

people. President Bush has pledged to help improve economic support programs and strengthen Palestinian democratic institutions.

The Finance Minister and I discussed President Bush's generous proposal to provide assistance to the Palestinian Authority. The Finance Minister agrees this assistance is crucial as President Abbas seeks to strengthen the mandate he earned in the January Palestinian elections.

From the Finance Minister's office we went on to the Presidential compound in Ramallah to meet with President Mahmoud Abbas. The meeting was constructive. The parties on all sides appear to appreciate the importance of a longstanding and meaningful dialog on ways to bring peace and security to the Middle East. We had a very open and candid discussion about the status of the peace process, the Palestinians' obligations under the roadmap, and the need for both sides to establish greater trust. In particular, we talked of the need to coordinate the Israeli withdrawal from the Gaza Strip so that the Palestinian Authority can reestablish a strong presence in that territory. This whole concept of coordination seemed and is so critical to that successful disengagement.

It is crucial that after that withdrawal the Palestinian Authority is able to strengthen its democratic institutions and maintain security and maintain law and order.

We discussed Israel's withdrawal from the Gaza Strip. I believe that is a courageous decision on the part of the Israelis. President Abbas expressed his concern over unilateral Israeli measures, stressing that progress toward peace should be made through dialog, bringing people together through negotiation and through coordination.

To that end, President Abbas expressed his commitment to dismantling the terrorist organizations and preventing terrorist attacks against Israel. This came up again and again. He conveyed to me his firm belief that nonviolence is the path to a Palestinian State.

In our discussions it was evident that President Abbas is a serious leader, an elected leader, but also a leader who is in a very difficult situation. His election victory gave him a strong mandate to depart from his predecessor's legacy, Arafat's legacy, of violence and terrorism. But he must also compete for that popular support with violent factions such as Hamas that continue to reject peace with Israel, and at the same time they garner support among the people by providing social services to the people. That is what President Abbas faces.

I strongly believe it is, therefore, necessary that the United States continue to support President Abbas in his efforts to transform the Palestinian Authority's reputation for cronyism, corruption, and nontransparency. We need to actively help his administration reform and strengthen the Pales-

tinian security and improve economic services. We must continue to support both economic and social services and offer a stable and peaceful alternative to the radicals that reject peace.

We also had the opportunity to talk with an independent Presidential candidate who lost in the election but garnered significant support—a physician, Dr. Mustafa Barghuti, who ran as an independent in the Presidential elections 5 months ago. He spoke of a need for a strong, viable, independent party to serve as an alternative to Hamas. Like President Abbas, he believes peace is the only path to an independent Palestinian State.

Dr. Barghuti took me on a tour of his medical relief prevention and diagnostic center for cardiovascular disease in Ramallah. It was quite impressive. It is a model he developed as a physician that he hopes, with the appropriate resources, he will be able to spread through the West Bank. We share that common bond of being physicians and had a great dialog on the importance of social services provided through health care to further build that support of this new government.

My experience in the West Bank in my meetings with the various leaders of the Palestinian Authority bolstered my belief that President Abbas is a genuine partner for peace in the Middle East. I also witnessed firsthand how the conflict has deeply affected the daily lives and routines of many Palestinians.

I take this opportunity to urge my colleagues to support President Abbas in his efforts to improve the lives of the Palestinian people and make their governing institutions more accountable and responsible to all. I am hopeful his nonviolent approach to relations with Israel will eventually lead to a viable, independent Palestinian State that is able to live side by side with Israel in peace and security for both.

I yield the floor.

#### 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 for up to 60 minutes, with the first half of the time under the control of the Democratic leader or his designee, and the last half of the time under the control of the majority leader or his designee.

The ACTING PRESIDENT pro tempore. The Senator from the great State of Massachusetts.

Mr. KENNEDY. Mr. President, I yield myself such time as I might use on the Democratic side.

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

#### NUCLEAR OPTION AND ABUSE OF POWER

Mr. KENNEDY. Mr. President, from its beginnings, America has stood for fairness, opportunity and justice. Generation after generation our Nation has been able, often with intense debates, to give greater meaning to these values in the lives of more and more of our citizens. We know today we are a better Nation when our democracy and our policies reflect these values. We are a stronger America when our actions respect those values for all our citizens especially those who are the backbone of America those—who work hard every day, who care for their families, and who love their country.

