been overturned more than any other circuit.

Is that group of judges mainstream in the Senator's opinion?

Mr. BROWNBACK. It is not mainstream.

The PRESIDING OFFICER. The majority's time has expired.

The Senator from Rhode Island.

Mr. REED. Mr. President. Once again, we are engaged in the early hours of the morning in a discussion about judges and the role of the Senate, and our role is stark. We have the responsibility under the U.S. Constitution to give advice and consent to the nominations of the President of the United States, not advice and approval, not just advice, but advice and consent. That requires the Senate to take a very active role in reviewing the qualifications of nominees who come before us and making judgments about their ability to serve as members of the Federal judiciary.

We take that seriously. I think that responsibility implies that at times we have to disagree with the President. It

is not unusual that such disagreements take place. This whole debate, I believe, might begin and end with a very simple statement of fact, 168 to 4. One hundred sixty-eight of President Bush's nominees have been reviewed by this Senate and have been confirmed. Four have not. It suggests to me that the Senate is properly discharging its responsibilities to advise and consent with respect to the nominees of the President to the Federal judiciary.

In fact, of those 168 individuals, they represent, I would suspect, jurists who have a conservative outlook, probably a different outlook than I have, on certain issues. Yet they represent both in terms of their conduct personally, but just as importantly their judicial temperament and their judicial philosophy, individuals who uphold the tradition of the Federal judiciary at the level of the district and circuit court individuals who follow law, not try to make it, who do not impose their views on the case before them but, in fact, follow precedence, who follow the guidance of the Constitution and the Congress in establishing the law.

It is in those cases and the very few cases, 4 out of 168, where there seems to be a record of ideological commitment rather than legal scholarship, of political—with a small p—interest, rather than a judicial temperament that is fair and balanced, that the President's nominees have not passed the test.

An example of this is the comment I made in May of 2003 when I contrasted the nomination of Judge Edward Prado to the pending nomination of the Texas Justice Priscilla Owen. Judge Prado served 19 years on the United States district court. He is someone who has a record of fairness and evenhandedness. I would suspect, since he is a nominee of President Bush, that he has a conservative outlook in his approach to cases. But he is an appropriate judge. He follows precedence. He does not insert his particular philosophy, his particular ideology, into the cases before him. As a result, he was confirmed, an example of the 168 judges who have been confirmed by this Senate on behalf of President Bush.

The four who did not pass the test were those whose record suggested that they were not evenhanded, they were not balanced; that indeed they inserted political or ideological bias in the conduct of their decisions. In that case, I think it is not only appropriate but it is our responsibility, as the constitutional body entrusted with advice and consent, to register our consent and to register our protest. And we have.

This is not an unusual circumstance in the history of this Senate and of this country. There have been instances several times when Republicans have used the device of cloture votes and filibusters to express their concern about the qualifications or quality of a judicial nominee. It goes back many years, and it certainly continued into the administration of President Clinton. Abe Fortas, whose nomination as Chief Justice of the Supreme Court of the United States was subject to cloture votes, was subject to attempted filibusters by the Republicans. So were Rosemary Barkett and Stephen Breyer as a judicial nominee for the circuit court. Justice Breyer is now a member of the U.S. Supreme Court. In fact, I was here yesterday morning and listened to my colleague, the junior Senator from Missouri, talk about how Justice Breyer was at a conference he was attending and how he was articulate and appropriate, and might not be someone he philosophically agreed with but that he was a good judge—but Justice Breyer was the subject of cloture motions and a filibuster.

Mr. SANTORUM. Would the Senator from Rhode Island yield for a question on that?

Mr. REED. Could I just continue?

Mr. SANTORUM. Certainly.

Mr. REED. He was subject to a filibuster and subject to cloture votes before he was ultimately confirmed, and then ultimately went on to the U.S. Supreme Court.

So this is not a procedure or a device that has not been used by the Republicans, because, in fact, it is part—indeed, a significant part—of the procedural devices of the Senate, something that is appropriate.

As I pointed out yesterday, what I find disconcerting and indeed somewhat contradictory to the argument of the Republicans today is that they were quite adept during the Clinton administration of using delay and denial of hearings to frustrate the nominations of so many individuals, so many potential judges, because many of these individuals never even reached the floor of the Senate for a vote. It was, in my words, a pocket veto.

We are all familiar with the notion of a pocket veto. The President of the United States, in the last 10 days of a session, can simply put the bill in his pocket, not sign it, not comment on it, and it essentially dies as legislation. Well, that was done all too often in the Clinton administration.

The most significant case is the one I mentioned before. In fact, the Senator from Pennsylvania and I yesterday had a bit of a colloquy about this. That is a nominee, Elena Kagan, who was nominated in 1999, spent 18 months waiting for approval, no action was taken, and her nomination expired. Fortunately for Ms. Kagan, she has found other employment. She is now the dean of Harvard Law School, which might suggest that she certainly had some legal abilities that could have been used on the Federal bench. But that is an example of a pocket veto.

Again, we are engaged in this discussion, this debate. It is a serious one, but it is taking place at a time when there are other very serious issues pressing this country. As my colleague from Nevada, Senator HARRY REID, pointed out in his long floor statement preceding this debate, that as we worry about four individuals who have not yet been confirmed, other Americans are seeing their jobs undercut. We are looking at unemployment rates of about 6.0 percent. They are hovering there. They seem to be persistent. Long-term unemployment is growing. It is becoming increasingly difficult for people to maintain their employment with good, solid jobs. We see the poverty rate going up. Meanwhile, the vacancies on the Federal courts have diminished significantly. We are at almost record levels of Federal judicial employment. But as we look at the people throughout this country, the poverty rate is growing. It is affecting children particularly. The rate of the uninsured, or people lacking health insurance, is increasing. Our budget deficit is soaring. The national debt is soaring. These are difficult issues, and yet we are here today talking about 4 individuals, out of 172, who have not been confirmed as judges and not been confirmed based, I think, on sound analysis and sound review of their records.

So I think, again, to place this in context, we are performing our historic responsibilities that have been used and deployed by countless other Senates, both by Republicans and Democrats, throughout the course of this country's history. And indeed I think that is our responsibility and we are doing it.

What I regret, and I hope after the conclusion of the votes this morning we can get back to, is critical business such as how do we expand economic opportunity in this country? How do we reinvigorate our manufacturing base, which is eroding dramatically? How do we give working families additional resources by raising the minimum wage? That would be something that would be very beneficial to millions of Americans. Can we pass good legislation that allows us to continue to invest in our infrastructure, in our highways, in our roads? And then in international affairs, how do we come to grips with the increasing crisis overseas in Iraq, a crisis that sees our soldiers, marines, airmen, and sailors each day engaged in conflict over there in a very difficult insurgency?

As Senator PRYOR mentioned, yesterday several of us had the opportunity to go up to Walter Reed Army Hospital. I have been there a few times over the last several months and have seen a Rhode Island military police unit, National Guard, assigned to Baghdad. They have suffered, unfortunately, casualties. To go there and see these young men, to see them having suffered, having served so magnificently, it makes you wonder why we are spending so much time on this debate, and not more time talking about the way ahead in Iraq, not talking about other situations of international concern.

I find it startling just a few days ago the Central Intelligence Agency released a report concluding the North Koreans likely have several nuclear devices and likely will be able to deploy

those devices without testing. That they have apparently mastered a technological means to circumvent testing is startling, in fact, horrific information, but this is being lost in the shuffle with the Iraq situation. This is a fact that is startling and is pressing on our national security and our future security.

But there is no extended debate on North Korean policy. There is no extended debate on the way ahead in Iraq. We have committed ourselves as a nation to a course of conduct that requires sacrifice, and yet we are not fully coming to grips with the nature of that sacrifice and what we should do.

For many of these reasons, although this debate is certainly appropriate—that is one of the great things about the Senate, you can talk of the issues of the moment, the issues of the time, but certainly there are so many more pressing issues, so many more critical issues to the future of this country and to the future of America's families the continued obsession with this topic does disservice.

Mr. SANTORUM. We have had debates in the past and I would like to ask the Senator from Rhode Island this question, and I am posing a hypothetical. Assume that, and I am sure some in this country would like to see this happen, in the next election President Bush is overwhelmingly defeated at the polls, after his defeat at the polls in November, President Bush nominates a judge to a circuit court after the election, and that the Senate happens to be in a lame-duck session after the election. He would nominate a judge to the circuit court. Let's also assume when President Bush gets defeated, not only does he get defeated but the Republicans lose control of the Senate. It is a huge win by the Democrats. Assume all that happens.

President Bush, in the face of that, comes out after the election, nominates a judge to the circuit court and the Republicans jam that person through committee, get him to the floor and try to move a vote on that nomination to confirm him prior to the end when the Republicans would lose control and a new Democrat President is in place. Does the Senator believe your side of the aisle would confirm that nominee like that?

Mr. REED. Reclaiming my time, I like your hypothetical. I like the context.

Mr. SANTORUM. I thought this would be an interesting example.

Mr. REED. I think you are being overly generous. I like to believe if the nominee was of the quality to serve on the Federal bench as a circuit judge, he or she would be approved, which is the rule that applies so far to 168 of the nominees of President Bush.

I do say quite sincerely that, indeed, if someone was nominated by a President who did not measure up to those standards, the 168 judges who have been affirmed, they would not be voted in because they lack ability, skill, or judicial temperament, or the other criteria, and they would be opposed.

Again, the record suggests that in dealing with President Bush's nominees, 168 have been confirmed. I suspect all of them are more conservative than any nominee suggested by President Clinton. All of them are individuals who, had a Democratic President been in office, would not have been nominated. That is the nature of the nomination process. Nonetheless, they were confirmed.

Now, the last 2 days of a legislative session, with a change of power, et cetera, that introduces a unique aspect.

Mr. SANTORUM. Do you believe anyone on your side of the aisle would try to block or attempt to filibuster given the unique nature of that circumstance?

Mr. REED. There might be an attempt to do that, but your question to me is, what do I believe. Maybe this is an expression of my beliefs. I would like to think that, as in the case of 98 percent of President Bush's nominees, they would receive not only careful review but ultimately confirmation.

Mr. SANTORUM. I ask the Senator two more points quickly. A nominee in November, to be confirmed within 3 or 4 weeks, the Senator would agree a careful review would be very difficult during that period.

Mr. REED. I think the Senator is trying to refer to the more philosophical than pragmatic logistics. The reality is if someone, either someone who is a sitting judge or otherwise, was nominated——

Mr. SANTORUM. Even assuming it was not a sitting judge.

Mr. REED. Nominated in November, simply the FBI, background checks, the questionnaires, reviews, all those things, take time. In fact, the reaction, frankly, if any President did that, President Bush or President X or President Y did that, the public reaction would be very adverse, regardless of the Senate. I would like to move on.

Mr. SANTORUM. The final point is, Justice Pryor, 1980, nominated by Jimmy Carter after the November election in 1980. The President's party lost the election, the Democrats lost the Senate, he was nominated after the election and was brought to the floor with no judicial experience, and the Republicans, who then took control of the Senate in 1980, were asked to confirm him.

What did the Republicans do? There were some on our side, I think the Senator can understand in response to the question, who said we should filibuster because we do not have the time to read his record, he has no judicial experience, but the Republican leader who was going to be the majority leader pushed his side not to filibuster, and moved him through. It was Justice Breyer.

Mr. REED. My point was Justice Breyer was subject to a cloture vote, subject to a procedure that is being used here.

Mr. SANTORUM. Under extraordinary circumstance, I think the Senator from Rhode Island would admit.

Mr. REED. Let me reclaim my time. The circumstances might have been extraordinary but, again, this was an example of Republicans using the device of cloture votes, of threatened filibuster, of extended debate, to make a point that they felt uncomfortable with a judicial nomination. That is the principle.

There is no special rule for the last 20 days of a session. There is no special rule that says that is when the filibuster is OK. There were sincere, well-meaning Senators, Republican Senators, who felt that because they did not have a chance to evaluate his record or because they felt his record was too liberal, they needed to do what they did. Justice Breyer, in fact, was well known to every person in this body. He had been the counsel to the Senate Judiciary Committee, and worked for Senator KENNEDY on the deregulation of the airline industry. He was someone who had personal knowledge of every Senator in this body at the time.

So this was not a question of who is this person. This was a question of some people expressing their sincere belief that because of his judicial philosophy, because of his temperament, because of the way he conducted himself, the Senate should not go forward in this automatic fashion.

The point remains the same. This notion of the unprecedented, unconstitutional, un-American use of cloture votes and filibuster is quite wrong. It has been used before by both sides.

The question must be back to the original hypothetical posed by the Senator from Pennsylvania, What is the criteria we are using. I urge that criteria has to be based upon a careful review of the conduct and temperament of the nominee. That is a better construct of the individual. Is this person someone who recognizes the careful balancing a judge must perform daily? Is this someone who, although he has very strong beliefs, strong ideas about the way the law should be interpreted, respects the fact that as a circuit judge or a district judge he or she has to follow precedent? Is this someone who does not try to impose their views on the law but tries to faithfully judge based on the law? That is the issue. That is the issue of all of these nominees, and 168 of President Bush's nominees have passed that test with flying colors. Four have not. That, I believe, is what we have to focus on.

Once again, as we move forward—and this is an appropriate debate, this is one of the virtues, the glories of the Senate. We can stand here at 4:50 in the morning and talk about great issues that affect this great country. However, this is not the only issue. I would say there are so many more pressing issues. We will conclude this extended

debate this morning. We will vote, and then we have the responsibility of getting back to some very critical business the business of this economy, of this country, both here and across the globe.

There is one issue among many issues we have to be particularly concerned about and that is the issue of our long-term economic vitality. We have a situation in the country where we are losing jobs left and right. We are particularly vulnerable to the loss of manufacturing jobs. Under the Clinton administration, in a huge jobs growth of the late 1990s, we saw an increase of 257,000 manufacturing jobs. Now we are seeing a contraction of employment generally, and particularly in manufacturing. We have lost about 2.45 million jobs in manufacturing. We have to do something. I hope we can.

So far we have not taken action aggressively or as aggressively as we should. What we have seen in many respects is our manufacturing sector are jobs being lured overseas by lower wages, poor environmental quality standards, very little in the way of labor rights. It is attractive to employment. We have to do something about it. We operate in a context of international trade rules where we cannot simply put up a wall of tariffs around our country, so we have to be more creative and innovative. One of the problems that inhibits our creativity and our innovation is the fact that to help manufacturing concerns we have to provide some resources, in terms of manufacturing tax credits, in terms of a solution or at least progress when it comes to the issue of health care costs to companies throughout this country, which is probably one of the key problems facing every business enterprise in this Nation. That does not come cheap. When you look as it as we are, not only erosion of jobs but an erosion of the Federal budget moving in this administration from a surplus projected to be in the trillions of dollars over a decade, to deficits which are equally now being projected into the trillions of dollars, it constrains our ability to respond to these issues, to provide some type of benefits to alleviate the cost of health care for the manufacturing sector, to provide incentives for manufacturing, to provide tax credits and other programs so we can help manufacturing companies particularly deal with environmental concerns.

One of the consistent complaints I get in Rhode Island is it is not fair, Senator, I have to abide by very strenuous rules on environmental emissions, yet I see competitors in China and other countries spewing smoke out of their smokestacks and pouring solids into the wastewater streams. I cannot do that.

In fact, up my way, the manufacturers have been zealous in protecting the environment. But they are in a terrible dilemma. How do we help them? We could provide tax credits for environmental improvements. But again that costs money. It costs something else, too. It costs the time and attention of this Senate on this issue. It costs the same time we are spending to talk about judges to invest in the future of our economy and the future of this Nation. I hope we can spend the time.

We have seen over the course of the last several years an economy that is beginning to at least show some signs of life, but we are not back yet by a long shot. There is a real fear we are leaving millions behind, a real fear in parts of this country that those jobs that were there 3 years ago, particularly in manufacturing, have not only been lost temporarily but have been lost forever. That goes not just to the individual families that have been affected, it goes to the fabric of the lives of those families.

When a manufacturing plants closes, it is not just a sad day in the lives of the workers, it is a community feeling a loss. We are seeing too much of that.

We have not only this challenge, we have the challenge of the tumultuous world. Again, when we look at the requirements and demands on our economy, and the requirements and demands of protecting ourselves internationally, we have to ask ourselves where are we going to get the resources, given the budget, to fund our military? To provide the resources to conduct a very expansive and aggressive foreign policy?

Just a few days ago this body voted $87 billion for reconstruction of Iraq. That is $87 billion in the context of a deficit in which we are spending money literally we do not have. I am sure that will not be the last time we consider additional resources for Iraq, Afghanistan, and other countries. Yet we are not doing those things we need to do to ensure fully that our nation is entirely protected.

So we have serious challenges before us. I hope again at the conclusion of this very extensive debate and at the conclusion of these votes this morning, we can get back to that critical business. Interestingly enough, we interrupted Senate proceedings at a juncture where we were ready to pass the HUD–VA appropriations bill to get on to the discussion of these judges. At that point, we were considering how we could strengthen further, increase further, the resources going to our Veterans Administration. That is another area of concern I have and I am sure we all have. We have to make sure those young Americans who are today struggling—and the fact those young Americans I visited yesterday who are being sent literally from Walter Reed Army Hospital to a VA facility, many of them amputees because of the nature of the conflict in Iraq that 5 years, 10 years from now they have the same quality of services they are getting today.

That is a challenge. And it is a challenge we cannot meet unless we focus our attention and our time and our effort on this bill. That was the very bill we left to come on to this discussion of judges.

How much time remains?

The PRESIDING OFFICER. The Senator's time has expired.

Mr. REED. I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, before I resume debate on the judicial nominations, all this talk about not having done work on the economy ignores the fact this Senate early this year passed a jobs and growth package that is working—7.2 percent growth in the last quarter. A lot of people, maybe some, may be upset we are having great economic growth and 300,000 jobs have been created.

As this chart shows, we are now in the most jobs in the history of America, 138 million people. See the signs of doom and gloom and 6 percent unemployment that 10 years ago would have been full employment, we are at that level now. The idea we are going to hell in a hand basket with the economy, some may wish that to be the case for political purposes, but it just is not. It is not a fact.

The facts are this economy is growing. Sure, we have more to do. That is why we have the jobs and growth package we are trying to push through having to do with litigation reform, which is being blocked by the other side of the aisle. On several fronts, whether it is medical lawsuit abuse, whether it is class action reform—which we lost on the floor of the Senate by one single vote—whether it is asbestos legislation—talk about manufacturing jobs. Asbestos litigation is killing us. What is happening? The other side of the aisle is blocking it because their trial lawyer friends in the Democrat Party, who support the Democratic Party more than any group, they are blocking productivity, they are blocking job creation.

They come to the floor and complain that there are no jobs available. The fact is, the policies of this administration are working, and it is just driving the other side crazy. They want to complain about the past.

Look to the future. Things are looking great, except when it comes to the third branch of Government.

The third branch of Government, the judicial branch of Government, is one of the most important branches of Government because it interprets our Constitution. It says what our rights and responsibilities are according to that Constitution.

You have to wonder because I get this question all the time: Senator, why are you spending all this time on judicial nominations? What is so important? How does it affect me? I get reporters' questions all the time. Reporters sometimes can be insightful and sometimes they can ask the most basic of questions. And you wonder why. But in this case the basic question is a good question: Why should we care about this?

Now, if you would listen to some on the other side, they would tell you, you should not care about this. Turn your televisions off. Nobody is paying attention. The sign from the Senator from Iowa: I am going to be watching ''The Bachelor'' tonight. That, to me, was one of the most telling things. It was a joke. Oh, but you know humor. Humor is one of the great things in our society, every society, because for humor to be really effective, there has to be a little bit of truth in it. The little bit of truth in that—I am going to be watching ''The Bachelor''—is don't pay attention. Please, don't pay attention to this. Go do something else. We would rather have you not know what is going on. We would rather have you, at 5 o'clock in the morning, be safely snuggled asleep in your bed knowing that, trust me, we have taken care of all of your concerns and needs. So go watch ''The Bachelor,'' something really important, something really significant, something that is going to elevate your life. Don't pay attention to one of the most important debates this Senate has ever had. Go watch ''The Bachelor.'' Go watch the continued debasement of our society. That is what you should be doing.

Now, I know that people are going to say: Oh, well, you can't take a joke. But in humor is truth; otherwise, the humor does not work, does it? Go watch the debasement of our society. I would argue, if you want to watch the debasement of our society, you should turn on to C–SPAN right now because what is happening on the floor of the Senate is an attempt by a minority to circumvent the Constitution.

Why? Circumvent the Constitution by requiring a higher standard for the confirmation of judges than has ever been held before. Well, they say there have been filibusters before. There has never been a case where there has been an organized attempt to block a nomination by requiring a supermajority. There have been cloture votes filed here.

In the case of Stephen Breyer, Justice Breyer, nominated after the 1980 election, after Jimmy Carter lost, after the Democrats lost control of the Senate in a landslide election—can you imagine if President Bush had the gall to nominate someone to a circuit court after getting swamped in an election? There would be audible laughter on the other side of the aisle that we would consider a nomination at that point. Filibuster? My goodness, they would be screaming how dare you have the gall to do something like that?

I know the Senator from Rhode Island said: Well, I would hope we would consider this. Oh, please. Please. Look at the nominations they are blocking now, ''out of the mainstream'' nominations they are blocking now.

Janice Rogers Brown: 76 percent of the vote in California. Out of the mainstream?

Priscilla Owen: 84 percent of the vote in Texas. Out of the mainstream?

Oh, I would hope we would consider these nominations in due course? Really? Really not. No. What the Senate Republicans did in 1980, by confirming someone to an appellate court, shows what the Senate was like years ago. But it has fundamentally changed. Why? Well, back then we had leaders. You had Howard Baker. You had people here on this side of the aisle who put the institution first, who said, as a leader: We are not going to filibuster. In fact, they moved the cloture vote to move the judge. Why? Because we only had a week or so left when the nomination came up.

Here in the Senate just to move anything takes weeks. At the end of a session, one Senator has enormous power because they can make you go through the procedures in the Senate to get to a vote, which takes weeks if there is not consent. So just one Senator, at the end of a session—we all know it. We all use this leverage. It is the beauty of this place. It is why one Senator is so much more powerful than dozens and dozens of House Members. It is because of the rules here.

But the Senate minority leader, soon-to-be majority leader said: We are not going to do that. We are not going to filibuster. If there is a hold on soon-to-be Judge Breyer, we will work with the soon-to-be minority that was swept out of the election—huge losses; hemorrhaging—we will work with you to confirm someone who, by the way, is now on the United States Supreme Court and is writing opinions that make me throw up.

But we did it because the Senate was a different place then than it is now. We did it because the leaders were different then. Leaders did not respond to the latest pro-choice Web site. They were not manipulated by organizations far from this place, who fund their campaigns and support their grassroots activity, narrow special interests, who seep into this Chamber like hidden gases underneath the door panel. That is what is poisoning this atmosphere. That is what is poisoning this atmosphere. It is narrow zealous special interests. That is what has changed in this place.

But it is not just them. They cannot do it without us because there have been the NARALs and the ACLUs, and People for the American Way, and the trial lawyers association and all—labor unions—they have been out there before. But people in the Senate always stood up for the Senate against the passions of the moment, the special interests of the moment, the needs and wants of your supporters at the moment.

They felt a responsibility. They felt a responsibility for their leadership in the Senate.

It is amazing to stand here. The Chamber is basically empty. No offense to my colleagues from Kansas and South Dakota, but it is 5:10 in the morning, as my voice echoes, resonates without very many people here. But you still look around this place, and you look at the empty chairs and you close your eyes and you can just feel the presence of the greats who have been here in the past, of the people who have sat in these chairs—these very chairs at these very desks in this very place, this beacon of deliberation, this beacon of sometimes delay and sometimes not particularly pretty debates in the Senate, but yet the essence of democracy here. And for 214 years—214 years—the leaders in this Chamber, not necessarily all the Members—we are a society of saints and sinners and everything in between, but the leaders in this Chamber always took the responsibility of leadership of this august body as a sacred trust because what we do here sets precedent for what will happen.

The Senator from West Virginia changed the filibuster rule. I know with his sense of history he knew the consequence of his action. When he changed the rules postcloture for the recognition of a quorum, the Senator from West Virginia knew what the consequences of that would be. When we change any procedural thing in this Senate, we know because history has taught us that there are profound consequences.

So when Senator DASCHLE, Senator REID, Senator KENNEDY, Senator LEAHY, Senator DURBIN, Senator CLINTON, and Senator SCHUMER—the leaders of this new strategy—decided they were going to enlist their colleagues on a new course, they could not help but know. You cannot help but know, if you spend any time in this place. If you are a page, who comes in 15, 16, 17 years old, and comes in and just sits in this place for any period of time, you know that what you do here over the years remains in some way because you set precedent.

You all know, just by looking at these sometimes not particularly attractive, sort of stodgy-looking leather chairs that this place is a place of tradition. It is a place of precedent. These are old wooden desks. We have little ink wells. Look at this little sand that comes out of these things that were used for people who signed documents with feathered pens. Come on. You cannot be here and not know that this is a place of tradition and precedent. It reeks of it.

So when you change something here, you have to realize that it has a huge impact on our society. So I ask, what is the great issue of the day—issues of the day—that are so urgent, that are so powerful, that are so necessary for this precedent of the Senate, for a leader never to involve his party in a partisan attempt to block a nominee by requiring an unconstitutional supermajority to confirm the nominee. Never has been in history. Mr. President, 2,730 nominees since the filibuster rule was put in place in the last century. No nominee—never, never with a nominee in the history of the country did a minority leader ever enjoin his forces to

block by using the filibuster. Never before. Now that is a precedent-setter, folks.

Why? Why? Why is it so important? What has changed that would not lead George Mitchell to do that? That would not lead Howard Baker to do that? That would not lead Mike Mansfield to do that? That would not lead Everett Dirksen to do that? That would not lead Senator Taft or Senator Vandenberg or Senator Johnson to do that?

Let's go on back through history. All of these men—the giants of the Senate—the giants of the Senate never once employed this tactic. Do you think that Lyndon Johnson, as majority leader, ever had a nominee he did not want? I assure you, having read some of the history of Lyndon Johnson, and Caro's book—the Senator from Arkansas talked about it—there were people the Senator from Texas did not like. There were people the Senator from Ohio, Mr. Taft, did not like.

You could go on throughout history, but did they ever apply a higher standard? Did they ever do that? The answer through history is no. Could they have? Well, obviously from what is happening right now, the answer is, yes, they could have. But did they do it? No.

Were there issues of great importance during those times? Well, I would suggest if you were living through those times of war and depression and communism and segregation, and in prior centuries, slavery, reconstruction, and trust busting, and human rights, I would argue those are pretty big issues. Never before used.

So I am going to go back to what the Senator from Kansas was talking about in the last hour. What are the issues—or what is the issue—that is so important that the Senator from South Dakota and the leadership of the Democratic Party would seek to change the way the Senate does business, would seek to change the precedent of the Senate and potentially forever change the judiciary of this country?

Let's make no mistake about it, you are going to dramatically affect who is going to be applying for these judges, who is going to be confirmed, and what their point of view is going to be—I would argue what their competence is. The issue is clear, it all centers around this issue called the right to privacy—the right to privacy.

Now, here is a copy of the U.S. Constitution. I am holding it up in my hand. I challenge any person in this country, in the world, to find the words ''right to privacy'' in this document. It does not exist. It does not exist. Wait a minute. I always thought—I ask students all the time: What section of the Constitution is the right to privacy? Will you please read the section that the Founders, or through constitutional amendment, established the right to privacy? Can you please find that for me?

Well, oh, yes, it is in the—let me see. Is it in the 14th amendment? Is that where it is? No. I am sitting here reading: ''All persons born in the United States subject to jurisdiction . . .''—no, no, I don't see the words ''right to privacy'' in there. Maybe I was wrong. Maybe it is the 10th amendment: ''No powers delegated to the United States Constitution prohibit the States or reserve the States with respect to . . .''—no. Oh, it has to be the first amendment. Good: ''Congress shall make no law respecting the establishment of religion, prohibiting free speech or the exercise thereof, or abridging the freedom of speech or the right to peaceably assemble . . .'' —no, it is not there.

Where is this right to privacy? Well, it was created by whom? It was created by judges. Was it amended because there is a provision in the Constitution, we can find that, that says how you amend this document. Is that the way it happened? No, it did not happen that way.

We amended the Constitution because we put in place a power of authority, people on the highest court of the land who decided it was their responsibility to change the Constitution, that it was their responsibility to find new meaning in these words that have been around for a couple of centuries.

I have always thought we were a government of laws and not of men, but that is not the case anymore. That is fundamentally what this debate is about because, you see, the written words of the Constitution that says a majority vote is necessary do not mean anything anymore because the Constitution is a dusty old document we can manipulate and change for whatever purpose because we have advances in society; we know more than they did then; we are enlightened. Come on, folks, 240 years ago, they didn't have the level of sophistication and knowledge of our culture today, and so these dusty old documents need to be revised; it is so complicated to go through the amendment process of the Constitution; it is so cumbersome; we, the enlightened, will change it as, of course, the culture demands us to do, to free us from the bonds and shackles of these now long departed Founders of our country who couldn't possibly understand the complexity of the world today and the advancements today that have made this document so unnecessary. So we don't need to find anything in this piece of paper. In fact, if we can't find it, that is fine; we will simply create it.

Who does this creating? It is the very judges we are debating today. The Senator from Kansas talked at length in the last hour about the line of cases that is taking an eraser to the word ''God,'' religion, erasing it from our public consciousness. It is as if the first amendment was never written:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

''Free exercise thereof.'' I asked a group of students yesterday what were the first words in the Constitution, separation of church and state or exercise of free religion. Half said separation of church and state. Of course, if you listened to the judges and what popular culture says, you would believe that.

Can you imagine, half the people I talked with yesterday did not think free exercise of religion was in the Constitution? Can you imagine? Why would they think that? Because in practice that is the message the culture sends about the Constitution. It is not about freedom of religion. If it were about freedom of religion, we wouldn't be erasing God from everything that is public in our culture.

Who is doing the erasing? Is it Congress? Did Congress pass a law that says you can't have prayer before a football game? Did Congress pass a law that says we will scrap ''under God'' from the Pledge of Allegiance? Did the people speak out and say, We don't want the mention of any faith in the public square? Is that what Congress did? No.

So people ask: What are the consequences of what we are doing here today? The consequences are clear. We have elected people who are erasing from the public consciousness some of the most important and fundamental rights and, I would argue, some of the most important and fundamental principles that keep our country moral, safe, free, and prosperous.

Mr. BROWNBACK. Mr. President, will the Senator from Pennsylvania yield for a question?

Mr. SANTORUM. I will be happy to yield to the Senator from Kansas.

Mr. BROWNBACK. Mr. President, I have been listening, and I think the Senator from Pennsylvania puts forward a brilliant and eloquent argument, and it gets to the nub of what we are talking about instead of the areas. It is in this last 4-year time period that a constitutional right to privacy has been discovered and which has spawned a series of cases. This is done by the Court. The Court has discovered this, and the Court has done this.

Let me ask a simple question: Has the U.S. Supreme Court ever been wrong?

Mr. SANTORUM. You would think from the debate here that this right to privacy, that has now been established as this incredibly well thought out and documented thing, is wholly supported within this document. I have folks on my side of the aisle—I always think of the former Senator from Washington, Slade Gorton, who is for abortion rights who thought Roe v. Wade was one of the worst legal decisions he had ever seen. So many people who are for abortion rights, who would have voted as a legislator to allow the legalization of abortion, saw this judicial construction or deconstruction of the Constitution as an abomination to our legal system.

Has that ever happened before? Obviously, the Senator from Kansas is referring to some of the cases such as

Plessy v. Ferguson where the Court looked at this Constitution and said: You know, equality really doesn't mean equality. The words here aren't exactly what we think they are, and you can be separate and equal. Or we can go back to Dred Scott. They looked at this Constitution and said: You know, equal doesn't mean equal. This rash of cases we have seen where the courts have just decided to take these hallowed words and twist them into the culture of the day, this is not a new thing in America; unfortunately, it is a very old thing in America.

