Over the course of the day, the Budget Committee will also be marking up the budget proposal. Once that markup is completed, we will bring that to the floor. I would very much like to be able to start that bill, if at all possible, tomorrow. Under the rules of the Senate, after that bill comes to the floor, we will spend 50 hours on that bill, and we will have a number of votes.

Once again, historically, or in the recent past, we have had amendment after amendment after amendment. The Democratic leader and I have, over the last week, been engaged in discussions on how we can help the managers of that bill limit the amendments to those amendments that really are important and substantive and to have a good discussion between us and between the managers, among all the Senators, so we can coordinate how to bring those amendments to the floor and have them voted upon so that we do not, at the end of the day, or at the end of that 50 hours, have 30, 40, 50, 60, 70, 80, 90 amendments, which we have seen in the past. It is not necessary.

If we can work together over the course of the next 8 or 9 days, I believe we can take what can be very chaotic on the floor and give it some definition and make it clear to people we want their ideas heard, we want them debated within the 50 hours, we want to have them voted upon, but we can do it in a way that brings order out of this sometimes chaotic process.

With that, Mr. President, I will yield the floor, looking forward to a very full day. We will be in session tomorrow. I would think—and I will have more to say a little bit later, but in talking to the Democratic leader, if we can complete the budget today in committee, and I believe we can, and if we complete this bankruptcy bill, which we will, then I would think we probably would not have to have rollcall votes tomorrow. We will be in session tomorrow. I put both of those ''ifs'' in there because we have to move forward and accomplish the business before us. If we were unable to finish those two things, we would have to be in tomorrow with rollcall votes.

But our goal is to complete the markup on the budget and complete the bankruptcy bill today. I would like to do it in the late afternoon. If not, we will go into the evening until we complete both.

Mr. President, I yield the floor and suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will be a period for the transaction of morning business until 11 a.m., with the time equally divided between the leaders or their designees.

The Senator from Massachusetts.

BANKRUPTCY REFORM

Mr. KENNEDY. I yield myself such time as I might use.

Mr. President, I speak now in morning business because at 11 o'clock we will have a continuation of votes in the Senate on the bankruptcy bill. Then we will have a series of votes later on in the afternoon, with a time to be designated by the leadership. Then we will move to final passage. There would not be otherwise an opportunity to express my views about the bankruptcy bill in general and on a number of the items we have debated and on which we have failed to persuade the majority of our colleagues. I want to reference those in my remarks this morning.

America at its best is when we are united in common cause and a unified purpose. We came together to overcome the Great Depression. We came together to fight two world wars against tyranny. We came together in the Cold War years to contain and defeat Communism. We came together to fight polio, to explore the heavens, and to create a secure retirement for our seniors. We came together after much struggle to expand the circle of opportunity in America for civil rights, voting rights, disability rights, and women's rights. We came together on 9/11 as a nation determined to fight terrorism and defend our land.

As Americans, we know how to come together to achieve great goals, to make stronger our communities, our families, our economy, our schools, and our nation. That is the America I believe in. That is the America I fight for every day. An America where we are joined arm in arm to advance the cause of opportunity, freedom, and fairness for all of our people.

But this legislation breaks the bond that unites America, the bond that makes our country strong. It says the concerns of low and middle-income families don't matter. They no longer have a voice in the United States Senate. What matters are the special interests. This bill sacrifices the hopes and dreams of average Americans to the rampant greed of the credit card industry. It turns the United States Senate into a collection agency for the credit card companies, reaching the long arm of the law into the pocketbooks of average Americans who have reached the end of their economic rope.

That is wrong. That is not what we should be doing here. We have a responsibility to the people to fight for them and their needs, not to do the bidding of the almighty credit card companies.

A lot of people are going to be pained with this bill. Make no mistake. The idea that this bill is focused on spendthrifts is laughable when the other side admits that the most we have in terms of spendthrifts is maybe 10 percent of the total of those who go into bankruptcy, and most of the bankruptcy attorneys say it is anywhere from 5 to 7 percent. We are picking up all these individuals who are going to be forced to pay and be treated more harshly with this bill than they otherwise would be under the regular Bankruptcy Act.

Our bankruptcy laws are intended to give families a second chance. As Americans, we believe that if you work hard, live responsibly, but fall on hard times, our bankruptcy laws should be there to help you get back on your feet. If you get sick and face a mountain of medical bills, if you face divorce and no longer have two incomes to support your family, if your job gets sent overseas, then Americans believe you should have an opportunity to rebuild your lives.

These are the principal causes for bankruptcy. We know that more children drop out of college every single year, not academically, but because of the cost of student loans. They can't pay them. We have been through this during the course of the debate. If you have a heart attack, if you are diagnosed with cancer, even if you have health insurance, you basically have overwhelming bills and more often than not get thrown into bankruptcy. If you get divorced—as we will have a chance to vote on—200,000 women don't receive alimony and don't receive child support, these are hard-working Americans who are going to get thrown into bankruptcy. And rather than be let out so that they will have a new chance and a new opportunity in life because they have done nothing wrong, they are going to be tied up and paying the credit card companies for the next 5 years. That is the way this bill works.

This bill changes everything. It takes dozens and dozens of bankruptcy rules and rewrites every single one of them in favor of the credit card industry. Yesterday, we witnessed the powerful grip of this industry over the Republican Party. The Republicans defeated amendment after amendment after amendment after amendment that tried to give average Americans a fair chance when they face the credit card company lawyers in bankruptcy court. But when it appeared that a special interest loophole for the financial services industry threatened to be closed by the Leahy-Sarbanes-Warner amendment, the Republicans shut down the Senate.

It is not as if the credit card industry is suffering. As we can see from this chart, the profits are in the billions of dollars: $6.4 billion 1990; $12.9 billion in 1995; $20.5 billion in 2000; and they expect as a result of this bill that it will be 5 billion more dollars in profits. That is what this bill will mean. Over who? Over the families going into bankruptcy because of a heart attack, a stroke, children who have spina

bifida, over women who are not getting paid alimony or child support, over those workers whose jobs have been shipped overseas trying hard to pick up another job and can't keep up with the payments and go into bankruptcy. Those are the people who are suffering. But when it came to an issue involving the financial services industry, our Republican leadership closed the Senate down last night.

In the 8 years that this bill has been before the Senate, credit card profits have jumped 163 percent from $11.5 billion a year to more than $30 billion a year.

We hear the proponents of this legislation say: Look, we have had this legislation before us for 8 years. We have a problem. We have to deal with the problem. A problem, with these kinds of profits?

We have a problem with health care coverage for Americans. We have a problem with the cost of health care. We have a challenge in supporting our schools and our local communities. That is what is on the minds of Americans. Here we are in the Senate, taking 2 weeks of our time in order to look out for the credit card companies and make sure there are going to be greater profits for a single industry. That is the priority of the Republican leadership, rather than dealing with the root causes of so many of those who will be dragged into bankruptcy and made indentured servants to the credit card industry for the next 5 years. It does not make sense. These are the wrong priorities, the wrong values.

