The Senate cannot allow the filibuster of circuit court nominees to continue. Nor can we allow the filibuster to extend to potential Supreme Court nominees.

Senators must be able to debate the merits of nominees on the floor and have the opportunity to publicly and permanently record a yes or no vote.

We must leave this obstruction behind. And we can—as an aberration in Senate history and a relic of a closely divided body during a challenging time for America.

The American people have re-elected a President and significantly expanded the Senate majority.

It would be wrong to allow a Minority to defy the will of a clear and decisive Majority that supports a judicial nominee.

And it would be wrong to allow a Senate Minority to erode the traditions of our body and undermine the separation of powers.

To tolerate continued filibusters would be to accept obstruction and harden the destructive precedents established in the current Congress.

With its judicial filibusters, the Minority has taken radical action. Now the damage must be undone.

American government must be allowed to function. And America must be allowed to move forward.

Senate rules and procedures have been shaped and molded throughout the body's history.

They're not set in stone. They can be changed to fit the governing climate, to respond to emerging challenges, and to restore vital constitutional traditions.

So when it became clear that the Minority was intent on abusing the filibuster in this Congress, we proposed to reform the rules.

In May 2003, Senator Zell Miller and I—joined by every member of the Majority leadership—proposed a new way to end debate and move to an up-or-down vote on nominations over a reasonable period of time.

A first attempt would require 60 votes, the next 57, the next 54, then 51, and finally we could end debate by a simple majority.

The Frist-Miller resolution went to the Rules Committee. Senator Lott chaired a hearing and the committee approved it in June.

For the remainder of 2003 and all of this year, Frist-Miller has sat on the Senate calendar—facing a certain filibuster by those who want to continue to filibuster judges.

The Frist-Miller reforms would be a civil, constructive and cooperative way to end the filibuster of judicial nominees.

The Senate now faces a choice: either we accept a new and destructive practice, or we act to restore constitutional balance.

We are the stewards of rich Senate traditions and constitutional principles that must be respected. We are the leaders elected by the American people to move this country forward.

As my colleague, Senator Feinstein said, ''A nominee is entitled to a vote. Vote them up; vote them down. . . . If we don't like them, we can vote against them. That is the honest thing to do.''

I fervently believe in the principles of the American Founding.

And I know you do too. Because I serve and work closely with 4 members of this society: Mitch McConnell, John Kyl, Jeff Sessions and Orrin Hatch.

Let me say this about these Senators: there are no more passionate defenders of America's founding principles anywhere in our government. They are true patriots.

They know that the principles enshrined in our Constitution have guided a miraculous experiment that has matured into the most stable form of government in human history.

And if we truly desire lasting solutions to the challenges of the 21st century, those same principles must guide us today and in the future.

The filibuster of judicial nominees is about Senate tradition. It's about the separation of powers. It's about our constitutional system of government.

But, at the most fundamental level, this filibuster is about our legacy as the leaders of the greatest people and nation on the face of the Earth.

What will we accomplish over the next four years? What will we do with the time and the trust that the American people have so generously given us?

One way or another, the filibuster of judicial nominees must end. The Senate must do what is good, what is right, what is reasonable, and what is honorable.

The Senate must do its duty.

And, when we do, we will preserve and vindicate America's founding principles for our time and for generations to come.

ADDITIONAL STATEMENTS

TAX RETURN PRIVACY

● Mr. CONRAD. On Saturday, November 20, 2004, the American taxpayers dodged a bullet. The Congress came close, much too close, to passing legislation that would have stripped every American of their right to privacy with regard to their tax returns.

The Senate averted this dangerous step, in part, because members of my staff—and one staffer in particular—came in to work on Saturday and read through more than 3,646 pages of a bill and its explanatory text.

As my colleagues know, we were called to the Chamber on Saturday to debate and vote on the conference report on H.R. 4818, the Omnibus appropriations bill. This so-called ''catch-all spending'' package included nine different appropriations bills costing some $388 billion for fiscal year 2005.

Many Members of Congress were familiar with some elements of the individual appropriations bills, including funding levels for programs and projects important to our States. But few, if any, Members were able to carefully analyze the bill in its entirety. Because the bill was delivered to each Senator and House Member at 6 a.m., we did not have much time to review the massive bill before we were asked to vote on it.