The Court in Dred Scott said: Yes, people have rights and people should be treated equally, but—I think of ''Animal Farm''—some people are more equal than others. Some people have more rights than others. In the case of the slave, they really don't have much in the way of rights at all.

We look back at those cases now with disgust, but judges found in this incredible document the right to do incredible harm to this country—incredible harm—and, in many cases, with complicity from the Senate, for it is we who are the guardians of this document because we put these judges in these places. So it is an important responsibility.

That is why this debate is so important. That is why we shouldn't be watching ''The Bachelor.'' We should be watching out for the future of this country.

In my next block of time in the next hour, the Senator from Kansas and I are going to talk about this right to privacy, this line of cases that has tried to erase God from the public memory and consciousness, all instigated by judges who would find wide praise and admiration on the other side of the aisle, who would be called mainstream judges—mainstream judges who are striking at the heart of this document.

What is a mainstream judge? Let's understand it. A mainstream judge says God has no place in the public square. That is a mainstream judge.

A mainstream judge says you have the right as an individual to have dominion over somebody else and terminate their life if you want to. That is a mainstream judge.

A mainstream judge says we are going to take the institution of marriage and corrupt it, deconstruct it, tear it apart, put it back together to mean nothing. It means any two people for any reason who want to get together should be recognized as married, irrespective of who they are. It has nothing to do with fathers and mothers and having children. What does that have to do with marriage? That is a mainstream judge.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. SANTORUM. It is an extreme judge, not a mainstream judge.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. JOHNSON. Mr. President, reference has been made at this early hour this morning about debasing the values of this institution and this country. If any American sadly wants to see debasing of the institution, they have only to look at the strategy that has been foisted upon this body and on the American people by the Republican leadership of this Senate with their fabrication of a ''crisis'' relative to the nomination and approval of Federal judges.

There is no crisis. The fabricated crisis the media has talked about is a polite way of saying the phony crisis, the fake crisis.

The reality of the situation is that this Senate has approved 168 Federal judges nominated by President Bush. The Senate has blocked the approval of 4 Federal judges, a remarkable 98 percent success rate.

The ratio of unfilled judgeships is now at its lowest point in some 13 years. The pace of approval of judges is at a higher rate than that of past Presidents of either political party, and I think it is fair to say that of these 168 judges, most of whom I voted for, virtually all, if not all, were conservative Republican judges. That is to be anticipated. They were all nominated by President Bush.

The question is not whether we should approve conservative Republican judges. We have, overwhelmingly. The question is, Should there be some shred of moderation, some shred of bipartisanship in this institution relative to these judges who will serve life terms on the bench? These are not Cabinet officers. These are not people who come and go with whatever President happens to be in office. These are people who will serve virtually their entire lives on the Federal bench. So this body has a constitutional obligation of advice and consent.

Apparently, the other side believes unless there is 100 percent approval of Federal judges, that somehow we haven't done our job. I would say the opposite, that if all we do is rubberstamp the nominations of any President, Republican or Democrat, this body has fallen down in its obligations, constitutionally and ethically.

One of the great things about the Senate and the great traditions of the Senate—and there are great traditions in this body—is that unlike the House—I served in the other body, as did many of my colleagues—unlike the House of Representatives with its majoritarian philosophy, set up that way by the Founders, where if you have a majority of one vote, that is sufficient to ram through almost anything, the Senate was devised by the Founders of our Republic to be a moderating, cooling institution. That is why we have 6-year terms—because Senators are invited to take a longer term view of what is good for our Nation and what is not.

The Senate is designed to be a body that doesn't jump every time a whim is expressed by the public or in the political whims of the day. Our role is to take a longer term view and to moderate what is oftentimes the hot politics of the House of Representatives.

It is very difficult, because of the rules of this body, to jam through legislation for the approval of virtually anything of any controversy without some bipartisanship. That is the course of action we are seeing here today.

While we have approved 168 of President Bush's judicial nominations, the minority party, a 51-to-49 minority, has said these are such important positions, let's make sure there is a general consensus about the support of these nominees. That is what the 60-vote rule requires.

The other side is very frustrated because they like to jam things through the Senate with 51 votes, but that is not the way the Senate works on this or many other issues.

I have to say President Bush's nominees have received prompt hearings compared to virtually any other standard. That contrasts greatly with President Clinton's experience. President Clinton was told: Don't bring us a nominee who is liberal; they will not receive a hearing. And, indeed, they did not.

We had people nominated, closed up their law practices and put their family on hold for years upon years, and could not get a hearing under the Republican leadership during the Clinton years.

That doesn't happen anymore. Now people who are nominated do receive timely consideration. They do get votes. They get votes on the floor of the Senate. But the Senate has chosen to use its prerogative to require bipartisanship on some of the judges who many in this body believe fall outside the mainstream of conservative thought in terms of their politics, in terms of their legal interpretations.

There is no crisis in terms of judges. For over a decade, we have not had the ratio of judgeships filled as we have today. President Bush has an enormous winning record in terms of the nominations that have been approved. Again, virtually all of them are conservative Republican judges. That is his prerogative. The Senate has gone along with that. There is no problem there. This is not as though somehow the President is getting jammed.

What is happening here, I think, is that there has been a strategy concocted by the leadership of the other side to try to gin up political support among a faction of their supporters. What we have here is politics, an effort to play to the radical right. It is costing $100,000 or more of the taxpayers' money for this debate, and yet what we have here is a phony, fake, fabricated crisis. This is no crisis. The Senate is dealing with judges in a timely and responsible fashion.

President Bush, obviously, could have the approval not of 98 percent but 100 percent of his nominees if he were to send to us mainstream conservative Republican judges, as he largely has

done. Clearly, it is part of the political strategy to look around the country and find a handful who fall far outside the mainstream of Republican or Democrat judicial thinking and nominate them, knowing there will be resistance to these individuals.

The thought is that by nominating these individuals, they can energize the radical right-wing political faction within the Republican Party. They will contribute money then if they see all this going on. It is a very cynical strategy. This has nothing to do with the interpretation of the Constitution. We are approving conservative Republican judges. It does have to do with able people who are in the mainstream, broadly thought.

I think it is regrettable that we find this Senate and our work hijacked by those who want to push aside timely consideration in the Senate of issues pertaining to jobs, education, health care, energy, environment, our veterans and our military—all the issues with which this body ought to be dealing.

The Federal fiscal year began October 1. Yet the Federal budget is not concluded. So there is so much that needs to be done, that we are being prevented from doing as we spend these many hours around the clock on a fabricated, phony crisis that does not exist. All of this to play to a very small faction politically in America. It has to do with political fundraising. It does not have anything to do with the quality of the court.

I note that 95 percent of the Federal judicial seats are now filled. That is the lowest vacancy rate in 13 years. Last year, this Senate, led by my colleague Senator DASCHLE, confirmed the largest number of judicial nominees in a single year since 1994. There ought to be celebrations on the part of the other side in this body over the remarkable, timely, aggressive approval of Federal judges, the highest number of judicial nominees approved in a single year since 1994. The highest level of judicial seats filled, ratio of seats filled, in 13 years. That ought to be cause for celebration. That is a remarkable level of progress, and it was done in a bipartisan fashion.

Part of that time, the Democrats controlled the Judiciary Committee with Senator LEAHY as chairman. Part of that time the Republicans controlled the Judiciary Committee. So the track record is truly extraordinary. What an irony that in the face of that reality, we find ourselves through the wee hours of the night, through the day yesterday, through the day today, being prevented from dealing with the real legislative issues while we talk about this political gamut that we have before us.

Some say, well, what about the appellate court judges? That is the highest Federal court next to the Supreme Court itself, and one that truly does write law. Well, even there the Senate has confirmed 29 of President Bush's appellate court nominees to date, more Bush circuit court nominees than—get this, President Bush has had more of his appellate court nominees approved by this Senate than President Clinton, President Reagan, or President George Herbert Walker Bush had by this point in their administrations. Yet here we are, the other side posing as though there is some sort of terrible crisis going on when, in fact, it is just the opposite. Conservative Republican judges are being approved at a record pace by this body.

What the other side seems to find unacceptable is that the Democratic Party is insisting that one should not go to a lifetime Federal bench unless there is a generally broad consensus, bipartisan consensus, not unanimous but a broad consensus, of at least 60 votes that that person deserves to sit on the bench dealing with legal issues that are of monumental importance to every American citizen for the rest of their lives. I think that is one of the great strengths of this body. That is one of the great strengths of the United States Senate, that we cannot be stampeded into the radical actions of a few but that we take a longer term view of what is good for America, what is consistent with American values, what is consistent with American priorities, for all of our people. That is what is happening in this body this year, and that is why a few on the other side are objecting so strenuously.

Now, other judges have been filibustered; cloture votes have been held. Other judges have been held up in committee, which has been the favorite mechanism of keeping people from having a vote at all. That is to be said even for these four. They have been allowed votes in committee and cloture votes on the floor. They cannot get the 60-vote requirement and so they are not going to the Federal bench because they do not have that broad-based consensus of support in this body.

That is what this body is all about. It is not just judges. This same 60-vote rule prevails on virtually everything we do in the Senate, from the passage of health care, to education, to appropriations legislation. Virtually everything is subject to that consensus requirement. I think it reflects the best of our values in America and, in fact, it represents America coming together in this body to try to produce legislation that is good for us all. It is not ideologically driven. It is not the product of the far left or the far right. The product of the far left or the far right does not do well in this body because of the nature of the rules that have been the rules since our Republic began. It is one of the geniuses of the Founders of this Nation, that that is the profoundly important role of the Senate to moderate the radical winds that occasionally blow politically through this country and through Washington, DC.

So it is a bulwark of individual freedom and of American values and priorities that we have a body like this that mandates that there be greater thoughtfulness, greater moderation, greater reflection than would otherwise be the case.

There are other issues that we rightfully ought to be moving on to. Recently—yesterday, in fact—I visited the Walter Reed Army Hospital in Washington, DC. One of my constituents, a soldier injured in Iraq, was there. Senator DASCHLE and I and a contingent of other Senators visited our troops. We can take great pride in the quality of these young men and women and what they have done for America, what they are doing for America. They are extraordinary people with great courage, and they are getting on with their lives as best as they can.

It was heartbreaking to go from room to room at Walter Reed and see our Iraq military veterans. In one room, a soldier has lost an arm. The next room, a 20-year-old young man has lost both arms. In the next room, a young man has lost his leg all the way to the hip. In another room, there was a young man with brain damage. In another room, a man has lost his feet. Another room, a man has lost his hand. In another room, an individual has lost his arm again. It goes on and on.

There has been a lot of reference to those who have lost their lives and made the ultimate sacrifice in Iraq. Our hearts and prayers go out to them and their families, but we should not forget those as well who are alive and with us but whose bodies are shattered, whose lives are forever changed because of what they were willing to do for the United States of America in their military service.

Their families were there. Young wives were there yesterday, many of them with very small babies, some pregnant. Now they have a husband who has no arms, who has no legs, who has brain damage. We need to give some thought to these families as well, think about the enormous sacrifices they are making for America.

One of the great ironies and sad ironies of this debate that is going on is that the legislation that was taken off the floor in order for us to have this debate was the VA–HUD appropriations bill, the very bill where we will make determinations about whether these young men and young women, once they conclude their military service, will have the health care, the job training, and the therapy they need to get on with their lives. That was pushed aside. We do not have time for that debate apparently because we need to spend 2 days or more of the Senate's time on this phony crisis because 4 out of 172 judges have not been approved by this body. What a sad commentary about the priorities of the Republican leadership in this body.

I do not ordinarily make partisan references lightly. I am a Democrat. I am elected in a State that is overwhelmingly Republican, and I am proud of the Republican support that has been

extended to me for many years. They are good, wonderful, thoughtful, patriotic, religious people on both sides, no question about that. But I am profoundly disappointed, to the point of contempt, for what has happened in this body the last day or so with the hijacking of the Senate's agenda already behind schedule on these important issues that we ought to be talking about in order to take up this question of 168 to 4.

I suggest that if it was 172 to 0, that would be good evidence that the Senate is not doing its job of advice and consent. This body is not meant to be a rubber stamp. That is not what the Founders of this Nation thought that they were doing when they wrote our Constitution and devised the rules of the Senate.

Mr. President, in 1968 New York Senator Robert Kennedy launched a Presidential campaign at a time of great unrest and dissent in our nation. He ran a campaign that lasted 85 days to empower those who did not have the power, to bring justice to those who did not have justice, and the protest the direction of our great nation. At the beginning of that campaign, he addressed criticism of anti-war protesters by saying:

There are millions of Americans living in hidden places, whose faces and names were never know. But I have seen children starving in Mississippi, idling their lives away in the ghetto, living without hope or future amid the despair on Indian reservations, with no jobs and little hope. I have seen proud men in the hills of Appalachia, who wish only to work in dignity—but the mines are closed, and the jobs are gone, and no one, neither industry or labor or government, has cared enough to help. Those conditions will change, those children will live, only if we dissent.

So I dissent, and I know you do, too.

Mr. President, I rise today to dissent. I dissent to the majority of this body's unwillingness to focus and deliver on healthcare and education. I dissent to this body's inability to provide for our veterans. I dissent to the President's blatant disregard for treaty and trust responsibilities to Indians. And most of all, I dissent this political charade.

Instead of talking about judges, as a body, we should be addressing the unmet needs across this country.

Our Veterans made tremendous sacrifices in service to our Nation. They have answered the call to defend our freedom and served our country at the time of its greatest need. We are trying to provide our veterans with the full benefits they have earned. While the White House can find money for tax cuts for America's wealthiest families and a $20 billion lavish grant for Iraq, too often poverty is pled when it comes time to providing our veterans the benefits they deserve. Right now 60,000 veterans are waiting 6 months or longer for an appointment at VA hospitals. I think it is important to fully fund VA health care so that veterans of Operation Iraqi Freedom can get the care they need when they return home.

My own son served with the 101st Airborne in Iraq. He is home now. He is safe. He did not suffer one of these horrific injuries. We are grateful for that, but we are very mindful that tens of thousands of others are still there, have suffered horribly, have lost their lives, and their families have gone through enormous painful stress.

In contrast, the Republican leadership in the Senate has broken their promise to provide an additional $1.8 billion for veterans health care this year and even proposed an increase in prescription drug copayments that impose a $250 annual membership fee for veterans seeking health care. Should we not be talking about these kind of priorities? It is astonishing to me that the Republican leadership of the Senate has set a target adjournment date only days from now, November 21, and has scheduled 39 straight hours of executive session to discuss this phony issue; not 39 straight hours to discuss critical legislation such as lack of prescription drug coverage facing millions of American beneficiaries in this country. Do not the 40 million Medicare beneficiaries deserve as much attention as this phony issue is receiving?

We are at an impasse. We do not have a final Medicare bill. At this rate, spending hours and hours discussing nominations which have overwhelmingly been approved, instead of debating important Medicare legislation, makes me wonder about the priorities of the majority party in this body. They are dedicating nearly 10 hours each of discussion for four individual judges, but we cannot spend 1 hour each for every million individuals on Medicare. What is wrong with that picture? High drug spending is placing a heavy burden on American families, and many businesses are responding to rising drug spending by increasing the amount that employees must pay for prescription drugs. The public programs such as Medicaid and the Veterans Health Administration are also struggling to respond to soaring drug spending. Finding a solution to the prescription drug crisis in this country is a priority for me, for many in this body. It should be a priority for the entire body.

States and local communities are struggling with the worst budget shortfalls since World War II and many have cut back on education funding, on instruction time, have laid off quality teachers and school staff. School district after school district in my home State of South Dakota are having opt-out votes, trying to do something to try to make sure that children in our communities have the resources they need to learn. Parents and students are holding bake sales and auctions to save teaching jobs, music, art, other student activities. It would be impossible for our public schools to meet the strict demands of the new Federal education law if vital school services continue to be cut all across our Nation.

I believe that fighting to bridge this gap by increasing Federal aid to the States and raising public awareness of the school public crisis is essential. I think it is important to recognize that money alone is not the solution to improving our schools, but we need also to be cognizant of the fact that public schools need the financial resources necessary to successfully implement No Child Left Behind. The National Education Association's State-by-State report on layoffs and cuts affecting public schools and the responses of students, parents, and communities, NEA collected anecdotal data from 2003 through the end of September and finds the school district stress all across this country.

In my home State of South Dakota, our Native-American community is struggling badly—high unemployment, lack of health care, high infant mortality, lack of jobs. Again, that is another area that deserves the attention of this body.

These are the real crises that face America, not a 98-percent approval of conservative Republican judges, which this body has done.

This President has been served very well by the Senate on the timely approval of 98 percent of these judicial nominations. I submit that the four who have been rejected were selected with the thought in mind that they would be rejected because what the other side of the body wants, and I think what the President wants, is a fight. They know that a fight will energize the radical right wing of the Republican Party and will energize political contributions. Sadly, that is what this debate is all about. That is why the taxpayers are having to fund $100,000 or more for the cost of this. That is why we are not able to get on to the other issues that truly we ought to be addressing right now.

One hundred sixty-eight conservative Republican judges have already been approved, most with my support. That is not the question. The Federal bench has a higher ratio of judges seated now than we have had in 13 years. The appellate judges are being approved at a faster rate than Clinton, Reagan, or George Bush, Sr.

So the record of this body, Republican and Democrat on the Judiciary Committee, has been one of accelerated consideration of judges in a way that has not been seen in many years. I think that reflects well on the body. What does not reflect well on this Senate is this hijacking that has taken place of our agenda, where we are being prevented from talking about the real issues, the real crises having to do with our children, having to do with our schools, having to do with our seniors, having to do with our veterans, having to do with health care costs. That has been hijacked by a body that wants to talk about these four judges who were selected, I think, by a process where the President and the leadership of the other side knew very well that these

would be lightening rod candidates, that they do not fall within the same mainstream body as the other 168 conservative Republican judges.

That has led to this dispute, and the dispute, I think, is not about principle. It is about energizing politics. It is about raising money. That is a sad commentary. That is contrary to the values of this body and of the American people, Republican and Democrat. The American people deserve better than what has gone on on the floor of this Senate over these last many hours. We are going to see the rest of today wasted as well.

Mr. President, our roads, schools, and infrastructure are crumbling as Nero fiddles here in the Senate. Yet our friends in the majority complain about a 98 percent approval rate for President Bush's judicial nominees. In baseball, that would equate to roughly a batting average of .980. A power hitter is someone with a batting average in the range of .330. That means if the Bush Administration's judicial approval rate in the Senate were considered in baseball terms, we would be batting nearly triple what any major league manager would love to have.

And consider a baseball team that would have a .980 winning percentage. A winning percentage like that would far surpass any record set by any team in major league baseball; and would certainly beat the losing seasons of the Texas Rangers when President Bush was their managing general partner.

In fact, the quality of some of the judicial appointments sent up here by President Bush shows the same judgment he used when he traded Sammy Sosa, a perennial home run leader, to the Chicago Cubs.

The PRESIDING OFFICER (Mr. COLEMAN). The Senator's time has expired.

Mr. JOHNSON. Mr. President, I yield the floor. I am sure it is a great place. I have not been there. I am sure it is wonderful. He used the whole day to talk about that, while we hear endlessly, Why are we not talking about veterans benefits or unemployment when all Monday was used by the Democratic side to talk about Searchlight, NV.

It is a wonderful place, I am sure, but I don't know of any legislation pending about Searchlight, NV. Why weren't we talking on Monday about these things and not addressing the great issues of the day or addressing what we need to be doing about the war in Iraq? Instead, we are talking about Searchlight, NV. Where was the protest? Where was the anger? Where was the outrage. How about rabbits eating cactus? Again, I am sure it is a great place. No offense to anyone from Searchlight, NV.

A week ago Friday, a week ago today, the other side ate a whole day up and we got no votes done on appropriations bills because they were chewing it up on filibustering at that point. Where was the outrage? We were not dealing with the great issues of the day. I guess it did not matter at that point in time.

I find it interesting that this is all about fundraising. It seems the people fundraising are the left. This is NARAL, National Abortion Rights Action League, their Web site, going to task on Charles Pickering; others on the left, pushing this hard for fundraising and organizational purposes. I don't think that is at the root of what we are talking about and why we are spending this time and why we are being tied up on something that has been without precedent, a blockage of Federal judges. This is really about a big issue, and that is why we are here at 6 in the morning on Friday, because we are talking about a big issue and we need to talk about other issues as well—which I agree with; we need to talk about other items, but we need to talk about this one, too.

When you get a judiciary that is blocked, you need to talk about it. Why would these folks be blocked? These are highly qualified. They get painted different ways, but we have been through ad nauseam the qualifications. They are highly qualified judges in mainstream positions in their States on the highest courts in Texas and California—I guess Texas and California are mainstream—they are on the highest courts. One is on the Federal bench in Mississippi, approved by this body previously.

What this comes back to—and the Senator from Pennsylvania was hitting it when we last had the floor—was a discovered right by the Supreme Court, the right to privacy. If we blow away the smoke and we are stating why we are here at this point in time and why would such qualified judges be blocked, it is because of the court that has been writing laws and about the right of privacy, or this constitutional right, discovery. It is not in this document, as the Senator from Pennsylvania pointed out, the right to privacy.

I find it interesting that others have mentioned that the appellate court writes laws and that is why the judges are important. The lower court, the Federal district trial court, does not write laws, but the appellate court does. There is the issue and the problem. The appellate court does not write laws. The Supreme Court does not write laws. They interpret the laws. They interpret the Constitution. They do not write it.

Unfortunately, people in this body look at it differently. Some are saying, yes, the court can write laws at the appellate and the Supreme Court. If that is the case, we have a second legislative body in Washington: We have three units of government, but two happen to be legislative and one executive. Yes, one legislative also has a court and judicial judges as well, but we have a second legislative body. And we are seeing this stream develop further with some people on the other side of the aisle saying we should examine the political opinions of people we are appointing to the bench.

If they are going to be a judge and they are going to interpret the law, why should a political opinion be of significance in the consideration? That is not their role. They are not a legislature. I am a legislator; you are a legislator; people in this body are legislators, but those on the Supreme Court or court of appeals are not legislators.

Some say, OK, we need to examine the political ideology of the people coming forward for the bench even though they are saying we will follow the law and that leads to writing laws on the bench. I hold to the opinion—most people on this side do—what you want in a judge is someone who interprets the law and interprets the Constitution and does not write it. There would be times I would have actually liked a judge to interpret something to the right and write it more conservatively. I would think that would be appealing to me, but I don't want a judge like that. I don't want a judge to do that. That is my job. That is not his or her job.

I am asking for one to stay within the document and not to discover or write amendments to this document. I want them to interpret the law. This is what we are seeing seep into this. These are not legislators. These are not legislators-to-be, going on the bench, who write laws. They interpret the laws.

What we have seen taking place is one of the biggest laws written by the bench over the last 4 years, the right to privacy, or as is more common vernacular today, this is about abortion and the Supreme Court's discovering this right. That is why all the judges are always quizzed ad infinitum about their views, because if the court can write that law, the court can repeal that law, so they do not want someone to go on with a political philosophy contrary to this, who might write the law differently.

Now, we have a bad premise here. The court should not be writing law. The court should be interpreting laws. So stick within the documents.

We also have a bad premise in the second step, looking at the political philosophy of someone being appointed. No, look at the qualifications and their willingness to uphold the Constitution. We are down a bad road a couple of steps already. That is why we are here at this time of day, because these four appellate court judges would be not questioned to any degree if it was not about political philosophy. That is the issue, and it is a big issue, and it is worthy of this discussion. And it is sad we are at this point because I have some of my colleagues here who want to speak and I do not want to dominate this half hour.

Mr. SANTORUM. I would like to ask the Senator a question. You may have answered the question I posed earlier: Why, throughout the history of the United States, have we not had a leader of the Senate, minority or majority,

join in blocking of a nominee to require a supermajority? Why has it never happened prior to this session?

I think the Senator landed on it when the Senator said for the first time we are seeing people come to the court not to be judges but to be legislators, to make law instead of decide constitutional interpretation and to settle disputes. So we have entered into a time when political considerations now become much more important than the quality of the judge, the temperament of the judge, the qualifications of the judge, the experience. Those are now important, but they are almost secondary issues to the political philosophy of the judge because the courts now are fundamentally different than they were 50 years ago or 60 years ago.

Is that what the Senator from Kansas is saying?

Mr. BROWNBACK. It is what I am saying. And it is bad that we are seeing this route taking place. This is going to lead us down a bad road. We are already started down the road.

Now we appoint legislators for life with superpowers, and we are unable to pull them out other than maybe for moral turpitude. You have people who become—in essence, they can almost be dictatorial or tyrannical, and they are appointed for life. That is why so many people are so passionate about what takes place on the bench today, because now you have a superlegislator who does not answer to the public. It starts to get irritating to a lot of people.

This is not the way we should be going. We should be backing up and saying these are three coequal branches of government with different jobs—not legislators each, but a legislative and executive and a judicial branch. This is the problem.

If we keep going down this trail, and you have to examine political philosophy because judges can write laws or you can discover rights, including rights of privacy in the Constitution, and what other rights can you discover in the Constitution, and it will be important to know the political philosophy. Say we get one or two Supreme Court nominees to come up. Now we have somebody such that we are looking at a superlegislator for life in the highest court of the land who can, with a couple of other people, rewrite this document—not just legislate but rewrite the constitutional document. That is why we have the huge fights on this floor.

We used to say in the past—thanks to the question my colleague raised, we say, I disagree with the philosophy of Ruth Bader Ginsburg, I disagree with the philosophy of someone else, but they said they would uphold the law. They are confined, as I am as a legislator, with a set of power and authority. I do not agree philosophically, but they are qualified and will do a good job and I don't have a good reason to vote against them.

Mr. SANTORUM. This gets to the heart of this 168-to-4 number. The vast majority of the 168 are at the district court level, trial court level.

What the Senator from Kansas is saying—and I want to make it clear—the district court judges, by and large, do not make law. They are trying cases. Appellate court judges, we have seen now in recent years, have begun to take on the mantle of legislator in making law, and therefore all of the nominees who are being blocked on that side are these quasi-legislative-type judges.

The Senator is suggesting the superlegislator is the Supreme Court. So if we are in for filibusters for appellate courts, can anyone imagine what a Supreme Court nominee fight will look like in the Senate now versus 20 or 30 years ago?

Mr. BROWNBACK. Absolutely. That is the point. We will be in such a mammoth fight and engaging the entire country with this, how will you ever get that person through?

It does go to this constitutional case that is being considered by the Supreme Court now on the flag salute, ''One Nation under God.'' Here was a continuation of the discovered set of laws that somehow discovered that our kids cannot say our flag salute, ''One Nation Under God.'' Ninety percent plus of the public is for the flag salute. I am confident that percentage is ahead of that. In this body, there is outrage. And the Ninth Circuit, in a consistent opinion with 40 years of discovery law, says: No, you cannot do that.

So now you put somebody in a legislative role—circuit court, lifetime appointment, cannot remove them—and the Ninth Circuit, which gets overturned all the time—as a group of legislators they get overturned all the time by the Supreme Court. Now, say you get a Supreme Court position that opens. They are not going to get overturned by anyone. And you get people fearful of the tyranny of the judiciary which the Founding Fathers were fearful of themselves. They wanted the judiciary to be the most limited because they have the lifetime appointments. They have a pretty big set of powers. They feared tyranny could become an issue because it was a lifetime appointment and was not subject to the checks and balances of the people.

People check and balance everyone in this body. But do they check and balance the judiciary? Where is the populace's ability to check and balance? That is why this is an important debate and why so many are concerned.

What we should be doing is backing up and saying, no, this is about the strict construction of the documents that pass through the legislative bodies that are in the Constitution that go through an extraordinary process. Where, as the Senator from Pennsylvania pointed out, the Supreme Court discovers a new right in this Constitution, if we had written that in there, it would have taken a vote of two-thirds of this body, three-fourths of the States, to become law. This is a big, lengthy process and, as such, we have a limited number of constitutional amendments, as it should be. It is a strong document, standing over two centuries, and yet a court can discover this.

We should back up and stand on the issue of, this should be about strict construction of what is taking place. This is a very important key fight to have.

With that, I yield the floor. There are several other Members who seek to speak.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. I take a step back here and go through what we are doing. What is going on? What is going on in the Senate that has brought about this debate which has been so important? Can we agree on what is going on? I think we can. Let me use the words, and I would agree with these words written by JON CORZINE, the Senator from New Jersey, who happens to be the chairman of the Democratic Senatorial Committee.

The Senator from South Carolina was here and the Senator from Minnesota was here talking about this throughout the night. We can agree on what is going on.

Senate Democrats have launched an unprecedented effort. By mounting filibusters against the Bush Administration's most radical nominees. . . .

Unprecedented. And what does ''unprecedented'' mean, according to the dictionary? Having no precedent. What is precedent? An earlier occurrence.

So, having no earlier occurrence. What does that mean? It has never happened before. That is not me. It is not Republicans saying this. You have protestations on the other side. This happens all the time. Come on, no big deal. The Senator from Illinois will show a chart, look at all these filibusters. Come on, no big deal. We do this all the time. Unprecedented. Their words, not mine.

To whom? To their people? Guys, this is what we are really doing. We are not going to say this on the floor of the Senate, but this is what we are really doing. It is unprecedented.

So what is going on? An unprecedented filibuster to raise the bar for certain nominees. That is what is going on. Not my words, the words of the Senator from New Jersey to the people he relies upon to support their party.

Let's look at the facts. Is it unprecedented? Since the filibuster rule was put in place, 2,372 nominees came to the floor of the Senate. Has anyone been blocked by filibuster? No. So you see, 168 to 4—stack that percentage against 2,372 to zero. Four? Let me ask if it is four.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Senate now proceed to the consideration of Calendar No. 169, the nomination of Carolyn Kuhl to be a United

States Circuit Judge for the Ninth Circuit; and further provided there be 100 hours of debate equally divided for the consideration of the nomination; and provided further the Senate proceed to a vote on the confirmation of the nominee, with no intervening action or debate.

Mr. DURBIN. I object.

Mr. SANTORUM. Now it is 168 to 5. So that chart is now outdated that the Senator from Illinois will show.

UNANIMOUS CONSENT REQUEST

Mr. SANTORUM. I ask unanimous consent that the Senate now proceed to the consideration of Calendar No. 455, the nomination of Janice Rogers Brown to be United States Circuit Judge for the DC District Court; provided further that there be 200 hours of debate equally divided for the consideration of the nomination; provided further that following the debate, the Senate proceed to a vote on the nomination of Janice Rogers Brown, with no further intervening action or debate.

Mr. DURBIN. Mr. President, I ask unanimous consent that that unanimous consent request be amended and that we move to legislative session immediately to consider an increase in the minimum wage and additional unemployment benefits for the 3 million Americans who have lost their jobs under President Bush's administration.

Mr. SANTORUM. I want to make it clear that you are asking, in addition to this unanimous consent, that we would do this unanimous consent in addition to this?

Mr. DURBIN. I ask unanimous consent that before we consider any unanimous consent request by the gentleman from Pennsylvania, that we first——

Mr. SANTORUM. I would object. I object.

Mr. DURBIN. Mr. President, reserving the right to object.

The PRESIDING OFFICER. Objection is heard.

Mr. DURBIN. Mr. President, I reserve the right to object.

Mr. SANTORUM. Mr. President, I have the floor.

The PRESIDING OFFICER. The Senator—

Mr. SANTORUM. Thank you.

Mr. President, I renew my unanimous consent request.

The PRESIDING OFFICER. The Senator may object or not object.

Mr. DURBIN. Mr. President, parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state his inquiry.

Mr. DURBIN. Will the Presiding Officer tell us what the pending business of the Senate is at this moment?