Middle class families are facing tough times with incomes falling, health costs out of control, college tuition through the roof, and now gasoline prices rising once again.

But this bill says that what's going on in your life every day doesn't matter.

You may be a member of the Guard or the Reserve called to Iraq and your business failed because you were away serving your country. In fact, 40 percent of those called up say they lost income, and over 19,000 soldiers declared bankruptcy just last year. They sacrificed their lives in Iraq and their financial security here at home, but the credit card companies will honor their service by squeezing every last dime out of our veterans in bankruptcy court.

Here is a letter from the Military Officers Association of America:

> On behalf of the nearly 370,000 members of the Military Officers Association . . . I am writing to request your support for the protection of servicemembers, veterans, and military survivors from the increased bankruptcy penalties.

They have it right, ''increased bankruptcy penalties.'' And this was written after Senators accepted the Sessions amendment which is just eye dressing.

> Our association is sensitive that overseas contingencies disrupt the lives and finances of servicemembers and their families. This is particularly true of the mobilized Guard and Reserve members. Those who are self-employed, or who took significant pay cuts from their civilian occupations, have been placed at increased risk of facing bankruptcy because of their service and sacrifice for our Nation. Survivors of members killed on active duty also may find themselves at increased financial risk. Many have left service rather than be subject to similar recalls in the future, and we are already concerned about the implications of this for long-term retention and readiness.
>
> MOAA does not believe this is the time to impose new financial strictures . . .

There it is. Nonetheless, we have gone ahead and done that. Democrats tried to correct this problem, to put some balance and fairness in the bill. Senator DURBIN offered an amendment to protect those who protect us, but our Republican friends said no. Every single Republican in the United States Senate voted for more credit card profits and against our service men and women.

You may be a cancer survivor, but you can't survive the $35,000 in medical bills that your insurance company won't pay, and you lost another $20,000 for all the months you couldn't work and had to use your credit cards to pay the mortgage, cover the car payments, pay the utilities, and buy the groceries. You're doing everything you can to pay down your debt. You have taken out a second mortgage. You have cashed in your retirement savings. Your family is sharing one car.

But that doesn't matter. Under this bill, the profits of the credit card companies are more important than your recovery from cancer. Tough words; tough bill.

Democrats fought to correct this problem. I offered an amendment to give responsible Americans who fall on hard times due to illness or injury a fair chance in bankruptcy court. But the Republicans voted against these Americans in favor of the credit card companies.

You may be a single mother trying to raise your family, juggle your job and school, and rely on alimony and child support to pay the bills. But more than 200,000 women owed alimony or child support are forced into bankruptcy every year.

Democrats are addressing this problem, too. Republicans have a chance to vote for single mothers later this morning. We have a chance to say to women across America, who are taking responsibility every single day for their children, but have a deadbeat dad who won't do his part, that we're on your side. We believe it's more important for you to get back on your feet than for the credit card companies to have greater profits.

Maybe your job was one of the 2.8 million manufacturing jobs that have been shipped overseas in the past 4 years. You found a new job, but it pays only half as much. But under this bill, it doesn't matter. In bankruptcy court you will still have to keep paying the exorbitant interest payments to the credit card companies as if you still had your old, better paying job.

It doesn't matter that you have worked hard and lived responsibly all your life.

It doesn't matter that you were willing to take a lower paying job because you wanted to be a contributing member of society.

It doesn't matter that you clip grocery coupons every week to try to preserve the money you set aside to put your children through college.

It doesn't matter that you gave up your vacation to pay for repairs to your leaky roof.

It doesn't matter that your lost job means you had to move your elderly parents into a cheaper nursing home to try to avoid bankruptcy.

It doesn't matter. You can sacrifice and cut corners and put aside hopes and plans and dreams. But all that matters in this bill is for the credit card companies to have more and more profits.

We'll have a chance to vote on this question later this morning, too. But I have a feeling that Republicans are going to say no to the needs of Americans whose jobs have been outsourced overseas, just as they have said no to Iraq veterans, to single mothers, to children, and to seniors.

We should be working to unite the country to achieve great goals again. Why are we not debating those issues here on the floor of the Senate, instead of trying to get more profits for the credit card industry—perhaps the most profitable industry in America—at the expense of the mothers, children, veterans of Iraq, those who have serious health care bills, and those whose jobs have been shipped overseas. We should be battling for them. We should be battling to improve our schools and make college more affordable. We should be strengthening our economy and training our workers to compete against globalization. We should be fighting to keep our country safe from terrorism.

This bill makes these goals more difficult to achieve. It divides America by rewarding the most powerful special interests at the expense of low and middle-income families. A Republican supporter of the bill said yesterday that this bill was ''fair and balanced.'' Where is the fairness? Where is the balance?

It does nothing to fix the millionaires' mansion loophole that allows millionaires to go into bankruptcy and still keep their massive estates. You may lose your home, but they get to keep their palaces under this bill. Where was the effort on the other side—talking about a fair and balanced bill—to try to do something about that? All they could do was whip up their own membership in order to defeat that amendment to have one standard for all Americans. That is what I thought we were about as a country one standard—not a dual standard for wealthy millionaires that can hide the tens of millions of dollars

in their mansions and palaces in a handful of States.

It does nothing to help the thousands upon thousands of employees and retirees of companies like Enron and WorldCom and Polaroid, who are left out, twisting in the wind, after a bankruptcy process that lets the responsible corporate executives go free. They go free. These employees lose their pensions, their health insurance, their retirement, and their investments, as they did at Polaroid. Is there anything in this bill to try to help those individuals, many of whom worked a lifetime for these companies? Absolutely not. They are fair game. After these individuals, the Ebbers, the Skillings, Enron, and the rest, robbed those companies, they are sitting in their mansions now in Houston; but these other individuals will be dragged into bankruptcy court if they get a serious illness or sickness, or if they run into family problems.

Fair and balanced? No way, Mr. President. The Republicans and the credit card companies may get their way, and the American people may lose this round; but the fight is never over until we have assured fairness and freedom and opportunity for every one of our citizens. That is our pledge as Democrats today and tomorrow and in the future. That is why I hope our colleagues will vote no.

I will mention a few further items. One is from the Children's Defense Fund, who care about children. We tried to point out some of the other groups that will be affected. Here is a letter from the Children's Defense Fund. I will read excerpts of it. I ask unanimous consent that this letter be printed in the RECORD.

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

CHILDREN'S DEFENSE FUND,
Washington, DC, March 1, 2005.

Re: oppose S. 256, the Bankruptcy Act of 2005.