Fairness; opportunity; justice.

But what we have seen in recent years is a breach of these values in order to reward the powerful at the expense of average Americans.

Those in power passed massive tax breaks for the wealthy and short-changed everyone else.

They granted sweetheart deals to Halliburton Corporation in Iraq while our troops went without armor.

They let the polluters write the pollution rules for our water and our air.

They let the oil industry write the energy policy in secret meetings in the White House.

Two weeks ago, over the opposition of every Democrat in the House and Senate, they forced through a Federal budget that preserves corporate tax loopholes at the expense of college aid, and slashes Medicaid for poor mothers to pay for tax breaks for millionaires.

They twisted arms for 3½ hours in the dead of night on the floor of the House to pass by a single vote a so-called Medicare reform that lavishes billions of dollars on HMOs and drug companies at the expense of senior citizens and the disabled.

They broke the ethics rules of the House of Representatives, then changed the rules to avoid investigation.

They want to break the promise of Social Security to our citizens by privatizing it, handing it over to Wall Street, and cutting benefits for middle-income Americans.

Their actions are a setback for the cause of fairness, opportunity and justice for all.

Now, Republican leaders want to break the Senate to get their way this time with the Nation's courts.

It's not as if the Senate has failed to confirm President Bush's nominations to the Federal courts. So far, we have approved 208 of his appointments and declined to approve only 10. We have blocked only the very, very few who are so far out of the mainstream that they have no place in our Federal judiciary. And yes, we have been willing to filibuster those nominees to protect America from their extremism.

Yet, Republican leaders now propose to scuttle the very Senate rules that have protected our constitution and our citizens for more than two centuries in a no-holds-barred crusade to

give rightwing activist judges lifetime appointments to the Nation's courts.

They want to break the rules to put judges on our courts who are friendly to polluters and hostile to clean water and clean air.

They want to break the rules to put judges on the courts who are hostile to civil rights, hostile to disability rights, hostile to women's rights, and hostile to workers' rights.

They even want to break the rules to put judges on the bench who condone torture.

The Nation's Founders understood that those in power might believe that the rules most Americans live by don't apply to them. That is why they put in place a democracy that preserves our rights and freedoms through checks and balances. These checks and balances protect our mainstream values by preventing one party from arrogantly and unilaterally imposing its extreme views on the Nation.

The Constitution grants the President a check on Congress by allowing him to veto any measure that he believes crosses the line.

It establishes an independent judiciary of judges with lifetime appointments and irreducible salaries, so they will be immune to political pressures and can serve as a valuable check against illegal or unconstitutional actions by the President or Congress.

It gives the President and the Senate the shared duty of appointing qualified men and women to the courts, as a check against a President who tries to force his will on the courts.

The Founders deliberately designed the Senate to be a special additional check. It is smaller than the House. It has 6 year terms compared to 2 years for the House, and 4 for the President. Our terms are staggered, so that at least two-thirds of us are veterans of a previous Congress. We have unique powers over treaties, appointments, and impeachments. We have full power over our own rules, so that we can be more deliberate and deliberative in our action. The Senate was meant to check an overreaching Executive—or an overreaching House as well, and to resist the fads of public opinion. Over the centuries, we have repeatedly played this balancing and stabilizing role, especially when the independence of the judiciary was threatened by an overreaching Chief Executive.

Thomas Jefferson, at the peak of his popularity and with his party controlling Congress, pushed the Senate to remove a Supreme Court Justice whose decisions Jefferson disagreed with, but the Senate said "no."

Franklin Roosevelt tried to expand the Supreme Court, so that he could pack it with Justices who would support his views. Again, a Senate—a Senate under his party's control—said "no."

Richard Nixon, having lost one Supreme Court nomination battle to a bipartisan coalition, dared us to reject a second, even worse candidate. But a bi-

partisan Senate majority honored the Founders' trust by saying "no."