The PRESIDING OFFICER. The nomination of Janice R. Brown, of California, to be United States Circuit judge for the District of Columbia Circuit.

Mr. SANTORUM. I renew my unanimous consent request.

The PRESIDING OFFICER. Is there objection?

Mr. DURBIN. Mr. President, I object. If the Senator is not going to consider the——

The PRESIDING OFFICER. Objection is heard.

Mr. SANTORUM. Mr. President, I have the floor.

Now that chart the Senator from Illinois is going to show is 168 to 6. And I would project that 168 to 6 will soon be 168 to 7 and then 8 and then 9 and then 10; and that this number is going to actually, looking forward into the future of the Senate, be a good percentage. I might agree with him looking forward because we will have set a precedent tonight. We will have set a precedent in this session of Congress that will go to haunt both sides forever. If we maintain it, it will. I guarantee it.

What we are doing here is playing with real bullets. I tell you there are folks on our side of the aisle who are loving what you are doing. They are loving what you are doing, man. They just think, go, baby, go. Do this because we can't wait to get our arms around the next Democratic President who wants to stack the court with a bunch of people who believe God does not belong in the Pledge of Allegiance. We can't wait—who, by the way, got confirmed by the Clinton administration and by this Senate. We can't wait to get our arms around people who find in this Constitution things that are not in it, who believe it is their job to be the super Senator, the super legislator, the super President. We can't wait to block those nominees because, do you know what. You did it first. You did it first. You can say, oh, no, we didn't do it first. You did it first. You crossed the line. Oh, it has been threatened. It has been talked about around here. I will not deny that. I talked about it.

Richard Paez, by the way, who tried to stop the California election a few days before the election, found somehow or other that ''you can't hold this election,'' that, to the people wanting to recall the Governor, ''you can't do that because, of course, I know more than the people.'' Richard Paez, Ninth Circuit, overturned more than any other circuit in the history of the United States. Clinton nominees, liberal, activist judges, out of step with the mainstream, the Senator from New York and maybe other Senators call mainstream, who says ''under God'' does not belong in the Pledge of Allegiance, who said ''three strikes and you're out,'' that the people of California voted for, is unconstitutional. The Supreme Court overturned that.

That is the mainstream. Can't wait to get at the next Richard Paez. Can't wait to get at the next Marsha Berzon. Go on down the list of folks. Did I want to filibuster them? Did I want to filibuster Richard Paez because he was a district court judge? And he was awful. He expressed values and views that were so out of step with America and with my constituents in Pennsylvania, I just could not stand it. I said, come on. How can we continue to let these judges, who think they are God, who think they are Senators, who write laws that do not exist, who take the laws we do write and turn them into what they think, not what the Senate believed and what the President believed—how do we let these people keep coming at us and not do anything?

My leader, TRENT LOTT, and my chairman of the Judiciary Committee, ORRIN HATCH, said that is not the way we do things in the Senate. This is the passion of the day. But in the Senate, one of the great things—and you hear it on both sides all the time—one of the great things about the Senate is we do not get caught up in the passion of the day. We understand the long term. We understand the greatness of America. We hear we are the cooling off. We do not get caught up with the passion of the day. We are the deliberative body. Therefore—and therefore—we have a higher calling than to respond to the NARAL ads or the People for the American Way ads. We have a higher calling. We are Senators. We look out for the long-term interests.

How do you preserve the long-term interests? You do it by following the laws and the precedent. You do it by using what has been established over 214 years to protect rights, and we are throwing it away. We are throwing it away, and understand the stakes of what we are doing here. Understand the precedent we are turning over and what we are going to unleash on the floor of this Senate. Do you know what. Maybe it is a good thing. I have sat here now—I will not argue against my colleagues, but I have sat here now, and I listened to the Senator from Kansas.

I would ask the Senator from South Carolina: Do you believe there are some on our side who, after listening to the Senator from Kansas and listening to the judges who have been put through—because we have been good stewards. We have allowed the Richard Paezs of this world to come and undermine our Constitution. We have allowed the left to seed into the court system those who would destroy this Constitution.

Are there not Members of our side, I ask the Senator from South Carolina, who would say, thank you, we never had the courage—we never had the courage—to change the way the rules are here in the Senate to make sure that we could protect—as I think the Senator from New Jersey said—''protect our courts?'' We did not have the courage—as the Senator from New Jersey said—''to stop judicial extremists.''

So maybe what we should be doing, I ask the Senator, is thanking the Senator from Illinois—and the Senator from North Dakota is here—and the Senator from South Dakota, Senator DASCHLE. Maybe what we should do is instead of protesting this is to thank them for giving us a tool, for giving us a tool to protect this document.

I assure them—maybe I should not assure them—maybe I will ask the Senator from South Carolina, what do you think will happen now?

Mr. GRAHAM of South Carolina. Well, to the best I can, to the Senator from Pennsylvania, for the last year—this is my first year—I have seen a trend that seems to be getting worse and worse. I can assure you, as the Senator from Pennsylvania has indicated, that for every liberal special interest group there is a conservative special interest group that feels just as passionately as the People for the American Way.

The Senator is absolutely right. I have been trying to say this all night. We are in political quicksand. You have put us in a place we have never gone before, and the more we fight and the more we fuss, the quicksand takes you deeper and deeper, quicker and quicker.

The truth is, the Senate will never be the same if this stands because the Senator from Pennsylvania is exactly right. There will be so much pressure on people on our side to stand up against anybody who is perceived to be liberal—not just whether or not they can follow the law, but they may have written an article when they were in law school. They maybe made a speech somewhere about the philosophy of life. And it will be seized upon, it will be touted, and it will be shouted, and 41 of us may buy into that.

The advise and consent clause has stood the test of time. But the formula that you are imposing upon the Senate is a formula for disaster, and a big loser. Who loses? It is average, everyday people who will be shut out because of special interest politics on the left and the right. The real big loser is somebody who loves the law who wants to be a judge but has said: I am not going to put myself and my family through that.

So Senator SANTORUM is exactly right.

The PRESIDING OFFICER (Mr. BOND). The Senator's time has expired.

Mr. GRAHAM of South Carolina. There will be no turning back, and this will destroy us over time in terms of the rule of law.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Thank you, Mr. President.

Let's not forget what this is all about. Mr. President, 168 of President Bush's nominees have been approved by the Senate; 4 have not—168 to 4. That is the score. This President has 98 percent of his nominees approved. We have now consumed 36 hours of the time of the Senate railing about the four who were held back.

Those on the other side of the aisle believe the advise and consent clause of the Constitution is meaningless. They believe their President, their Republican President, should have every nominee, every judge. They really argue with the premise that these judges should be asked hard questions. They do not believe that a judge seeking a lifetime appointment to the bench should be asked, What do you believe? What values will motivate you if you were in a position of power, a position to decide cases and basically the position to decide the outcome of people's lives?

They do not believe in that. Frankly, they are arguing that this Constitution, that they have sworn to uphold, which provides for the advice and consent of the Senate before a Presidential nominee is appointed to the bench, should be tossed out.

Those of us on the Democratic side disagree. I think, frankly, in their heart of hearts a lot of the more moderate Republicans disagree. They understand that no President gets everything he wants 100 percent. No President should, Democrat or Republican. But they are loyalist, and their partisan loyalty is showing. It has shown for 36 hours.

Let me show you the judicial confirmation scorecard so you will understand what has happened to nominees sent by Presidents to the Senate.

President Clinton's nominees: 248 confirmed, 63 blocked. So 20 percent of the nominees, one out of five sent to the Senate by President Clinton, were blocked by the Republicans, Senator ORRIN HATCH, and the Senate Judiciary Committee.

President Bush's nominees: 2 percent have been blocked.

I listened to the Senator from Pennsylvania tell us, warning us that, frankly, stopping four judges will be remembered, and they will revisit this if the Democrats ever take control of the White House again.

Well, let me remind my colleague from Pennsylvania, those 63 Clinton nominees who were blocked, most of them were never even given the courtesy of a hearing. I know this personally. Three judges from Illinois, three good people seeking Federal appointments, were stopped because one Republican Senator—in the case of one of my nominees, former Republican Senator John Ashcroft of Missouri—personally stopped this nominee. This nominee, a good person, who would have been an excellent judge, was stopped because Senator Ashcroft objected to him. In objecting to him, he never got a hearing.

So for the Senator from Pennsylvania to come and warn us that if there is ever a Democratic President, you can count on nominees being stopped, we learned that lesson. We learned it when President Clinton offered nominees who were quality people, moderate people, and stopped because of some perceived slight, stopped because of some perceived position on issues that the right wing did not agree with.

Let me show you some of the photographs of some of these nominees. You can see that even this small gathering of nominees here represent a rich diversity of people across America. The Republicans would have us believe these people sent to the Senate Judiciary Committee by President Clinton were somehow radical people, people who did not share the views and opinions of America.

You can count on this: Within those people are excellent judges, people with the highest ratings from the American Bar Association, people who were rejected. It gets back to this, as shown on the next chart: The final score here is 168 to 4. So 168 of President Bush's nominees have been approved; only 4 have been held back. Ninety-eight percent have been approved.

I listened to the speech just given by the Senator from Kansas. I hope that those who are following this debate, even though I cannot imagine at 3 o'clock in the morning on the west coast a lot of people are tuned in, but if those who are following this debate heard what the Senator from Kansas said, I think it was chilling and troubling, if not alarming. It is a clear indication of what is at stake here in this debate. The Senator from Pennsylvania joined in the chorus because the Senator from Kansas said they were opposed to judges who were ''discovering the right of privacy in the Constitution.'' Those were his words, ''discovering the right of privacy in the Constitution.''

Well, the Senator from Kansas is correct. The word ''privacy'' does not appear in the Constitution of the United States. But those who have interpreted this document have come to the conclusion that Americans have a basic right of privacy. I suppose from what the Senator from Kansas said, that is judicial activism in his eyes.

But let's remember how that right of privacy first came to the Supreme Court and the decision made, the landmark decision of Griswold v. Connecticut, a Connecticut statute which said they would prohibit the right of married couples to buy birth control devices, contraception, an archaic statute from the 19th century that said that married couples could not buy birth control devices. We are talking about the ones most commonly known.

The Supreme Court said that is wrong. We believe that the people of Connecticut, the people of America, have the basic right of privacy and that married couples should be allowed to make that decision, and no State government should prohibit them from making that decision.

So in this case, the Supreme Court ''discovered'' the right of privacy in the Constitution. The Senator from Kansas believes, I suppose, that this is judicial activism, that the court went too far. How many people in America believe that? How many people in America believe that States or the Federal Government should prohibit the right of couples or even individuals to buy birth control devices, to buy birth control pills? Is that this discovered right of privacy at work? The same right of privacy, I might add,

that was at the core of the Roe v. Wade decision.

So there we have it. They are looking for judges who even question the right of privacy in the Constitution. You wonder why we would even stop four judges because given free rein, I am afraid that my Republican friends would turn the clock back, turn the calendar back to the 19th century, questioning the right of privacy of Americans.

I thought conservatives, by their nature, were opposed to the overreach of government. But what we hear this morning from the most conservative members of the Republican caucus is that we have to question the right of privacy. That is hard to believe.

They also went on to say, the Senator from Kansas agreed with the Senator from Pennsylvania that we need a check and balance on the courts. Think about that for a moment. Oh, it is a nice-sounding phrase. But think about the check and balance on the courts, and then think about the principle of an independent judiciary. Those two are inconsistent.

The check and balance on courts comes in the process when the President nominates a judge, and when we review that judge's credentials and decide whether that judge receives a lifetime appointment. Then there is the correct belief that short of impeachment, judges in America are independent to make decisions. It is one of the bedrocks of our democracy. That has been challenged on the floor of the Senate today by the most conservative members of the Republican caucus.

You wonder why we are here for 36 hours? You wonder why we are taking all this time. It is because of the views just expressed this morning by two members of the Republican caucus which indicate the extreme position they are prepared to take, indicate why 168 of President Bush's nominees being approved and 4 being stopped is unacceptable, and indicate that they want to change the profile and complexion of the judiciary across America in profound ways.

The Senator from Pennsylvania has political amnesia. He comes to the floor this morning and forgets that 63 of President Clinton's nominees never even received a hearing, not even the dignity of a hearing. And he warns us in a booming voice: We will remember this if there is ever a Democratic President.

I say to the Senator from Pennsylvania, he is suffering from political amnesia. He has failed to acknowledge that 63 of President Clinton's nominees were never even given the dignity of a hearing. That was a sad outcome for those nominees and their families. To think we are not going to stop this process at this point in time, that we are going to continue on for another 3 hours is, frankly, I think, unfortunate.

Yesterday, I went with a group of Senators out to Walter Reed Hospital to visit with some of our injured soldiers. Senator TIM JOHNSON from South Dakota was in that group, as well as Senator BYRON DORGAN of North Dakota. There were about a dozen of us who went out and visited with these soldiers. It is something I am not going to forget. These are some of the best we have who have given the most. They have been subject to injuries which are truly sad and tragic in a way, but their courage and their determination are going to stick with me.

Why aren't we talking about Iraq? Why aren't we talking about the veterans? Why aren't we talking about the need for this country's national security or its economy? Really, because there is another agenda in play here. We are involved in a made-for-TV filibuster. That is what this is all about. This isn't for real. Those cots were props on a stage. I walked around the Senate. Most of those cots are still cold as ice. They have never been warmed by a Senator's body. They were brought in here so Fox TV News and all the right wing talk shows could say: My goodness, we are staying up all night. There is a handful of Senators who have given a lot of hours here, no don't about it. This is a made-for-TV filibuster. Sadly, we are ignoring the agenda of this country.

My colleague from North Dakota is here, and I yield the floor to him.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Mr. President, I appreciate the comments of my colleague from Illinois. This is, in many ways, an interesting debate and certainly an important debate largely because it is alleged that we have embarked on something unusual, something unique. Of course, that is not the case.

The issue of filibusters is not a unique issue in the Senate. Let me talk just for a moment about something I listened to on the radio on the way in. C–SPAN is covering this by radio. I heard my colleagues, as my colleague from Illinois indicated, on the other side of the aisle talk about this issue of right to privacy. There is no right to privacy, they say. What is this right to privacy that somehow has been manufactured? They don't agree with the right to privacy. The American people don't have a right to privacy, they say; that is not in the U.S. Constitution.

Let me give an example of right to privacy issues that relate directly to the issue of judgeships. We have a nominee before us named Carolyn Kuhl who is a State judge. Carolyn Kuhl was involved in a case and dismissed a claim and then was overturned in her dismissal. Let me describe the claim. It was an egregious invasion of privacy.

An oncologist was giving a breast exam—in fact, a full examine, including a breast exam—to a woman in his examination room. Another person was in the room with a white coat, another male. That male turned out to be a pharmaceutical salesman. No, not a doctor, a pharmaceutical salesman observing the full physical, including the breast exam of this patient.

The patient sued. Judge Kuhl dismissed it, just threw it out. This woman had no right to privacy, no right to expect privacy. That is what the judge said.

That judge was overturned on appeal, and the court that unanimously overturned that said: The conduct was highly offensive—that is, allowing another male in the room to observe, and not even a doctor but a pharmaceutical salesman—that conduct was highly offensive and the patient had an ''objectively reasonable expectation of privacy.''

My colleagues suggest this is a manufacturing of some right that doesn't exist. This woman has no right no privacy in the Constitution. Judge Kuhl would have it right, they would say.

Judge Kuhl didn't have it right. This happens to be one of the judges who has been held up by the Senate—one of the 4; 168 approved, 4 not approved. This particular judge we decided does not merit approval by the Senate. The other side says there is no right to privacy, so don't be critical of this judge; there is no right to privacy for the American people.

I don't understand that argument. I hear it, but I don't understand it. That is rooted somewhere in the 1930s or the 1920s or perhaps the 1880s. It is certainly not what the American people would expect someone in the Senate to be asserting in the year 2003, that the American people have no right to privacy, or that Judge Kuhl's decision is the right decision, and that has already been determined. That was thrown out on appeal—unanimously, I might say. So Judge Kuhl is not advancing in the Senate. We make no apologies for that. This is someone far outside the mainstream whose record of decisions indicates to us we don't want to elevate this person to a lifetime on the Federal bench.

Let me just say with respect to the 168 approved, 4 not, 2 of those are North Dakota Federal judges, judges from my State. Both are Republican and both nominations I was proud to support. They are both now on the Federal bench in North Dakota. I played a role in getting them there, and I am pleased I did. I think they will be great Federal judges.

That happened the right way. The administration visited with Senator CONRAD and myself and selected from among some good candidates two judge candidates we supported who we think will do well on the Federal bench.

There are other approaches to this. One is, for example, saying to the two California Senators: It doesn't matter what you think, we are going to pick an ultraconservative in California whose record doesn't merit support by the Senate, and we are going to try to shove it down your throat because we believe we have a right to do that. That is the attitude. There is a kind of arrogance there, in my judgment.

When they wrote the U.S. Constitution, the Framers decided they were

going to have a couple of steps to this process. I am glad they did. In fact, they almost decided the President should not be involved in the process. That was part of the discussion because they didn't want to give that much power to one person in this country, but they finally made a compromise with respect to judges. They said the President will nominate and the Congress will have a role of advising and consenting. That is, the President will nominate and the Congress will say yes or no.

We have been extraordinarily cooperative with respect to this President. In almost all cases, we have said yes. In four, we have said no. For that, we now have a 30- or 39-hour extravaganza in which, when I was driving in this morning, I heard my colleagues talk about corruption and all the code words they have developed especially for this debate, especially for their political friends so the word will mean something and it becomes much more than actually exists. This is all a manufactured debate.

They say there has never been a filibuster. That is not true. But if you say it eight times an hour for 39 hours, maybe some people will believe it. I don't know.

This is the oft-repeated old story about the man who comes home at 2 o'clock in the morning, having been drinking and with lipstick on his collar. And his spouse angrily confronts him and says: Where have you been?

He says: Riding my bicycle.

She says: That can't be true, I took your bicycle to the shop yesterday.

He says: That's my story, and I'm going to stick to it.

That is what is happening here: It is my story, patently untrue, obviously false, but they stick to it. They say there has never been a filibuster. The fact is, when the Republicans were in the minority, they filibustered 16 nominations in 1 Congress alone. So if they say it eight times the next half hour, just understand, it is not true. They can say it, say it, and say it, but it is not true.

I guess debate is an opportunity to exchange views. It does not require someone to tell you the facts. The facts are, as my colleague from Illinois indicated, many of the nominees in the previous administration never even got a hearing—not even a hearing. But in addition to that, there have been numerous filibusters, and some of my colleagues, in fact, who are here this morning voted against cloture to sustain a filibuster, some of the same ones who are making this claim.

I don't understand, I guess, how they think it sticks just to stand up here and say something they believe to be the case when they know it is simply not true.

Let me, in the couple of minutes I have remaining, talk about some of the issues I wish they had passion to address. This, in many ways, relates to the right to privacy.

The President and my colleagues on the other side of the aisle have decided in recent days that this young lady—her name is Joni Scott, who went to Cuba to distribute free Bibles—will be fined $10,000 by the U.S. Department of the Treasury. Why? Because she exercised her right to travel and distributed free Bibles to the poor people of Cuba.

She now is subject to a $10,000 fine. I tried to change that the other night. I couldn't do it. The majority in this Congress and the President said: Absolutely not, we are going to maintain these travel restrictions that restrict the right of the American people to travel.

By the way, this woman is going to get no relief. A $10,000 fine for an American citizen who distributes free Bibles in Cuba—maybe we could be talking about that this morning and see if we can agree that it is a perversion to do this. It seems to me this woman has some rights. Yes, the right to travel, perhaps the right to privacy, the right to distribute free Bibles. But the majority party says: No, she has no such right, none at all.

Let me ask if we might not want to talk about another subject during these 39 hours. We have lost 3 million jobs in the last couple of years with a failed economic policy.

This is a picture of a Huffy bicycle. They used to be made in the United States. In fact, right here under the handlebar they used to have a decal that was the American flag decal. Mr. President, 850 workers in Ohio were fired because they were making $11 an hour, and they moved this bicycle manufacturing plant to China where they can pay 33 cents an hour, and they took this flag decal off the handlebar and put on a decal of the globe. Not an American flag, a globe. Why? Because they decided $11 an hour is an egregious wage, outrageous amount of money to pay people when you can make it for 33 cents an hour in China, working 16 hours a day, 7 days a week. So we lost 850 jobs. These 850 people went home and had to tell their families: I lost my job. I am a good worker. I tried hard, but I couldn't compete with 33 cents an hour.

I wonder if maybe we wouldn't have the same passion on this floor to talk about jobs that Americans had but don't have any longer. Could we have a few of our friends stand up and join us to have a 39-hour debate about jobs the American people need, want, and deserve but don't have because these jobs are moved to parts of the world where people are paid 33 cents an hour.

I could hold up another chart to show you 12-year-old kids working 12 hours a day, being paid 12 cents an hour, and they get the jobs and those jobs leave this country. Is there a passion on this floor to talk about that? Oh, no, we don't have time. This isn't a big issue.

The passion is to stand up here and say with respect to the four nominees to the court who have not advanced that we are engaged in a filibuster that has never before been done. That is absolutely, patently false, and the people who make that charge know it.

My hope is we can stop some of this and get on to the things that really matter to the American people and the economy and the future of this country.

My colleague from Illinois I know has additional comments.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I thank my colleague from North Dakota for reminding us that there are issues out there about which the American people really care. I dare say if you go to Missouri, Illinois, North Dakota, South Carolina, Georgia, or Minnesota and take the average person on the street and ask them: ''Where in the list of priorities in your life is the fact that 4 judges out of 172 nominated by President Bush have not been approved,'' my guess is they are going to say: I didn't even know that. Is that a big problem?

In fact, this morning's Washington Post has an interesting story about what we are doing here, this made-for-TV filibuster. They say:

> The greatest deliberative body shows what it does best—talk itself silly.

That is the Washington Post this morning. They refer to filibuster buttons—we have them on both sides of the aisle—filibuster T-shirts, and filibuster bingo games.

I am glad they didn't disclose the identity of this man, but they went out and asked one of our Capitol Police officers what he thought about this marathon debate. He probably would lose his job if his name were disclosed because of the Republican majority. Here is what this man said, a Capitol policeman who has been standing guard over the Capitol through the wee hours of the morning while we gassed on here on the floor about our favorite political issue: the lack of confirmation of four judges.

Incidentally, for those who are keeping score, I believe it cost us about a quarter of a million dollars in taxpayer money for additional pages to be printed in the CONGRESSIONAL RECORD and for additional Capitol Hill Police overtime protection because of this 39-hour marathon—a quarter of a million dollars.

Let me get to the quote from this Capitol policeman. They asked about the made-for-TV filibuster. He said:

> I can see it if it was something important, like the budget or Iraq, but who cares about judicial appointments. They should get a life.

There is a lot of wisdom out there standing in the hallways and in the streets in the cold wondering what in the world we are doing here. The Senator from North Dakota knows full well, if you go to his State or my State and talk about 3 million jobs lost under the Bush administration, those are the numbers they care about, not 168 to 4.

The Republican majority is out of touch. They just don't get it. They don't understand what real families and real businesses across America care about.

The cost of health insurance—for goodness' sake, how much time have we spent in the Senate talking about the cost of health insurance this year? Nada, zero, rien, not at all. No time to discuss the cost of health insurance, the biggest single issue facing families and businesses across America, but, boy, for four judges we are prepared to stand on this floor for 36 hours and grind red meat for Fox TV News and the right-wing radio boys. We will spend night and day. We will bring in our props such as cots and suitcases, and we will pretend this is a really serious filibuster and ignore the really serious issues that America really cares about.

You wonder why fewer and fewer people take the Senate seriously? You wonder why fewer and fewer people vote? It is because of this kind of charade.

Mr. DORGAN. Mr. President, will the Senator from Illinois yield?

Mr. DURBIN. I yield for a question.

Mr. DORGAN. In the previous administration, over 50 nominations were sent to the Congress in which there wasn't even 1 day of hearing—not even the courtesy of allowing someone to come to the Capitol for a hearing. Were any of the folks who are now on the floor of the Senate complaining about our holding up four judges who did get a hearing but we decided not to confirm—were any of the folks complaining back then that those 50 nominees never got a hearing?

Mr. DURBIN. I say to the Senator from North Dakota, their passion for justice did not apply to a Democratic justice. Their passion for justice did not apply to 63 nominees who were not given a chance to come to the Senate floor. Their passion for judges did not apply to those men and women whose lives were changed forever. But when it comes to these four, we take up the time of the Senate, take up the money of the taxpayers to divert us from issues that people really care about. It tells us what it is all about.

When the Senators from Kansas and Pennsylvania come to the floor and say, We want judges who don't discover the right of privacy in the Constitution, is that a conservative value, is that a family value—to reject the right of privacy? That is what they said, and I don't get it. If that is what they are for, they are clearly out of the mainstream, and we ought to take a closer look at every job.

I even think Robert Bork, when he was trying to get on the Supreme Court, said he agreed with Griswold v. Connecticut, a right to privacy case. What we heard this morning from the most extreme members of the Republican caucus is they will not even acknowledge a right of privacy for individuals and families across America. That is a sad outcome and one I think, frankly, should be challenged because if that is really the standard we are going to play to, I am going to look a lot harder on the Senate Judiciary Committee to make sure we don't have nominees given lifetime appointments to the bench who would have our Government raiding the bedrooms and private lives of Americans. That is what it is all about. It should not be allowable.

I see the majority leader on the floor and I respect him very much, but this is wrong. What we are doing is wrong. This made-for-TV filibuster over 4 judges after the President had 168 approved—why aren't we talking about issues people really care about, such as the cost of health care, the loss of jobs, the poor soldiers coming back injured who need help in veterans hospitals?

The Presiding Officer is chairman of the Veterans' Administration and HUD subcommittee on the Appropriations Committee. We had to pull his bill from the floor the other day. We did not have time to finish the bill, the 2 hours it would take to finish that bill—$62 billion, if I am not mistaken, or $68 billion for the Veterans' Administration—because we had to hurry on to this made-for-TV filibuster. That is sad. We should do the people's business. We should focus on things that Americans really care about.

I yield the floor.

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

Mr. SANTORUM. Mr. President, to be referred to as an extreme Member of the other side of the aisle, I would like to suggest that this extreme Member on the other side of the aisle never voted against cloture on a judicial nomination. How extreme is this Member versus the Member who just spoke, who has voted repeatedly and repeatedly and repeatedly and repeatedly and repeatedly against cloture? Who is the extremist?

I will posit that to the American people. Who is the extremist? The Senator from Pennsylvania, who never in his career voted, ever, against a cloture petition for a judicial nomination or the Senator from Illinois, who has led the effort, organized the posse, to filibuster, for the first time in American history, nominations for the court?

This is only 168 to 4. When the rules are changed, upon changing the rules you have to start with one. Then you do two. Then you do three. Then you do four. And today we do five. Today we do six. Next month it will be seven. Then it will be eight. Years from now, it will be 127, and then 3,455. It starts with one. It starts with the change.

There have been 2,372 nominations since the filibuster rule was put in place; zero blocked on the Senate floor. It has never been done in history.

Oh, it is only four, just a few. We are doing great. ''We just started,'' is what they are not saying—we have only just begun. We just started this, folks. Not the Senator from Pennsylvania, not the Senator from South Carolina, not the Senator from Missouri. The Senator from Missouri opposed a judge. He said, look, have an up-or-down vote and then I will vote no. That has been the way it has been done here. This idea that we have filibustered nominations by folks not getting a vote in committee, let us look at the record.

Fifty-four Bush nominees under the Democratic Senate got no hearing, did not get confirmed. Have we complained that they were filibustered? No, because they were not. Every President at the end of his term has judicial nominations in committee who have not gotten through, for a variety of reasons. It is just the flow of the Senate. In this case, 54 Bush nominations. How many Clinton nominations, after 8 years? Forty-one.

Let me repeat this again because we are saying this is different; Clinton was treated so unfairly. There were 377 nominations, 1 defeated on the floor, up-or-down vote. No filibuster.

I remember—the Senator from Missouri, I am sure, can remember this—Richard Paez. I do not know if the Senator from Missouri voted against him or not, but I sure did. I did not vote against cloture because the Senator from Mississippi, Mr. LOTT, and the chairman, Senator HATCH, said: Do not set this precedent. Do not change the rules. It is going to come back and bite us. We cannot do this. It is too important to the future of the Senate. It is going to undermine the judiciary. The Ruth Bader Ginsburgs of this world, the Antonin Scalias of this world will not have a prayer getting through this place. The best and the brightest are going to get knocked away or scared away if we raise this bar, if we allow the extreme elements of either party to start to run the Senate. We cannot let this happen.

As much as we may want to, as much as we did not want Richard Paez to be a Ninth Circuit Court judge, you have to hold back. You cannot let the passion of the moment completely destroy the precedent that has served this body and this country so well. Do not succumb to the special interest groups who are pleading with you. Come on.

The Senator from South Carolina said just in the last hour that for every one liberal special interest group there is one conservative one. Guess what. When the shoe is on the other foot, do you think we are going to say, oh, well, we are going to go back to the way it was; we are going to let you have all of your liberal judges; we are only going to require 51 votes? Fat chance. Fat chance.

Mr. GRAHAM of South Carolina. Will the Senator yield for a question?

Mr. SANTORUM. I will yield the floor to the Senator from South Carolina.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM of South Carolina. For something that is a waste of time, it

has been hard as heck to get to say anything around here because everybody is so fired up about talking, which I think is good. We have been in almost 39 hours, and if Senators get 15 minutes to express themselves they are lucky, which I think is a testament to how important this is to people.

I am very proud of what the Senator from Pennsylvania has tried to tell the body about what the future will be like. The Senator from Minnesota and the Senator from Georgia, my two good friends, my classmates, we were not here during a lot of these problems of the past. We are worried about the future.

I want to very quickly respond to my good friend from Illinois. Here is what I am willing to do—and I do not know who the Capitol Hill policeman was, God bless him for serving—I am willing to stand by a poll of all the cops in America and see whether they think appointing a judge is a big deal. It is my belief that most cops in America have had experiences in court that they really would like us to pick judges wisely. As a prosecutor, I can assure my colleagues who the judge is matters. I can assure my colleagues that most police officers do watch how the court operates, and they are concerned about the quality of judges because many of them have made cases risking their lives only to see it bounced.

So I totally disagree that this police officer is speaking for the mainstream of cops. Cops care about judges.

The Washington Post—I am not a great fan of the editorial page, but I read the Washington Post about what they think is going on here today. On February 5, 2003, the Washington Post said this filibustering of judges—Miguel Estrada—is really not a good thing. A world in which filibusters serve as an active instrument of nomination politics is not one either party should want.

Well, the extreme Senator from Pennsylvania shares the same views as the Washington Post, which begins to bother me a little bit. Maybe he should be a little more extreme. But what he is saying is what the Post said back in February. You do not have to be a rocket scientist to figure this out because I figured it out. I am not a rocket scientist.

This is about manufactured controversies. Judge Pickering, oh, this is no big deal. Why are the Senate Democrats sending out urgent e-mails saying send us money, my God, the country is about to blow up because the Bush administration is devoted to using the courts to its political advantage? If that does not get your blood boiling, what would? It would scare me if I got a memo from somebody who is a responsible member of the Senate Democratic leadership saying, send money quickly. The Bush people are taking over the courts, and they are going to put a guy on the court named Charles Pickering. While he was in law school, he wrote an article about making sure the ban on interracial marriage in Mississippi was not stricken down.

As a State senator in the 1970s, Pickering worked to repeal the important provisions of the Voter Rights Act. That ought to scare you to death if you believe in racial harmony and justice.

This e-mail is totally in contradiction of what has been said on the Senate floor. The e-mail says that Senate Democrats have launched an unprecedented effort. If you have listened to everybody for the last 33 hours, this is just business as usual. The e-mail is the best evidence of what is going on over there. They have picked a few judges, for whatever reason. They have manufactured controversies about who these people are, and they are ruining their lives.