DEAR SENATOR: The Children's Defense Fund is writing to urge you to oppose S. 256, a bankruptcy bill that would hurt many Americans facing financial problems due to job loss, divorce, child-rearing, lack of medical insurance, or predatory lending practices. This bill would inflict hardship on more than one million economically vulnerable women and families who are affected by the bankruptcy system each year. Medical emergency, job loss or family breakups are factors which account for nine out of ten filings.

The bill would also hurt women who are owed child or spousal support by men who file for bankruptcy. The bill will make it more difficult for mothers to collect support because credit card companies and other commercial creditors will have greater claims to the debtor's resources during and after bankruptcy. Being first among unsecured creditors in Chapter 7 bankruptcy is meaningless when over 95 percent of debtors have no resources to pay unsecured creditors. In Chapter 13, the bill would require larger payments to be made to many commercial creditors, resulting in smaller payments of past-due child support over a longer period of time, increasing the risk that child support debts will not be paid in full. And after the bankruptcy is over, more debts owed to commercial creditors will survive—and mothers and children owed support are not a match for the collection departments of the commercial credit industry.

S. 256 contains a number of provisions which would have a severe impact on families trying to regain their economic stability through the bankruptcy process. S. 256 would make it harder for women to access the bankruptcy system. Low and moderate income families are not protected from many of the bill's harsh provisions. Parents who desperately need to preserve their homes from foreclosure or prevent their families from being evicted, or keep a car to get to work, would find it more difficult to do so. And, when the bankruptcy process was over, parents already facing economic disadvantage would find it harder to focus their income on reasonable and necessary support for dependent children because many more debts would survive.

Passage of the bankruptcy bill would make it harder for families struck by financial misfortune to get back on track. It would benefit the very profitable credit card industry at the expense of the modest-income families who represent the great majority of those who declare bankruptcy. Congress should not enact reform that puts women and children at greater risk. The bill is profoundly unfair and unbalanced. Unless there are major changes to S. 256, we urge you to oppose it.

Very truly yours,
DEBORAH CUTLER-ORTIZ,
Director of Family Income and Jobs, Children's Defense Fund.

Mr. KENNEDY. In part, the letter says:

This bill would inflict hardship on more than 1 million economically vulnerable women and families who are affected by the bankruptcy system each year.

. . . and after the bankruptcy is over, more and more debts owed to the commercial creditors will survive—and mothers and children owed support are not a match for the collection departments of the commercial credit industry.

There it is. The credit card companies and the mothers will be scrambling over the nickels and dimes that might be left. Guess who is going to win out? That is the fairness and balance that has been put in here. That is why the Children's Defense Fund is strongly opposed to this.

The National Women's Law Center wrote:

This bill would inflict additional hardship on over one million economically vulnerable women and families who are affected by the bankruptcy system each year: those forced into bankruptcy because of job loss, medical emergency, or family breakup—factors which account for nine out of ten filings—and women who are owed child or spousal support by men who file for bankruptcy.

It will make it ''harder for women to meet their children's needs after bankruptcy because many more debts would survive.''

Finally, the Alliance for Retired Americans wrote:

The fastest growing group of Americans filing for bankruptcy are those over 65. This unfortunate situation has been caused by skyrocketing health costs that can drain a lifetime of savings in a very short period of time. In addition, many older Americans have seen their pensions and retirement savings disappear as well. The result has been that many older Americans cannot enjoy the security in their retirement through no fault of their own. And they end up in bankruptcy.

This legislation before the Senate actually increases the burden on older Americans who undergo financially difficult times through health care costs or loss of retirement income.

This administration wants to privatize Social Security. This is what they say. That is why they are opposed to it. Those who represent the children are opposed to it. The ones in the military are opposed to it. Those who represent workers are opposed to it. Those who represent women are opposed to it. The one group that is for it is the credit card companies. Take your choice. I know how I will decide.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from Utah.

Mr. HATCH. Madam President, the crisis created by the unprecedented use of filibusters to defeat judicial nominations must be solved while preserving two important Senate traditions. On the one hand, extended debate is an important part of how the United States Senate conducts its legislative business. On the other hand, we have traditionally given judicial nominations reaching the Senate floor a final confirmation decision. Two years ago, this latter tradition was attacked when the filibuster was used for the first time to defeat majority supported judicial nominations. Mr. President, these are two different and important traditions and each must be preserved.

Solving this crisis by restoring Senate tradition is not a partisan step, but is in the interest of the Senate as an institution. Both Republicans and Democrats should follow the same standard, no matter which party occupies the White House or runs the Senate. Neither Democrats nor Republicans should have to go through this vicious cycle of filibusters against qualified judicial nominees.

Let me first clarify once again the situation in which we find ourselves. Before 2003, no majority supported judicial nomination had been defeated by a filibuster. Under our Rule XXII, we did vote on motions to end debate on judicial nominations, though we did so just 15 times in 35 years. Simply taking a cloture vote, however, does not mean a filibuster is underway. In fact, some of those cloture votes were used deliberately to prevent filibusters, clearing the procedural path and guaranteeing an up or down confirmation vote. Some have been used for floor management purposes. We did so even on very controversial nominations, such as President Clinton's choices of Richard Paez and Marsha Berzon for the U.S. Court of Appeals for the Ninth Circuit.

Before 2003, only one judicial nomination on which cloture was not invoked was not confirmed. Opposition to cloture on the controversial 1968 nomination of Abe Fortas to be Chief Justice was evenly bipartisan and showed that

the nominee lacked clear majority support. At the nominee's request, President Lyndon Johnson withdrew the nomination the next day. Senator Robert Griffin, from Michigan, who led opposition to the nomination, personally told me that there never was an intention to use the filibuster to defeat the Fortas nomination. There was no need, since the votes were there to defeat the nomination outright. Lyndon Johnson knew it and that is why they withdrew the nomination rather than be embarrassed by the bipartisan vote of both parties against the nominee.

Before 2003, if the Senate rejected a judicial nomination that reached the Senate floor, we did so by voting it down; filibusters did not prevent a final vote in order to keep a nomination from confirmation. The break with that tradition came in 2003. During the 108th Congress alone, we voted on motions to end debate on judicial nominations 20 times. Each vote failed, and opposition to cloture was completely partisan. None of those nominees was confirmed, though each had clear bipartisan majority support.

Those who want to end this Senate tradition of giving judicial nominations reaching the Senate floor an up or down vote fear they will lose if we follow that tradition. To them, the end of defeating President Bush's judicial nominations justifies the means of destroying Senate tradition. Being honest about it would reveal how such partisan strategies are politicizing the judicial appointment process, so they try to make other arguments.

They claim Republicans filibustered President Clinton's judicial nominations, but each of his judicial nominees on whom we took a cloture vote is today a sitting Federal judge.

They claim they don't filibuster very often, which is beside the point if using the filibuster against judicial nominations violates constitutional principles and departs from Senate tradition. There have already been enough judicial nomination filibusters to give President Bush the lowest appeals court confirmation rate of any president since Franklin Roosevelt.