When the bill arrived I asked members of my staff to pore over the bill, each tasked with finding and reviewing sections of the bill where they have policy expertise. It was during this effort to review the bill that one of my staff members discovered an egregious tax provision. Steve Bailey, my tax counsel on the Senate Budget Committee, reading the Transportation-Treasury section of the bill, spotted section 222 and immediately realized it was a huge problem. The paragraph read:

Notwithstanding any other provision of law governing the disclosure of income tax returns or return information, upon written request of the Chairman of the House or Senate Committee on Appropriations, the Commissioner of the Internal Revenue Service shall hereafter allow agents designated by such Chairman access to Internal Revenue Service facilities and any tax returns or return information contained therein.

Mr. Bailey, who has worked on tax issues for more than 20 years, knew that if enacted, the provision would endanger the right and expectation of every American. This provision held the very real promise that the privacy of their tax returns could be compromised.

Thanks to Mr. Bailey's close reading of the bill and his quick recognition of the negative implications of that 60-word paragraph, I was able to bring the paragraph's existence to the attention of my colleagues. Fortunately, the Senate then firmly and unanimously rejected the paragraph and demanded that the House of Representatives remove the offending language before the bill could be sent to the President's desk for his signature.

At the conclusion of my remarks, I would like to have printed in the RECORD at the conclusion of my remarks an editorial from today's New York Times, ''Snookering the Taxpayers.'' This editorial mentions ''a sharp-eyed Democratic staff member [who] spotted the terse paragraph sitting like a toxic clam in the muck of the omnibus spending bill. . . .'' This editorial concludes with a clear understatement, ''Taxpayers can only hope someone keeps reading.''

Well, I can assure my constituents in North Dakota that my staff and I will keep on reading. But I also hope this experience will lead to a new method of doing business next year. The Senate should never again tolerate a process by which we are given a 3,600-page bill and are then asked to vote upon that bill several hours later. As my colleague from Arizona, Senator JOHN MCCAIN, has noted, this process is broken and it must change. I will be working with my colleagues to accomplish that goal next year.

I wanted to take this opportunity to recognize and thank Mr. Steve Bailey for his outstanding work and service to me and to the Senate. This past week, his hard work made a big difference to millions of American taxpayers.

The editorial follows.

[From the New York Times, Nov. 24, 2004]

SNOOKERING THE TAXPAYERS

It is called a snooker clause in legislative parlance—a last-minute insert into a dense and hurried midnight bill that, if ever disclosed after passage, always leaves legislators shocked, shocked at how such an undemocratic bit of mischief ever came to be. ''No earthly idea how that got in there,'' said Bill Frist, the Senate majority leader, after the impenetrable, 14-inch-thick omnibus budget bill turned out to have a provision giving Congressional chairmen and staff members entree to Americans' tax returns without regard to privacy protections.

This has been a sacrosanct area ever since the Watergate scandals. Severe civil and criminal penalties were enacted after the Nixon administration's rifling of private tax returns to build the ''enemies list'' aimed at government harassment.

A sharp-eyed Democratic staff member spotted the terse paragraph sitting like a toxic clam in the muck of the omnibus spending bill, a 3,000-page disgrace in its own right that capped months of Capitol procrastination. Once the provision was found, everyone felt compelled to denounce it. Senator Charles Grassley, the Iowa Republican, growled that it summoned ''the dark days in our history when taxpayer information was used against political enemies.'' The Senate declared the clause void, forcing G.O.P. leaders in the House, where the gambit originated, to sheepishly follow suit. House leaders insisted there was never an intent to pry into taxpayers' lives. The goal, they said, was simply to establish better oversight of the tax collection bureaucracy. Really? Then how come anyone bothering to read the bill (and that did not include many members of Congress) could see what an outrageous license it provided for the appropriations committees to look into tax offices ''and any tax returns or return information contained therein.''

Embarrassed solons had to admit they had no idea what other dangerous items might be in the bill. Taxpayers can only hope someone keeps reading.●

IDEA

● Mr. HARKIN. Mr. President, I wish to thank my colleagues, Chairman GREGG and Senator KENNEDY, as well as Chairman BOEHNER and Representative MILLER, for conducting a truly bipartisan conference. When the legislative process is working properly, we have a fair negotiation, and more often than not, that produces a better bill. Not a bill that gives each of us everything we wanted, but a fair result given the two bills that we are charged with reconciling. And that is what we have here.

Last week, Washington Post's internet site ran a cartoon by Ted Rall that was one of the most egregious things I have ever seen. I don't know if many of you saw it, but it showed a student in a wheelchair with crossed eyes and drool coming from his mouth. He had joined a class of students without disabilities and here is what one of the panels of the cartoon read: ''The special needs kids make people uncomfortable and slow the pace of learning.'' The cartoon showed the class changing from higher level math to simple addition because of the special education student.