Judge Pickering was approved by this body 12 years ago. I would daresay this body would not have unanimously put him on the district court as a Federal judge if they believed he was writing articles supporting interracial marriage bans and that while he was a State senator he actively undermined the rights of African Americans in Mississippi. That makes no sense. That means this place is totally asleep and worthless when it comes to screening, or they are manufacturing controversies about this judge.

Judge Pickering was voted well qualified, the highest rating one can get from the American Bar Association. I am convinced that the ABA is not putting people on the bench well qualified if they believe they are a bunch of racists. It goes on and on with all four of these people, and it soon will become 12. That is why I am so upset.

Special interest groups who do not live in Mississippi have declared war on the basic essence of who Charles Pickering is, defying all of the evidence out there by people who know him the best and what he has done with his life. That is a sad state. That will lead to chaos, and the Senator from Pennsylvania is absolutely right. You are going to have people applying for these jobs in the future who will have never uttered a word about anything because if they say anything that may get a liberal or a conservative special interest group mad at them, they will come and knock their head off. That is why we are here at 10 minutes after 7 and you have to really watch it to make sure you do not deny your colleagues a chance to speak because contrary to what they say over there, this is a big deal to everybody, and, my God, it ought to be. If it gets to be where it is not a big deal to how a judge is appointed and nominated, and whether you follow the Constitution, our problems with the economy pale in comparison with our problems as a nation. When politics enters the judicial arena and the judicial arena just becomes another form of politics, then we have drifted far astray from where our forefathers wanted us to be.

I will yield to my colleague from Missouri.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. BOND. Mr. President, I could not agree more with my colleague from South Carolina. When I hear asked on this Senate floor, who cares about judicial appointments, who cares about the important judiciary that makes decisions that affect our everyday lives, I would join with him in saying that the people in Missouri care.

I have found all of the problems—and there are many problems, there are lots of concerns. People are concerned about Iraq. They want to see the President carry on the war against terrorism. They are concerned about jobs. They are very grateful, I might add, that the Republican Congress has given the economy such a boost with its good fiscal policy and gotten the economy growing, an economy that President Bush inherited that was in the tank, but it is starting to grow, and we want it to grow faster. They ask me more about this unprecedented filibuster of judges than anything else.

No matter where I go, in the rural areas, in the big cities, in the suburbs—my colleagues on the other side ask, who cares? Well, people in my State understand. They know how important the judiciary is. They know that appellate courts, the courts that oversee district courts usually in many States, make decisions that affect our everyday lives.

The Senator from South Carolina was right. The police officers, the sheriffs, these are the folks who go out and risk their lives and then they see appellate judges, people on appeals courts, making decisions that turn these criminals loose. And they say what is this all about? I am risking my life, I am out there getting shot at, trying to bring somebody in, and an appellate court judge misuses the law to set him free. Our police officers, our law enforcement officers today understand the constitutional rights. They know. They have to abide by the standard. They have to respect the rights of all citizens. But when they do that, when they go through all of the steps and do it right and then a criminal is turned loose, they, who have risked their lives, know how important these judges are.

My Democratic colleagues complain that we are taking time. Well, I have been waiting to get on the floor because this is something we need to talk about. We have listened to them all year long delay, filibuster. They bragged about they finally passed the Healthy Forests bill to stop the wildfires that have burned in California and threaten many States, and do my colleagues know what they are doing? They are filibustering the ability to take that bill to the conference so we can get it passed. They are filibustering that.

My colleague from Illinois was talking about how long it took us to get to the VA-HUD bill, a bill I am responsible for. Well, something may have

interfered with taking up that bill when the minority whip spent 8½ hours on the Senate floor on Monday complaining about filibusters. Excuse me, but what is that when he will not release the floor beginning at 1:30? I gave up. I heard he went 8½ hours, maybe it was 9½ hours. I decided to turn on the ball game about then. But we were blocked from doing anything. We were blocked by the same Democrats who complained, after they filibustered all year long, that we are talking too much.

There is a lot to be said, but the most important thing I can say is that the President has nominated 46 people to serve on the Federal circuit court, and the Senate has confirmed only 63 percent. This is what we are talking about, unprecedented. The President has made four nominations to the Court of Appeals for the DC Circuit, the second highest court in the land, and only one has been confirmed.

Despite the self-congratulations of the Democrats who say they have confirmed 168, they have not confirmed 37 percent of the circuit judges. What nominee has withdrawn his name? One of the most qualified people ever nominated for the judiciary. Three remain filibustered. Three more are being threatened with that fate. Numerous others are being blocked or delayed by the minority. The reason most cited is that these nominees are out of the mainstream.

The mainstream, it appears, is defined by a few of my colleagues and some of the most liberal interest groups in the country. I know the liberal interest groups, the Hollywood group, put in a lot of money, and they have strange ideas of what the mainstream is. When you talk about some of their mainstream Hollywood people or People for the American Way ideas, I tell my colleagues, that dog does not hunt in Missouri. I imagine it does not hunt in South Carolina, Georgia, and Pennsylvania either.

If that is the litmus test, let us talk about who is in the mainstream. For the Ninth Circuit, Judge Carolyn Kuhl, the American Bar Association says she is well qualified for the position. Oh, earlier on, that was going to be the gold standard. The Democrats said: We cannot appoint anybody who is not rated at least qualified by the American Bar Association.

She is rated well qualified, a distinguished career as an attorney with the Department of Justice, U.S. Solicitor General, a clerk for the United States Supreme Court. Twenty-three women judges on the Superior Court of Los Angeles, and nearly 100 judges who serve with her have spoken out on her outstanding abilities and professionalism. The litigation section of the L.A. County bar has also. Are those people out of the mainstream? Are they somehow different? Are they somehow unworthy?

Then Judge Janice Rogers Brown, she is the first African-American woman to serve on the State's highest court. She was retained by the support of 76 percent of the voters in her last election. That is in California. Is 76 percent of the California voters out of the mainstream? Academics from colleges across the State have written in to speak about her professionalism and evenhandedness. Sounds like mainstream to me.

They like to think that the panel of the Ninth Circuit, which is the most liberal, most overruled, most out of touch circuit court in the Nation, is mainstream, but this panel of Ninth Circuit judges tried to stay the recall election in California. The Ninth Circuit judges declared that the words ''under God'' in the Pledge of Allegiance are unconstitutional. Is that the mainstream? Two Democrats appointed to the Ninth Circuit ruled that convicted felons serving a life sentence have a fundamental right to procreate by artificial insemination. Are they in the mainstream? Where is that in the Constitution?

Mr. President, I have many colleagues who need to speak. I have a whole lot more to say. I will be sharing it with you. But most of all, I am hearing from the people in Missouri who know their lives could be affected by what the nominees of the appellate courts in the Nation can provide.

After 9/11, a Jordanian named Osama Awadallah was apprehended after material linking him to some of the hijackers was found in a car parked at Dulles by one of the hijackers. It was established that Awadallah knew two of the hijackers and had met with one of them up to forty times. But Clinton appointee Judge Shira Scheindlin dismissed his charges and in the process struck down a federal material witness statute long used by the Department of Justice to detain witnesses who are a flight risk. The fact that this was well-settled law used by the prosecution was no deterrent to the judge. Fortunately, she was overruled by the court of appeals.

Yesterday, we also heard about Clinton appointee Judge Jed Rakoff, who ruled that the federal death penalty is unconstitutional, again disregarding well established precedent. In his opinion, the judge likened the statute to murder. The judge seemed to have total disregard for the fact that the arguments he made were those that should be made in a legislative body, but that would require one to be responsive to the will of the voters—what an old fashioned notion! Even the Washington Post—which opposes the death penalty—condemned this blatant overreaching decision as entirely inappropriate for a judge.

Another recent Clinton appointee has ruled it necessary for the government to permit criminal illegal immigrants bail, rather than holding them for deportation—A very useful tool for our immigration services to ensure that criminal aliens are sent back to their native countries.

President Clinton nominated a New Jersey federal judge to the court of appeals who once ruled that a homeless man, despite the disturbance he was causing the patrons, had a right not to be removed from a public library. Of course, he was supported unanimously by the Democrats. On the circuit court, he went on to rule that prisoners had a constitutional right protecting their mail from searches and argued that the government could not go after the proceeds of drug forfeitures—fortunately for the war on drugs, he was unsuccessful.

Speaking of prisoner cases, one of the decisions issued by Judge Pickering that the Democrats have been critical of was a prisoner's rights case. A prisoner was dissatisfied with the prison issue typewriter because it was lacking a memory system—Judge Pickering ruled that this prisoner's typewriter was adequate and he did not have the right to one with memory. What a cruel decision. Is that what this debate has come down too? This hardly puts Judge Pickering out of the mainstream, in fact I would bet just about everyone listening to this debate would agree this decision is mainstream—It makes common sense.

I could stand here all morning reading decision after decision handed down by Democrat appointed judges that simply defy reason and bear no resemblance to what most people in this chamber or in their states would consider to be the ''mainstream''. Yet a few of our colleagues have taken it upon themselves to make this critical determination. By their history, they have no credibility on this question. In fact, all the nominees who have been labeled as such actually enjoy the majority support in this body and have the support of Republicans and Democrats alike.

Mr. President, it is time to give these extremely well-qualified, high-respected individuals an up or down vote. It is time for the minority to quit hiding behind this flimsy argument about being in the mainstream.

It is too late for Miguel Estrada, his nomination was withdrawn after 848 days and 7 cloture votes, unanimous rating of well qualified by the ABA, but it is time to give Justice Priscilla Owen a vote, her nomination has been pending for 917 days and there has been three cloture votes, unanimous rating of well qualified by the ABA, it is time to give Judge Charles Pickering a vote, his nomination has been pending for 901 days and he has an ABA rating of well qualified, it is time to give Attorney General William Pryor a vote, his nomination has been pending for 217 days and he received a qualified rating, it is time to give Judge Carolyn Kuhl a vote, her nomination has been pending for 873 days and the ABA has give her a well qualified rating, it is time to give Justice Janice Brown a vote, her nomination has been pending for 110 days, and it is time to give Judge Henry Saad a vote, his nomination has been pending for 743 days.

Mr. President, it is time for the body to give these candidates an up-or-down vote.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Just like the Senator from Missouri, I want to talk for just a second about who cares about these judicial nominations because obviously the folks on the other side of the aisle who have been obstructionists in not allowing circuit court judges to come to a vote think the American public does not care about our Federal judicial system. Sure, our supporters understands it and they care. Sure, every Rotary Club I go to understands it and they care because they ask me about it. Every church where I go to speak, they care, they understand it, because they ask me about it. I have been walking down the street in my hometown and some stranger will come up to me. He understands it and he cares.

Obviously, the Senator from Illinois is totally insensitive to these kinds of people.

Let me tell you who else cares. That criminal defendant who is sitting in jail and who is having to wait longer than he ought to wait because we do not have Federal judges on the bench, he or she cares. That plaintiff or defendant in a civil lawsuit who is having to sit and wait and wait for justice, whatever that justice may be, on either side of the appellate case, he cares because he is not getting his case served.

Obviously, the folks on the other side of the aisle who are complaining about and conducting this filibuster think those people are OK and they do not care. They care.

I guess one of the major other differences between the Senator from Illinois and this Senator is that I don't go to the Washington Post to get my anecdotes. I don't go to any conservative newspaper to get my anecdotes.

Yesterday I drove to my office over in the Russell Senate Office Building, and as I pulled my car up to the gate, just like all of us—we stop, the Capitol Police have to come around and run the mirror under your car—the Capitol policeman came over to me and he knew I had been up except for an hour the night before, and I could tell he was dead tired, and he looked at me and he said: Senator how are you doing? And I said: I am tired. He said: Senator, you guys are doing the right thing. Make your point.

You know that guy cares because he is like every other law enforcement officer in America. They depend on us to make sure we provide them with good judges to take the bad guys off the street which makes their job easier.

There is one other point I want to make because I have heard this comment off and on for the last 38 hours. And that is, the fact that the score of 98 percent is a pretty good score. I don't care whether it is a math, English, or a reading test. They keep bringing this point up that we have confirmed 98 percent of the President's judicial nominees.

First of all, the numbers are not right, but I will not get into that. I want to talk about the 98 percent. On its face, that might sound fine. When you come to messing with the Constitution of the United States, when it comes to the confirmation of judges, 98 percent is not good enough. The reason is that every other President in the history of the United States of America—and we have had 43 of them now—every single one of the other 42 Presidents of the United States has had a score of 100 percent when it comes to the issue of not having their judges filibustered.

For these folks to stand up on the other side of the aisle and say 98 percent is pretty good, they don't care about the fact that they are the first in the history of the United States of America to filibuster a judge.

I repeat, if 98 percent is OK and they are smiling and happy about it, I would like to hear how many of them go home this afternoon and think they would get a good reception from their spouse if they said: You know, honey, I have been faithful to you 98 percent of the time. Or I wonder how many of them would feel good as they get on an airplane this afternoon and head home smiling and thinking, boy, we have done great work defending our judges and defending our filibuster of these judges but that airplane had a safety record of landing 98 percent of the time.

There is a difference. We live under this document that has served us so well for so many years and 100 percent of the judges who are nominated have been confirmed by every other Senate for every other President prior to this one as per the language of this great document.

I close by reading some comments out of a book written by a man of which I am a big fan. The Democrats in this Senate are not particularly a fan of his right now, but let me tell you, he is a great American. He is a great American who speaks the truth, and he is speaking the truth about what is going on in this body right now. ''The National Party No More, the Conscience of a Conservative Democrat.'' It is written by my colleague, my good friend from the State of Georgia, Senator Zell Miller.

I ask unanimous consent that the entire chapter, chapter 8, entitled ''41 Beats 59—That Strange Senate Math,'' be printed in the RECORD.

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

41 BEATS 59—THAT STRANGE SENATE MATH

The United States Senate is the only place on the planet where 59 votes out of 100 cannot pass anything because 41 votes out of 100 can defeat it. Try explaining that at your local Rotary Club or to someone in the Wal-Mart parking lot or, for that matter, to the college freshman in Political Science 101. You can't, because this strange Senate math stands democracy on its head.

By name, this incongruous, obstructionist procedure is known as a filibuster. The word filibuster comes from a Spanish word for ''pirate,'' and that is exactly what this procedure does. It hijacks the democratic process. Filibusters first caught the fancy of the nation after James Stewart, in Frank Capra's classic movie Mr. Smith Goes to Washington, made Mr. Smith a hero standing up to the Senate bosses on behalf of the people. But now, however, most Americans understand vaguely that in the Senate any member can stand up and talk endless drivel for hours in order to prevent legislation he or she opposes from coming to a vote. The process is so ridiculous that the filibuster, like that old comics-page blowhard Senator Claghorn, has unfortunately become, in the minds of many, just another caricature of the Senate, just another thing to laugh at, just more hot air from the Cave of the Winds.

Realizing that with the scrutiny of television, the people would not stand for such nonsense, the ''Old Bulls'' of the Senate fuzzed it up. They made it subtler. These verbal gunslingers can now be forced to shut up, and the process and the Senate move along toward a vote if sixty members remove the cotton from their ears and vote for cloture. A cloture shuts off what is called a debate but isn't because it takes two sides talking to constitute a debate. If this sounds confusing, it is meant to be. That is precisely the objective.

The short version of this debacle is that the way filibuster is being used in the Senate gives the minority an absolute veto on just about everything. In fact, the U.S. Senate has become similar to the Security Council of the United Nations where one country can veto the will of a clear majority and castrate the entire process.

Winston Churchill once said, ''Democracy is based on reason and fair play.'' Well, there's nothing reasonable or fair about what's been happening in this august body. It's not just that it's an expensive waste of time and taxpayer money, but it's also a flagrant abuse or majority rule, the principle that democracy operates on everywhere. Everywhere, that is, except in the U.S. Senate.

Rule XXII of the Senate is the reason for all this. It was adopted in 1917 and was meant to move things along. President Woodrow Wilson had lashed out at what he called a ''little group of willful men'' who had blocked his proposal to arm our merchant ships against German submarines. Sixteen senators could file a petition against a bill or an amendment and if two-thirds approved it within two days, debate was to be limited to one hour per member or one hundred hours. Later it was modified to sixty votes, not two-thirds, necessary to halt a filibuster. And in 2003, for the first time, it was used to prevent a vote on the presidential judicial nominees.

The longest filibuster in congressional history was waged against the Civil Rights Act in August 1957 by Senator Strom Thurmond of South Carolina, when he held the floor for twenty-four hours and eighteen minutes. Wayne Morse of Oregon comes in a close second with twenty-two hours and twenty-six minutes. Probably the most entertaining was the Kingfish, Huey P. Long of Louisiana, who in 1935 only went on for fifteen hours, thirty minutes against one of President Roosevelt's New Deal proposals. When asked how he kept from answering the call of nature for that long he answered, ''Why do you think I wore a navy blue suit?'' Strom Thurmond had dehydrated himself in a sauna before taking the floor for his record-setter and didn't worry about that problem.

James Madison, the Father of the Constitution, feared some future political leaders would pervert the legislative process in

just this way. He warned in Federalist Paper #58 that when it happened, ''The Fundamental principle of free government would be reversed. It would be no longer the majority that would rule. The power would be transformed to the minority.'' I'm sure the man who wrote the Constitution is spinning in his grave.

Alexander Hamilton may be taking a couple of revolutions as well, because he agreed with Madison. He pointed out in his Federalist Paper #68 that the vice president was given a tie-breaking vote for ''securing at all times the possibility of a definite resolution of that body.'' A ''definite resolution''; how well put. But no one has said it better than Senator Henry Cabot Lodge in 1893, when obstructionism was not nearly as bad as it is today: ''To vote without debating is perilous, but to debate and never vote is imbecile.''

Years ago, when I was teaching freshman political science at Young Harris College, I always repeated the old story about the origin of the Senate. Thomas Jefferson was in France when the Constitutional Convention was being held. Later, he asked his friend George Washington, who presided over the convention, about the purpose of this upper chamber, the Senate. Washington, so the anecdote goes, then asked Jefferson, ''Why do you pour coffee into your saucer?'' To cool it,'' Jefferson replied. Washington responded, ''Even so, we pour legislation into the senatorial saucer to cool it.''

Cool it, yes. but not freeze it into an ice cube. Truth is, there is nothing at all said in the Constitution about protecting Senate minorities. Our Founding Fathers, I believe, thought the smaller size, longer and staggered terms, as well as state legislation on the selection of senators, would provide more wisdom.

Some constitutional lawyers have argued that any kind of super-majority vote is unconstitutional, other than for the five areas specified in the Constitution: treaty ratification, impeachment, override of a presidential vote, constitutional amendments, and expelling a member of Congress. As I write this, Judicial Watch is doing just that. They have filed a lawsuit arguing that confirmation of judges is not specified in the Constitution and, hence, does not require a super majority.

That's one possible remedy. There are others. We could abolish Rule XXII that protects this travesty and let the U.S. Senate operate under rules like every other democratic legislative body in the world where a simple majority rules. That's about as likely as a day dawning in Washington without ten fund-raisers.

Or we could modify what I call the ''two-track trick'' or filibuster by stealth adopted a few years ago, where another piece of legislation is considered at the same time a filibuster goes its windy way. I call it ''filibuster-lite.'' It's a way to avoid the inconvenience and pain of a real filibuster as if we are using powder-puff, 16-ounce gloves instead of bare knuckles. I'd much rather just duke it out in a real debate and get it over than try to deceive the public that no blood is being spilled. Many veterans of the senate—not a newcomer like myself—have expressed dismay wit the process. Henry Clay, generally recognized as one of our greatest senators, condemned the first organized filibuster when it occurred in 1837. Even back then, he though there needed to be some workable limitation for endless debate. If only he could see what happened late in the twentieth century, Clay would be another grave-spinner. In the nineteenth century, there were twenty-there filibusters. In the last thirty years of the twentieth century, there were more than two hundred.

Two pieces of crucial legislation that filibusters have stymied over the years include the anti-lynching bill of the 1920s and abolishing the poll tax that was held up for twenty-two years from 1942–1964. The Civil Rights Act of 1964 was filibustered for ninety-three calendar days.

With Georgia's Senator Richard Russell as their leader and unlimited debate as their weapon of choice, a small band of Southern senators for years had managed to defeat or drastically weaken any civil rights legislation that came before the Senate. But it was different in 1964. The Senate membership had changed and President Johnson was pushing it with all his considerable power. He told the nation that passing the legislation would be the most fitting memorial that recently assassinated John F. Kennedy could be given. He also managed to peel off Minority Leader Everett Dirksen who often sided with Russell. In the end cloture was invoked 71–29 and the bill went on to pass by an overwhelming margin.

Obviously, both parties have used filibusters time and time again, one just as guilty at the other. In 1996, Democrats blocked a vote on a constitutional amendment on term limits and the Republicans blocked a vote to reform campaign finance. Many conservatives would disagree with me, but I happen to think the political process would have been improved if both those measures had passed. Certainly, it would have greatly weakened the current death-grip of the well-heeled special interest groups because electing their pet incumbents over and over with little or no opposition is what gives both the tremendous power they have. I call it ''the dance,'' and it's nothing like that Garth Brooks song by the same name. After the music of election year stops, it's the public that gets screwed.

In the mid-1990s there was a bipartisan group of distinguished citizens called ''Action, Not Gridlock'' that came together with great ballyhoo, intent on reform and majority rule. Republican Barry Goldwater was among them. Then in 1995, Democratic Senators Tom Harkin and Joe Lieberman introduced a rule change that I believe is the best that's been proposed.

Two years earlier, Harkin had let a committee hearing have it with both barrels: ''There comes a time when tradition has to meet the realities of the modern age. The minority's rights must be protected. The majority should not be able to run roughshod over them, but neither should a vexatious minority be able to thwart the will of the majority and not even permit legislation to come up for a meaningful vote.''

The Harkin-Lieberman plan called for a four-step process that kept sixty votes on the initial cloture vote, but decreased it by three votes with each of the next three cloture attempts until finally it got down to the majority of fifty-one. They argued, logically, that this would preserve the Senate tradition while giving the minority plenty of time to plead its case without blocking the majority forever. I liked this idea so well that in March 2003, I introduced an identical bill. In May I joined with Majority Leader Bill Frist in a modified version applying the process only to judicial nominees. That seems to have the best chance for any kind of change and I'm afraid that's not much. Both Harkin and Lieberman now oppose what they so eloquently promoted a few years earlier.

As far as the fate of the Harkin-Lieberman rule change, the New York Times celebrated New Year's Day 1995 with a lengthy editorial beginning, ''The U.S. Senate likes to call itself the world's greatest deliberative body. The greatest obstructive body is more like it.'' The article continued, ''Once a rarely-used tactic reserved for issues on which senators help passionate convictions, the filibuster has become the tool of the sore loser, dooming any measure that cannot command the sixty required votes.''

All of this came to naught, however, after the Republicans solidly opposed the amendment and Democratic Senator Robert Byrd who, like that mythical, hell-guarding, ferocious three-headed dog Cerberus, punctuated his opposition with the story of how Cato the Younger, in 60 BC, got the floor in the Roman Senate at midday and valiantly spoke until sundown, the time of adjournment, in order to thwart one of Julius Caesar's proposals. That story marked the end of the Harkin-Lieberman filibuster reform bill. Never mind that Byrd didn't tell the rest of the story, that Caesar was not thwarted and fourteen years later Cato committed suicide while Caesar was at the height of his power and still going strong.

Now, I must admit I greatly admire and respect this man, Cato the Younger. He was one of Rome's greatest statesmen, not at all like his great grandfather Cato the Elder, who exemplified the corruption and hypocrisy that later undermined the traditions of republican liberty. Cato the Younger was different. He was a moral man and a great defender of the Constitution and the dominant role of the Senate. That was his role and he always played it to the hilt. His reputation was such that our Founding Fathers admired him as a symbol of opposition to tyranny. In fact, George Washington ordered a play about Cato performed to inspire his soldiers at Valley Forge.

But, truth be told, Cato met an ignoble end. His reputation was greater than his ability. After he was defeated by Caesar at the Battle of Thapsus, rather than accept the generous offer of clemency from his old antagonist, he committed suicide. And he botched that; he didn't fall directly on his sword and it didn't kill him swiftly so he tore out his own intestines with his bare hands. It gave ''spilling your guts'' a new meaning and was a messy end for the First Filibusterer. While today we can find many good books on Caesar, I have yet to find one on Cato. So, you lovers of the filibuster, I say that is a history lesson worth thinking about.

For all the good stories that have come down through the centuries inspired by the filibuster, in the end, it has nothing to do with ancient history.

The filibuster has nothing to do with the British Parliament.

The filibuster has nothing to do with coffee cooling in a saucer.

The filibuster has nothing to do with freedom of speech.

The filibuster has nothing to do with tradition.

The filibuster has nothing to do with the Constitution.

The filibuster has nothing to do with protecting minority rights.

The filibuster has everything to do with personal political power. It's about Alpha dogs defending their turf in that great big kennel under the dome.

Mr. CHAMBLISS. Here is what he says:

The United States Senate is the only place on the planet where 59 votes out of 100 cannot pass anything because 41 votes out of 100 can defeat it. Try explaining that at your local Rotary Club or to someone in the Wal-Mart parking lot or, for that matter, to the college freshman in Political Science 101. You can't, because the strange Senate math stands democracy on its head.

He then talks about ''Mr. Smith Goes To Washington'' and the perception about a filibuster. And he continues:

Realizing that with the scrutiny of television, the people would not stand for such nonsense, the ''Old Bulls'' of the Senate fuzzed it up. They made it subtler. These verbal gunslingers can now be forced to shut up, and the process and the Senate move along toward a vote if sixty members remove the cotton from their ears and vote for cloture. A cloture shuts off what is called a debate but isn't because it takes two sides talking to constitute a debate. If this sounds confusing, it is meant to be. That is precisely the objective.

The short version of this debacle is that the way filibuster is being used in the Senate gives the minority an absolute veto on just about everything. In fact, the U.S. Senate has become similar to the Security Council of the United Nations where one country can veto the will of a clear majority and castrate the entire process.

He goes on and gives several anecdotes about the Constitution and what a great document it has been and cites Jefferson's comment to Washington about the function of the Senate and Washington's statement that has been mentioned several times about the function of the upper Chamber, the Senate. The story is told with Washington asking: Why do you pour coffee into your saucer? To cool it, Jefferson replied. And Washington said: Even as we pour legislation into the senatorial cup to cool it.

Here is what Senator MILLER says about that: Cool it, yes. But not freeze it into an ice cube.

There is a significant difference.

Again, he goes on talking about the history of the filibuster. In the history of Democratic Senators, Democratic Senators who are serving in this body today who in recent years have asked that this filibuster rule be changed so that we would not go through the process that we are experiencing today. All of a sudden those Democratic Senators have amnesia and are voting not to invoke cloture.

This is the way Senator MILLER winds up:

For all the good stories that have come down through the centuries inspired by the filibuster, in the end, it has nothing to do with ancient history.

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The filibuster has everything to do with personal political power. It's about Alpha dogs defending their turf in that great big kennel under the dome.

I agree with Senator MILLER.

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from Louisiana.

Mr. BREAUX. Good morning, Mr. President and colleagues.

I was very interested in listening to the distinguished Senator from Georgia and the Senator from Pennsylvania. I am trying to keep track of what he was quoting from. We decided he was quoting from Miller, chapter 1, verses 6 through 12. I am sure it is considered a holy document. And of course, as most documents, there are two sides to every story. Indeed, on that I imagine you have at least two sides to Miller, chapter 1, verses 6 through 12.

I arrived in this institution over 30 years ago and remember quite well driving up from Washington 35 years ago in a U-Haul with two small children and my wife. I was in absolute awe of the Capitol. In fact, the first time I had ever had an opportunity to visit Washington was when I came here to work as a very young aide to a then-sitting Member of Congress on the House side.

Over those 35 years, I have come to love and respect and appreciate all of the good things that this institution, including the other body, as well as the Senate, stands for. It is a wonderful opportunity to engage in serious debate about the important issues of the day and to address the important issues and problems facing the people of this Nation. That is what this institution does best.

Unfortunately, every now and then the institution tends to break down and we spend an inordinate amount of time doing things that do not address the great issues of the day or contribute anything to solving the great problems of the day. This is one of those times. I have not lost my respect for this institution, and particularly the Senate, even though as in most things in the real world, sometimes things did not run quite as they should. We have now engaged in a couple of days of exhibiting how this institution does not work very well, although on very rare occasions. I still have the utmost respect for this institution and will continue to have that respect for as long as I live despite the fact that every now and then it breaks down.

The issue it has broken down on—I imagine most people in this country are probably watching the morning news show; some are probably watching cartoons with their children. I doubt very well most are watching what some would consider a cartoon-type of atmosphere in this debate which has been on longer than it should. The issue is quite simple: Are Democrats stopping Republicans from getting their judges approved? And are we doing it in a way that is somehow unconstitutional or outside the rules of the Senate?

If you look at the record of the judges, our side has pointed out we have approved 168 judges while only 4 have stopped. I was trying to say, how does that relate to the average American? If the Washington Redskins had a 98 percent win-loss record, people would think that is absolutely astounding, and Spurrier would be given a big raise if they had 98 percent win-loss. If Tiger Woods won 98 percent of the tournaments he entered, people would be writing in amazement about that incredible person capable of winning 98 percent of the time. I happen to play tennis, and if Andre Agassi won 98 percent of his matches, I would imagine people would say this is truly incredible, someone would be capable of winning 98 percent of the time. I guess I should throw in the New Orleans Saints because if they won 98 percent of the time, I cannot imagine what the State of Louisiana would do.

But that is, in fact, the record the President of the United States, President Bush, has established with regard to the judges he has submitted for confirmation. It is truly a remarkable record of having almost every person he has submitted to the Congress be considered by appropriate committees and considered on the floor and approved. A 98 percent record is truly a remarkable achievement by any measure, whether it is a sports metaphor or whether it is any other type of metaphor we can imagine.

I will bring it closer to home. Imagine any Member of this body getting 98 percent of the vote. Maybe the distinguished Senator from Georgia who is in the Chamber is capable of that, but I don't know if any of us would ever get 98 percent of the vote. Some have been fortunate to get over 50 percent every now and then, but no one ever gets 98 percent of the vote. Teams do not win 98 percent of their games, golfers do not win 98 percent of the tournaments, and neither do tennis players. It is unheard of.

If the average person starts looking at a record where 98 percent of the nominees have, in fact, been approved and are sitting on the bench and doing their duty, by any measure of any standard of operation in this country, people would say that is a pretty outstanding record. Yet the Senate has spent the last several days complaining about a 98 percent achievement record by the President of the United States, saying somehow that is not enough; somehow it should be 100 percent every time with every nominee.

Most American people would say: What are they talking about? Why are they spending so much time saying 98 percent achievement is not enough? That is where we are. That is what we are talking about.

Enough said about that. After 2 days of talking 24 hours a day, we have heard enough about the 98 percent record. Some I voted for cloture and some I decided not. But the record speaks for itself. It is an outstanding record.

Let me talk about one of the things we ought to be doing if we are going to be the greatest deliberative body in the history of the world, which I think the Senate truly is, something I have been working on for over 5 years as former chairman of the National Commission on Medicare Reform and now a member of the Senate Finance Committee working with our colleagues, trying, in a bipartisan fashion, to address one of the really important issues of this Nation.

We are at a health care crisis in America. We have literally millions and millions of Americans with no health insurance at all. They have to go to emergency rooms. They are in the poorhouse and get services under the State Medicaid Program. Many of these people work hard every day. Yet the companies they work for no longer provide health insurance. It is truly a national problem of monumental proportions, yet we are not talking about that in the Senate today.

Another issue is the fact that we have something over 40 million American citizens who have a health insurance plan that is inadequate, outdated, and in desperate need of reform in terms of how much money we spend on the program. The current program we have for seniors is unsustainable in terms of the money we spend and where it will come from.