Or they claim they filibuster only nominees who are out of some kind of mainstream. It is difficult to know what that charge really means, especially since the American Bar Association—which Democrats once considered the gold standard—has found them qualified. Senators may, of course, vote against a judicial nominee for any reason they wish, but we should stop pretending that out of the mainstream is anything more than a prediction that the nominee may not always rule the way liberal interest groups want. Considering the stream in which many of those groups swim, I'm not so sure this isn't a compliment. If the mainstream really mattered, though, these filibusters would never have started. Newspaper editorials opposing filibusters of judicial nominations outnumber those supporting them by at least six-to-one.

Madam President, I ask unanimous consent that some representative editorials from mainstream newspapers be printed in the RECORD.

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

[From the Wall Street Journal, May 13, 2003]

THE POLITICS OF FILIBUSTERS

Where's Jimmy Stewart when you need him? Two historic filibusters are currently under way in the Senate—one's been going on for months—but next to no one outside the Beltway has noticed.

Senate business proceeds as usual, the Members get to sleep in their own beds at night, and Miguel Estrada and Priscilla Owen's names come up only when repeated motions to close debate and bring their judicial nominations to a vote are defeated. Hollywood is not remaking ''Mr. Smith Goes to Washington.'' All of which is exactly the way Democrats want it: They can defeat two Bush judges, and more down the road, without paying a political price.

So one can hardly blame Majority Leader Bill Frist for trying to shine a little light on the problem. The Democrats are imposing an extraordinary new standard for confirming judges—not a simple majority of 51 votes but a super-majority of 60, the number required to shut off debate. Both filibustered nominees have the support of a bipartisan majority, yet they are being denied the confirmation votes to which they are entitled under the advice-and-consent clause of the U.S. Constitution.

Mr. Frist's proposed solution is to change the procedure under which debate ends and a vote is taken, a process known as ''cloture.'' He would amend Senate Rule XXII so that the number of votes needed to end a filibuster would fall from 60 to 57 to 54 to 51 on successive votes. This would preserve the essential purpose of the filibuster—which is to give the minority a chance to make their case—but not let them abuse the system by holding confirmable nominees hostage forever.

Georgia Democrat Zell Miller made an even more ambitious reform proposal on this page in March, when he called for new cloture rules for nominations and legislation—not just nominations, as Mr. Frist proposes. Mr. Miller's proposal was in turn based on one in 1995 by Democrats Tom Harkin and Joseph Lieberman.

That last one had the support of none other than Tom Daschle, who said at the time that ''Democracy means majority rule, not minority gridlock.'' Mr. Daschle hewed to a different principle on Sunday, when he told NBC's ''Meet the Press'' that Mr. Estrada and Judge Owen are ''exceptions to the rule'' that every nominee deserves an up or down vote in the Senate. Apparently he doesn't believe the Constitution should be applied equally to every American.

Under current practice no Senate rule, including the 60–vote cloture rule, can be changed except by a two-thirds majority. Which is where things get interesting, constitutionally speaking. Many legal scholars—liberal and conservative—argue that Rule XXII is unconstitutional because it binds future Senates to rules made by a past Senate. ''It is an ancient principle of Anglo-American law that one legislature cannot bind a succeeding legislature,'' Steven Calabresi of Northwestern Law School, told the Senate last week.

Catholic University's Douglas Kmiec made a similar point on this page in March, and Lloyd Cutler, White House Counsel to Presidents Carter and Clinton, wrote in 1993 that ''the Senate rule requiring a super-majority vote to cut off debate is unconstitutional.'' Vice Presidents Nixon, Humphrey and Rockefeller, while presiding over the Senate, have all held that Senate rules can be changed by a simple majority.

If the current Senate did that with Rule XXII—obtain a majority vote to change the cloture rules for nominations—Vice President Cheney would presumably agree. That would leave the Democrats with the option of going to court, where the Supreme Court could take the case or, more likely, decide it was a political dispute best left to the Senate to resolve. The President's nominees would be seated.

We've said it before, but it's worth repeating that the Democrats' judicial filibusters are unprecedented in Senate history. Filibustering nominations wasn't even permitted until 1949 and the sole judicial nominee stopped by a filibuster was Abe Fortas, LBJ's nominee for Supreme Court Chief Justice, who faced charges of corruption. Meanwhile, the Democrats are just warming up. A third appeals-court filibuster looks likely this spring, and a Supreme Court filibuster could be next if there's a vacancy this summer.

The system for confirming judges is clearly broken. Democrats are playing politics with Senate rules, but they now profess shock and outrage that Republicans want to play politics too and reform the filibuster rules being abused. Sounds to us as if Republicans are on to something.

[From the Wheeling News Register Intelligencer, Sept. 8, 2003]

TIME FOR FILIBUSTER RULES TO CHANGE

Miguel Estrada, whose nomination to the U.S. Court of Appeals was bottled up by hyper-partisan Democratic opposition for more than two years, decided to get on with his life and withdrew himself from the nomination process.

It should not have shocked Republicans to see their liberal colleagues play hardball on judicial nominations. Democrats have been doing it since the Reagan administration. Teddy Kennedy and friends undoubtedly are astonished to encounter a GOP Senate leadership so feckless that it has allowed them to get away with imposing an extra-constitutional 60-vote supermajority requirement on judicial nominations, by using the filibuster technique to stall a vote on Estrada. It takes 60 votes to end a filibuster, and Senate leaders no less than seven times mounted ''cloture'' votes to ''end debate,'' each time coming up short.

But they never forced Democrats to take to the Senate floor to expound at length about their opposition to Estrada or any of the several other nominees now subject to powder-puff filibusters. All a senator need do these days is threaten a ''filibuster,'' and—presto!—60 votes are required to accomplish anything. The ''filibustering'' senators need not worry about actually having to publicly defend their position on the Senate floor.

Yes, long gone are the scenes from Frank Capra films in which senators lose their voices trying to keep the floor to maintain filibusters.

While Republicans have control of the Senate, they should put an end to this practice that allows the will of the minority to prevail without any effort being put into it.

The practical effect of GOP leaders allowing the minority to so easily impose a 60-vote supermajority means there's a new set of litmus tests for the courts: No judge may be confirmed unless he or she agrees with the Senate's left wing.

Now that there's nomination blood in the water, Republicans can expect a lot more bare-knuckle torpedoing of President Bush's

judicial nominees unless Republicans are willing to actually get a little political dirt under their fingernails. And maybe even—gasp!—sacrifice an all-nighter on the Senate floor by making the ''filibusterers'' actually filibuster. If they want it badly enough, they should have to work for it.

[From the Grand Forks Herald, Mar. 13, 2003]

CALL END TO FILIBUSTER

(By Tom Dennis)

Our View: Don't set a new constitutional standard of demanding a supermajority vote.