The cartoon was supposed to be some kind of analogy to the United States, but it was very hard to understand the point. What was crystal clear, however, was the author's bigotry and stereotyping of children with disabilities. I understand that the Post will no longer run cartoons by Mr. Rall because cartoons like this are not funny. They are hurtful and serve as a stark reminder of why we are here and why IDEA is such important civil rights legislation.

I was here in Congress in 1975, as were some of my Senate colleagues, when IDEA was enacted. It is important to remember why we passed this legislation in the first place. We passed it because bigotry and discrimination were keeping a million children with disabilities completely out of school. Those children were locked out of an education and denied the bright future that comes with an education. IDEA opened the doors of opportunity for those children.

I have participated in many subsequent revisions to the law over the past 29 years, and I am supporting this reauthorization because we continue our proud tradition of ensuring that children with disabilities have the right to a free, appropriate public education (FAPE). In addition, we improve the enforcement of that right.

Over the years, I have been involved in the debate about disciplining students with disabilities—and this was a major issue for the conferees. I know parents were very concerned about changes to this section of the law. I appreciate and understand those concerns because I have shared them.

While this reauthorization streamlines the discipline provisions, it continues several key principles. We will continue to consider the impact of the disability on what the child is doing, and we will not punish children for behavior that is related to their disability. It is also important that we continue to require that children receive educational services when they are being disciplined so they do not fall further behind. We also continue to emphasize that an assessment and services must be provided to children who have more serious behaviors so we can prevent future discipline problems.

I believe that discipline will become less and less of an issue over time as schools implement positive behavior supports more widely. Section 614(d)(3)(B), entitled Consideration of Special Factors, was added in 1997 to provide special emphasis on certain related services, modifications, and auxiliary aides which were not being considered by IEP teams and therefore not provided. The Senate bill modified subsection 614(d)(3)(B)(i) to state that behavioral supports must be provided when the child's behavior impeded his/her education or that of others. In conference, current law was reinstated in order to make the subsection consistent with the other special consideration subsections.

By instructing the IEP team to consider the specified services, it goes without saying that the services must be provided if the IEP team finds that the services will assist the child in benefiting from his/her educational program. In the case of behavioral interventions, the section sets forth the circumstances when the services would be required.

The regulations to IDEA specify that ''if, in considering the special factors . . . the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP.'' 34 C.F.R. Sec. 346(c). And IEP services must be provided to the student. See Office of Special Education Programs Letter to Osterhout, 35 IDELR 9 (2000).

There has been widespread noncompliance with this requirement. However with reauthorization's increased emphasis on monitoring and enforcement, we expect this implementation will improve. Children whose behavior is impeding them or others from learning should get the positive behavioral supports they need when the IEP team considers this issue and finds that the services are part of FAPE for that child.

In addition, we allow schools to use up to 15 percent of their funds to address behavior issues for children who have not been identified as special education students. Also, Senator CLINTON has worked to include authorization for a program that would provide funding for systemic positive behavioral supports in schools.

Research by Dr. George Sugai and others indicates that the implementation of positive behavioral supports can have a dramatic impact on disciplinary problems. Dr. Sugai testified in 2002 before the Health, Education, and Labor Committee that by shifting to schoolwide positive behavioral supports, an urban elementary school decreased its office referrals from 600 to 100. It also decreased in 1 year its days of suspension from 80 to 35. Schools can save administrators' time and resources and cut down on discipline problems by implementing these programs.

Another area that generated discussion in this reauthorization is litigation and attorneys fees. However, the facts show that there is very little litigation under IDEA. GAO examined the data and concluded that the use of ''formal dispute resolution mechanisms has been generally low relative to the number of children with disabilities,'' according to a 2003 report titled, ''Special Education: Numbers of Formal Disputes are Low and States are Using Mediation and Other Strategies to Resolve Conflicts.''

My own State of Iowa follows the general trend of very low hearings and court cases. A graduate student in Iowa did a thorough analysis of due process hearings in Iowa from 1989–2001. Since the amendments in 1997, there were three hearings in 1998; three also in 1999 and four hearings in 2000. The Department of Education informs me that this trend continues, with only three hearings in each of the past 2 years. And there are thousands of children in special education in the State of Iowa.

Given the fact that litigation is generally not a problem in IDEA, in this reauthorization we merely include a standard that is used in other civil rights contexts—it is generally referred to by the case, *Christiansburg Garment Company* vs. *Equal Employment Opportunity Commission*, 98 S.Ct. 694 (1978). Both prongs of the Christiansburg