Throughout our history, the Senate, has structured its processes to reflect the unique powers entrusted to it. For such irreversible steps as conferring lifetime judicial authority on nominees for the bench, it has given the minority the ability to protect our republic from the combined tyranny of a willful executive branch and an equally willful and like-minded small majority of Senators. Thus the Senate's rules have allowed the minority to make itself heard as long as necessary to stimulate debate and compromise, and even to prevent actions that would undermine the balance of powers, or that a minority of Senators strongly oppose on principle. Especially with respect to appointments, as to which the Senate's "advice and consent" is a matter of constitutional prerogative, there has never been a constitutional right, or even a right under the Senate rules, to a floor vote on a nomination that would allow a bare majority to automatically rubberstamp the President's choice.

In fact, until 1917, the Senate had no limit on debate at all, and during that time countless nominees, including judges, not only failed to receive Senate consent, but failed to receive the up or down vote that some pretend has been available as a matter of right.

The cloture rule adopted in 1917 permitted debate to be ended on legislation if two-thirds of the Senate voted to do so, but that rule did not apply to Senate proceedings on nominations. In 1949, the rule was extended to all issues, including nominations. Still, there was no "right to an up-or-down vote on the floor" on a matter, because there remained many different ways to prevent it from ever reaching the floor.

In 1975, the two-thirds rule for cloture was reduced to three-fifths, but there was no change in the basic rule: the only floor vote you have "a right to" is a floor vote on cloture, and if you lose that vote, the matter does not go forward unless a later cloture vote succeeds or until the opponents are prepared to vote. That has been the consistent practice since the first cloture rule 88 years ago. Everyone knows that is the rule. It has been followed without exception in every Senate since then. We can argue—and most of us have—whether cloture should or should not be invoked on a particular matter. But if the majority is not large enough to win a cloture vote, it cannot move ahead to a final vote on that matter, including a nomination. That is what the rules say. That is what they have always said. And that rule has never been broken, especially when the issue is changing the Senate rules themselves, which still requires a two-thirds majority for cloture.

Just 19 years after the cloture rule was extended to nominations, Republicans in the Senate led a filibuster against a Supreme Court nomination, the nomination by President Johnson

of Abe Fortas to be Chief Justice. The Senate Historian describes it accurately on the Senate website: "October 1, 1968: Filibuster Derails Supreme Court Appointment."

Some have tried to rewrite the history of that filibuster. But three of us know what happened in 1968 because we were Senators then. President Johnson was one of the best vote counters in our history. If you want to hear a master at work, just listen to his detailed discussion of Senate and House votes on President Johnson's tapes. Lyndon Johnson would not have sent the Fortas nomination to the Senate if he was not completely confident that a majority of the Senate would support the nomination. And in fact those of us who favored the nomination believed he had that support.

The Judiciary Committee reported the Fortas nomination favorably, but its Republican opponents, knowing that they still lacked the votes to defeat the nomination outright, launched a filibuster on the floor, attacking the nominee on a number of different fronts, in an effort to draw away his supporters. In the end, cloture failed, and President Johnson withdrew the nomination.

We may never know what the final vote would have been if there had been no filibuster. But there can be no doubt that what occurred was a filibuster of a Supreme Court nomination, and that the purpose of that Republican-led filibuster was to prevent an up-or-down vote on the nomination. Even though there may have been a majority in support of the nomination when the process started, under the Senate rules at that time there was no way for the majority to cut off the minority's right to continue debate unless two-thirds of the Senate voted to do so. As that cloture vote made clear, there would never be a floor vote on the nomination, unless its opponents ended their filibuster.

In fact the Senate has never allowed a bare majority to silence the minority on any bill or treaty or nomination, least of all on judicial nominees, whom the Framers were determined to keep independent, and whose independence was assured by the Senate's joint role in their appointment. The idea that we should relinquish any part of our power over judicial appointments, while leaving that power intact for nonjudicial nominations and for all legislation, is not only irrational, it is bizarrely backward.

Certainly, this is no time to reduce the ability of the Senate as a whole, and of individual Senators, to assure judicial independence. We need independent courts more than ever. We know that activist groups and their supporters in Congress are putting heavy and well-organized pressure on the courts. They want to restrict rights and liberties in the name of national security. They want to subordinate individual interests to powerful economic interests. They want to intrude

Government into sacrosanct areas of family and religion. They want to reverse longstanding precedents that allow the Nation to realize its full potential.