North Dakota's congressional delegation has to walk a political tightrope. Sens. Kent Conrad and Byron Dorgan and Rep. Earl Pomeroy are Democrats, while North Dakota itself trends heavily Republican. The GOP's supermajorities in both houses of the state Legislature, plus the fact that voters chose Republicans for president in 1992, 1996 and 2000, illustrate this.

But the delegation not only has walked that tightrope, it has done handstands and even an occasional flip. All three members are masters of wrangling federal dollars for North Dakota projects. Furthermore, they've chosen their party-line issues with care, voting with the Democrats on the budget but showing more independence on some social and environmental issues.

The Miguel Estrada filibuster in the Senate, however, may change that perception.

Because the filibuster is as nakedly partisan as an issue gets.

Estrada is President Bush's candidate for the District of Columbia Circuit Court of Appeals. He's a Harvard Law School graduate who clerked for a Supreme Court justice, worked in the U.S. Solicitor General's office, argued cases in front of the Supreme Court, earned the top ranking of ''well qualified'' from the American Bar Association—and didn't speak English when he immigrated to the United States from Honduras, to boot.

Fifty-five senators (including four Democrats) support his nomination. But the other 45 Senators won't let it come to the floor for a vote. They've invoked a filibuster. They say they're doing it because Estrada hasn't answered enough questions, but that's patently false. Senators know as much or more about Estrada as they have about most nominees. Furthermore, when given the chance to ask Estrada more questions in writing, not one Democratic senator took the administration up on its offer.

No, the transparent reason for the filibuster is that Estrada's a conservative Hispanic lawyer who has a shot at being named to the U.S. Supreme Court.

And for the left wing of the Democratic party, that's do-or-die unacceptable.

Conrad and Dorgan should distance themselves from this scorched-earth tactic. The Constitution gives the president the power to appoint ''with the Advice and Consent of the Senate . . . Judges of the supreme Court and all other Officers of the United States.'' It does so in the same paragraph in which it lists a special power demanding a two-thirds majority Senate vote—namely, the power to ratify treaties.

The Founding Fathers could have held judicial confirmations to that higher standard. But they didn't. Clearly, they intended judges to be confirmed by a simple Senate majority. Just as clearly, 200 years of Senate practice call for the same thing.

The GOP won its Senate majority fair and square. The filibustering Democrats smack of being spoilers when they obstruct majority rule, especially because their objection in this case is not based on truth, justice or the American way, but on politics.

Fifty-five duly elected United States senators are willing to give Estrada the nod. That's enough.

Let his nomination come to the floor, and call the vote.

[From the Buffalo News (New York), Mar. 19, 2003]

LET'S CHANGE RULES THAT HANG UP JUDICIAL NOMINEES

Senate rules are an important part of American political tradition, worthy of respect. Ditto for the constitutional process by which the Senate confirms federal judges. The abuse of one must not be allowed to undermine the other. But that is precisely what is happening. No matter which party controls the Senate gavel, when it comes to confirming judges, those in power too often behave reprehensibly.

Senators grandstand and play games. They distort nominees' records and views, misrepresent their positions and malign them with words like ''extremist.'' It is no wonder there is such a high number of judicial vacancies at the federal level. . . .

The system is flat broken. And, finally, last week, thank goodness, someone said so. President Bush is justifiably upset at how Democrats have abused the filibuster to thwart the nomination of Miguel Estrada. . . .

Now the president proposes something drastic: amend the Senate rule book to require that, no matter which party controls the White House or Senate, all federal judicial nominees get an up-or-down vote. The practical application would be to eliminate the filibuster with regard to judicial nominees. Wow. It's not every day the president wants to tinker with Senate tradition. . . . Thank goodness.

But the status quo is unacceptable. If Democrats have other ideas, let's hear them. If not, Americans should push the Senate to embrace Bush's suggestion. . . .

[Las Vegas Review Journal, June 20, 2003]

ADVICE AND CONSENT

Has the fact that presidents of the United States appoint the justices of the U.S. Supreme Court now become such an obscure factoid that it's about to be relegated to an answer in the new edition of ''Trivial Pursuit''?

Apparently the Democrats think so.

Since the nation's founding document says the president ''shall nominate, and by and with the advice and consent of the Senate, shall appoint judges of the Supreme Court,'' Democratic Sen. Patrick K. Leahy of Vermont, on behalf of fellow Senate Judiciary Committee member Charles E. Schumer of New York and others, wrote to the president on June 11, offering to help Mr. Bush choose his next high court ''nominee or nominees.'' There is speculation that one or more member of the current court may step down after the current term.

The offer sounds conciliatory on its face—after all, wouldn't it be better for everyone to get together and choose a consensus candidate beforehand, rather than subject a string of nominees to hostile questioning and ultimate rejection on political grounds?

The ''advice and consent'' clause might indeed lend itself to such a novel reading—if the Senate were overwhelmingly held by a party diametrically opposed to the president's philosophical leanings.

But if this has never been the procedure in times when the government was thus implacably divided, why on earth should it be adopted now? It's not as though Sens. Leahy, Schumer and Barbara Boxer of California represent the majority in the U.S. Senate. In fact, their current efforts to bottle up Mr. Bush's fully qualified appellate court nominees appear desperate and divisive precisely because most of those nominees would be quickly confirmed if an open vote were allowed on the Senate floor—precisely as the founders intended.

Rather, a small minority of these aging warhorses of the failed policies of Lyndon Johnson's Great Society now use the arcane and Byzantine rules of the Senate to keep those nominations from coming to the floor.

''I am astounded by those letters. Does Charles Schumer think he is the president?'' law professor John Eastman told The Los Angeles Times.

Of course, there's a knife concealed in the folds of the Democrats' proffered ''gift.'' The implication is that—if they are not given this extraordinary power to hand the president their own list of suitably liberal nominees, or to strike names of known constitutionalists off any list the president may have in hand—they might even filibuster a nomination to the Supreme Court.

Wisely, Mr. Bush has now called that bluff.

White House counsel Alberto R. Gonzales replied in a letter to Senate Democrats Wednesday that, ''If a Supreme Court vacancy arises during his presidency, President Bush will nominate an individual of high integrity, intellect and experience,'' whereupon ''the Senate will have an opportunity to assess the president's nominee and ... to vote up or down.''

Will the last ponderous graybacks of the New Dealers' aging herd squander their remaining political capital attempting a last hurrah—lining up for a first-in-history filibuster designed to prevent the entire Senate from voting on the confirmation of a chief justice? It would be interesting to watch them try.

[From the San Diego Union Tribune, Sept. 8, 2003]

BATTLE OVER JUDGES—WITH ESTRADA OUT, SENATE MUST END TURMOIL

The battle between Democrats and Republicans in the Senate over President Bush's judicial nominees may be the stuff of interesting politics. But while this continuing controversy makes for a potentially potent campaign issue, it makes for bad government. After last week's withdrawal of Miguel Estrada for consideration to the U.S. Circuit Court of Appeals, antagonism in the Senate is only likely to grow.