All of the Members in this Chamber and all of our employees have health insurance that is significantly better than every single one of the 40 million Americans who do not have health insurance. Our health insurance covers hospitalization, our health insurance covers doctors, our health insurance covers emergencies, and our health insurance covers prescription drugs. Yet we have not been able to do for seniors what we have done for ourselves. That is something that challenges this institution and something to which this institution has to pay attention.

The simple fact is that Medicare today does not cover 47 percent of an average senior's health care costs. It is embarrassing that we, arguably the strongest Nation in the history of the world, have a system where the seniors of this country who have worked, earned, and paid into a fund to provide health insurance when they are old, now are covered by a policy that only covers 53 percent of the average senior's medical costs, and leaving 47 percent somewhere else.

We have been working very hard for a long period of time to reform Medicare. The groups that have been working together have reached an agreement that is a tentative agreement, and no one is bound by it until we see the final product, and that includes me.

The interesting thing about this is that if anything should not be political, it is health care. But I can think of no subject that has become more political than health care, and no subject that has become more political in health care than how we treat the Nation's seniors.

Republicans continue to talk about why Democrats will not do what is needed and necessary to pass a reform bill. And Democrats continue to say Republicans want to privatize it and end Medicare as we know it.

There are Republican political pundits in this city who have said we should pass a Republican-only bill in the House of Representatives and send it to the Senate so the Senate Democrats can kill it; it will be a terrific political issue for us. On the other hand, there are Democratic political pundits in this city who will say there is no way we can support and pass a Medicare bill. Why? Because it would give President Bush an opportunity to sign a bill in the Rose Garden and he might get credit doing so.

So we continue to play what I would call the political blame game. We are more concerned about ourselves and our political parties than we are about the 40 million seniors who desperately need the help in order to get prescription drugs under a reformed Medicare plan.

If we go along those lines, what we will have done is to say, once again: It is their fault it did not get done. And they will say: No, it is your fault it did not get done. But once again what we will give to America's seniors is a basket of excuses. And I have suggested many times that seniors cannot take an excuse to the drugstore and get their prescriptions filled. It is not possible.

What they need is both sides to act like grownups and both parties not just to look at their political base but to look at what is good for America, and join forces and say: Yes, it is going to be a compromise. No, it is not going to be everything I would like if I had an opportunity to write the bill, but we do not. Each of us is part of a larger body, and each of us is part of a body that is almost evenly politically divided.

So that is a challenge that is facing us. What we have tentatively agreed to is an insurance program under Medicare, for the first time since 1965, which will cover prescription drugs for America's seniors. They will pay a premium and have a small deductible and have some copayments, but every Member of the Senate has that type of a drug plan. The Federal Government will pay 75 percent of it, and the senior beneficiary will pay 25 percent.

We will spend $400 billion over the next 10 years trying to make that happen. We see seniors every day going to Mexico and going to Canada to buy drugs from foreign countries. Why? Because they do not have insurance that covers it. Hospitalization in Canada is cheaper than it is here. Doctor treatments and doctor visits are cheaper in Canada than they are here. Why do seniors not complain about that and say: ''I am going to have my doctor visit in Canada. I am going to go to a hospital in Canada''? It is a very simple reason. Because they have an insurance policy in this country that covers doctors, and it covers hospitalization. But it does not cover prescription drugs. There is no insurance. So they have to bear the burden of 100 percent of the costs of prescription drugs.

This legislation will be designed to say: All right, we are going to solve that problem. We are going to give you a prescription drug plan. We are going to take seniors who are now under the Medicaid Program for the poor and put all of them into the Medicare Program for all 40 million American seniors. I think that is good, solid, public policy. We are going to make sure all low-income seniors get a special rate by reduced premiums or no premiums at all to make sure we take care of the most vulnerable among us as far as the senior population is concerned.

It is important, as I conclude, when we look back on this session, that we will be able to say we have done more than create more excuses. The seniors can no longer live on political excuses coming out of Washington as to why we have not completed the job. There will be things in this bill that both sides will be able to pick and find and say, I can't be for it because of this. But I would just ask my colleagues to look at the broader picture, to look at the total package and say: When we have an opportunity, perhaps once in several decades, or once in a lifetime, to truly get something done to put in place a system that can be improved upon in the future, we will seize that unique opportunity and come together in a bipartisan fashion. And the American people will be able to say: Yes, they did it, and they did a good job.

I think that is what this body should be dealing with. That is one of the critical, important issues of this day. And I would suggest we get on to it just as soon as we possibly can.

With that, Mr. President, I yield to the distinguished Senator from New Mexico.

The PRESIDING OFFICER. The Senator from New Mexico.

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

Let me, first of all, commend my colleague from Louisiana, Senator BREAUX, for the hard work he has been doing to try to get us to a prescription drug bill for Medicare beneficiaries that will, in fact, preserve the Medicare system but will also meet this very real need that most seniors and all of us have, to be able to afford prescription drugs.

Let me say a few words about the issue of judicial appointments before I then talk about a couple of other issues I want to briefly visit as well.

As I approach this whole question about judicial nominations, I guess my starting point is to ask, how is the system supposed to work? How is this system of choosing and nominating and confirming of judges supposed to work when it involves Federal judges?

I think it is supposed to work the way it generally has worked with this President; and that is, it is supposed to work the way it has worked with regard to these 168 judges who have been confirmed. The truth is, these judges who were confirmed, they were nominated by the President, were confirmed by the Senate These are judges who are conservative in their political philosophy, in their legal philosophy. That is sort of a given with this President. We understand that. Everyone understands

that. Democrats understand it. Republicans understand it. I have no problem with that.

This President was elected as our President. He has the right to choose judges who have a conservative perspective, and clearly that is what he has done, and clearly that is the way the system is supposed to work. But as I think about how the process should work, it seems to me the very first step the President should take—and the President and his assistants, his general counsel have taken with regard to most of those 168 judges, maybe all of them, at least the ones I am familiar with—the first step is to go to the Senators from the State involved and ask those Senators if these are acceptable persons to be nominated.

That is exactly what has a happened in the case of judicial nominations from my home State of New Mexico. And I am very appreciative of the President and his counsel for including me in that discussion and in that decisionmaking. Essentially, what has happened is that my colleague, Senator DOMENICI, and the White House have identified a person—in the case of each vacancy we have had in New Mexico—they have identified a person who they thought should be nominated for that position, and they have asked me to talk to that person and give them a response as to whether that was someone I would support as well.

In each case, I had been very pleased to support those nominees. In each case, I have had the chance to sit with those people, talk to them, acquaint myself with their qualifications. And, as I say, I have been very pleased to support those nominations.

That is the way the system, in my opinion, is supposed to work. But once the President has determined that the Senators from a particular State—at least one of the Senators, but preferably both Senators from a particular State—will support the nomination of a judge or judicial candidate from that State, then, of course, it is much easier to get the full Senate to go along with that. Frankly, that is the way the system ought to work.

I have had circumstances where individual Senators have come to me, Democratic Senators have come to me and asked: Are you sure you want us to support this nominee for a judicial position in your State? because my staff tells me there are questions—and this and that. I am pleased at that point to be able to respond, yes, that I have checked out these nominees, I have determined that they are people I support, and I urge that the full Senate support them.

Now, we have two judicial nominations coming before us today that are coming up for a vote on cloture that have not come up before, but in both cases my understanding is they are being presented as nominees over the strenuous objection of both Senators from the State from which the judges come.

I have difficulty understanding why I should want to support a judicial nominee from a State if the Senators from that State oppose that nominee. I try to think of how I would feel if I were opposed to a nomination from my State and the President and a majority here in the Senate were trying to confirm that nomination over my strenuous objection.

I think we have some obligation to our colleagues to defer to their own understanding and their own knowledge and their own opinion on these issues, particularly as it affects their State. Now, not exclusively; we do not have to defer. But I am just saying that as a precondition for going forward and considering a judicial nominee, we ought to begin by asking: Do the Senators from the State the judge comes from support the nomination? That seems to me to be a threshold question.

In the case of Carolyn Kuhl, on whom we are having a cloture vote later today, as I understand it, and in the case of Janice Rogers Brown, about whom we are also having a cloture vote later today, I am informed that the Senators from California have determined they do not support these nominations. They are urging that the Senate not go forward with these nominations. They urge that the Judiciary Committee not report these nominations. And in spite of all of that, the President says we are going to do it any way.

We are doing this over the objection of the Senators from California. That, to me, is a cause for concern. We are talking about a breakdown in the traditions and a breakdown in the system that is supposed to be functioning. To me, that is a clear breakdown in the system for choosing and nominating and confirming Federal judges.

So I hope we can get back to a policy with regard to all the nominations that come from the White House and this President that is consistent with the experience I have had in my home State of New Mexico; and that is, that before a nomination is sent to the Senate for confirmation, Senators will be asked to give their opinion as to the appropriateness of the nominee.

One good thing about this country—it is certainly true in my State; I am sure it is true in every State in this country—we have a wealth of very capable, honest, hard-working members of the bar who would love to serve on the Federal courts. There is no shortage of good people for these positions. Accordingly, it is not difficult to find a person to serve in these key positions who has the strong support of Senators, Congressmen, and public officials in these States.

The list of organizations and public officials, and both California organizations and national organizations, that oppose the two nominees I have referred to here is extensive, and I have been given that list.

Twenty-two members of the California congressional delegation have indicated their opposition to our going forward with the nomination of Janice Rogers Brown. We have members of the Judiciary Committee of the California Assembly who have come out in opposition to our going forward with Carolyn Kuhl's nomination to the Ninth Circuit Court of Appeals. There is a very long list of individuals and organizations.

I know neither of these nominees personally myself, but, clearly, I have to give deference and some consideration to the opinions of those who have worked with them.

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

Mr. BINGAMAN. I am very pleased to yield to my colleague.

Mr. LEAHY. Mr. President, the distinguished Senator from New Mexico had an exemplary career as attorney general of New Mexico and, obviously, is in a position probably to know more about the bar of New Mexico than anyone else in his State; and his service replicates that of other Senators on both sides of the aisle from their representing their States.

My question is this: The traditions of the Senate mean so much, and most of them are there for a reason. The tradition of having to get clearance from home State Senators—and, of course, every State is equal in the Senate. But Federal judges have an enormous impact on the States. The tradition has always been that the home State Senators have the best idea who the Federal judge is who is going to be making decisions that affect the men and women of that State. This has not always been perfect, but has it been the experience—I ask this of my friend and former attorney general of his State, a Senator of great respect and competence—has it been his experience that in the main, very much in the main, this has worked extremely well?

Mr. BINGAMAN. Mr. President, in response to the question, I certainly would say it has been my experience that this does work. In fact, when the name of someone is being considered for appointment to a Federal judgeship in my State of New Mexico, I have been getting calls. I get calls from lawyers who have worked with these individuals. I get calls from people who have tried cases against these individuals. Some of them, frankly, are favorable and some may not be as favorable.

I get a great deal of feedback on these individuals who are being considered by us for nomination. And, of course, I have the ability, as a Senator from New Mexico, to call people whose opinions I respect and to say: You have spent your lifetime practicing law in the courts in New Mexico. What do you think about the qualifications and the temperament and the appropriateness of this person for this kind of a judicial position? Based on that kind of feedback, then I am in a position to advise the President, advise my colleagues, advise anyone in the Senate that, in my opinion, this person would be well qualified.

I am sure that same process occurs with every Senator in every State, and it should. I think that is exactly what the Framers of the Constitution had in mind when they talked about advice and consent. I think they were talking about Senators being able to give their advice before the President made a final determination as to who would be elevated to a judicial position, and Senators being able to either give their consent or withhold their consent.

It is far preferable, in my view, if that advice and consent is requested and provided at an early stage in the process, not once the nominee has been sent up here, not once the President has had a press conference at the White House with the nominee in attendance. I think it is in many ways unfair to the people being nominated to have them pushed to that stage without the necessary advice and consent having been sought from the Senators in question.

I think that is the unfortunate circumstance we find ourselves in this morning, that there are individuals being pushed upon us as appropriate members to be elevated to court of appeals positions, and the nominations are being strongly opposed by the Senators from the States from which those individuals come.

So I think it would be unfortunate in the extreme if the Senate were to disregard the views of the Senators from those States and say: Regardless of their views, we are going to go forward here, regardless of the feedback they have provided; regardless of the numerous groups and individuals who have come forward to state objections here, we are going to push this nomination through the Senate.

I do think there is a very valuable purpose the Senate serves; and that is, to slow things down. That is what we have done here as to some of these nominees. These are nominees who, in my view, should have been better vetted with the Senators from the States involved.

If those Senators had been given an opportunity to make their case to the President and to his counsel at an early stage, perhaps we could have avoided some of the votes we are going to have to cast this morning. I think that would certainly be preferable.

Has my time expired, Mr. President?

The PRESIDING OFFICER. The Senator has 4 seconds.

Mr. BINGAMAN. I will yield back my time, Mr. President.

The PRESIDING OFFICER (Mr. CHAMBLISS). The Senator from Minnesota.

Mr. COLEMAN. Mr. President, I have great respect for the Senator from New Mexico and the principles he just talked about: his deep concern of the breakdown of the system, of the tradition of the Senate. It is important. This is a very special place. This is the greatest deliberative body in the world. I believe that. That is really what we are talking about today—the tradition of the Senate. That is part of why this debate is important.

This is not a game. This is not a charade. This is important. The past 11 Presidents' judicial nominees confirmed v. filibustered: 2,372 confirmed, 0 successfully filibustered until now—the traditions of the Senate, the traditions of this great institution.

We have been up all night. We have had a lot of conversation, a lot of debate. My colleagues across the aisle said it is absolutely, patently false to say we haven't successfully filibustered circuit court nominees. Read my charts. They are real. Here is the list. Judicial nominees subjected to cloture attempts 1968 to 2003 time after time: No. 1, Abe Fortas, rejected. The Senator from Michigan, who was part of that process had a letter saying, by the way, that was a bipartisan effort. The Republican leader supported cloture on that. Of all these, not a single partisan effort where the nomination was successfully blocked.

The folks involved in making those decisions who predated me reflect what the Senator from New Mexico talked about—a reverence for the tradition of this body, a tradition I believe that is reflected in the Constitution that says decisions about judges are done essentially by a majority—two-thirds for treaties.

As I listened, I understood what was happening here. Part of this tradition is any single Senator can stand up and say: I object. That is who we are. That is a great power for an individual Senator.

We talk about advice and consent. I think perhaps the concept now in people's minds is that we all should be part of this advice and consent process; we all should be heard. But the reality is, in the end, and again according to the Constitution, the decision is going to be made by a majority. It is not about the President being successful 98 percent of the time. It is about 100 percent of the time giving an opportunity for an up-or-down vote. That is what this is about, 100 percent of the time giving an up-or-down vote and then let the vote be what it may.

In fact, nominees may be rejected. It is not about guaranteeing the outcome, but it is following the Constitution to give people a right to a vote. That is the process, that is the tradition, and that is the history. We run such a terrible risk when we cast that aside.

This has been a very sharp debate. There has been a lot of discussion about all sorts of other issues about which we should be talking. I reiterate again, I am deeply concerned about jobs. I am deeply concerned about the economy. Some folks say it is hard, but we can actually multitask around here. We can absolutely uphold our constitutional responsibility to advise and consent and give a vote and do other business.

We passed the third largest tax cut in the history of the country, and we are seeing the impact of that now. The economy is moving forward. GDP is up 7.2 percent in the last report. There are over 250,000 jobs over the last couple of months. There is more to be done, but we can do more than one thing.

For those of my colleagues who protest, oh, we are spending all this time, we spent 10 or 11 hours on Monday talking about Searchlight, NV, talking about rabbits eating cactus and rocks. That is part of the process. People get frustrated. I understand that.

The bottom line is, we stand here after 30 hours of debate, now almost 38 hours, and what do we get out of that? What do we understand? We understand that the history of the Senate is one in which this body up to now has not used a partisan filibuster to block judicial nominees. We see that happening today. We see the record of that.

They talk about 168 to 4 and talk about all the judges. Clearly, when we talk about appellate judges, we have 29 confirmed and 6 who have been blocked and 6 who are threatened to be blocked. Now we are talking about 29 and 12. That is 30 percent. Not only is that nothing to be proud of, but it is in contravention to the constitutional direction the Framers and the Founders gave us.

The consequences of this are ones about which we should all be concerned. We are talking about our judicial system. This is not a game. This is one of the fundamental underpinnings of this constitutional democracy, and we have a solemn obligation and responsibility to choose men and women of good judgment and good character who bring a willingness to apply the law to the table and to make judgments.

The reality is that those candidates before us are folks their own peers have said are of the highest quality. The American Bar Association, the gold standard that my colleagues on the other side talked about so many times, say they are highly qualified. In some cases, the voters, those who have run for office—Priscilla Owen, Janice Rogers Brown—have received overwhelming shows of support. That tells you something about the mainstream, the bipartisan nature of the support.

Judge Carolyn Kuhl: A bipartisan group of nearly 100 of her colleagues said:

> We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and the Senate that confirms her. As appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge.

A bipartisan group of 23 women judges of the superior court who served with Judge Kuhl wrote:

> As sitting judges, we, more than anyone, appreciate the importance of an independent, fairminded, and principled judiciary. We believe Carolyn Kuhl represents the best values of such a judiciary.

The fact is, these judges hold strong opinions, there is no question about that, but to a person they said they will do what a judge needs to do and put those personal opinions aside and apply the law. Their colleagues who

know them have raised their hands and said: Yes, that is what they have done; that is what they will do. The voters who know them reaffirmed their positions by reelecting them by overwhelming majorities. That is what we should be looking at. That is mainstream. That is not extreme.

In the end, we are grasping for something simple: for every Senator on this floor to do what every Senator has the right to do—to be heard, to give your advice to the President of the United States, and if you don't agree with his nominees, do what has been done through the entire history of this country, for 214 years: Give your advice, give a vote; vote them up, vote them down, but give them a vote. It is what the Constitution requires. It is what I believe the future of this institution requires.

Let's get beyond the partisan politics. Let's put it aside. Let's do the right thing. Let's come together. Let's focus on getting things done. That is our opportunity, and I hope we don't squander it.

I yield to my colleague from South Carolina.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM of South Carolina. Mr. President, I thank the Senator for yielding. It has been a real pleasure to talk with him throughout the night. It has been a great debate. For something considered a waste of time, so many Senators have participated. It has not been a waste of your time or the country's time. We have a good record the people can look upon and make a decision about what we are doing here in this Senate.

If I had to boil it down to what all this means to me, which I have to do between now and a quarter after, here is what I think is the down side of what we are doing in the Senate: Special interest politics is being given a green light to go after people they may disagree with because they think the nominee doesn't share their philosophy or political persuasion.

You are giving them a green light to manufacture controversies, to go after people in a personal way, and we are going to rue the day we did that. The left is doing it today. The right will do it tomorrow. We are unleashing special interest forces. We should be deterring them. Right now we are emboldening them, and the country will be worse for the wear.

There are people at the end of the process. We are talking about individuals. Miguel Estrada has claimed to be outside the mainstream. All I can tell you is that the Washington Post on February 5, 2003, not exactly a right-wing rag, said:

> Estrada is well qualified for the bench. This should not be a tough case for confirmation. Democrats who disagree should vote against him.

I think that pretty well sums up the idea that he can't be that far out of the mainstream or the Washington Post would not have said that about him.

If you disagree with me and think he is out of the mainstream, vote against him. Please don't continue the process of filibustering people because we are going to change the Senate forever, for the worst, and the future nominees to come, whatever they said in law school, whatever letter they may have written to their wife, whatever decision they made about going on a trip, if they said something that offends the left or offends the right, people are going to come after them like gangbusters, knock their heads off, and you are going to keep good men and women from wanting to serve. That is going to happen, sure as I am standing here. It will be a great tragedy. Please let's turn this around.

Judge Brown will be No. 5. She sits on the Supreme Court of California. She is objected to. She is out of the mainstream allegedly. I would argue that 76 percent of the voters in California are not right-wing zealots, and that anybody who can get 76 percent of the vote in California has to have some sort of moderation about them. She has written the majority of the court's opinions. She is respected by her peers. You wouldn't get 76 percent of the vote in California if you were out of the mainstream in any real way.

Justice Owen from Texas, No. 1 in everything. She serves on the State supreme court. She received 84 percent of the vote. The only people left who didn't vote for her are probably the extreme people. I would argue that 84 percent of the people who chose to vote in Texas is probably our best evidence about who she is and the way she conducts herself.

Pryor: If you read in the paper today, the attorney general of Alabama has just successfully removed the chief justice of Alabama. It was his job to bring the case to the grievance committee in the State of Alabama, and the reason the chief justice was removed was that he defied a Federal court order to remove the Ten Commandments out of a courtroom in Alabama.

Whatever you want to say about Attorney General Pryor being out of the mainstream, let me tell you that the Ten Commandments are popular in Alabama. He chose the less traveled route for a politician. He chose to enforce the law against a rogue judge who is pandering to the political moment. He followed his constitutional duty, and I bet you he agrees the Ten Commandments have a right to be displayed, but he said: It is not about me; it is about the law.

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

Mr. GRAHAM of South Carolina. Yes.

Mr. SESSIONS. With regard to that matter, Attorney General Pryor did file a brief on behalf of Judge Moore and argued that the Ten Commandments were legitimate because there are three depictions of the Ten Commandments in the Supreme Court. And right on this wall are the words ''In God We Trust.'' He defended that.

When the case was lost, the judicial inquiry commission brought a charge against the chief justice because he did not comply with the court order, and it was the duty of the attorney general to bring that case under Alabama law. So he was required to present the case that had been brought by something akin to a grand jury.

Mr. SANTORUM. Will the Senator from Alabama say that is following the law?

Mr. SESSIONS. It is absolutely following the law. There are a host of other examples to a degree I have never seen before in America. Bill Pryor always does what he believes the law compels him to do. Many times it is something he does not personally like to do.

Mr. GRAHAM of South Carolina. Senator LEAHY said in 1998:

> [I]f we don't like somebody the President nominates, vote him or her down or up.

He was right then. I am very afraid that we are opening the darkest chapter in the history of the Senate when it comes to judges. I don't want to be a part of it. I reject the past. I embrace a better future. Please, for God's sake, let's not continue to do this because we will all regret it.

The PRESIDING OFFICER. The majority has 30 seconds remaining.

Mr. SANTORUM. Maybe what we are finding out here is the minority doesn't want someone who is going to follow the law. I think what they really want is someone who is going to make the law, make the law politically, exactly maybe as the Senator from Vermont would like it to be made. Maybe there are things he or other Members on his side can't accomplish in the legislative chamber, so they want judges who will make the law they want. That is why the litmus test. They want activist judges on the court not to follow the law but to make it the way they really want it. That is what is at issue here.

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from Vermont.

Mr. LEAHY. Mr. President, I am glad to see my friend from South Carolina used a tiny part of a quote of mine. I am always glad when somebody quotes me, even when they don't do it accurately.

What I was referring to, if you look at the quote, was the one-person filibusters of 63 of President Clinton's nominees, where one person, one Republican, usually anonymously, would object to President Clinton's nominees and then those nominees would never get a vote at all. Those were filibusters by one person done anonymously, not in the open.

Here, of course, unlike what was done to President Clinton, the Democrats have cooperated to make sure that 168 of President Bush's nominees to the Federal judiciary have gone through and only 4 have not. We can see only 4 have been blocked. We have confirmed 168 and only blocked 4. That contrasts to the 63 anonymous filibusters done

by the Republicans—63 done by the Republicans when they were in charge.

As I walked over this morning, I thought: Finally, the Republican leadership is bringing to a conclusion three really ''Alice in Wonderland'' kind of days, really wasted days in the history of the Senate. During those days, as much as the Republican leadership wanted to waste the Senate's time, at a cost of hundreds of thousands of tax dollars, I am proud of our Democratic Senators who had to endure endless criticism for objecting to a handful of the President's most extreme, controversial, and divisive nominees.

What they have tried to do is get the Senate's attention back on the unfinished legislative business of this session that is of such concern to the lives of so many Americans. As I said, we have cooperated in the confirmation of 168 of this President's judicial nominees. We confirmed 100 in the 17 months I was chairman and confirmed another 68 in the 17 months my distinguished colleague from Utah was chairman. I am not going to criticize him that he didn't get as many confirmed as I did, but there are the numbers, 168 to 4. That is more judges than President Reagan, the ''all-time champ,'' appointed his entire first term in office when he had a Republican majority. So in less than three years, we have already eclipsed President Reagan's four year total.

Among the 168 confirmations are more circuit court confirmations than for any of the last three Presidents at this stage in their first terms. The scorecard is 168 to 4.

After this week, the total of those blocked could increase by two, but the number of confirmations will not have been increased. Rather than work with all Senators to confirm those nominees who can be confirmed after a vote or who may be confirmed after a reasonable debate and a vote, the Republican leadership has remained fixated on the most controversial and most divisive nominees.

During this 40-hour talkathon, the Republican leadership of the Senate has taken what could have been productive days at the end of this year's legislative session and decided to abandon work on the real priorities of the American people. I understand that the reason they have been spending so much of the taxpayers' dollars in doing this talkathon is that some of the Republican campaign committees have tried to use this to raise money. If they are, instead of charging the taxpayers for this, I wish they would do it themselves.

But what we have are our friends on the other side engaging in repetitive speeches about promoting a small handful of controversial nominees to lifetime positions as Federal judges. These are people who already have good well-paying jobs. They do not want to talk about the legislation that might help the more than 3 million Americans who have lost their jobs since President Bush assumed office.

Unlike President Clinton's term, where a million new jobs were created every year, in the 3 years of President Bush's term, 3 million jobs have been lost, but they do not want to talk about that.

The Republican leadership has already overshot the Senate's adjournment date by more than a month. We have already had to enact three continuing resolutions just to keep the Federal Government going because we have not passed our appropriations bills. The law says we have to enact our 13 appropriations bills by the end of September. The Republican Congress has enacted only 5 of the total 13. They ignore the law on that, but then they waste this time and hundreds of thousands of taxpayer dollars to have a campaign talkathon.

They do not want to vote on the appropriations bills and, instead, they want to waste time on this? They want to waste time giving lifetime jobs to three or four people but they do not want to do anything about the 3 million Americans who are out of jobs.

Here is what they are not talking about, here are the issues that are not being voted on, here are the bills that the Republican leadership will not bring up: Funds that go to improve our schools. Funds that NIH uses to advance our medical knowledge in fighting disease and illness. The resources used by EPA to enforce our clean air and water laws. They do not want to bring up appropriations for our veterans and for law enforcement. These are things that all people should be able to agree on, Republicans and Democrats, but we are told there is no time to bring up money for our law enforcement or for our veterans.

In fact, during the first evening of this exercise in the wind chambers, the senior Senator from West Virginia was trying to get the Senate to do its work. Senator BYRD, as the ranking Democrat on the Appropriations Committee, urged the Senate to complete its work on the appropriations bills that fund services for our military veterans. He said, Why do we not finish this? This administration has cut money for veterans benefits. It has cut money for veterans hospitals. It has cut money for disabled veterans. He said, Can we not at least take a couple of hours more—if you are going to spend 40 or so hours talking about four judges, can we do something, can we take 2 more hours to finish the bill that will affect millions of America's veterans?

He said we could do it in 2 hours. The Republican leadership objected. Those few minutes at the beginning of this debate may be the most telling of this entire so-called debate. Republicans chose to sacrifice the work of the Senate, the priorities of the American people and the interests of American veterans so they could pull a partisan political stunt.

In one of their many press conferences on this diversion, on November 6, the Republican leader committed to ''complete the appropriations process'' before beginning this charade. Even the junior Senator from Pennsylvania agreed with him and said: ''The leader's right. What we are about to embark in next week, after the appropriations process has run its course, is to enter into a debate. . . .'' Well, when given the chance to honor that commitment, the Republican caucus chose partisan theater over the work of the Senate.

We said can you not take 2 hours out of these 40 hours to at least do the appropriations bill for our veterans? I mean, you are not going to do the appropriations bills for our law enforcement. You are not going to do it for medical research. You are not going to do it for anything else. If you could just take 2 hours out of this, at a time when we are creating a lot more veterans, many of them horribly disabled and disfigured from the war in Iraq, we are told, no. We do not have 2 hours for that.

There is the unfinished business of the Nation's unemployment and lack of job opportunities that confound so many American families. With millions of Americans having lost their jobs in the last three years, the Republican Senate has, instead, insisting on spending these final days of this session on a handful of highly controversial judicial nominations that divide the Senate and the American people and ignoring the needs of the almost 10 million Americans who are out of work, including those more than three million Americans who have lost their jobs since President Bush took office.

Instead of working together on such important matters, we are being forced to repeat another cloture vote on the nomination of Priscilla Owen. The Senate has voted three times on this nomination, and three times, the Senate has decided against granting consent. Her nomination had been fairly and thoroughly considered by the Judiciary Committee last year, and her nomination was rejected on the merits. Never before has a President renominated a judicial nominee who was rejected on the merits by the Judiciary Committee.

She has shown herself to be a judicial activist and an extremist even on the very conservative Texas Supreme Court where her conservative colleagues have criticized her judging. All that has occurred since the cloture votes during the spring and summer is that Republican partisans have ratcheted up their name calling and Justice Owen has been made to serve as a political prop for the White House.

In fact, I commend to my colleagues an insightful article by David Margolick that appeared recently in Vanity Fair magazine entitled ''Bush Scored Advantage.''

The second in this series of votes is to be on Judge Carolyn Kuhl. This nomination to the 9th Circuit has been opposed by both the home-state Senators from California and for good reason. From her days seeking to change

federal policy and provide tax breaks to Bob Jones University, to her efforts to overturn Roe v. Wade, to her recent decisions seeking to excuse the invasions of the privacy of Ms. Sanchez-Scott, a breast cancer survivor, Carolyn Kuhl has been extreme.

Finally, the Senate will be required to vote in relation to a nomination that has been whisked through the Judiciary Committee in the last several days, that of Janice R. Brown. This controversial nomination is opposed by the Congressional Black Caucus, the National Bar Association, the California Association of Black Lawyers and a long list of African-American and civil rights leaders and organizations. Former Senator and former ambassador Carol Moseley Braun has recently written to us opposing this nomination. I ask that her November 12 letter be made part of the RECORD.

