Members saying they have concerns about what is in the bill. This is an opportunity to lay down the amendments. We have been told by the distinguished Republican leader today that if there is no progress on this bill he is going to file cloture. This is the highway bill. This is not a bill where cloture will not be invoked. There is wide-ranging support for this bill.

I hope everyone follows the admonition the Republican leader just gave and be ready with amendments because, if we wind up waiting much longer, we will not have an opportunity to do that.

The ACTING PRESIDENT pro tempore. The majority leader.

JUDICIAL NOMINATIONS

Mr. FRIST. Mr. President, 4 years ago today President Bush nominated Miguel Estrada to the District of Columbia Circuit Court of Appeals. His nomination should have gone smoothly. The American Bar Association pronounced him highly qualified, a rating my colleagues on the other side of the aisle once called the gold standard. He clerked for a Supreme Court Justice and worked in both the Bush and Clinton administrations.

The Honduran immigrant then won top honors at Columbia University and Harvard Law School. Miguel Estrada epitomized the American dream. But Miguel Estrada's nomination never received an up-or-down vote. A minority of Senators used the filibuster to stop the Senate from exercising its constitutional duty to advise and consent.

Senators supporting his nomination made seven attempts to bring his nomination to a vote. Each time the effort failed. Finally, after enduring 2 years of obstruction, Miguel Estrada withdrew his name from consideration.

Unfortunately, today marks the fourth anniversary of another candidate whose nomination is, likewise, being blocked. Priscilla Owen, who has served on the Texas Supreme Court for 10 years, has earned the praise of both Republicans and Democrats. Judge Owen won reelection to the Texas bench with 84 percent of the vote and the endorsement of every major newspaper in the State.

Former justice Raul Gonzalez, a Democrat, says:

> I found her to be apolitical, extremely bright, diligent in her work, and of the highest integrity. I recommend her for confirmation without reservation.

Still, a minority of Senators is using the filibuster to stop this Senate from exercising its constitutional duty to advise and consent, to vote up or down, to vote yes or no, to vote, confirm or reject.

This campaign of obstruction is unprecedented. Before Miguel Estrada, the Senate had never denied a judicial nominee with majority support an up-or-down vote. In the last Congress, the President submitted 34 appeals court nominees to the Senate. Ten of those nominees continue to be blocked. Each has been rated ''qualified'' or ''well-qualified'' by the American Bar Association, each has the majority support of the Senate, and each would be confirmed if brought to the Senate floor to a vote.

Meanwhile, the other side threatens to shut down the Senate and obstruct government itself if it does not get its way. Instead of thoughtful deliberation and debate, a small minority is attempting to change 225 years of constitutional history. Former Senate majority leader Bob Dole is correct when he says:

> By creating a new threshold for the confirmation of judicial nominees, the Democratic minority has abandoned the tradition of mutual self-restraint that has long allowed the Senate to function.

Precedent has been replaced with partisanship, and respect for the separation of powers tossed aside.

Now, 12 of the 16 court of appeals vacancies have been officially declared judicial emergencies. The Department of Justice tells us that the delay caused by these vacancies is complicating their ability to prosecute criminals. The Department also reports that due to the delay in deciding immigration appeals, it cannot quickly deport illegal aliens who are convicted murderers, rapists, and child molesters. Additionally, there are notoriously long delays in deciding habeas petitions, meaning that both victims' families and prisoners often wait years before getting final resolution on murder convictions.

All of this obstruction must stop. It is hurting the nominees. It is hurting the Senate. It is hurting the American people.

For most of the 20th century the same party controlled the White House and the Senate. Yet until the last Congress, no minority ever denied a judicial nominee with majority support an up-or-down vote. They treated judicial nominees fairly. They respected the Senate's role in the appointments process designed by the Framers.

Before the recess, I came to the Senate to offer a compromise. That proposal was simple: Appeals court judicial nominees should get a fair, open, and exhaustive debate, and then they should get an up-or-down vote. Whether on the floor or in committee, it is time for judicial obstruction to end no matter which party controls the White House or the Senate.