Estrada, nominated to the appeals court more than two years ago, had become the focal point of the controversy because Democratic senators had used the filibuster seven times to block votes by the full Senate on his nomination. If the Senate had been allowed to vote on Estrada's nomination, a majority would have confirmed him. But under Senate rules, 60 votes are needed to break a filibuster in the 100-member chamber. The motions to end the filibuster never received more than 55 votes.

In addition to Estrada, Democrats have blocked the nominations of Alabama Attorney General William Pryor to the 11th U.S. Circuit Court of Appeals, which sits in Atlanta, and of Texas Supreme Court Justice Priscilla Owens to the 5th Circuit, which sits in New Orleans. Other filibusters are likely, including one over Bush's appointment of Los Angeles Judge Carolyn Kuhl to the 9th Circuit Court of Appeals, which covers California and other Western states and territories.

But while Republicans put forth strong and justifiable arguments over Democratic abuse of the filibuster, which allows a minority to thwart the will of the majority, antagonism over judicial nominees did not start with President Bush's nominees. While one could go back to President Reagan's 1987 nomination of Robert Bork to the U.S. Supreme Court and his ultimate rejection by a Democratic Senate, the real battle started during

the Clinton administration. During those years, even single senators, using a ''blue slip,'' could block nominees. At least two nominees to the court on which Estrada was to sit were blocked in this manner.

Overall, nominees during the first three years of the Bush administration and the first three years of the Clinton administration have been confirmed at about the same rate. So far, the Senate has confirmed 145 of Bush's appointments, 27 of them to the appeals courts, even though the discourse has grown more strident.

In the interest of good government, a few senators have talked of possible compromise, but nothing workable has yet been put forward. Any compromise obviously would have to involve the White House, and so far both the administration and senators from each party are standing their ground.

But what's at stake here is the independence of the federal judiciary and the public's respect for that branch's interpretation of the laws Congress passes and the president signs. If the Senate continues to fight over nominees, and nominees are viewed as more political, there is a danger that the public perception of judges who are eventually seated could be tarnished. That would be disastrous for our system of law and order. For this reason, and for others, both sides must end this rancor.

Mr. HATCH. These may be their reasons, but there are no excuses. At the mere suggestion of abandoning the Senate's tradition regarding judicial nominations when President Clinton was in office, former Democratic Leader Tom Daschle said, ''I find it simply baffling that a Senator would vote against even voting on a judicial nomination.'' That should be our response today as Senators on both sides of the floor.

Last week here on the Senate floor, the distinguished Senator from West Virginia made his case against returning to Senate tradition regarding judicial nominations. I respect him. I have a lot of regard for him, but I have to confess I was surprised that someone with such knowledge of the traditions and rules of this body would appear so willing to abandon tradition.

He equated the filibuster with the Senate itself. He equated filibustering judicial nominations with filibustering legislation and concluded that returning to our tradition regarding judicial nominations would be an attack on the Senate somehow. I would like to address each of these elements because I do not believe they can withstand fair scrutiny.

First, my friend from West Virginia argued that the Senate was designed from its very inception as a place of absolutely unfettered and completely unlimited debate. As such, he argues, any limitation of debate strikes at the very heart of the institution itself. Yet in the second volume of his own history of the Senate, he writes on page 115:

It is apparent that the Senate in the First Congress disapproved of unlimited debate.

The original rule IV prohibiting a Senator from speaking more than twice in any one debate on the same day without leave of the Senate remains in only slightly modified form as our rule XIX today. Even more significantly, rule VIII in the first Senate provided for a majority to proceed to a vote by calling the previous question.

Coupled with the Founders' expressed commitment to majority rule, these facts demonstrate that even with regard to legislation, the possibility of preventing final action through extended debate was not created by original design. It arose by default through dropping that previous question rule in 1806.

It would still be decades before Senators who sought to protect the institution of slavery would discover they could use this procedural loophole to their advantage and, of course, the filibuster was born. Its twin, however, was a parallel and ongoing effort at filibuster reform by which we have actively sought properly to balance the minority's right to debate and the majority's right to decide. The solution we seek today is part of that ongoing effort.

The Senator from West Virginia next equated filibusters of judicial nominations with filibusters of legislation. His policy arguments in favor of the filibuster, however, apply only to the legislative process. He said, for example, that without the filibuster ''there exists no leverage with which to bargain for the offering of an amendment. All force to effect compromise between the parties will be lost.''

I note that in previous debates about filibuster reform, such as in 1975, Democrats, such as the senior Senator from Massachusetts, Mr. KENNEDY, offered this very same argument against the filibuster. Still, this notion obviously applies where the Senate either fashions or effects legislation, but it is irrelevant to nominations.

The Senator from West Virginia has long been this Chamber's leading expert on our history and procedure. For that I compliment him. For this reason, though, I was disappointed that he would fail to make such an important distinction between legislative and judicial nomination filibusters, a distinction based on both historical fact and constitutional principle. In other words, there is a difference between the legislative calendar and the executive calendar in the Senate.

The Senator from West Virginia is not the first in the debate over these new judicial nomination filibusters failing to make this critical distinction. Other Democratic Senators, for example, want to use the cup-and-saucer analogy by which George Washington allegedly described pouring hot action from the House cup to cool in the deliberation of the Senate saucer.

As Jeffrey Toobin's recent analysis in the New Yorker magazine points out, however, not only is this story probably apocryphal, but the supposed exchange between Washington and Jefferson specifically focused on, you got it, legislation. In fact, that is the only context in which it makes any sense. If they said it at all, they were talking about the relationship between the two Houses within the legislative branch, not the relationship between the legislative and executive branches.

The distinction between legislative and judicial filibusters is a matter of historical fact. Every example offered last week by my friend from West Virginia involved legislation. He opened and closed his speech by evoking scenes from the classic film ''Mr. Smith Goes to Washington.'' I went back and checked the script. Senator Jefferson Smith in that movie, played by the great Jimmy Stewart, filibustered an appropriations bill. That is legislation.

The example the Senator from West Virginia said was most relevant—President Franklin Roosevelt's proposal to reorganize the judiciary—was also, you got it, legislation. That example is actually not relevant at all, however, because that 1937 legislation was not defeated by a filibuster. The most definitive study of President Roosevelt's plan by Mary McKenna concludes that it did not have majority support in the Senate at all. There was no need for a filibuster. Rather than the majority being stymied in its attempt to pass the bill, the majority—and an overwhelming majority at that—sent it back to committee.