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

WOMEN'S ORGANIZATIONS OPPOSING NOMINATION OF PRISCILLA OWEN

National Organization for Women
National Organization for Women, Texas Chapter
NOW Legal Defense & Education Fund
Religious Coalition for Reproductive Rights
National Abortion Federation
National Women's Law Center
NARAL Pro-Choice America
National Council of Jewish Women
National Council of Jewish Women, Texas
American Association of University Women
American Association of University Women of Texas
National Family Planning and Reproductive Health Association
National Women's Political Caucus
Texas Women's Political Caucus
Texas Freedom Network
Women's Issues Network—Dallas
Women's Health and Family Planning Association of Texas
Republican Pro-Choice Coalition
Gender Justice Action Group
Feminist Majority
National Partnership for Women & Families
Greater Dallas Coalition for Reproductive Freedom
Texas Abortion and Reproductive Rights Action League
Planned Parenthood Federation of America
Planned Parenthood Association of Hidalgo County
Planned Parenthood Association of Lubbock
Planned Parenthood of Cameron and Willacy Counties
Planned Parenthood of Houston and Southeast Texas
Planned Parenthood of North Texas
Planned Parenthood of San Antonio & South Central Texas
Planned Parenthood of South Texas
Planned Parenthood of the Texas Capital Region
Planned Parenthood of West Texas

WOMEN'S ORGANIZATIONS OPPOSING NOMINATION OF JANICE RODGERS BROWN

National Organization for Women
California National Organization for Women
NOW Legal Defense & Education Fund
Religious Coalition for Reproductive Rights
National Abortion Federation
National Women's Law Center
NARAL Pro-Choice America
National Council of Jewish Women
National Council of Jewish Women, California
National Council of Jewish Women, Los Angeles
American Association of University Women
National Family Planning and Reproductive Health Association
National Partnership for Women and Families
Feminist Majority
Planned Parenthood Federation of America
Planned Parenthood of Golden Gate
Planned Parenthood of Los Angeles
Women Lawyers Association of Los Angeles
Women's Reproductive Rights Assistance Project
Pacifica Institute for Women's Health
Black Women Lawyers of Los Angeles
California Abortion and Reproductive Rights Action League
California Women's Law Center

WOMEN'S ORGANIZATIONS OPPOSING NOMINATION OF CAROLYN KUHL

American Association of University Women
Breast Cancer Action
Breast Cancer Fund
California Abortion and Reproductive Rights Action League
California National Organization for Women
California Women Lawyers
California Women's Law Center
Center for Reproductive Law and Policy
Coalition of Labor Union Women (CLUW)
Feminist Majority
Los Angeles African-American Women's Political Action Committee
NARAL Pro-Choice America
National Abortion Federation
National Council of Jewish Women
National Organization for Women
National Partnership for Women and Families
National Women's Law Center
National Women's Political Caucus—California
Pacific Institute for Women's Health
Planned Parenthood Federation of America
Planned Parenthood Affiliates of California
San Diego County National Organization for Women
Women's Committee, Labor Committee for Latin American Advancement
Women's Leadership Alliance Women's Political Committee
Women's International League for Peace and Freedom
Women's Reproductive Rights Assistance Project.

NOVEMBER 12, 2003.

Hon. BILL FRIST,
Majority Leader, U.S. Senate, Russell Senate Office Building, Washington, DC.
Hon. TOM DASCHLE,
Minority Leader, U.S. Senate, Hart Senate Office Building, Washington, DC.

GENTLEMEN: Respect for the rule of law, and the impartiality of the judiciary are almost synonymous concepts. It is out of concern for both that I want to convey my most serious concern about the State's consideration of the nomination of Justice Janice Rogers Brown for the United States Court of Appeals for the District of Columbia Circuit.

Justice Brown has not demonstrated the balance and judicial temperament and prudence that are central to a respected judiciary. Indeed, she has spoken to an organization of my own alma mater, the University of Chicago Federalist Society, in terms so radical as to bring into question her own regard for the position she currently occupies. The extremism of her views has been publicly demonstrated time and time again, particularly concerning matters of settled law regarding the national government's responsibility to protect civil and political rights of women and minorities. Such extremism undermines the confidence any citizen might have in the capacity of this nominee to fairly interpret and administer the law.

I am the only African American woman to have served in the United States Senate, or on its Judiciary committee. As such I have not only an appreciation for the gravity of the Senate's role and responsibility in regards to the appointment process, but I also have a keen appreciation for the diversity of opinion among African Americans. Not all black people think alike, and I have no doubt that there is a constituency that would be happy to see an African American of any political persuasion confirmed for such an important position as the D.C. Circuit Court of Appeals. However, it does both the black community as well as the courts a great disservice to confirm to such a position an individual who has so clearly demonstrated a disregard for the balance and impartiality required of the members of the bench.

I appeal to our President to exercise greater respect for the traditions of the judiciary in making future nominations. Justice Brown should be given an opportunity to mature in her demeanor and her judicial conduct, but not as a member of the Circuit Court. As such, I urge the members of the Committee to reject this nomination.

Sincerely,

CAROL MOSELEY-BRAUN.

Mr. LEAHY. The San Francisco Chronicle and the Washington Post editorialize against her as an example of the Bush Administration's efforts to pack the circuit courts with ideologues. In her decisions and her writings and speeches she has shown herself to be a consummate judicial activist who will disregard precedent when convenient to her ends. Her view of government is not consistent with the work of the D.C. Circuit in reviewing the environmental protections, workplace protections, consumer protections and other government regulations authorized by Congress to protect all Americans.

The obvious intent of these stacked votes is a partisan effort to paint opposition Senators as anti-woman. Women know better. Women leaders, women's rights organizations have opposed these nominations. I know the Republican partisan public relations machine will be cranking overtime to say we are anti-woman. Given that we are being led by Senator BARBARA MIKULSKI, Senator DIANNE FEINSTEIN, Senator BARBARA BOXER, Senator PATTY MURRAY, Senator MARY LANDRIEU, Senator BLANCHE LINCOLN, Senator MARIA CANTWELL, Senator HILLARY CLINTON, and Senator DEBBIE STABENOW, it is hard to see how Democrats can be subjected to such allegations with a straight face. I mean, tell them that they are anti-woman. These are all women who have the finest records of defending, upholding, and advancing women's rights. It is crazy.

When we were in charge, the Senate confirmed 100 of President Bush's judicial nominees, including 21 women, in just 17 months. They included 4 women to our Courts of Appeal. During the 107th Congress, President Bush nominated only 18 women to district court seats out of 98 district court nominees,

or 18 percent, and only 8 women to circuit courts out of 32 circuit court nominees, or 25 percent. Well, this year, Democrats have supported the confirmation of 12 additional women nominated to the Federal bench, including 3 more to our Courts of Appeal. The thirty-three women judges confirmed represent 20 percent of the 168 judges confirmed so far.

Perhaps, though, they are a little bit nervous about this. President Bush has nominated far fewer women to the Federal bench than President Clinton did. This President's nominees have included only one woman in each five judicial nominees. By contrast, nearly one of every three of President Clinton's judges are women. Of course, the Republicans who controlled the Senate and the Judiciary Committee during the Clinton administration also blocked 18 women nominated to Federal judgeships by President Clinton. They did it by their one-person anonymous filibuster. Do not give me this baloney that, oh, it is so terrible that we are standing out here in open session blocking four judges. They blocked 63 by anonymous filibuster, 18 of them women. The women who were blocked from getting Senate action on their judicial nominations by the Republicans include Kathleen McCree Lewis, Elena Kagan, Elizabeth Gibson, Helene White, Christine Arguello, Bonnie Campbell—all of whom were nominated to the circuit courts. Now, these six outstanding women lawyers and judges were not extreme or ideologues. They were blocked anonymously by Republican Senators. This was done without any explanation. This was done without a vote of any kind. We never had a debate on them.

These other judges, the 4 out of 168 of President Bush's who have been confirmed, at least there was a debate on them. We discussed the merits of their nominations. The 63 of President Clinton's nominees who were blocked by the Republican majority would have liked to have at least had a hearing or debate on the merits of their nominations. There was no debate. Nobody wanted to come to the floor and talk about them, not when they could do a one-person filibuster, and do it anonymously so the press in their hometown would never know who was holding them up, including some of the Senators from the States where they were nominated. They could do this anonymously, and they could do it in a way that they would never have their fingerprints on it.

Now, I have heard more crocodile tears shed on this Senate floor this week than I have heard in my 29 years. Why? Because 4 judges of President Bush's were stopped, out of 168 who were confirmed. He has had less nominees stopped than any President I can remember since I have served in the Senate.

I yield the floor.

(At the request of Mr. DASHLE, the following statement was ordered to be printed in the RECORD.)

● Mr. EDWARDS. Mr. President, my Republican colleagues are calling this 30-plus-hour marathon ''Justice for Judges.'' Now, I'm all for justice for judges. And that's exactly what every single one of President Bush's judicial nominees has gotten.

But I ask my colleagues, where is Justice for the American people? They seem more concerned about Justice for a handful of judges—the 2 percent of those Bush's nominee who haven't been confirmed—than justice, fair play and opportunity for the American people.

The Republican majority claims that we're facing a vacancy crisis in our Federal courts. Ninety eight percent of Bush's judges have been confirmed and this is a crisis? Two percent of Bush's judges have not been given lifetime appointments and we're in a crisis?

Under George W. Bush, the unemployment has risen to 6 percent the poverty rate has increased to 12.1 percent the percentage of Americans with no health insurance has gone up to 15.2 percent. And, during this time, the vacancy rate on the Federal courts has gone down to 4.5 percent its lowest point in over 13 years. In fact, there are more full-time Federal judges on the bench today than at any other time in U.S. history? The vacancy rate is now below the number that Senator HATCH called ''full-employment'' in the Federal judiciary during the Clinton administration.

Where is the concern for the 6 percent of the American people who can't find jobs? The same people who claim that 4.5 percent vacancy is a crisis think that 6 percent unemployment is great news, that a ''jobless recovery'' is a good thing. Why aren't they at least as concerned about Justice for the Jobless, Justice for Working People, Justice for the Poor, Justice for Families?

So, what does this marathon debate tell us about the priorities of the Republican majority? What does it tell us when they are more concerned about securing lifetime jobs for three sitting judges and a State attorney general than in securing jobs for the 9 million Americans who are out of work?

Why are they more interested in fighting for three judges and an attorney general—all of whom have received full and fair consideration—than fighting to bring hope back to the American people?

Why aren't we spending 30 hours debating how to help the 9 million Americans who no longer have the dignity and self-respect that comes from completing a hard day's work? Why doesn't the Republican majority schedule 30 hours of debate to figure out how to provide health care to the American people and prescription drug benefits to the elderly?

We should be figuring out how to bring back the 3 million jobs we've lost on George Bush's watch—one job lost for every minute he has been in office.

We should be addressing the anxiety of families who fear that by sundown they will be without a safe home. We should be working to find a way to lift the tax burdens on working families and provide real economic opportunities so they can provide food, clothing, and shelter for their families.

We should be debating about the best way to close the education gap and support and fund our public schools.

We should be working together to lift Americans out of poverty.

And we should be coming together, not to fight for justice for judges but to fight to end the injustice that still tugs on the soul of America.

In other words, we should be fighting for Justice for the American People.

But instead, my Republican colleagues have virtually shut down the Senate to force lifetime appointments for three judges and an attorney general.

This political stunt is getting lots of coverage, but it's not doing a thing to improve the life of one single American—except three sitting judges and an attorney general.

We have confirmed 168 of President Bush's nominees. I voted for the vast majority of these judges, even though many of these judges have held conservative ideologies with which I strongly differ, because I believed they would ultimately enforce the Constitution and the law.

But I cannot and will not vote for these four nominees, for good reason. These nominees not only do not represent the mainstream, but they have demonstrated an unwillingness to set aside their personal views to uphold the law and protect civil rights. We have good reason to oppose these nominees. And we not only have the right, we have a constitutional obligation to stand up to the President when he makes unacceptable nominations to the bench.

Our Founding Fathers did not give the President unilateral or unfettered power to select Article III judges. They wanted to ensure that the people—through their elected representatives—have a say in who will be appointed to the Federal bench. So they created a partnership between the President and the Senate by requiring the President to obtain the advice and consent of the Senate in nominating judges.

Every President—whether Republican or Democrat—must consult in a meaningful way with the Senate to appoint highly qualified judges to the Federal bench. The give and take that results makes it far more likely that we will have a judiciary that is not skewed too far to the right or too far to the left, a balanced judiciary that reflects the people it serves.

Meaningful consultation does not mean that the White House just sends us who they want and we rubberstamp them, without careful examination and consideration. Meaningful consultation often involves compromise and consensus.

This approach has worked reasonably well—with some exceptions—over the years. But now we find ourselves dealing with a White House that disdains

this longstanding principle of advice and consent. Instead, the President is appointing judges who are far out of the mainstream. Judges who are hostile to civil rights and equal justice. Judges who are not only willing but eager to put their personal views above the law. Judges he certainly knows are unacceptable to us and our constituents. These appointments are being made without our advice and without our consent. We have tried to work with the White House to find common ground, but most of our attempts to reach consensus with the administration have been dismissed. In some instances, our commitment to fairness and diversity has been attacked. This is not the way this process should work. It is wrong. It would be wrong, regardless what party the President belongs to.

Any honest observer must acknowledge that previous administrations of both parties attempted in good faith to work with the Senate in its appointments process. President Clinton put up numerous highly qualified mainstream nominees for Federal judgeships, only to have them blocked, denied hearings and denied votes by a Republican Senate. Twenty percent of Bill Clinton's judges were blocked by a Republican Senate. We heard nothing about justice for judges then.

This had a particular impact on my home State of North Carolina, which is part of the Fourth Circuit. North Carolina—the largest State in the circuit—until this year had not been represented on the court since 1994. President Clinton tried three times to put a North Carolinian on the court, only to have his nominees blocked for reasons other than their qualifications. In fact, during his last 6 years in office, President Clinton had eight nominees—four of them African American—blocked in the Fourth Circuit alone. These were well-qualified men and women, none of whom could be labeled ideologues, whose views were well within the mainstream of legal thought and practice. Nevertheless, they were blocked. I believe that this was part of a plan, a plan to keep these seats open for a Republican President who would fill them with right-wing judges outside of the mainstream.

We've seen what happens when the President meets us halfway. He's done it before—rarely, but he's done it. He reached out to us on Allyson Duncan, an outstanding North Carolinian who just last month was formally installed as a judge on the Fourth Circuit Court of Appeals, breaking a logjam that had held our State back for a decade.

In that case, President Bush did more than just pay lipservice to our constitutional obligation to a advise and consent. He reached out to us before he made his decision—he consulted with us—he sought our advice. And in making his decision, the President selected a nominee who represents the mainstream of our State.

Throughout Judge Duncan's confirmation process, I commended the President for consulting with us and making an excellent nomination. And I told him that if he takes this approach to future judicial nominations we have a real opportunity to find common ground in the search for excellence on the Federal bench. When we work together, we find outstanding nominees like Allyson Duncan, who represents the best of North Carolina and America.

In light of our efforts to cooperate with the President on nominations, I'm puzzled and troubled by the Republican attacks on us, the accusations that we are anti-women, anti-black, anti-Hispanic, anti-Southern, anti-Catholic. They're running attack ads against us that represent the worst forms of religious and racial McCarthyism. They're doing this even though the record shows that Democrats have voted to confirm 13 of President Bush's African-American nominees while Republicans blocked 12 of Clinton's African-American nominees. We have confirmed 33 of Bush's woman nominees. Nearly 40 percent of the Bush judges confirmed have been from southern States. So, not only are these accusations of bias flat-out wrong, they are outrageous and I must speak out against such demagoguery and race baiting.

We have gone the extra mile. We have demonstrated that we are willing to work with the White House to move forward on nominees who provide balance to the courts. We have confirmed 168 of President Bush's judicial nominees—98 percent. We have been more than cooperative.

It's really a shame that the majority doesn't spend a fraction of the time they've spent on the full employment program for judges on finding ways to improve the lives of the American people.

The American people deserve better than this. We owe it to them to call a halt to this marathon madness and get down to work to address the problems they sent us here to solve. It is time to fight for justice, jobs and opportunity for the American people.●

Mr. DODD. Mr. President, the majority has indicated that as part of this debate to invoke cloture on these three nominees to the Federal judiciary, they may move to consider S. Res. 138, a resolution introduced by the majority leader, Senator FRIST, which would amend the Senate rules to treat debate on Executive Calendar items differently than matters on the Legislative Calendar.

Nothing is more fundamental to the ability of the Senate to fully exercise its constitutional responsibility to provide advice and consent to the President's executive nominees than to subject such nominees to full and deliberative debate. And any move to amend the Senate rules to place additional limitations on that debate is tantamount to a ceding of legislative branch powers to the executive. I appreciate the opportunity to speak on the issue of proposed changes to Senate rule XXII.

The filibuster is widely viewed as one of the Senate's most characteristic procedural rules. I believe we can all agree that the best way to consider a change to Senate rules is to do so in accordance with existing Senate rules. I believe this 30-hour debate will follow Senate rules and precedent.

Any attempt to change Senate rules, particularly cloture rule XXII, should be in keeping with the deliberative rules, precedents and practices that have been the hallmark of this institution since it was conceived during a steamy summer in Philadelphia over 217 years ago.

Senate rules have endured the age-old test of time, people, places, and events. Senate rules delineate the constitutional responsibilities of the body and define the character of the institution. Making changes to the rules and the precedent of the Senate is not an action that should be taken lightly or for partisan purposes.

In the history of the institution, the rules of the Senate have been through general revision just seven times: 1806, 1820, 1828, 1868, 1877, 1884, and 1979. The architecture of our Senate rules and precedents is built on the foundation of the right to debate and amend, the two basic principles that make the Senate the upper House in all of the legislative bodies of the world. If you chip and change this keystone, then you chip and change the Senate as an institution.

Herein lies the central paradox and towering majesty of the Senate. What makes this institution so revered and unique is what can simultaneously gall us the most: the practice of extended debate.

But the Founders insulated the Senate from sanction for debate and explicitly left it to ''determine the rules of its proceedings.''

The rules of the Senate reflect the intent of the Framers that the Senate be the ''saucer into which the nation's passions may be poured to cool.'' The ability to fully examine and debate any matter of national importance is the hallmark of the Senate. Nowhere more than in the advice and consent responsibility of the Senate do we see the Framer's intent to balance the fear of a resulting tyranny of a majority against the principle of majority rule.

As Alexis de Tocqueville observed: ''. . . the main evil of the present democratic institutions of the United States. . . . [arises from] the very inadequate securities against tyranny. . . . if ever the free institutions of America are destroyed, that event may be attributed to the unlimited authority of the majorities, which at some future time may urge the minorities to desperation. . . .''

The President nominates, but his power is balanced, and checked, by the power of the Senate to provide advice and consent. Neither can act alone. And in the case of the judiciary, the creation of the third, separate and equal, branch of Government, the powers are deliberately counterposed.

This is not the first controversy over Senate rules, precedents and practices of the right to extended debate. Through our history, the right of extended debate has never been seriously questioned as other than a vital foundation of our Republic. This right has been a catalyst for achieving the most remarkable feature of our civilization: the degree to which we have been able to provide our citizens with, at one and the same time, both great freedom and great stability.

As Robert Caro, author of ''The Master of the Senate,'' for which he was awarded his second Pulitzer prize, has observed, and I quote him, ''in creating the new nation, its founding fathers, the framers of its constitution, gave its legislature not only its own powers specified and sweeping, but also powers designed to make the Congress independent of the President, and to restrain and to act as a check on his authority, including power to approve his appointments, even the appointments he made within his own administration. And the most potent of these restraining powers the framers gave to the Senate.''

The power to approve Presidential appointments was given to the Senate alone. A President could nominate and appoint Ambassadors, Supreme Court justices, and other officers of the United States, but only with the advice and consent of the United States Senate. This is the American way and it must remain the American way. While the Founding Fathers recognized the inherent dangers in granting a minority of Senators a veto over the will of the majority, the Constitution did just that.

But proposals to limit debate would change that.

S. Res. 138, a proposal by Majority Leader FRIST, would amend Senate rule XXII to provide for a declining number of votes required to invoke cloture on Executive Calendar items, such as judicial nominations.

I have deep reservations about Majority Leader FRIST's resolution to amend Senate rule XXII. I fully appreciate the majority leader's desire to expedite the business of the Senate. I fully understand the frustration with respect to the deep desire to invoke cloture on Executive Calendar items, including executive nominations such as judicial nominations.

But there is simply no crisis facing our judiciary today that necessitates the damage to the very fiber of this institution that such a rules change would render. The vacancy for the Federal judiciary is at its lowest level in 13 years.

Since President Bush came into office, the Senate has confirmed 168 of his nominees and has decided not to proceed with only 4. That is a 98 percent success rate for the President. In my view, this is a great success rate.

The Senate must not act to change its rules. To do so now would amount to a ''hijacking'' of the Senate's constitutional duty to provide advice and consent to the President's nomination authority. The supermajority requirement is consistent with the intent, spirit and language of the Constitution.

S. Res. 138 presents the question of whether rule XXII should be revised to accommodate a targeted remedy for filibusters of judicial nominations. The real question should be whether S. Res. 138 strikes the most appropriate balance between existing Senate rules and the advice and consent duties of the Senate. In the view of this Senator, it does not.

The cloture rule exists by virtue of the longstanding rules of the Senate enacted pursuant to authority under the Constitution, article I, section 5.

The Constitution expressly authorizes such procedural rules and sets no standard to limit the Senate's discretion in formulating such rules. Further, the Constitution does not compel the Senate to take any action, much less a final vote, on any matter, legislative or executive.

There is no argument to the fact that the Senate has plenary authority to devise its own rules. Nor is there any argument to the fact that there is no right to mandatory majority rule. Most importantly, the Senate tradition on filibuster offends no constitutional edict. In the words of Chief Justice Burger, ''there is nothing in the language of the Constitution or history or our cases that require a majority always prevail on every issue.''

At its most fundamental core, the Senate is a testament to the coexisting rights of the majority and the minority. Small states have an equal say in the Senate's tradition, and rules protect debate no matter whether it is a principled stand of one Senator or a chorus of the convinced. The Senate rules balance majority rule with minority right.

As a Senator in this body, I recall watching the Senate as a very determined minority insisted on their right to be heard on the issue of civil rights. Their position on civil rights was unfair, unpopular, and illegal. Yet the majority of Senators did not question the right of the minority Senators to assert their right under Senate rules and precedent to debate, delay, diminish or defeat civil rights legislation. And, the minority did so for years.

Ultimately, both the noble principles of racial equality and extended debate prevailed in the Senate. But the Senate rule that had been long thwarted was left essentially unchanged.

Prior to 1917, there was only a century old rule that required unanimous consent to cut off debate. This means that for 111 years, the Senate practice of extended debate was absolute in its scope. All Senators had to consent in order to bring consideration of a matter to a close. For the subsequent period of 58 years, two-thirds of the Senate were required to end debate. Currently, three-fifths are required. Until 1949, there was no procedure for limiting debate on nominations in the Senate. For the past 212 years, there has never been a Senate rule that permits a simple majority to force a vote on any matter up for consideration, including judicial nominations.

In this historical context, S. Res. 138 would be without precedent to require a simple majority to invoke cloture, in my view. S. Res. 138 would reduce to a majority vote that Senate procedural rule which girds the independence of the coequal judicial branch.

There is an irony to S. Res. 138 that cannot go unstated or unexamined. It would reform the cloture process only for nominations and leave cloture for the remainder of the Senate debate as it is. Arguably, it is precisely in the area of nominations, particularly judicial nominations, that the Framers intended these powers to be utilized.

S. Res. 138 would fundamentally alter the nature of the Senate and the balance of powers created by the Framers of the Constitution. It would undermine the Senate's role in our constitutional democracy, cede enormous power to the Executive and upset the deliberate system of checks and balances intended by the Framers.

S. Res. 138 would fundamentally diminish the Senate's power in relation to that of the Executive. And if the Senate cedes such power to the Executive, then I do not think the Senate will ever get that power back. Of all the issues that the Senate faces now and in future Congresses—such as war, the economy, health, education, election reform, jobs—none is more important than this one on Senate rule changes. Why? Because how we resolve this issue will, in many respects, determine how we resolve all others.

S. Res. 138 proffers change that is historically significant. However, S. Res. 138 does not proffer filibuster reform that will permit ample debate while rejecting delay in perpetuity. Nor does S. Res. 138 fit squarely within Senate tradition of balancing the right to debate with the responsibility to conclude the people's business.

Instead, S. Res. 138 would shift the balance of power on advise and consent to the executive branch. To accommodate this proposal means a profound change in the Senate as an institution and the character of the Senate as a body itself.

It reduces the constitutional advice and consent authority, indeed duty, to a mere rubber stamp of the President's prerogatives. We must always attempt to find the right checks and balances between a rubber stamp and a deliberative body on both legislation and nominations. This is what makes the Senate, as an institution, so powerful, so special, so unique.

We must remember that during the Constitutional Convention, only after lengthy debate, was the power to appoint judges committed to the President as well as to the Senate. Why? John Rutledge of South Carolina said

it best: ''the people will think we are leaning too much toward monarchy'' if the President is given free rein to appoint judges.

The final compromise was characterized by Governor Morris of Pennsylvania as giving the Senate the power to appoint judges nominated to them by the President. In Federalist 76, Hamilton explained, ''the Senate's review would prevent the President from appointing justices to be the obsequious instruments of his pleasure.''

Against this backdrop, I find it quite troubling that Majority Leader FRIST now suggests that we narrow deliberation, debate, and the rights of the minority with respect to the nomination process and thereby enhance the ability of the majority to turn the Senate into a rubber stamp of a President's nominee.

What is at stake in this debate is nothing less than the integrity of the Senate and the independence of the judicial branch—the deliberate intention of the Framers to ensure against the excess of the Executive.

In describing the role of the Senate to provide advice and consent to executive nominations, Roger Sherman noted: ''the Convention, who formed this Constitution, thought it would tend to secure the liberties of the people, if they prohibited the President from the sole appointment of all officers. They knew that the crown of Great Britain, by having that prerogative has been enabled to swallow up the whole administration . . . but this government is different, and intended by the people to be different.''

The real problem here is not constitutional, but rather it is institutional. Senators must think of themselves as part of an institution, held together by a common respect for its rules and traditions. We have a responsibility to the President, the people, and to the institution.

This is a moment for Senators, as Senators, to stand up for the Senate.

Those of us fortunate to serve in this body are but its temporary custodians. We are stewards of an institution governed by rules and practices that have withstood the test of more than two centuries of time. Now is not the time to retool the rules to achieve goals that are, in essence, transient and partisan in nature, no matter how deeply felt.

When in history has the will of a minority—through extended debate been able to stop anything that this Nation desired or that had the broad support of its people? The Senate works its will, extended debate and all, as it was intended to work—in the words of James Madison—''. . . to consist in its proceedings with more coolness, with more system, and with more wisdom, than the popular branch.''

The disagreements that we have over judicial appointments, and over some legislation, will likely be long forgotten, and of limited consequence, in years to come. But to change the rules and practices of the U.S. Senate in the manner that is here proposed, in my view, would do permanent and lasting damage, not only to this institution but to our democracy that has served us so long and so well.

I hope that cooler heads will prevail and that the majority leader will not bring up S. Res. 138 to amend the rules of the Senate.

But if that happens, I urge my colleagues, as Senators, to uphold the unique authority of the Senate to give equal voice to all States, indeed to all people, and to forego the political expedience of the moment in order to ensure the integrity of the Senate, and the functioning of this Republic, for generations to come.

Mr. LIEBERMAN. Mr. President, in the course of this debate, I have been deeply disturbed to hear the characterization my Republican colleagues have given to a filibuster reform proposal Senator HARKIN and I offered nearly a decade ago. They have referred to our proposal, and our statements in support of it, as precedent for their efforts here today. As I have said in the past, I believe that is deeply wrong. To make clear both what our proposal did, and why my Republican colleagues' characterizations of it are wrong, I thought it would be worthwhile to make sure the record included testimony I offered to the Senate Rules Committee this past June. I ask unanimous consent that the full text of that testimony be reprinted in the RECORD.

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

STATEMENT OF SENATOR JOE LIEBERMAN, SENATE RULES AND ADMINISTRATION COMMITTEE, JUNE 5, 2003

Chairman Lott, Senator Dodd and Members of the Committee. I greatly appreciate the opportunity to submit this statement for your hearing record, so that I can share with the Committee my thoughts on filibuster reform and my previous efforts on the topic.

In late 1994, I joined Senator Harkin in launching an effort to encourage Senate discussion of reforming the Senate's cloture rule. Like Senator Harkin, I had become increasingly frustrated at the way the Senate's cloture rule repeatedly allowed a minority of Members to prevent the Senate's majority from enacting legislation. I felt—and continue to feel—that the Senate rules should be changed to prevent a small minority of Senators from bringing legislation to a halt simply by saying that they will never end debate. Senator Harkin and I therefore offered a proposal under which an initial cloture vote would require 60 votes, but the requisite number to reach cloture would decline by three with each of the next three cloture attempts on the same matter. As of the fourth cloture vote, 51 votes—a simple majority—would suffice to invoke cloture.

This was not a partisan effort on our part. Indeed, Senator Harkin and I offered our proposal after the Democrats lost their majority status and at a time we therefore fully understood that our proposal would more often than not—in the short term, at least—inure to our party's detriment. Let me say that again: our proposal was not an effort to push through our own agenda or help our own party. Nor was it a proposal aimed at carving out special rules for one type of legislation or Senate action in order to ease enactment or Senate approval of one particular agenda.

In early January 1995, we offered our proposal on the Senate floor. After a good debate, the Senate voted on it and, unfortunately, we lost by a landslide. 76–19. Among those voting against our proposal were every Member of this Committee who was in the Senate at the time, including the current Majority Leader, whose proposal the Committee is considering today. I considered that an unfortunate result then, and I continue to consider it so today. Despite the often troubling ways in which the current Majority has sought to run the Senate, I still believe the filibuster rule should be changed so that once Members have had an opportunity to fully debate and seek to amend measures, the majority can have its say.

But that is unfortunately not what the Majority Leader's proposal seeks to do. Indeed, although I expect some will seek to characterize the proposal the Committee is considering as akin to the Harkin-Lieberman one, it most assuredly is not. Our proposal applied across the board—to legislation and nominations alike. As I already mentioned, it was the legislative gridlock that motivated us back then, and that continues to be the real problem caused by the cloture rules. But my Republican colleagues don't want an across-the-board reform. As they would have no choice but to acknowledge, they don't want to give up their own ability to filibuster legislation, even while they are in the Majority. That's because, whether it's the patients' bill of rights, campaign finance reform or a plethora of other issues, they have launched their own filibusters while in the Majority, and they just don't want to give up their ability to continue to do so. Majority rule apparently should only go so far in their view.

What the Majority Leader's proposal amounts to is a demand for unilateral disarmament. It is an effort to force the current minority party to swallow a rules change that allows this President and his party to carve an exception from the Senate rules for their out-of-the-mainstream judicial nominees, while keeping the parts of the cloture rule that they want to continue taking advantage of. But the issue of how the Senate operates should not be subjected to such one-sided demands. We all must work with the rules we have and seek to apply them fairly and impartially. That's why, as I said at the time I first made this proposal with Senator Harkin, even though I support filibuster reform, as long as the rules are what they are, I'm not going to be the only one to abandon them. I will continue, as a representative of the interests of the voters of my state, to live within them and support filibusters where I think it appropriate.

In short, in contrast to the serious reform effort we made, this proposal amounts to one party's effort to turn a Senate rule into a partisan tool—to cherry pick its favored issue in the name of democracy, while leaving themselves free to filibuster away on legislative proposals they don't like. I would welcome more company in the effort to engage in serious reform of the cloture rules so that we all—Republicans, Democrats and Independents alike—can make the Senate work better for the American people. But this unfortunately is not that effort.

Mr. SANTORUM. Mr. President, this is a very historic time for our country. Until this Congress there had never been a filibuster of a circuit court nominee in the history of this country. Thus far we have had four filibusters of highly qualified judicial nominees this year and may have two more by the

end of this week. It is not the intent of the Constitution to confirm a nominee with 60 votes but to confirm with a simple majority. Whether we vote a nominee up or we vote them down, it is our duty to bring them for a vote and to represent the will of the majority in the advice and consent role of the Senate in relation to the President's nominees. If the minority would like to create a 60-vote requirement, then they should respect the Constitution and introduce a constitutional amendment to do so—and build the necessary support for it around the Nation—rather than through this backdoor assault. The precedent that is being set through this abuse of the filibuster is a dangerous and destructive one for future Presidents, future nominees, and most importantly the future of the Judiciary.

As we look at the nominees that have faced obstruction, I ask what makes these nominees ripe for such unprecedented obstruction in our country's history? The most recent judicial nominee to experience this assault is California Supreme Court Justice Janice Rogers Brown. I spoke on the floor a few weeks ago of the cruel treatment that Justice Brown has had to endure. Ms. Brown was recently degraded by a stereotypical cartoon on blackcommentator.com. The cartoon has President Bush and Justice Brown walking into a room and the President saying, ''Welcome to the Federal bench, Ms. Clarence—I mean Ms. Rogers Brown, you'll fit right in.'' In the background are Justice Thomas, Colin Powell, and Condoleeza Rice. The bottom says, ''News item: Bush nominates Clarence-like conservative to the bench.'' Left oriented groups opposing the President's nominees did not condemn this distortion.