Senate tradition is comprised of shared values based on civility and respect for the Constitution. I sincerely hope that Senate tradition can be restored. It is a matter of fairness. It is a matter of honor. It is our constitutional duty to give these nominees a vote.

I yield the floor.

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. The Senate minority leader is recognized.

JUDICIAL NOMINATIONS

Mr. REID. Mr. President, of the initial Bush nominees, the 10 or 11 we are talking about today, 8 have been confirmed; only 3 were not. Of course, one of those, Miguel Estrada, has not been renominated. Another, Terrence Boyle, has never been reported by the Judiciary Committee, even after 4 years of Republican control. So only one of the initial nominees, Priscilla Owen, is currently on the calendar.

I think the Democrats have been responsible and reasonable in exercising advice and consent regarding this initial nominee.

Regarding Priscilla Owen, she served on the Texas Supreme Court with the President's lawyer, Alberto Gonzales, who is now the Attorney General. Judge Gonzales wrote that several of Judge Owen's opinions were acts of unconscionable activism.

I am concerned the Senate is heading toward an unnecessary showdown over judicial nominations. One of the Hill newspapers recently reported that my distinguished friend, the majority leader, is under enormous pressure from right-wing groups to trigger the so-called nuclear option. So many of our colleagues, Democrats and Republicans, have contacted me and, I am sure, the majority leader, saying: Let's try to work something out. They want to avert this damaging confrontation because it would be bad for the Senate and bad for the country. So we need to take every step we can to avoid this confrontation.

We are prepared to be reasonable even with respect to these controversial nominations that are now before the Senate. But it seems that the White House, and maybe the Senate leadership, will not give the Senate a chance to put this issue behind us.

It is important to understand that this manufactured crisis has been forced upon the Senate by the White House. During President Bush's first term, the Senate confirmed 205 of his judicial nominations and turned back only 10. This is a significant, strong percentage—more than 95 percent.

The President could have accepted that success and avoided confrontation by choosing not to resubmit the names of those who were rejected. Instead, the President sent back 7 of the 10 nominees the Senate declined to confirm, including: the very controversial nominations of Priscilla Owen, whom I briefly commented about; William Myers, who, by the way, is the first nominee to the Federal bench that American Indians have ever opposed; William Pryor; Janice Rogers Brown; and Henry Saad.

In fact, this whole crisis is really about five people. I have mentioned the five. Of the 10 previously rejected nominees, 3 were not renominated, and 2 are tied up in a separate controversy over the Sixth Circuit involving procedural matters. So we are talking only, I repeat, about 5 judges, 5 out of the

218. But this historically high percentage the President has obtained, creating one of the lowest vacancy rates in the entire history of the Federal judiciary, is not good enough for some. They have to have it all.

Meanwhile, the President has failed to send us new nominations. In the more than 4 months since he was sworn in to a second term, the President has sent the Senate only one new judicial nomination. Other than that one nominee to the District Court of Nevada, Brian Sandoval, every single one of the President's judicial nominees has been here before. I have said to everyone who will listen that Senate Democrats will be careful and judicious in the use of our procedural rights. I have said that judicial filibusters will continue to be rare. So why doesn't the White House test our willingness to be reasonable by sending new nominees who we can consider anew and fresh, instead of old nominees who have run into trouble before?

It is clear that the White House would rather pick fights than pick judges. One reason the White House will not send new judges to the Senate is that they do not want to give Senate Democrats a chance to show we are reasonable. They do not want the confirmation rate to increase from 95 percent to 96 or 98 percent. They want to paint us as obstructionists. But the facts are that the judicial confirmation rate this year is 100 percent and that there has not been a single filibuster of the four nominees the majority leader has brought before the Senate this year. But the radicals on the far right do not want to give us an opportunity to continue that cooperation because it would undercut their argument justifying the nuclear option. Maybe the White House wants to force the nuclear option on the Senate because it wants to clear the way for a Supreme Court nominee, because they are afraid the person they will submit is not going to be reasonable.