To my knowledge, no Senators are today calling for an end to the legislative filibuster as a group of Democratic Senators did a decade ago. Nine of them, led by the Senator from Iowa, TOM HARKIN, and the Senator from Connecticut, JOSEPH LIEBERMAN, serve in this body today. They argued back then that all filibusters, including those of legislation, unconstitutionally infringe on majority rule. The two Senators from Massachusetts, EDWARD KENNEDY and JOHN KERRY, along with the Senator from California, BARBARA BOXER, the Senator from New Jersey, FRANK LAUTENBERG, the Senator from Maryland, PAUL SARBANES, the Senator from New Mexico, JEFF BINGAMAN, and the Senator from Wisconsin, RUSS FEINGOLD, voted against tabling that proposal.

I find it simply baffling that Senators who once supported abolishing the Senate tradition of legislative filibusters would today support establishing a tradition of judicial nomination filibusters—in other words, filibusters of nominees by the President on the executive calendar, not the legislative calendar.

Ignoring the distinction between legislative and judicial nomination filibusters is necessary for the argument of the Senator from West Virginia, as evidenced when he asked:

If we restrain debate on judges today, what will be next?

Yet for more than a century, filibusters of legislation coexisted nicely with our tradition of giving up-or-down votes to judicial nominations that reach the Senate floor.

Our experience under the current version of rule XXII shows that these two traditions can peacefully coexist. That rule, by the way, was born in 1917

after a filibuster of legislation. We have had the current version of rule XXII since 1975. From 1975 to 2002, the 94th Congress through the 107th Congress, only 3 percent of cloture votes were judicial nominations; 85 percent of those cloture votes passed, and all nominations subject to cloture votes were confirmed.

During the 108th Congress, 49 percent of cloture votes were on traditional nominations. None of them passed, and none of the nominations were confirmed.

I must say, with all due respect to my dear friend from West Virginia, that using the filibuster to defeat majority-supported judicial nominations has not been part of even modern Senate practice, let alone historic Senate tradition.

Let me repeat that. Using the filibuster to defeat majority-supported judicial nominations has not been part of even modern Senate practice, let alone historic Senate tradition.

In his op-ed piece in the Washington Post last week, the Senator from West Virginia ignored our tradition regarding judicial nominations in another way. He argued that by preventing a confirmation vote through a filibuster, the Senate had formally rejected these judicial nominations. How can it be a rejection of judicial nominations when a majority of Senators supports confirmation of each one of those people? Each nominee on whom cloture was not invoked remained on the Senate's executive calendar. Our own rule XXXI states that nominations that are ''neither confirmed nor rejected'' shall be returned to the President. Each of those filibustered nominations was, indeed, returned to the President when the 108th Congress adjourned. By definition, common sense, and our own rules, that means they were not rejected. My friend from West Virginia cannot on the one hand claim these nominations were rejected but on the other hand claim that these filibusters are about deliberation and debate.

Legislative and judicial nomination filibusters are different as a matter of historical fact because they are different as a matter of constitutional principle. Legislation belongs to the legislative branch under article I of our Constitution, while nomination and appointment belong to the President under article II. In Federalist No. 65, Alexander Hamilton wrote that the President would be the ''principal agent'' in appointments. The Senate has an important role of advice and consent that checks the President's appointment power, but we do not control the executive process any more than the President controls the legislative process. We recognize the difference between legislative and executive business when we leave legislative session and proceed to executive session to address nominations we have placed on the executive calendar. My friend from West Virginia, I think, ignored those differences.

Interacting with the executive branch is simply not the same as interacting within the legislative branch. And thus it would seem almost self-evident that procedures we use regarding our authority over legislation might not be appropriate when we affect the President's authority over appointments. We must preserve our tradition that recognizes this constitutional distinction between the executive and legislative branches, between our role of advice and consent on judicial appointments, and our authority over legislation.

The Senator from West Virginia, in my opinion, used an unfortunate analogy in attacking those who would return the Senate to its confirmation tradition regarding judicial nominations. Others, such as the Anti-Defamation League, have strongly objected to his reference to Hitler's Nazi regime for various reasons. My point here is not that. It is different. I object to his claim that returning to our tradition regarding judicial nominations would be an example of ''how men with motives and a majority can manipulate law to cruel and unjust ends.'' There is nothing cruel or unjust about the Senate returning to our traditional advice and consent role regarding judicial nominations.

The Constitution gives the Senate the authority to determine our procedural rules. It was pursuant to that authority that the Senate dropped the previous question rule in 1806, adopted a cloture rule in 1917, and amended that rule several times since.

It was also pursuant to that authority that the Senator from West Virginia aggressively used various strategies to change Senate procedures when he served as majority leader of this body. This includes approaches currently under discussion, such as seeking a ruling from the Senate's Presiding Officer. Though the Senator from West Virginia last week said such an approach would abandon the ''cloak of legality,'' it would simply be following a procedural path that he himself blazed. I was here for part of that.

The Senator from West Virginia said this approach ''seeks to alter the rules by sidestepping the rules, thus making the impermissible the rule.''

Yet the Senate operates on the basis of parliamentary precedents and traditions, as well as by our standing rules, a history my friend from West Virginia helped shape and has been recognized as helping shape those rules.

In 1977, for example, the Senator from West Virginia made a point of order that once cloture has been invoked, the Presiding Officer must rule dilatory amendments out of order. One Senator criticized this strategy as trying to change Senate rules by majority vote during the heat of the debate. That criticism sounds an awful lot like the criticism the Senator from West Virginia leveled last week against those who might take the same approach today. Nonetheless, the strategy succeeded when the full Senate tabled an appeal of the Presiding Officer's ruling in favor of the distinguished Senator from West Virginia.

In 1979, the Senator from West Virginia introduced Senate Resolution 9 to make various changes to rule XXII. He argued that notwithstanding rule XXII's cloture requirement for rules changes, a simple majority could change Senate rules at the beginning of a new Congress. He was right. The current Senate, he argued, is not bound by the dead hand of the past Senate. He threatened that if the Senate did not come to a time agreement for considering his resolution, he would attempt to proceed by seeking a parliamentary ruling.

Also in 1979, the Senator from West Virginia made a point of order that the Presiding Officer, rather than the Senate, as required under our rule XVI, ruled nongermane certain amendments to appropriations bills.

As in 1977, that strategy worked when the Senate tabled an appeal of the Presiding Officer's ruling in favor of the Senator from West Virginia. In 1980, the Senator from West Virginia also secured a helpful parliamentary precedent but from a different procedural direction. He wanted to achieve confirmation for an individual nominee on the Executive calendar.

At that time, while a motion to go into executive session was not debatable, a subsequent motion to proceed to a specific item on the Executive calendar was debatable. On March 5, 1980, the Senator from West Virginia made a single motion for the Senate both to go into executive session and to proceed to a specific nomination. When the Presiding Officer sustained a point of order against this motion, one Senator criticized this attempt to change procedure by majority vote. Nonetheless, the Senator from West Virginia appealed the Presiding Officer's ruling, which was his right to do, and the Senate overturned, supporting the distinguished Senator's majority rule change.