In Justice Brown's Judiciary Committee hearing, she responded to this cartoon saying, ''But while I've been having those meetings, people have said to me: 'Well, you know, it's not personal, it's just politics, it's not personal.' And I just want to say to you that it is personal, it's very personal—to the nominees, and to the people who care about them.'' It doesn't get more personal than this. Brown is a very intelligent woman who is a Supreme Court Justice in our Nation's largest State, was re-elected to her seat with 76 percent of the public vote, possesses a stellar educational record and has a great judicial reputation. However, in order to fulfill her dream and the President's wishes, she must subject herself to unfair personal attacks and embarrassing degradation.

Carolyn Kuhl, another female judicial nominee, also faces harsh and unwarranted criticism in her nomination for the Ninth Circuit Court of Appeals, a circuit court that even Senator SCHUMER admits is way too liberal and is the most overturned circuit of the 13 circuits. The Judicial Conference of the United States has declared this vacant seat a ''judicial emergency.'' But this is not even the main crisis for this court. This court gave us the notorious Pledge of Allegiance decision that Democrats joined Republicans in disavowing. Our friends on the other side of the aisle stress the importance of appropriate balance on the court. This court has 17 judges appointed by a Democratic President and 8 appointed by a Republican President. It seems apparent that Judge Kuhl would be a perfect candidate to better balance a court tipped extremely to the left. Judge Kuhl, like the overwhelming majority of President Bush's nominees, has received a ''Well Qualified'' rating from the ABA, the ''Gold Standard,'' previously deferred to by Democrats in the Judiciary Committee. However, Judge Kuhl has been receiving unfair treatment from leftist special interest groups seeking to control the nominations process through the historically unprecedented misuse of the filibuster. They criticize Kuhl's role in a 1986 case in which the Government filed a brief stating President Reagan's position that Roe v. Wade was wrongly decided.

Rather than be criticized, Judge Kuhl should be praised for fulfilling her ethical duty to her client. Her job was to represent the President's position before the Supreme Court. Rule 1.2b of the Model Rules of Professional Conduct state that ''[a] lawyer's representation of a client, including representation by appointment does not constitute an endorsement of the political, social, or moral views or activities.'' The hypocrisy of those opposing her nomination lies in the fact that they have not objected to past nominees who were attorneys on the same government brief. Furthermore, Judge Kuhl is supported by a wide range of pro-choice supporters who strongly believe that she will uphold the law. So, as I have asked before, what makes Judge Kuhl so special that warrants obstruction as a judicial appointee?

Then, there is Priscilla Owen. Justice Owen was nominated for the Fifth Circuit Court of Appeals by President Bush in May of 2001. Justice Owen was elected by 84 percent of the voters of Texas to the Texas Supreme Court. This vacancy has been declared a ''judicial emergency'' by the Judicial Conference of the United States. She has yet to have an up-or-down vote. She has significant bipartisan support, including from three former Democrat judges on the Texas Supreme Court and a bipartisan group of 15 past Presidents of the State Bar of Texas. Owen is yet another nominee who has received a unanimous ''Well Qualified Rating'' from the ABA. Critics argue that she has strong views on abortion, but she has always interpreted the law faithfully by applying statutes enacted by the Texas Legislature.

Abortion-rights activists claim that Owen's decision to uphold a new statute that requires girls under the age of 18 to notify their parents of an abortion is an example of judicial activism. Never mentioned by these organizations is that not only was Owen upholding a statute enacted by the Texas Legislature, the U.S. Supreme Court has long held that parental notification is permissible under the constitutional right of abortion as dictated by Roe v. Wade. The claims that Owen is a judge who has and will continue to practice judicial activism are not true and unwarranted. As of today it will be 917 days since President Bush nominated Justice Owen. You will not find a more qualified candidate.

Another nominee who has been waiting more than two years is Charles Pickering. A nominee for the Fifth Circuit of Appeals, another vacant seat declared a ''judicial emergency,'' Judge Pickering has been labeled by some of those across the aisle as ''racially insensitive'', and that his ''poor'' judicial record reflects this. How is it then that Pickering has received a ''Well Qualified'' rating by the ABA, the ''Gold Standard'' according to Democrats on the Judiciary Committee, to serve on the Fifth Circuit Court of Appeals? Many of Pickering's colleagues, civil rights leaders, and Democratic leaders from his own State attest to Pickering's remarkable record on race. James Charles Evers, brother of slain civil rights leader Medgar Evers, has endorsed Pickering by saying ''As someone who has spent all my adult life fighting for equal treatment of African Americans, I can tell you with certainty that Charles Pickering has an admirable record on civil rights issues. He has taken tough stands at tough times in the past, and the treatment he and his record are receiving at the hands of certain interest groups is shameful.'' Along with the false accusations of racial insensitivity, activists also accuse Pickering as not being fit to hear abortion cases. Pickering has testified that he is committed to following Supreme Court Precedent in Roe v. Wade and Planned Parenthood v. Casey.

Abortion rights activists in their assault on some of the President's nominees have especially focused their attacks on Alabama Attorney General William Pryor, nominee for the 11th Circuit Court of Appeals. General Pryor has been criticized by these organizations as well as from colleagues across the aisle for what they term ''deeply held beliefs.'' Earlier this year, I spoke on the floor about General Pryor's ''deeply held beliefs.'' Criticism of Pryor's beliefs stem from his views on abortion. These views are, in large part, due to his background as a devoted Catholic. Being a devoted Catholic requires one to oppose the practice of abortion, and General Pryor is indeed a devoted Catholic. As a practicing Catholic myself, I am disturbed at what is being conceived here. If the Catholic philosophy of having no leeway on the concept of abortion is preventing General Pryor from an up or down vote, then we have a constitutional crisis on our hands which would eliminate tens of millions of Americans from being considered for Federal

judgeships. General Pryor's record speaks for itself. Though he has criticized the Supreme Court's decisions on abortion, which is well within his rights as an American citizen, he has demonstrated a commitment over the years to enforce and uphold the law as one of the longest serving attorneys general in the Nation.

I fear for the future of the judicial nomination process. Good, decent people who have outstanding records of upholding the law are being put through unfair, unjust and unnecessary attacks by people do not agree with their conservative values. One must ask my colleagues, why they think the politicization of the Judiciary is in anyone's interests. At what price do we continue this unfair degradation of judicial nominees?

We all know the sad ending of Miguel Estrada's nomination. His qualifications remain outstanding. He came to the United States at age 17 after being born and raised in Honduras. He graduated magna cum laude from Harvard Law School where he was editor of Harvard Law Review. He is a former assistant to the Solicitor General and argued 15 cases before the U.S. Supreme Court. He clerked for Supreme Court Justice Anthony Kennedy, a Justice who does not share Estrada's conservative philosophies. He received strong support from prominent members of the Clinton administration whom he worked for.

Are we to believe that documents the administration is unwilling to share from the Solicitor General's Office are what blocked his nomination, when all previous living Solicitors General, Republican and Democrat, signed a letter saying such work products should not be required to be provided? To do so would only undermine the ability of the office to represent the Federal Government and the President and would negatively impact the ability to attract quality lawyers to the office. We have also discussed time and again the appropriateness of Estrada's reluctance to prejudge cases at committee hearings. Opponents knew that they had no basis to oppose his nomination so they chose to place the burden on the nominee to prove a negative or else to have the Office of the Solicitor General undermine its independence and effectiveness.

So what is the answer to why these nominees are receiving unprecedented unfair treatment? Why are we spending time here arguing for these candidates that are so well qualified for judgeships? I have voted for dozens of judicial nominees whose philosophies I do not share in deference to the President and to the Constitution. I fear the answer is the belief by a minority of Senators that there is short-term political gain in filibustering these nominees because some special interest groups are demanding this. But the long-term cost of this short-term thinking is tremendous. This unfair obstruction is setting a dangerous precedent and direction for the future of the Judiciary. The Constitution has given the Senate the responsibility to defend the judiciary there is no one else.

Mr. INOUYE. Mr. President, it is most unfortunate that we in the Senate found ourselves embroiled in a lengthy and costly debate over four of President George W. Bush's judicial nominations—and make no mistake: this debate will cost more than is readily apparent.

On a simple level, the preparation for 30 hours of debate on the Senate floor will translate into hundreds—possibly thousands of man hours of preparation. My fellow Senators, their staffs, and the myriad interested civic groups will toil ceaselessly to ensure that both Democrats and Republicans will be able to get their messages across to the American people. The media coverage and analysis are likely to be comprehensive and focused intensely down to the most minute details. Like a ravenous beast, this spectacle will devour our time, attention, and energy, until eventually, it consumes itself.

My Democratic colleagues and I are acutely aware of another cost of this debate: the cost of opportunities lost to the Senate and to the Nation. Thirty hours of sustained attention could have addressed the needs of the 3 million citizens who have lost their jobs since the President took the oath of office. Thirty hours of continuous inquiry could have finished our constitutionally mandated duty of providing funds for the Federal Government. Thirty hours of debate could have broken the logjam on Medicare and Medicaid reform. Any of these goals would have been worthy of America's time, but regrettably, our 30 hours of debate will purchase for us none of these noble ends.

Instead, our colleagues from across the aisle will have spent this time on four men and women—four men and women who have jobs. Four men and women who collectively make a million dollars every year. Four men and women who have already been the subject of countless hours of debate in the Senate, and whose records have already been displayed amply before the American people. Four prosperous men and women against the millions of American citizens who are unemployed.

By far the highest price of these 30 hours of debate, however, will be its contribution to the growing rift between people of different ideological bents. The Senate has always been a place where Senators—a group as diverse and varied as the people they represent—have been able to put aside their differences and work for the good of the country as a whole. As one Senator who has had the privilege of participating in the life of this institution for over 40 years, I cannot understand why the majority leadership has brought us to this point.

My grave concern is tempered only by my hope and confidence that we will rise above the divisive spirit that provoked today's debate, and begin to do the work of the Nation and its people.

The PRESIDING OFFICER. Under the previous order, the hour of 8:30 a.m. having arrived, the Senate will begin an hour of debate equally divided prior to the first cloture vote. Under the previous order, the last 20 minutes will be equally divided with the first 10 minutes under the control of the Democratic leader or his designee, and the last 10 minutes under the control of the majority leader or his designee.

Who seeks time?

The Senator from Utah.

Mr. HATCH. Mr. President, let me personally express gratitude and thanks to Senator SANTORUM of Pennsylvania, Senator NORMAN COLEMAN of Minnesota, Senator LINDSEY GRAHAM of South Carolina, and Senator JEFF SESSIONS of Alabama, all of whom stayed here all night last night to make the points they have made. I personally appreciate it.

Senator GRAHAM asked me to take time to read the full quote of Senator LEAHY that he was not given the benefit of. Senator LEAHY said he was misquoted, so I will read the full quote: This is Senator LEAHY in the CONGRESSIONAL RECORD of June 18, 1998, regarding delays in Senate action on judicial nominations:

> I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty. If we don't like somebody the President nominates, vote him or her down.

Now, that is the correct full statement by the distinguished ranking member of the committee. Senator GRAHAM wanted me to make sure that the full statement was put in.

What is involved here is whether or not we are going to abide by the Constitution because the Constitution is pretty clear on this subject of advice and consent. This little book right here contains the Constitution of the United States. In article II, section 2, clause 2, speaking of the President, it says this:

> He 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—

It goes on to say appoint judges. Now, that is what the Constitution says. The Founding Fathers knew what a supermajority vote was. They put that requirement in here, where it was necessary for treaties. It is very clear to anybody who reads it, and I think any constitutional scholar, that advice and consent means a vote up or down, a majority vote up or down.

During the Clinton years, when Democrats were afraid the Republicans were going to filibuster their nominees, Democrat after Democrat got up and said we should not filibuster, vote up or down one way or another. If my colleagues do not like a judge, vote against him or her. A lot of those

quotes have been put in the record during this 40-hour debate. The fact is, when push comes to shove, when it becomes to their political advantage to stop people on the floor of the Senate, they start filibustering.

This business of one-man filibusters, that is pure bunk. The fact is, everybody who came to the floor got a vote up or down. Now, there were a few on our side who wanted to filibuster some of those judges because they were so liberal, but I personally stood up in our conference and in our caucuses, as did Senator LOTT, who was then the majority leader, and said that is not going to happen because that is constitutionally unsound. Plus, it is not right.

But it has happened, as our colleagues on the other side have not been able to stop themselves from taking political advantage.

Why are they doing this against these six people? I get a kick out of the use of 168 to 4. Today it is 6. What will it be tomorrow? I can tell my colleagues the number is going to go up continuously because they do not want anybody on these circuit courts of appeals who may be pro-life. That is what this is all about. It is about abortion. Otherwise, how could anyone find one fault with Priscilla Owen? I do not even know what her position is on abortion. I know that question is not asked by the White House or by us. I do not know what her position is.

What fault can my colleagues find with a woman who was No. 1 on the bar exam in that State and who broke through the glass ceiling for women? Now, women are partners in law firms, where before they could not get secretarial jobs half the time. It was terrible what women went through. She was one of the people who broke through that problem. She won 84 percent of the vote in Texas, which is not particularly a Republican State, although it is fast becoming one looking at what is going on up here, just like Alabama is becoming a Republican State when they see the injustice and unfairness going on here.

Priscilla Owen won 84 percent of the vote; every newspaper in that State ran editorials supporting her, and yet she is being treated like dirt here. Why? Because in a dissent she would have upheld the rights of a parent to have notification that those parents' child was about to have an abortion. Eighty-two percent of the American people believe that is the right thing to do. She was merely evaluating whether the lower court finder of fact in that parental notification case had made an error, and he hadn't, so she thought that the factfinding judge ought to be upheld. What is wrong with that?

Going to Janice Rogers Brown, Janice Rogers Brown won 76 percent of the vote in her reelection, more than the leading liberal then on the California Supreme Court, Stanley Mosk. Mosk was a liberal voice on the court. He got 68 percent. Janice Brown got 76 percent. Now, I know if this was reversed and Mosk was the one who was nominated by a Democrat President, the Democrats would be arguing that he got 68 percent of the vote and that we should just confirm him. And we, as Republicans, probably would if we concluded that he was competent, had a good temperament, was intelligent enough to do the job, was honest and a person of integrity, even though we disagree with him on many issues.

My contention is that the fact that a person may be pro-life is irrelevant, or the fact that a person is pro-choice is irrelevant if that person is otherwise qualified for these Federal judgeships. If we get to the point where we stop people because of one litmus test issue, Katie bar the door, it is going to politicize the Federal judiciary in a way that never should happen.

Janice Rogers Brown is the justice who wrote a majority of the majority opinions last year in the California Supreme Court. She also joined in unanimous opinions, I think around 73 times. There is no question she is in the mainstream. That just has become a bad redefining of terms by our friends on the other side. Since they do not have any real arguments against these people, they will say, well, they are outside the mainstream of American jurisprudence. Well, that is just pure bunk and everybody knows it.

What about Carolyn Kuhl? Carolyn Kuhl has 100 of her fellow judges on the California Superior Court, Democrats and Republicans, vociferously supporting her as somebody who would make an excellent judge on the Ninth Circuit Court of Appeals, which has a tremendous imbalance. Senator SCHUMER is constantly talking about imbalance, that we should balance up the courts, liberals and conservatives being equal. Well, there are 17 Clinton and Carter nominees and judges on the ninth Circuit Court of Appeals. I believe there may be eight judges on that court nominated by Republican Presidents.

If that is the case, if they really want balance, why oppose even voting on Carolyn Kuhl, one of the leading scholars in America? What do they hold against her? When she was a 28-year-old, a junior lawyer in the Department of Justice, doing the bidding of the then-President, Ronald Reagan, she actually helped write some of the briefs which she would do in the normal course of events—anyone would do, even if you do not agree, because that is your job—on some issues that our friends on the other side do not appreciate. Again, it comes down to abortion.

I was talking to one of the leading civil rights ministers who during the 1960s was threatened every day. He was head of the ACLU in Mississippi, a liberal Democrat who has been in some of the Democrats' meetings, during which they've plotted their mistreatment of the President's nominees. He said to me: Senator HATCH, you are absolutely right—he is pro-choice, by the way, but he sees the injustice of this as he came out in support of the judge. He said: Senator HATCH, you are absolutely right, this is all about abortion.

We do not know where these nominees stand on abortion, at least I don't. I have had discussions with all three of them and never asked the question. Whether pro-choice or pro-life is irrelevant if they are otherwise qualified to serve on the courts.

What is being done to these three women we are going to vote on today? We are not voting on their right to be a judge, we are voting on cloture, on the right to go forward and have a vote up and down on these judges. For the first time in history, the absolute first time in history, we now have filibusters against six incredibly qualified, well qualified candidates.

During the 8 years of the Clinton administration, time after time, the Democrats would say: We have a person who is qualified by the American Bar Association. That is the gold standard, the American gold standard. The imprimatur of the American Bar Association, that is all it takes. 377 Clinton nominees got through; one was rejected by a majority vote on the Senate floor. 377. Amazing how the statistics are distorting. This talk about 168—that was a hard fought battle on most of them. It was not at all simple to get them through. Democrats have politicized everything around here with regard to the judiciary. I would like to end that by having votes up and down on all judicial nominees.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. How much time is available to the Senator from Vermont?

The PRESIDING OFFICER. The Senator from Vermont has 30 minutes, and that includes time for the Democratic leader.

Mr. LEAHY. I obviously will not take that time.

Again, in 29 years here, I have been accustomed to some hyperbole and some interesting changes of statistics and even quotes. I have great respect for my dear friend from Utah, but, man, he has hit the trifecta of the hyperbole in the out-of-context quotes.

Of course, what he does not point out, when I spoke of filibusters on this floor, I was talking about the one-person anonymous hold filibuster on Sonia Sotomayor. It was only after a public outcry that she was allowed a vote and she had overwhelming support in this body—not somebody who was almost 50–50 or 52–48, she had overwhelming support. But she was not allowed to get a vote. And even that took 2 years of putting her life on hold. Editorial writers from the right to the left said: Give this woman a vote. This was a consensus candidate.

We hear about all the ones who got votes. For some reason, there seems to be a reluctance by my friends on the other side to talk about the 63 who were never allowed votes. They were

blocked because one Republican would anonymously say no.

I don't find the record of cooperation during the Clinton years to be anything to brag about. Sixty-three fine men and women were blocked and never given a vote. In fact, when President Bush took office, there was an unprecedented number of vacancies in a lot of the circuits. Why? As testimony before our committee showed, because the nominees were told by Republican Senators: We think you are great. We think you would make a good judge. But we have been told we are not allowed to move you forward, we are not allowed to give you a vote. We are not allowed to give you a hearing because someday there will be a Republican President and he will want to fill those vacancies.

Notwithstanding that, when I was chairman, even though it pained me to do it, I allowed those vacancies to be filled by President Reagan's nominees, by President Bush's nominees, even though in testimony before our committee the nominees said they were told by Republicans they would never be allowed to have a vote.

I don't hear the other side talk about the 63 who were given a one-person filibuster, anonymously, whether they were judges from Pennsylvania, Ohio, Missouri, Michigan, or elsewhere. They were blocked by these one-person anonymous holds. Sometimes it was not too difficult to realize who the hold was because it was usually from their own State.

Of course, there were many others. As the distinguished Senator from Utah has said in his own writings, the Democratic President would consult with him on different people and he would tell them no, do not even send this one up, they will not get a vote. So they never came forward. I guess on inaugural day that consultation stopped.

We have confirmed 168 and held back 4. Is anyone going to tell me with a straight face that in the Bush administration, with all the promises they have made to the far right, there are not a whole lot of pro-life judges in here? Of course there are. Many have been very clear, saying they were pro-life, but I voted for them because I believed they could be fair, they would be judicious, they would follow the law, they would follow the precedence and not their personal inclinations.

When I hear of the crocodile tears about Ms. Kuhl, saying she was a young person writing a memo for the Reagan administration, do not hold that against her—come on. She was not only writing a memo, she was a spear carrier for Bob Jones University.

Now I know Bob Jones University is kind of a pet of the other side, but this is a university where the founder and philosophies are anti-Catholic, anti-Mormon, anti-Black. Yet we are supposed to say, forget the fact she was anti-Catholic, anti-Mormon, anti-Black in her support of this, she was only doing her job. She was only doing her job.

A lawyer has a right to follow their conscience. If a lawyer has a client and says: Go out there and take a position that really should not be sustained—in this case, a position on Bob Jones University—you ought to say: No, I quit. I quit. We have seen many instances of that in the past.

Not counting the time for the leader, how much time remains to the Senator from Vermont?

The PRESIDING OFFICER. Thirteen minutes.

Mr. LEAHY. I yield 10 minutes to the distinguished Senator from California.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, I thank Senator LEAHY for so many things. He has been so strong on this whole issue of making sure we do not put on the bench folks who are so outside the mainstream that they would set us back. Because you have a very strong position as a top Democrat, you have allowed to be approved 168 of George Bush's nominees.

He has talked to us in depth, as well as other Members of the Judiciary Committee, about the four, up to now, who the Senator believes are far outside that mainstream. In order to protect the rights of our people, this is not some argument about a football game, that you are beating us 168 to 4. It is about protecting the people we represent, protecting their rights, protecting their health, making sure they are treated equally before the law. All the things that we as a great country, the greatest in the world, have given to our citizenry, could be overturned if we wind up having a court system that is radical and that moves away from those freedoms.

So if nothing else, I hope people in America understand that the Republicans in the Senate are complaining because they did not get all of their President's nominees. So we have made the point over and over.

Today, we are going to add two more, I believe, to this list and it will be 168 to 6, for a 97 percent success rate. Why are we doing that? Why do we think we are going to stop two of these candidates today—actually, we have stopped a third before and we will do that again. Because they do not reflect the values of this country in their decisions. I could go over them one by one; I don't have the time to do that. And they would be dangerous.

Here is the interesting thing. We have sitting in the committee two nominees who cleared the committee, Mark Filip and Gary Sharp, one from Illinois, one from New York, and all you have to do is bring those out. They have full support. You will be back up to 98 percent before the day's end.

I say to my friends, I do not deserve to be a Senator if I do not exercise the power our Founders gave us explicitly in the Constitution, the power of advice and consent. It does not say sometimes advice and consent. It does not say maybe advice and consent. It does not say if you feel like it. It does not say if there is a Democrat in power or Republican. It says the Senate has the power to advise and consent. This does not mean rolling over for any Member.

That is the key point. Do the people of America want a rubberstamp Senate or do they really want Senators who take their responsibility seriously and look at each nominee seriously?

The power we were given is a very important power. I will explain that to the people of my State. If they want a Senator who will be a rubberstamp for a President of either party, they need to think long and hard about Senator BOXER because I am not their girl. I am not going to do that. That is not why I am here.

So anyone reading the Constitution knows that Senator LEAHY and members of the Judiciary Committee—and I see the Senator from Illinois here—they are just doing their job.

The Republicans have spoken almost 40 hours. I lost track after 30 hours. They are telling us essentially: Don't do your job; be a rubberstamp. We are not going down that path.

I am happy to yield.

Mr. DURBIN. I know we are coming to the breathless close of this wonderful marathon, this made-for-TV filibuster.

I ask the Senator through the Chair the following question: Is the Senator aware in the early hours this morning Republican Senators from Kansas and Pennsylvania came before the Senate and raised the question of whether the Constitution includes the right to privacy? According to the Senator from Kansas, he referred to it as the discovered right of privacy in the Constitution.

I would like to ask through the Chair if the Senator from California could reflect on the right to privacy, particularly as it relates to one anomaly from her State, Carolyn Kuhl.

Mrs. BOXER. Absolutely. I will show the number of women's organizations who oppose Carolyn Kuhl. I am glad the Senator raised this question.

It is particularly interesting that today we have three women before the Senate. I say to my colleagues from both sides of the aisle, as a woman who has been in public life, actually elected to my first office in 1976, making sure that women have an equal opportunity, making sure that women move into positions of leadership has been one of the hallmarks of my career.

Now we hear people on the other side saying anyone who votes against these women is not in favor of women.

Let me state from the bottom of my heart—and I will get to that issue of privacy—the worst thing that can happen to the women of this country—to your daughters, to your nieces, to your aunts, to your grandmothers, for that matter, to your moms—the worst thing is to have a woman in power who rules against the interests of women. Carolyn Kuhl is one such woman. Janice Brown is one such woman. And Priscilla Owen. And those are the three

who come before the Senate today in a package. Each of them, if you look at their decisions, has been hostile to women.

I will talk about the Carolyn Kuhl case. Before Carolyn Kuhl, as a sitting State judge, comes a case in which a woman is explaining that she went to a physician for a followup mastectomy examination, a very humiliating, difficult, painful moment for that woman. That woman has written us and her story is in the RECORD. I have placed it in the RECORD.

The woman simply said to Judge Kuhl: My privacy was violated because I went to my doctor and the doctor allowed in the room a drug salesman. The doctor did not ask me, the doctor never told me.

This drug salesman was leaning over the table, was fanning this woman with a fan, was involved in this intimate exam.

Every woman in this country knows that if that happened to them, they would be humiliated beyond belief. This woman had the courage to sue. Carolyn Kuhl ruled against the woman, and the excuse is, she allowed the case against the doctor to go forward. Untrue. That particular case never was before her. The issue was breach of privacy. She ruled against the woman. Carolyn Kuhl had to write an apology to the committee for misstating what actually had happened.

Mr. LEAHY. Will the Senator yield?

Mrs. BOXER. Yes.

Mr. LEAHY. In other words, under this ruling, if the doctor had invited his auto mechanic because he might like to watch breast exams, put him in a white coat, it would be the patient's fault for saying: By the way, is this another doctor? Is this your auto mechanic?

Mrs. BOXER. My friend is right.

Mr. LEAHY. Frankly, I would hope I could say to my wife or my daughters, there would be a right of privacy issue here. For those who say there is no privacy in a case such as this, they have never been in a doctor's office for an examination.

I yield back to the Senator from California.

Mrs. BOXER. Let me say that, fortunately, her decision was overruled unanimously by the State appellate court. This is the State appellate court. There are lots of Republicans on that court. They saw this was a terrible decision.

Here is the list of women's groups against the nomination of Carolyn Kuhl. It includes Breast Cancer Action, Breast Cancer Fund—on and on—Women's Leadership Alliance. And the same list—actually a few different names, for Janice Brown and for Priscilla Owen. These women do not care about women advancing. They have not cared about the equal rights of women.

Let's have some backbone here and stand up when we think these nominees are good for the people and oppose them when we know they have been bad for the people and they will do worse yet.

The PRESIDING OFFICER (Mr. SMITH). The Senator's time has expired.

Who seeks time?

Mr. LEAHY. Mr. President, what is the time remaining?

The PRESIDING OFFICER. The Senator from Vermont has 2 minutes 13 seconds; the Senator from Utah has 8 minutes 12 seconds.

Mr. LEAHY. Well, and there is time reserved for the two leaders?

The PRESIDING OFFICER. There are 10 minutes each for the majority leader and the minority leader.

Mr. LEAHY. Mr. President, over these past 24 hours, the American public has heard a lot of what one could generously describe as wishful thinking from the other side of the aisle about the history of the Senate in considering nominations, especially recent history of Republican obstruction when a Democrat was in the White House. Their efforts to re-write American history and the history of this Senate remind me of the old Soviet Union, rewriting its history books to suit the ruling party and erasing photos that would reveal inconvenient facts. Their misleading and wrong assertions have been made over and over and over again, perhaps in the hope that repetition would turn those falsehoods into fact. I think it is important for posterity to set the record straight.

Last night, echoing Republican press conference, Republicans took to the floor to claim that no judicial nominee had ever been filibustered or blocked from getting a confirmation vote in the history of the Senate. They made these assertions repeatedly while pointing to signs with the number zero printed on them. They refused to acknowledge that any judicial nominee has ever been filibustered, that any has ever been denied a confirmation vote, that any nominee for even a short-term position has ever been filibustered on the floor or filibustered in Committee. The repeated the party line from GOPUSA that ''no federal judicial nominee by the past 42 presidents has been filibustered in the history of the U.S. Senate dating back to 1784.'' I ask unanimous consent to place the following excerpt from the New York Times from 1968 into the RECORD about the filibuster in the Senate over the nomination of Justice Abe Fortas to be Chief Justice of the Supreme Court, a letter signed by more than 60 law professors from across the country in support of the use of the filibuster of judicial nominees, and an important and outstanding letter from Professor Michael Gerhardt which thoroughly addresses the specious arguments being made about the use of the filibuster under our Constitution. I hope that this evidence would cause some of my colleagues to reconsider some of the false and misleading statements made by my colleagues on the other side of the aisle. One can always hope.

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

[From the New York Times, Sept. 25, 1968]

PRECEDENT FOR JUDICIAL FILIBUSTERS

CRITICS OF FORTAS BEGIN FILIBUSTER, CITING ''PROPRIETY''

GRIFFIN ATTACK LASTS 3 HOURS—MANSFIELD BACKS JUSTICE, BUT SCORES LECTURE FEE.

May 16, 2003.

Hon. BILL FRIST and TOM DASCHLE,
U.S. Capitol,
Washington, DC.

DEAR SENATORS FRIST AND DASCHLE: As law professors, we write to express our opinion that the Senate's use of the filibuster with respect to both legislation and nominations is constitutional. Both the text of the Constitution and historical practices strongly support the constitutionality of the filibuster. Article I, Section 5 expressly provides, ''Each House may determine the Rules of its Proceedings.'' Article I, Section 5 plainly authorizes the Senate to make procedural rules. It empowers the Senate as well to delegate what is sometimes final authority over the fate of legislation and nominations to committees and their chairs. The textual authority for the filibuster is precisely the same as those for these other measures. If these measures are constitutional, then so too is the filibuster.

The Supreme Court has repeatedly emphasized the relevance of historical practices for determining constitutionality. The filibuster, understood as protracted debate precluding final Senate consideration of a legislative matter, began early in the history of the Republic. It has been used frequently by senators from both parties with respect to nominations as well as legislation. In fact, it has been used effectively to defeat presidential nominations, including the nominations of Abe Fortas to be Chief Justice of the United States in 1968, Sam Brown to be Ambassador in 1994, and Henry Foster to be Surgeon General in 1995. This longstanding historical practice weighs heavily in support of the filibuster's constitutionality.

The filibuster reflects the Senate's longstanding respect for minority views and underscores the unique role of the Senate as a part of American democracy. It has the salutary effect of giving an incentive to all sides to seek compromise on issues where points of view are sharply divided. With regard to nominations to an independent branch of government such as the judiciary, the filibuster encourages the President to find common ground with the Senate by nominating individuals who can garner consensus.

For these and other reasons, we conclude the filibuster is constitutional.

Very truly yours,
(Signed by 60 Law Professors).

UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW,
November 10, 2003.

Hon. PATRICK LEAHY,
Dirksen Senate Office Building,
Washington, DC.

DEAR SENATOR LEAHY: I understand that this week the Republican leadership will be coordinating thirty hours of debate about the legitimacy of the recent filibusters against three of President Bush's judicial nominees. To assist you (and the Senate) in this debate, I have taken the liberty of providing below a revised version of my testimony earlier this summer on behalf of the filibuster. The revised testimony reflects my thinking and research on the subject since my testimony in May and June. My continued thinking and research on the filibuster

have clarified further the solid constitutional foundations for filibustering judicial nominations. My hope is that this revised testimony may help to set the record straight on the Senate's longstanding commitments to allowing the filibuster (against all kinds of nominations) and to amending its rules in accordance with its rules.

EXECUTIVE SUMMARY

The filibuster derives its authority from the Senate's express power to design its own procedural rules to govern its internal affairs and the Senate's consistent support for its legitimacy. It is also one of many counter-majoritarian features of the Senate, including the committee system and unanimous consent requirements. If these practices are constitutional, then so too is the filibuster.