There are lots of reasonable people around. There are Members sitting in this Senate today who could be a Supreme Court nominee of President Bush. They do not want a David Souter, a Republican, or an Anthony Kennedy, a Republican, or a Sandra Day O'Connor, a Republican, or a Ruth Bader Ginsberg, or a Stephen Breyer.

So, Mr. President, I want a chance to prove that Senate Democrats are reasonable. There is a nominee on the Executive Calendar named Thomas Griffith. Mr. Griffith is a controversial nominee to an important appellate court. But if he is brought before the Senate, I believe he will be confirmed. He is the former Senate legal counsel. He was here during the impeachment proceedings. His nomination to the DC Circuit was reported from the Judiciary Committee by a 14-to-4 vote. Ranking Member LEAHY and other Senators who opposed Griffith were concerned, among other things, that he had failed to obtain a license to practice law in either the District of Columbia or Utah during the time he was working as a lawyer in those jurisdictions.

A number of Democrats will vote against confirmation on the floor, for these reasons and other reasons. But we on this side know the difference between opposing nominees and blocking nominees. We will oppose bad nominees, but we will only block unacceptable nominees. Democrats will use extended debate responsibly, and there is no cause for the majority to break the rules and 217 years of Senate traditions to take that right away. Mr. Smith should still be able to come to Washington, with either a Democratic or Republican Senate.

I emphasize that Mr. Griffith is nominated to the DC Circuit Court of Appeals. This is the most important appellate court, separate and apart from the Supreme Court. Republicans say that our 95-percent confirmation rate is not relevant because many of the 208 judges we have confirmed are district court nominees—trial court judges, not appellate court judges. Well, here is a nominee to the most important Federal appellate court in the country, with the exception of the Supreme Court, and we are prepared to move forward. So I ask, do we get extra credit that this nominee is to the DC Court of Appeals?

Let me note that this same courtesy was not extended to President Clinton's nominees to the DC Circuit. Republicans held up the nomination of Justice Department official Merrick Garland for years before finally confirming him.

President Clinton then nominated two distinguished lawyers to the court: Elena Kagan, now dean of the Harvard Law School, and Allen Snyder, a partner in the law firm of Hogan & Hartson and a former clerk to Chief Justice Rehnquist. Both of these nominations were buried in the Judiciary Committee and were never given an up-or-down vote in committee or on the Senate floor.

I have heard my Republican friends say so many times this year that nominees are entitled to an up-or-down vote. I would defy them to explain why Kagan and Snyder were denied votes on the Senate floor and why 69 Clinton nominees were buried and lost in the judiciary committee. But we want to move forward. To demonstrate our good will, we want to move forward on a controversial nominee to the DC Circuit. I want the majority leader to know that Democrats are prepared to enter into a unanimous consent agreement to move to the Griffith nomination. Under this unanimous consent agreement, we would proceed to the Griffith nomination immediately upon disposition of the supplemental appropriations bill. We would then have up to 10 hours of debate on that nomination, equally divided. Following that debate, we would be willing to have an up-or-down vote on this controversial nominee to the DC Circuit.

Let's take a step away from the precipice. Let's arrive at this step and have a decision made on Griffith and then move on. Let's try cooperation rather than confrontation, which seems to be the hallmark of what we have been doing here lately.

I just remind everyone: This has been a pretty good year for work being done in the Senate. My friend, the distinguished Presiding Officer, served in the House of Representatives where you can ram things through the House. If you are in the majority there, things go very quickly. But that is not how it works in the Senate. So we have been very fortunate this year to move legislation—important, landmark legislation, legislation that many of my colleagues on my side of the aisle did not especially like: class action legislation, bankruptcy legislation.