When one political party controls all the levers of power in both the White House and Congress, and that party feels beholden to a narrow ideological portion of its base, the independence of the courts is more vital than ever. Despite its razor-thin victory in the all-important political campaign last year, following its especially narrow victory in the election in 2000, which was decided by a 5 to 4 vote in the Supreme Court, the Republican party evidently believes it has absolute power. House Republicans yield to the White House, bending House rules to the breaking point to give the President his way. The President has personally picked the majority leader of the Senate and through him seeks to impose unprecedented strict party discipline on Republican Senators.

Now, in a trial run for doing the same to the Supreme Court, the President wants to pack key appellate courts with activist ideological judges he knows could not possibly command a bipartisan consensus in the Senate. It is clear from their records and their resumes that they have been selected precisely because the most radical forces on the Republican right believe they will advance their ideological agenda on the bench.

In these circumstances, we as Senators have not only the right, but the obligation, to use every power at our disposal, within the Senate's rules and traditions, to focus the attention of the Senate and the Nation, and ultimately the President, on the overreaching abuse of power by the White House and the Republican majority. That is what our Senate powers and our Senate rules are meant to do. That is what checks and balances are all about. That is why the filibuster exists.

The Republican argument to the contrary is irrational, incomprehensible and hypocritical. They say that if we dare to use the well-established Senate rules to preserve the independence of the courts, then they are entitled to break the Senate rules to stop us. They assert—and this is the keystone of their argument—that we are abusing the filibuster by actually using it, even on a very few nominations. They seem to say it is permissible to filibuster if you already have a majority of Senators with you; that is, if you don't need to filibuster. But it is not permissible to filibuster if you are in the minority, which is, of course, the only time you need to filibuster. They say you are permitted to filibuster if you don't have the votes to prevent cloture, but are not permitted to do so if you do have the votes to prevent cloture. In short, their argument seems to be that you are allowed to filibuster only when you don't need it or can't make it stick. In a word, their argument is absurd.

The fact is, the Republicans showed in 1968 how the filibuster can be used to change minds when you don't start with enough votes, whether it is Senators' minds, citizens' minds, or just the President's mind.

During the Bush years, the filibuster has been used as an exceptional tool against a small number of judicial nominations—10 out of 218—in contrast to nearly 70 judicial nominations blocked from a floor vote by other Republican tactics during the Clinton administration.

But here is the most important reason the Republican arguments make no sense: It is the President, not the Senate, who determines how often the filibuster is used.

Whenever President Bush decides he would rather pick a fight than pick a judge, then he is likely to be creating the need to filibuster. There is no need for a filibuster if the President takes the "advice" of the Senate seriously, under the "advice and consent" clause of the constitution, when he nominates lifetime judges for important courts. President Clinton did so with Senator HATCH, the Republican chairman of the Senate Judiciary Committee at the time, on his nominations of Justice Ginsburg and Justice Breyer in the 1990s, and other Presidents have done so throughout history.

Those who do not like the filibuster should take their complaints to the other end of Pennsylvania Avenue, where the real responsibility lies.

The claim that filibustering judges is unconstitutional is without a shred of support in the Constitution or in history. The Republican leadership seems to be on the verge of abandoning that claim. The recent compromise suggested by Senator FRIST would allow the practice to continue for legislation, and for all Cabinet and other executive branch appointments, and even for lifetime Federal district judges. None of these categories is constitutionally distinguishable from Federal appellate court nominations and Supreme Court nominations under the Senate rules. If anything, Article III lifetime appellate judges deserve the filibuster's extra insulation from Executive abuse even more than short-term Cabinet and diplomatic appointments, let alone legislative actions that can be reversed by future legislation.

In short, neither the Constitution, nor Senate Rules, nor Senate precedents, nor American history, provide any justification for selectively nullifying the use of the filibuster.

Equally important, neither the Constitution nor the rules nor the precedents nor history provide any permissible means for a bare majority of the Senate to take that radical step without breaking or ignoring clear provisions of applicable Senate Rules and unquestioned precedents.

Here are some of the rules and precedents that the executive will have to ask its allies in the Senate to break or ignore, in order to turn the Senate into a rubber stamp for nominations:

First, they will have to see that the Vice President himself is presiding over the Senate, so that no real Senator needs to endure the embarrassment of publicly violating the Senate's rules and precedents and overriding the Senate parliamentarian, the way our presiding officer will have to do.