While there have been many criticisms directed against the filibuster in recent months, none has merit, in my opinion. First, the most popular arguments against the filibuster are circular, i.e., they simply assume their conclusion. The arguments presume that some constitutional principle, such as majority rule or anti-entrenchment, trumps the filibuster. Then, operating from this premise, they set out to demonstrate flaws in the arguments of the defenders of the filibuster. Yet, exposing flaws in the other side's arguments does not make an affirmative case for a constitutional principle of majority rule or anti-entrenchment; it merely shows imperfections in the defense of the filibuster. The absence of support for the other side does not establish the legitimacy of the case against the filibuster. Those maintaining that the filibuster is illegitimate must show the constitutional foundations for the principles on which they are relying. Second, the arguments against the filibuster—e.g., it violates majority rule—cannot be squared with the constitutional structure as it was designed or has evolved. Third, Article I of the Constitution contains no explicit or implicit anti-entrenchment principle that would preclude the Senate from adopting, for the sake of institutional stability and order, certain procedural rules that carry over from one session to the next and may only be altered with super-majority approval. In fact, entrenchment is far more consistent with our constitutional structure than anti-entrenchment is. Entrenchment is much more the rule rather than the exception in the legislative process. Even legislative bodies such as the House that formally reconstitute themselves as the outset of each new session have pre-set agendas in place prior to any vote as to how they should proceed to reconstitute themselves, what they should do once they have formally reconstituted themselves, the committees to which members need to be assigned, how those assignments may take place, the jurisdictions of those committees, and even the rules they may select under which to operate. Moreover, given that only a third of the Senate is up for re-election at any one time, there is no ''new'' majority that comes into power at the outset of a session who can credibly claim any entitlement to vote on the rules under which it would be operating throughout the session.

The filibuster is best understood as a classic example of a non-reviewable, legislative constitutional judgment. It is a practice that has the same claim to legitimacy as many countermajoritarian practices within the Senate, including the committee structure and unanimous consent requirements. The Constitution permits all of these practices, but it does not mandate any of them. These practices define the Senate's uniqueness as a political institution, particularly its historic commitments to various objectives—respecting the equality of its membership and to minority viewpoints; encouraging compromise on especially divisive matters; and facilitating stability, order, and collegiality in the long run. The principal checks on these practices, including the filibuster, are political. They include the Senate Rules, the need to maintain collegiality within the institution, and the political accountability of senators for their support for, or opposition to, filibusters.

I.

Neither the Constitution nor the Senate Rules expressly mention, or mandate, the filibuster. Nevertheless, the best starting place for understanding the authority for the filibuster is Article I of the Constitution, which governs and defines the powers of the Congress. In Article I, section 5, the Constitution provides, ''Each House [of the Congress] may determine the Rules of its Proceedings.'' This section plainly authorizes the Senate to make procedural rules, including but not limited to the length of debate in the Senate. This section further authorizes the Senate to delegate official responsibility to smaller units (and even individual members) within the Senate. Many of these delegations allow committees and their Chairs to have what is sometimes final say over the fates of legislation and nominations. This same authority provides the support for many informal senatorial practices such as senatorial courtesy—in which individual senators may make recommendations to the President on the people whom he should nominate to federal offices in their respective states—as well as the blue-slip process that has traditionally allowed individual senators with the means by which to nullify nominations to judgeships within their respective states. In addition, a single senator may place a ''hold'' on legislation or a nomination, postponing consideration to a later date. The filibuster derives its legitimacy from the same authority that allows for each of these other legislative practices—Article I, Section 5, which empowers the Senate to implement procedural rules, including the specific rule governing the procedure for cloture, Rule XXII. If these practices are constitutional, then so too is the filibuster.

The other, possible authority for the filibuster is historical practices. The filibuster has been employed, in one form or another, as extended debate in the Senate throughout the history of the Senate. In fact, ''the strategic use of delay in debate is as old as the Senate itself. The first recorded episode of dilatory debate occurred in 1790, when senators from Virginia and South Carolina filibustered to prevent the location of the first Congress in Philadelphia.'' While the First Congress allowed a so-called motion for the previous question which could not be debated, its name was misleading. In practice, ''the previous question motion was seldom used before the Senate abolished it in 1806;'' and it rarely succeeded in silencing those senators determined to continue the debate. Instead, the motion tended, once made, to end debate by requiring the removal of the matter being debated from the Senate agenda. Thus, it did not force a vote but rather forced the Senate to move onto other business. Moreover, the availability of this motion did not prevent the Senate from continuing to permit protracted debate to delay floor votes. The eminent biographer Robert Caro explains the history of the filibuster subsequent to the abolition of the previous question motion:

''For many years after 1806—for 111 years, to be precise—the only way a senator could be made to stop talking so that a vote could be taken on a proposed measure was if there were unanimous consent that he do so, an obvious impossibility. And there took place therefore so many 'extended discussions' of measures to keep them from coming to a vote that the device got a name, 'filibuster,' from the Dutch *vrijbuiter,* which means 'freebooter' or 'pirate,' and which passed into the Spanish as *filibustero,* because the sleek, swift ship used by the Caribbean pirates was called *filibote,* and into legislative parlance because the device was, after all, a pirating, or highjacking, of the very heart of the legislative process.''

In other words, the practice in the Senate from 1806 until 1917 allowed the smallest minority possible with the Senate—a single senator—to bar a floor vote on any legislative matter by engaging in an extended speech. During this period, every floor vote required unanimous consent.

The Senate first, formally curbed the practice of endless debate in 1917, after eleven senators had successfully filibustered President Woodrow Wilson's proposal to arm American merchantmen against German submarine attacks. At President Wilson's urging, the Senate passed Rule XXII, which allows debate upon a ''pending'' matter to be terminated when, after a petition for such ''cloture'' was presented by sixteen senators and approved by two-thirds of the senators present and voting. In subsequent years, senators from both parties have used the filibuster to block a floor vote on a wide range of legislation. From 1917 until 2000, cloture was invoked 193 times out of the 545 times it was attempted. During the period from 1927 through 1962, the Senate did not invoke cloture once. In this period, conservative senators repeatedly used the filibuster to block civil rights legislation, provoking liberal senators to denounce the filibuster as illegitimate and conservative senators to defend it. In the late 1960s and early 1970s, conservatives and liberals switched positions on the filibuster: Liberal senators used the filibuster to block centerpieces of President Nixon's social and economic agenda while many conservative senators questioned its legitimacy. After Bill Clinton became president, a series of Republican filibusters blocked by aspects of his legislative agenda, including a comprehensive bill providing for national health care reform. Nevertheless, the filibuster has endured, with the most recent reform occurring in 985 when a supermajority within the Senate approved an amendment to Rule XXII requiring only three-fifths, rather than two-thirds, of the Senate as the requisite number to invoke cloture.

Throughout the long history of its deployment in the Senate, the filibuster has not been restricted to delaying floor votes only on legislation. It has been often used to thwart presidential nominations. The first, recorded instance in which it was clearly and unambiguously employed to defeat a judicial nomination occurred in 1881. At the time, Republicans held a majority of the seats in the Senate but were unable to end the filibuster, which had been employed near the end of the legislative session, the preclude a floor vote on President Rutherford B. Hayes' nomination of Stanley Matthews to the Supreme Court. Though Matthews eventually served as an Associate Justice, it was only because Hayes' Republican successor, President James Garfield, re-nominated Matthews in the next legislative session. (There were also nine other occasions in the nineteenth century when the Senate held no floor votes on Supreme Court nominations.) A recent Congressional Research Service study shows that from 1949 through 2002, senators have employed the filibuster against 35 presidential nominations, on 21 of which senators had sought and invoked cloture. 17 of the 35 nominations filibustered were to Article III

courts. All 21 nominations on which cloture was invoked were eventually confirmed. Of the 14 nominations on which cloture was sought but not invoked, 11 were eventually confirmed. For instance, Republican senators filibustered President Clinton's nominations of Walter Dellinger to head the Office of Legal Counsel in the Justice Department and Janet Napolitano to be U.S. Attorney for Arizona, but eventually the Senate confirmed both nominees—Dellinger after Republican senators relinquished their opposition to his nomination and Napolitano after the Senate voted 72–26 on a cloture motion to end the filibuster against her nomination. Four of the 35 filibustered nominations failed altogether—then-Associate Justice Abe Fortas to be Chief Justice and Judge Homer Thornberry to be an Associate Justice in 1968, Sam Brown to be Ambassador in 1994, and Dr. Henry Foster to be Surgeon General in 1995. Other nominations have failed without having been formally filibustered, as Senator Jesse Helms' threat of a filibuster nullified President Clinton's intention to nominate then-Assistant Attorney General Walter Dellinger as Solicitor General. Another dramatic use of the filibuster occurred when Republican senators filibustered five of President Clinton's nominations to the State Department in order to gain leverage in a dispute over whether the State Department adequately investigated allegations that a former Clinton campaign worker who later served in the department had improperly searched the records of 160 former political appointees and publicly disclosed the contents of two of the files. As John McGinnis and Michael Rappaport concluded in their extended study of the Constitution's super-majority voting requirements, ''the continuous use of filibusters since the early Republic provides compelling support for their constitutionality.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. LEAHY. I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I am highly offended, and I think anybody who is fairminded would be highly offended by this one-sided, partisan attack on Judge Kuhl, and bringing up that particular case because everybody knows that case was settled by the woman's doctor, the one who was at fault. And, frankly, that was hitting below the belt.

Carolyn Kuhl, she is a pioneer for women: cum laude graduate of Princeton University; Duke University Law School: Order of the Coif; law clerk to then-Judge Anthony Kennedy of the Ninth Circuit.

She worked at the Department of Justice: Special assistant to the Attorney General; Deputy Assistant Attorney General; Deputy Solicitor General.

She was 28 years old when she was asked to work on the Bob Jones case. I think it is slanderous to say that Republicans support Bob Jones University's attitudes about race. Give me a break. Nobody on this side does, and neither did she. The case she worked on was a tax issue, and she had an obligation to work with her senior people in the Department. She was very junior at the time. And, frankly, they had a reasonable argument about a certain IRS tax exemption relevant to private universities.

She was a partner in the Los Angeles firm of Munger, Tolles & Olson, one of the best law firms in the country. She is the first female supervising judge of the Civil Department of the Los Angeles County Superior Court.

This is a woman of tremendous abilities. They pick one case out of the hundreds or thousands she has heard and tried, and then distort that case. It drives you nuts around here.

''Both Democrats and Republicans . . . step up to the plate to support [Judge] Kuhl.'' This is Vilma Martinez—not known for conservative politics, by the way—who is one of the top leaders in the Mexican American Legal Defense and Education Foundation, if I recall it correctly. In the Daily Journal this is what Vilma Martinez had to say:

[Judge Kuhl] stepped up to the plate. She wrote letters, made phone calls and exhorted her fellow Republicans to confirm [Judge] Paez and other Clinton nominees.

Judge Paez was a very controversial nominee. I know. I had to work it through to even give him a chance. But he got a vote up and down. And, unfortunately, some of my colleagues who were against him were right. He has become a very activist judge on the Ninth Circuit Court of Appeals, just stepping right in and becoming a member of the leftist majority on that court.

Vilma Martinez, this Hispanic-American leader, says:

[Judge Kuhl's efforts are] characteristic of her sense of fairness and respect for an independent judiciary.

She goes on to say:

[M]any of the groups that support Judge Paez, ironically, have turned their fire on Judge Kuhl, apparently to exact payback against Senate Republicans.

If you listen to those arguments, it is easy to conclude that.

Then, in the bottom paragraph, Vilma Martinez says this—and Vilma Martinez is a Democrat, not a Republican—she says:

This turnabout is not fair play. It is the continuation of a vicious cycle that punishes worthy judicial candidates in a misguided effort to use the judiciary to further narrow political ends.

That is the type of stuff we are dealing with around here: distortions, distortions of the facts, maligning absolutely qualified people. Look at this. Carolyn Kuhl has the support of prochoice women. Anne Egerton, judge on the LA Superior Court:

I understand that some have raised concerns about Judge Kuhl's commitment to gender equality and reproductive rights. I do not share those concerns. . . . I have been a registered Democrat for thirty years, and I have supported—financially and otherwise—[Senator Feinstein], Senator Boxer, and other Democratic legislators and candidates. I have no reservations in recommending Judge Carolyn Kuhl . . . for appointment to the Ninth Circuit Court of Appeals.

Take Gretchen Nelson, pro-choice Democrat, plaintiff's attorney. On February 14 she had this to say:

I am opposed to the appointment of any judicial nominee who is incapable of ruling based upon a considered and impartial analysis of all of the facts and legal issues presented in any manner. Judge Kuhl is not such a nominee and she is well-deserving of appointment to the Ninth Circuit.

Let's quit slandering these people. Let's quit distorting the facts. All because you think they might be pro-life.

My gosh, look at the women judges who support Judge Kuhl's confirmation. A bipartisan group of 23 women judges at the Los Angeles Superior Court, on February 22, said this:

Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges. . . . She has helped promote the careers of women, both Republican and Democrat. . . . As sitting Judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary.

Let's get this out of this totally slanderous political debate and start talking about the real facts.

Democrats on this Floor have tried to confuse the issue, to pretend that what they are doing is no different than what happened to some of President Clinton's nominees. But they are dead wrong. They are comparing apples to oranges. They are different. We did not filibuster a single Clinton nominee who had majority support. Once on the floor, all of them received up or down votes. 377 confirmed for Clinton. Despite the Democrats, not because of them, we have confirmed 168 Bush nominees.

One Senator went so far as to call the four filibustered nominees, as of yesterday, lemons, if you can believe it, when all of them have well qualified ratings from the American Bar Association.

Look at the facts. President Bush has had 29 circuit court of appeals nominees confirmed, but another 12 of them, at least, are facing filibusters. I believe that number is really higher, about 17. It is an amazing, unprecedented series of filibusters of appellate nominees, what we are going through, and there are more to come.

Let me get the last chart up there. The real facts are that since we have had the filibuster rule, since the administration of Franklin Delano Roosevelt, we have had 2,372 judges confirmed and zero filibustered—until now.

Now, it is one thing to filibuster, it is another thing to slander these people. I have seen so much of that over the last 2 or 3 years that I am just sick of it. I am just sick of it.

Let's give these people votes up and down. The reason they will not is they know there are enough good-thinking people in this Senate on both sides who would—for all of these six people who are being filibustered—confirm them on a bipartisan majority.

So a tyrannical minority—which is in so many ways slandering these people, these honest, decent, good people—is preventing votes up and down on judicial nominees for the first time in the history of this country.

Mr. President, how much time do I have left?

The PRESIDING OFFICER. The Senator has 1 minute 15 seconds.

Mr. HATCH. I yield it to the distinguished Senator from Pennsylvania.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, I plead with the Members on the other side of the aisle to stop this. I have folks on our side of the aisle saying: Don't plead with them. Don't plead with them. Let them do it. Because we will have our opportunity someday, and we will make sure there is not another liberal judge ever, ever, to get on that—no more Richard Paezes, no more Ruth Bader Ginsburgs—never, because what is good for the goose is good for the gander. Let them up the ante. We will take all those activist judges they send up and we will shoot them down.

Is that what they want? Anybody who gives a political opinion in America no longer will be eligible for the judiciary. We are going to sanitize the judiciary? We are going to send it to ''Mediocrityville''? Is that what we really want here?

Because let me assure you, as I live and breathe, that is what will happen. If we keep this up—it is 4 today; it will be 6—in 2 hours it will be 6. The Senator from Utah said pretty soon it will be 12. Why it is only 4? Because you just started. You always start with 1.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. SANTORUM. Stop now. You have a chance to save this country and this judiciary. Stop now.

The PRESIDING OFFICER. The Democrat leader is recognized.

Mr. DASCHLE. Mr. President, as I understand it, I have 10 minutes.

The PRESIDING OFFICER. The Senator is correct.

Mr. DASCHLE. I would ask the Presiding Officer if he could notify me when I have used all but 3 minutes.

Mr. President, I find it remarkable that our colleagues can continue to come to the floor these past 40 hours and lament the fact that we have had votes on 172 judicial nominees and 4 of them have not been confirmed because they have not attained cloture. With passion and with emotion they scream out. Where is the fairness for those four nominees, they ask. Where is the fairness?

I find it remarkable that some of the very people who lament not getting a vote for those 4 nominees were participants in the effort to deny even a hearing to 63 nominees for the bench during the Clinton administration. Don't talk to me about the unfairness of a cloture vote on the Senate floor. Don't talk to me about cloture. Don't talk to me until you talk about those 63 who waited, in some cases 4 years, and never got a hearing—or a committee vote.

Denying consideration of judicial nominees is an ongoing practice that our Republican colleagues have been involved in for as long as they have been in the Senate. So this extraordinary outcry, this emotional fervor that we hear so often on the other side, with their misleading charts, does not bear up to the facts.

You tell those 63 people who have not had even a chance for a vote, who should have been confirmed, how it is right for them now not to have the jobs for which they work were nominated—you tell them about the fairness of those four votes.

We have done all we can to work with our colleagues to accommodate all nominees. We have now spent 40 hours talking about this matter. And we have actually spent over 20 days debating judicial nominations since the Bush administration has come to office, 20 days debating and largely confirming the nominees sent to us from the White House.

From the beginning of these last 40 hours, our message was really very simple: We have confirmed 168 of the 172 nominees to date. We have worked with our colleagues on the other side to do as much as we can to ensure that they get a fair debate and ultimately an opportunity to be voted on, whether it is a cloture vote or an up-or-down vote on this Senate floor—unlike what they did on 63 occasions during the Clinton administration.

What we have said over the course of these 40 hours, though, is that it is very unfortunate that while we are debating these four jobs, we are not debating what the American people care most about. We are not debating the fact that 3 million people have lost their jobs, or what to do about it. We are not debating the fact that we are not working on the things the American people care most about.

Several times we spoke about the need to pass the highway bill, and our Republican colleagues ignored our concerns. Several times we spoke about the need to pass the manufacturing jobs credit bill; our Republican colleagues ignored our concerns. These are bills that could truly provide the opportunity for the unemployed in this country to actually acquire a good job and be a little more confident that they will have a brighter future.

Several times we have asked for an increase in the minimum wage by unanimous consent so those who are working would get the pay they deserve.

Republicans objected.

We could have been spending our time a lot more effectively, a lot more in concert with the expectations of the American people, but that has not been the case.

We will continue to work with our colleagues, and in those cases where we can find agreement, we will continue to confirm most of the Bush nominees. But that will not be the case this morning.

We are now debating three justices who continue to insist on putting their own views above the law, to interpret law on their own and without regard to judicial precedent.

As a result, virtually every single women's organization and every single civil rights organization in the country has urged the Senate, pleaded with all 100 Senators to reject these nominations.

I am very grateful for the effort made by our Democratic colleagues on the Judiciary Committee who have put the time and effort they have into analyzing the record of these nominees and have concluded, as I have, that they do not warrant confirmation.

Mr. President, there will come a day, once again, when we can find nominees for whom there can be agreement. But until that happens, until we have the confidence that we can look upon them with an expectation that they will uphold the law, interpret law and not write the law, we have no other recourse but to oppose their nominations, as we will this morning.

I yield such time as he may require to the distinguished Senator from New York.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Thank you.

Mr. President, I thank my colleague from South Dakota for once again being our leader in every way. We are grateful to him, and I think I speak for every Member on this side of the aisle.

Mr. President, this debate ends as it began, with this one immutable fact: 168 to 4; 168 judges confirmed, 4 rejected.

The other side has spent 39 hours trying to come up with other signs, trying to come up with other ways. In reality, this debate has actually helped our side because this fact stands out above all others.

Are we being obstructionist when we approve 168 and reject 4? Everyone but the most extreme of Americans say absolutely not. Are we violating what the Founding Fathers wanted when they talked about advise and consent when we merely blocked 4, 2 percent of the 100 percent of the judges brought up? Every seventh grader who studies constitutional law knows that 168 to 4 is not obstructionist.

The bottom line is the other side has spent hours on sophistry, successful filibusters are wrong, but unsuccessful filibusters are OK because they engaged in filibusters on judicial candidates in 2000 and 1994 and previously. Filibusters of judges are unconstitutional, but filibusters of statutes, of laws, of bills are perfectly OK. What sophistry.

The bottom line is that the other side comes up first with the result and then tries to make the argument backward. I understand why. The small hard-right minority has a scorched earth policy in America. They have to get everything their way and then are pushing, pushing, pushing the other side. They are saying: Do something. But, frankly, because of the wisdom of the Founding Fathers, the Senate still is the cooling saucer, and there is nothing they can do.

This debate has degenerated. To try and get this to be 172 to 0, there is name-calling: anti-Hispanic, anti-Black, anti-Catholic. We know what low and cheap shots those are. We are opposing judges based on their being out of the mainstream, judges who would make law, not interpret law. I don't like judges far left or far right who do that.

Then last night we got from my good friend from Utah, whom I love, he says calling for rollcall votes was obstructionist. That is how absurd and how frustrated and how piqued the other side has been. Calling for rollcall votes on judges is obstructionist? I say to my colleagues, we on this side would have rather spent the time debating how to bring jobs back to America, how to bring health care to America, how to raise the minimum wage.

But at the end of the day, this exercise, come up in the mind of a few, has ended up benefiting us, and there is one solution, I say to my good friend from Pennsylvania, who pleads earnestly——

The PRESIDING OFFICER. The Senator's time has expired.

Mr. SCHUMER. To stop this, and that is come talk to us, work with us in a bipartisan way, nominate judges both sides can support. Don't say my way or the highway and this will stop. But that is the only way to stop it.

Thank you, Mr. President.

The PRESIDING OFFICER. The majority leader.

Mr. FRIST. Mr. President, over the past 2 days, the Senate has sustained what has truly been an extraordinary, all-hours debate, a debate on judicial confirmations and on the very nature of each Senator's duty and right to give advice and consent on the nominations sent to us by the President of the United States, just as the Constitution requires.

We have placed our differences over the last 39 hours, to paraphrase Justice Brandeis, in the disinfectant sunshine of public opinion. This continuous debate has been framed by the bipartisan effort on a very simple principle; and that is, give us an opportunity for an up vote or a down vote, just give us that right to vote.

We have been focused on the Fifth Circuit Court nominee, Justice Priscilla Owen of Texas, who has already been denied that simple up-or-down vote on three previous occasions. It has been focused on two new circuit court nominees from California, Judge Carolyn Kuhl, nominated to the Ninth Circuit Court of Appeals, and Janice Rogers Brown nominated to the DC Circuit Court of Appeals.

We also debated the bipartisan proposal cosponsored by Democrat Senator ZELL MILLER of Georgia to limit the use of the filibuster as to all nominations, a proposal that I believe will change the all too rancorous way that Washington does business. Indeed, this proposal, although more narrow, was based on one previously supported by Senators KENNEDY, LIEBERMAN, KERRY, and other Democrats.

The minority has suggested again and again—we heard it just a few minutes ago—that we should not have spent this time on this issue of the Constitution of the United States of America; that we should not have spent this time discussing the unfair treatment of the President's nominees. They argue that we should not have spent this time on these new judicial nominees that we will be voting on in cloture in just a few minutes.

We simply don't believe that the Senate stewardship, our responsibility, that stewardship for the third branch of Government is the least of our duties, as is suggested that we should not be spending time focused on these issues.

It is almost as if the other side of the aisle said these issues are not important. On the contrary, the Senate stewardship of the independent judiciary is perhaps the Senate's most important task. Why? Because it is our responsibility. It is not the responsibility of the House of Representatives.

George Washington understood this. He believed the judiciary was the most important of the three branches because the courts would protect our liberties. But America's courts do much more than that.

We heard a lot about the economy. We heard a lot about jobs. It is our independent judiciary that provides the anchor for America's economic strength. It is the stability, and it is the confidence that our courts provide that make the United States of America the safest location, the best location for domestic investment, for foreign investment, whether in industry or commerce, and for the overall economy. Why? Because the courts protect those liberties. That means, what? More jobs. It means more prosperity for all Americans.

Our courts guard the rule of law, and to the extent they are free of results-oriented politics and other forms of corruption, they are the foundation stones that have allowed America's history to unfold differently than our sister republics to the south.

In this past year, Americans have come to understand the influence of the courts over our everyday lives, over our daily lives, over our national culture in ways that our Founding Fathers would have never imagined.

Of course, the Democrats' complaint that we are spending too much time on these issues is a little bit strained in that it is they who are filibustering, continuing to debate, denying that opportunity to vote yes or no on these nominees. The filibuster rule, when not abused, is intended to give the minority more time, to allow more time for debate.

Despite the complaints and the charges back and forth, I do give my Democratic colleagues real credit for collegially joining in this debate over the last 39 hours. I am enormously proud of my Republican colleagues. I believe that both sides should feel a certain degree of satisfaction as to how this historic debate has been conducted.

In the past 2 days, we have debated three nominees who the American Bar Association considers qualified to serve on the appellate court but who a Democrat minority considers out of the American mainstream. How many times have we heard that over the last 39 hours—''out of the mainstream.''

I can tell you I don't think the minority has argued effectively or persuasively how Justice Owen, who was elected to the Texas Supreme Court by 83 percent of Texas voters, is out of the mainstream. Out of the mainstream, Justice Brown. Out of the mainstream when she was retained to serve by 76 percent of California voters? Is that out of the mainstream?

They have certainly not convinced any fairminded person how it is that Judge Carolyn Kuhl—who has the support of over 100 California judges and labor unions across the political spectrum, and yes, even trial lawyers—cannot serve on that Ninth Circuit, that really worrisome Ninth Circuit Court that declared the Pledge of Allegiance unconstitutional.

What we have seen, and the reason this debate is historic is that it underscores and it lets the American people know, as well as restates the importance of the issue, that over the past year, the minority has used the filibuster to deny a bipartisan majority the opportunity to vote up or down, to give advice and consent. Let me say that again.

A minority, for the first time in history—it happened this year—for the first time in history, a minority in this body is using the filibuster to deny a bipartisan majority the opportunity to vote yes or no.

It has come up that while majorities have delayed judges in the past through the majority's delegation to the Judiciary Committee, votes on judges have never before been blocked by a minority. Of course, this debate has been more than about Senate procedure. In effect, what we have seen over the last year is the minority is, in effect, amending the people's Constitution without the people's assent. The reason for this is now well know.

Senate liberals have sought with increasing intensity to politicize not just the confirmation process, but the courts themselves. In pursuing this course, they are threatening the legitimacy of America's courts. That legitimacy comes from much more than just black robes or a high bench. It comes from the people's belief that judges will apply the law or the Constitution without regard to personal politics.

Rather than seeking to determine the judiciousness of a nominee and whether a nominee will be able to rule without bias, liberal Democrats are out to guarantee that our judges are, in fact, biased against some and in favor of others. In America, with that result,

citizens will have to worry about the personal politics of the judge before whom they come for justice. I say judiciousness, why?

Like other Senators this year faced with the question of what is required by the Constitution's mandate that the Senate give the President advice and consent, I have turned for guidance to the Founding Fathers and especially to the father of the independent judiciary, John Adams, to find that correct standard by which we give advice and consent on a judicial nominee.

President Adams, the father of our independent judiciary, memorialized for us what the standards should be for confirming our judges. He wrote that they should be ''men [and women] of experience on the laws, of exemplary morals, invincible patience, unruffled calmness, and indefatigable application who will be appointed for life and subservient to none.''

President Adams understood well enough the challenge of being judicious despite one's opinions and even in the face of unpopular opinion. Few people remember it was John Adams who defended the British soldiers who, on March 5, 1770, shot into a crowd on the streets of Boston. Our children study this episode today as the Boston massacre. It is a history lesson we can learn from in our work and on judicial nominations.

John Adams defended the British soldiers before a Boston court with angry mobs in the street.

I will close in a second. I will speak on leader time for the next minute.

I have to wonder, Mr. President, if today John Adams would be obstructed by filibuster because an out-of-touch minority, urged on by special interest groups, questions John Adams' qualifications based on his past advocacy simply for being a good lawyer defending a client, however politically unpopular.

In a few minutes, the filibustering minority will have another opportunity to stand in the light of the Senate floor and do the right thing. I say to the minority: Give these nominees a vote. Vote them up or vote them down, but just give them an honest up-or-down vote.

The PRESIDING OFFICER. The Democratic leader.

Mr. DASCHLE. Mr. President, I will use leader time first to engage in a brief colloquy with the distinguished majority leader with regard to the schedule for the remainder of the day. I wonder if he can inform us as to what his intentions are with regard to schedule.

Mr. FRIST. Mr. President, I will be happy to talk during the votes with the leadership on the other side. My intent would be to have these three consecutive cloture votes and then after that have no other votes today. Before saying that with definitiveness, I would like to have a discussion with the minority leader, if there is other business he would like to bring to the floor as well.

We likely will have other business following that. Again, I expect no rollcall votes after these three votes.

Mr. DASCHLE. I thank the majority leader.

Mr. President, I also note at the end of this period of time, we have been here now for about 40 hours. It is probably not accurate to say we have all been here for 40 hours. Some of us had the luxury of coming and going, but there have been a lot of staff on the Senate floor, in our cloakrooms, in the Sergeant at Arms Office, our Capitol Police, all of our clerks—the extraordinary effort that they have made in these last 40 hours should be recognized.

I know I speak for all of our colleagues on both sides of the aisle in expressing our heartfelt gratitude to all of them. Once again, they have exceeded our expectations, and we are grateful for their dedication and professionalism during these difficult days.

I yield the floor.

NOMINATION OF PRISCILLA RICHMAN OWEN, TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

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. 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.

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

The question is, Is it the sense of the Senate that debate on Executive Calendar No. 86, the nomination of Priscilla Richman Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit, shall be brought to a close? The yeas and nays are mandatory under the rule. The clerk will call the roll.

Mr. REID. I announce that the Senator from Delaware (Mr. CARPER), the Senator from North Carolina (Mr. EDWARDS), the Senator from Hawaii (Mr. INOUYE), the Senator from Massachusetts (Mr. KERRY), and the Senator from Florida (Mr. NELSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Delaware (Mr. CARPER) and the Senator from Massachusetts (Mr. KERRY) would each vote ''nay.''

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

The yeas and nays resulted—yeas 53, nays 42, as follows:

The result was announced—yeas 53, nays 42, as follows:

[Rollcall Vote No. 450 Ex.]

YEAS—53

Alexander	Dole	Miller
Allard	Domenici	Murkowski
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Brownback	Frist	Santorum
Bunning	Graham (SC)	Sessions
Burns	Grassley	Shelby
Campbell	Gregg	Smith
Chafee	Hagel	Snowe
Chambliss	Hatch	Specter
Cochran	Hutchison	Stevens
Coleman	Inhofe	Sununu
Collins	Kyl	Talent
Cornyn	Lott	Thomas
Craig	Lugar	Voinovich
Crapo	McCain	Warner
DeWine	McConnell	

NAYS—42

Akaka	Dodd	Leahy
Baucus	Dorgan	Levin
Bayh	Durbin	Lieberman
Biden	Feingold	Lincoln
Bingaman	Feinstein	Mikulski
Boxer	Graham (FL)	Murray
Breaux	Harkin	Pryor
Byrd	Hollings	Reed
Cantwell	Jeffords	Reid
Clinton	Johnson	Rockefeller
Conrad	Kennedy	Sarbanes
Corzine	Kohl	Schumer
Daschle	Landrieu	Stabenow
Dayton	Lautenberg	Wyden

NOT VOTING—5

Carper	Inouye	Nelson (FL)
Edwards	Kerry	

The PRESIDING OFFICER. On this vote, the ayes are 53, the nays are 42. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is not agreed to.

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

CLOTURE MOTION

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

The 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 G. 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. LEAHY. Mr. President, I want to commend the Senators from California for their leadership in connection with this matter.

Today, the Senate is considering the nomination of California Judge Carolyn Kuhl to the U.S. Court of Appeals