We have done a lot of work here. We are going to do the supplemental appropriations bill. We have finished the budget. We have done a lot of work. We are on the highway bill. So I would think we should move forward. I say to those people who are interested in moving forward and who are interested in cooperation rather than confrontation, let us move forward on a unanimous consent request—which I would be happy to propound at a subsequent time, or the majority leader could do it—to move forward on Griffith. We want 5 hours on our side to talk about this man. They could have whatever time they want on their side. And we would move forward on an up-or-down vote on a DC Circuit Court of Appeals judge. I would think that would get us down the road to doing work that needs to be done in the Senate.

Mr. LEAHY. Mr. President, will the Senator yield on that point?

Mr. REID. I would be happy to yield to the distinguished ranking member of the Judiciary Committee.

Mr. LEAHY. Is it my understanding, Mr. President, the distinguished Democratic leader is saying he is prepared to ask consent to move forward on the nomination of Tom Griffith to the DC Circuit?

Mr. REID. I answer my friend: the answer is yes, even though this man is a controversial nominee. I know my distinguished friend, the senior Senator from Vermont, has on a number of occasions criticized this nomination. I have mentioned already a number of the reasons, including his practice of law without a license in a couple of different jurisdictions. But I have stated that I would be willing to move forward on this nomination. We would have adequate time on our side—up to 5 hours—to talk about the merits or demerits of this gentleman, and the majority could have whatever time they wanted. We would move to an up-or-down vote on this man. I think this would be an appropriate way to move forward and—again, I repeat for the third time—have in this body cooperation rather than confrontation.

Mr. LEAHY. Mr. President, if the Senator will yield further for a question, the Senator has stated he realizes Mr. Griffith practiced law illegally, first in one jurisdiction for 3 or 4 years, then in a second jurisdiction for 3 or 4 years, but that he is the President's choice for going on the DC Circuit.

I am sure the Senator is aware that during the last administration, several nominees for that same seat were blocked by pocket filibusters by the Republicans—one was Elana Kagan, who is now the dean of the Harvard Law School. Another was Allen Snyder, a former Supreme Court law clerk to Chief Justice Rehnquist.

I voted against Mr. Griffith because I felt on the second highest court of the land it is not a good example to have a person, whatever his other qualifications might be, who was so cavalier as to practice law illegally in two different jurisdictions.

I ask the Senator, is the Senator aware I did work with the distinguished Chairman of the committee, Senator SPECTER, to allow the hearing to go forward with Mr. Griffith and to allow a vote to go forward without delay in the committee? While I voted against Mr. Griffith because of the practice of law, primarily, and while, I felt concern that Chief Justice Rehnquist's former law clerk and Dean Kagan were blocked by the Republican pocket filibuster, I ask the leader if he understands that I will certainly have no objection nor do I know of any Democrat who would object to moving forward and having a real debate and the up-or-down vote that was denied to a Democratic President's nominees? Does the Senator understand that not withstanding the fact that I would vote against that nominee, I would support him bringing this nomination forward? I suspect he would get a majority of the votes in the Senate.

Mr. REID. Let me say to my friend through the Chair, there is no question that Elana Kagan is qualified—she is the dean of the No. 1 rated law school in the country, No. 1. Yale and Stanford come close, but Harvard is the No. 1 law school in the country. She is the dean of that school. But the Republicans controlled the Judiciary Committee, and they would not allow this woman to come to this floor.

I would love to have had her on the floor so somebody could have filed a cloture motion. I would have loved to vote on that, but they would not even bring that nomination to the floor for a vote. They would not let it come to a vote in the committee, because this woman was eminently qualified, not only by her legal experience and her education, but by her demeanor and personal attitude toward the law. So she would have been really good for the second highest court in the land.

And I say about the other person——

Mr. LEAHY. Allen Snyder.

Mr. REID. Allen Snyder, this man clerked for Chief Justice Rehnquist. Again, there was not even the courtesy of having a vote in the committee. They come to the floor and cry crocodile tears about up-or-down votes. We would have taken a cloture vote on either one of these people. But they were unwilling to bring this person before the committee or the floor.