Next, they will have to break Paragraph 1 of Rule V, which requires 1 day's specific written notice if a Senator intends to try to suspend or change any rule.

Then they will have to break paragraph 2 of Rule V, which provides that the Senate rules remain in force from Congress to Congress, unless they are changed in accordance with the existing rules.

Then they will have to break paragraph 2 of Rule XXII, which requires a motion signed by 16 Senators, a 2-day wait and a three-fifths vote to close debate on the nomination itself.

They will also have to break Rule XXII's requirement of a petition, a wait, and a two-thirds vote to stop debate on a rules change.

Then, since they pretend to be proceeding on a constitutional basis, they will have to break the invariable rule of practice that constitutional issues must not be decided by the presiding Officer but must be referred by the Presiding officer to the entire Senate for full debate and decision.

Throughout the process they will have to ignore, or intentionally give incorrect answers to, proper parliamentary inquiries which, if answered in good faith and in accordance with the expert advice of the parliamentarian, would make clear that they are breaking the rules.

Eventually, when their repeated rule-breaking is called into question, they will blatantly, and in dire violation of the norms and mutuality of the Senate, try to ignore the minority leader and other Senators who are seeking recognition to make lawful motions or pose legitimate inquiries or make proper objections.

By this time, all pretense of comity, all sense of mutual respect and fairness, all of the normal courtesies that allow the Senate to proceed expeditiously on any business at all will have been destroyed by the preemptive Republican nuclear strike on the Senate floor.

To accomplish their goal of using a bare majority vote to escape the rule requiring 60 votes to cut off debate, those participating in this charade will, even before the vote, already have terminated the normal functioning of the Senate. They will have broken the Senate compact of comity, and will have launched a preemptive nuclear war. The battle begins when the perpetrators openly, intentionally and repeatedly, break clear rules and precedents of the Senate, refuse to follow the advice of the Parliamentarian, and commit the unpardonable sin of refusing to recognize the minority leader.

Their hollow defenses to all these points demonstrate the weakness of

their case: They claim, "We are only breaking the rules with respect to judicial nominations; we promise not to do so on other nominations or on legislation." No one seriously believes that. Having used the nuclear option to salvage a handful of activist judges, they will not hesitate to use it to salvage some bill vital to the credit card industry, or the oil industry or the pharmaceutical industry, or Wall Street, or any other special interest. In other words, the Senate majority will always be able to get its way, and the Senate our Founders created will no longer exist. It will be an echo chamber to the House, where the tyranny of the majority is so rampant today.

Our Republican colleagues also claim that "Senate Democrats have previously used majority votes to change the rules", so they can do it too. That spurious claim depends entirely on a pseudo-scholarly article by two Republican staffers, who happen, unintentionally, to have provided enough facts to rebut the claim. As Senator BYRD and other experts on the rules have shown, the instances they rely on do not involve breaking the rules or changing the rules. They were narrow and minor interpretations to fill gaps in existing rules, but always consistent with the underlying rules and their purposes, and always in keeping with the regular procedures of the Senate. They never allowed debate on any nomination or bill to be cut off without the required cloture vote. The Nuclear Option, in contrast, involves major changes in the essence of key rules, without following the required procedures for changing the rules. In fact, even at the start of a new Congress, the one time when some of us thought the rules might be changed by a majority, the Senate has repeatedly and explicitly rejected the proposition that the rules can be changed without following the rules.

Why would our Republican colleagues try to do this? The simplest answer is that they will do it because they think they can get away with it. If enough Republicans accede to this raw exercise of unbridled power, and ignore the rules and traditions and comity and history and purpose of the Senate, and think they can pull it off and not be held accountable, then they will try it.

Obviously, their party is also being driven by an irresponsible fringe force that does not care about the credibility of their party or the institutional interests of the Senate or the future of our checks and balances form of government. They were the ones who compelled their leaders on both sides of the Hill to intrude in the tragic case of Terri Schiavo. The overwhelmingly hostile reaction to that fiasco should be enough to encourage the White House not to go down such paths again, especially after Stanley Birch, a conservative appointee of the first President Bush, on a conservative federal circuit court of appeals, excoriated Congress for its unconstitutional inter-

ference with the courts, and particularly excoriated Republican opponents of judicial activism for hypocritically pushing their own corrosive brand of judicial activism.