This strategy might be described by some, using the Senator from West Virginia's words last week, as altering the rules by sidestepping the rules. It certainly limited what he now insists would be unfettered and unlimited debate.

In 1987, the Senator from West Virginia secured a parliamentary precedent that obviously dilatory requests by Senators to be excused during a rollcall vote were out of order. This applied the same strategy he had used in 1977, getting the Presiding Officer to rule dilatory tactics out of order, in a new context. Each of these examples has similarities and differences with the current situation.

I offer this detail only to demonstrate that Senate procedures have been changed through parliamentary rulings as well as by formal amendments to the rules themselves. As my friend from West Virginia has demonstrated by pursuing each of these

strategies himself, the Senate can exercise its constitutional authority to determine its procedural rules either way.

He may certainly believe that the changes he sought were warranted while the change we may seek today is not. That is his right, and he can express that right in debate by voting against such a change. But that difference of opinion does not make his attempts to limit debate, even on legislation, right and just while any attempt to do so today on judicial nominations cruel and unjust.

We departed from our tradition of giving judicial nominations reaching the Senate floor an up-or-down vote only 2 years ago. The result has been the Senate's inability to do its constitutional duty of providing advice and consent regarding judicial nominations. We were able to give advice, I presume, but with regard to these 10 nominees we were never able to give consent or not consent, whichever the case may be. And that is done by a vote up and down. It demonstrates that the confirmation process is, in the words of the Washington Post, ''steadily degrading.''

Returning to that tradition of giving up-or-down votes for judicial nominations will not in the long run mean either party will always get its way. Both the executive branch and the Senate do change partisan hands from time to time. This standard, this tradition, knows no party and guarantees no partisan advantage. It applies no matter which party occupies the White House or which party controls the Senate. It would bind Republicans as well as Democrats and preserve our institutional traditions. I hope and believe, however, that restoring this tradition will, despite some Senators' threats to blow up the Senate, help restore some comity and good will to this body.

Returning to that tradition, which recognizes the difference between our authority over legislation and the President's authority over appointments, is not an attack on the Senate; rather, it affirms our traditions and the Senate's unique place in our system of separated powers. Returning to it both respects the President's authority over appointments and asserts the Senate's role of advice and consent, not just advice but consent as well.

A majority of Senators have been deprived of the right to give or not give consent by these irresponsible filibusters of judicial nominations on the Executive calendar. The deviation we have seen from that tradition, wherein a filibuster prevents confirmation of nominees with majority support, undermines the President's authority and distorts the Senate's role. Preserving both of our traditions—extended debate regarding legislation and up-or-down votes on judicial nominations reaching the Senate floor—will restore the proper balance.

There is nobody in this body who respects the distinguished Senator from West Virginia more than I do. I hope we can resolve these matters so both parties are bound by the correct tradition that we are not going to filibuster executive branch nominees and we will both preserve the right to filibuster over the matters we totally control on the legislative calendar. I would fight to my death to preserve rule XXII on legislation because I have also been in the minority from time to time, and it was the only way we could stop some things which would have been just terrible for this country. But there is a difference between the legislative calendar and the Executive calendar.

I respect my colleague from West Virginia. I can truthfully say I love him because he has been a strong force around here for years, but I hope he will look at some of these examples I have given and some of these thoughts I have and help us stop this impasse that is occurring in the Senate, not by preferring one party over the other but by binding both parties to treat Presidential nominations with the respect they deserve.

I have to say I never quite concentrated on this enough until these judicial nominations were filibustered in 2003 and 2004. I myself am to blame for not having thoroughly studied this until these problems arose, but I have now studied it. I believe it would be far better for our Senate to get rid of these animosities and threats to have nuclear warfare and bind both the Republicans and the Democrats in the Senate to do what is right, to give a vote up or down, so that we can not only give advise but consent as well.

I yield the floor.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. Madam President, what is the time that I have under the order?

The PRESIDING OFFICER. The minority controls 14 minutes.

Mr. BYRD. Madam President, I ask unanimous consent that my time may be extended to a total of 35 minutes and that the final 5 minutes be under the control of the distinguished Senator from Delaware, Mr. CARPER.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. BYRD. I thank the Chair.

FREEDOM

Mr. BYRD. Madam President, freedom is a fragile thing and never more than one generation away from extinction. It is not ours by inheritance; it must be fought for and defended constantly by each generation, for it comes only once to a people. Those who have known freedom and then lost it have never known it again. These words come from the lips of former President Ronald Reagan.

I rise today to discuss freedom, not the grandiose worldwide ''freedom talk'' one hears so much about. No. Not far-flung foreign policy goals, but, rather, my concern today is preserving our freedoms right in our own backyard at home.

Freedom, like a good garden, needs constant tending. One must watch for the worms in the wood. As Wendell Phillips, the abolitionist, orator, and the columnist, once said, ''eternal vigilance is the price of liberty.'' One must pay the price if one wants the blessing.

In a culture where sports metaphors are more common public parlance than historical analogies, our unique form of government, carefully restraining powers while protecting rights, presents a special challenge to maintain. The ''winning is everything'' philosophy so beloved by Americans may, without careful balance, obscure the goal of justice for all that must be the aim of a representative democracy. Demeaning minority views, characterizing opposition as obstructionist—these are first steps down the dark alley of subjugating rights.

Majorities can prevail by numerical force. They do not need protection from minorities. Yet some would have us believe that minority voices threaten the larger public good in the case of Presidential judicial appointments. The opposite is true. It is minorities who are most in jeopardy without fairness from the Federal bench. I am talking about those who are in the minority. The persecuted, the disadvantaged, the poor, the downtrodden—these are the very citizens who need the strong protection of an unbiased legal system.

Appointees to the Federal bench should be scrutinized for traces of ideological rigidity or allegiance to political movements which could cloud impartial judgment. I for one do not favor activist judges of any stripe. I do not think the proper role for a judge is to make new law from the bench. My own preference is usually for strict constitutionalists. Conservative judges can hold activist views, just as can liberal judges. Such labels tell us very little. What we should strive for on the Federal bench is blind justice; that is, justice absent a political agenda.

Judicial appointments must never be a sure thing for the bench simply because they please the majority party, whether that majority is Democratic or Republican. Federal judges enjoy life tenure. Remember that. Federal judges enjoy life tenure, making decisions of huge importance to the lives and the livelihoods of our citizens. Are they accountable to anyone? No. They are accountable to no one, and no President can fire them. No President can say: Go home, you are sick today.

It is ridiculous to suggest that mere superiority of numbers in the Senate should alone guarantee confirmation to a Federal judgeship. Such a claim reduces the constitutional advice and consent function of the Senate to a pro forma rubberstamping of Presidential judicial appointments whenever the President's party controls the Senate. We are talking about a separate branch of the Federal Government. We are talking about a separate branch of the