So I say to my friend, you are absolutely right, there is a different standard now than there was. We are bringing people to the court. They say there has not been an up-or-down vote. There has been a vote. Every one of President Bush's nominees has come before the Senate for a vote. And I think it is on 69 different occasions that President Clinton had a nominee turned down on even a hearing in the Judiciary Committee, even a vote in the Judiciary Committee, let alone coming to the floor.

So my distinguished friend is absolutely right.

Mr. LEAHY. Mr. President, I ask the distinguished leader through the Chair——

The ACTING PRESIDENT pro tempore. If the Senator from Vermont would suspend for a second. The Chair would remind both the Senators that Senators may yield time for the purposes of a question only.

Mr. LEAHY. I am posing a question.

Mr. REID. I am happy to yield to my friend for a question.

Mr. LEAHY. I would ask if the Senator would yield for the purpose of a question. When we talk about votes, 40 is the threshold on filibusters. Of course, the Senate sets the rules. The Senate could say: You require 95 votes. Or it could say: You require 2 votes. There is nothing magic about 50, 40, 60, or anything else. But be that as it may, I would ask, through the Chair, whether the Senator from Nevada is aware of numerous instances in which Democrats have proceeded to debate and vote on the President's nominees against which there were more than 40 negative votes—I can think of three significant judicial nominations where there were 41 Democratic votes against allowing them to go forward: Timothy Tymkovich was confirmed to the Eighth Circuit although 41 Senators voted against him; Jeffrey Sutton was confirmed to the Sixth Circuit although 41 Senators voted against him; J. Leon Holmes was confirmed to the district court in Arkansas although 46 Senators from both parties voted against him. In addition, Senate Democrats proceeded to debate and vote on the controversial nomination of former Attorney General Ashcroft, who was confirmed although 42 Senators voted against his confirmation; Ted Olson, who was confirmed to be Solicitor General although 47 Senators voted against his confirmation; Victor Wolski, who was confirmed to the Court of Claims although 43 Senators voted against his confirmation.

Most recently, a number of us voted for cloture on the nomination of Stephen Johnson to head the EPA. He was confirmed with only 61 votes in support. I was one of those who voted for cloture so we could go forward with the President's nomination.

Was the Senator from Nevada aware of all those?

Mr. REID. Mr. President, the answer is yes. As I said earlier, we know the difference between opposing nominees and blocking nominees. I believe this is the time to put all of this behind us. Eight years of President Clinton, four years of President Bush, let's move forward. That is what this proposal is all about. Let's move forward. After we finish that, let's see where we are and see what else we can do. I think it is time to move forward. Again, I have no problem distinguishing between what happened to the 69 Clinton would-be judges who never showed up, never saw the light of day, and all those we have dealt with in the normal process in the 4 years President Bush has been President.

We have been very selective in those we have opposed. We think we are right on every one of them. Hindsight will tell.

This whole dispute is over 5 judges, 5 out of 218. It seems that people of goodwill can agree, as my distinguished friend from Nebraska Senator HAGEL indicated this weekend on television, when he said: We should be able to work this out. We should. The world is watching us. We should not be changing the rules by breaking the rules. We should not do that. I hope the distinguished Senator from Tennessee, the majority leader, my friend, will accept the gesture of goodwill we have made. It is a step in the right direction. I hope we can let bygones be bygones and move forward.

TRANSPORTATION EQUITY ACT: A LEGACY FOR USERS

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of H.R. 3, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 3) to authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

Pending:

Inhofe amendment No. 567, to provide a complete substitute.

Salazar amendment No. 581 (to amendment No. 567), to modify the percentage of apportioned funds that may be used to address needs relating to off-system bridges.

The ACTING PRESIDENT pro tempore. The Senator from Texas.

Mr. CORNYN. Mr. President, I ask unanimous consent to speak as in morning business.

Mr. LEAHY. Reserving the right to object—I will not object—I ask unanimous consent to follow the Senator from Texas as in morning business.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. REID. Reserving the right to object, would the distinguished Senator from Texas give us a general outline of how long he is going to speak.