Sadly, with Dr. Frist's encouragement and support, the same rabble rousers recently accused us of blocking nominees because they are "people of faith," thus suggesting that the 208 judges whom we have not blocked are not "people of faith." Clearly these activist ideologues do not agree with the Founders about the need for judicial independence, for the separation of powers, or for the separation of church and state. They have no respect for history, no respect for checks and balances, and no respect for the role of the Senate. They simply want as many judges as possible who will follow their instructions.

Fortunately, the vast majority of Americans' share our commitment to basic fairness. They agree that there must be fair rules, that we should not unilaterally abandon or break those rules in the middle of the game, and that we should protect the minority's rights in the Senate.

Even in the darkest days of the government's failure to respond to the civil rights revolution, half a century ago, the Senate never tried to allow a bare majority to silence a substantial minority. Yet that is exactly what Republicans want to do now. There simply is no crisis which justifies such a drastic and destructive action.

Who are the nominees the Republican leadership wants confirmed so desperately that they are willing to resort to tactics like these? Obviously, they are doing it in anticipation of the battle soon to come over the nomination of the next Supreme Court Justice. The judges nominated so far who have been filibustered by the Senate show how truly appalling a Supreme Court nominee may be, if the President can avoid a filibuster.

President Bush has said he wants judges who will follow the law, not try to re-write it. But his actions tell a different story. The contested nominees have records that make clear they would push the agenda of a narrow far-right fringe, rather than protect rights important to all Americans.

Priscilla Owen, Janice Rogers Brown, William Myers, Terrence Boyle, and William Pryor would erase much of the country's hard-fought progress toward equality and opportunity. Their values—favoring big business over the needs of families, destroying environmental protections, and turning back the clock on civil rights—are not mainstream values.

As a Texas Supreme Court Justice, Priscilla Owen has shown clear hostility to fundamental rights, particularly on issues of major importance to workers, consumers, victims of discrimination, and women. Neither the facts, nor the law, nor established legal precedents, stop her from reaching her desired result.

Owen was elected to the Texas Supreme Court with donations from Enron and other big companies. She consistently rules against employees, and consumers who challenge corporate abuses. She bent the law in an attempt to deny relief for the family of a teenager, who was paralyzed after being thrown through the sun roof of the family car in an accident. She wanted to reverse a jury award for a woman whose insurance company wrongly denied her claim for coverage of heart surgery. She argued that the Texas Supreme Court should reinterpret a key civil rights law to make it harder for victims of discrimination to get relief.

It's not just Senate Democrats who question Justice Owen's record of judicial activism and her willingness to ignore the law. Even many newspapers that endorsed her campaign for the Texas Supreme Court now oppose her confirmation after seeing how poorly she served as a judge. The Houston Chronicle wrote that Justice Owen "too often contorts rulings to conform to her particular conservative outlook." The paper also noted that "It's saying something that Owen is a regular dissenter on a Texas Supreme Court made up mostly of other conservative Republicans."

The Austin American-Statesman wrote that she "seems all too willing to bend the law to fit her views." The San Antonio Express-News opposed her nomination, reminding us that "[w]hen a nominee has demonstrated a propensity to spin the law to fit philosophical beliefs, it is the Senate's right—and duty—to reject that nominee."

Her own colleagues on the conservative Texas Supreme Court have repeatedly accused her of the same thing. They clearly state that Justice Owen puts her own views above the law, even when the law is crystal clear. Justice Owen's former colleague on the Texas Supreme Court, our new Attorney General Alberto Gonzales, has said she was guilty of "an unconscionable act of judicial activism." Some claim that Attorney General Gonzales didn't mean this criticism. But this was no single, stray remark. To the contrary, both he and her other colleagues on the Texas Supreme Court have repeatedly noted that she ignores the law to reach her desired result.

In one case, Justice Gonzales held that Texas law clearly required manufacturers to be responsible when retailers sell their defective products. He wrote that Justice Owen's dissenting opinion would "judicially amend the statute" to let the manufacturers off the hook.

In a case in 2000, Justice Gonzales, joined by a majority of the Texas Supreme Court, upheld a jury award holding that the Texas Department of Transportation and the local transit authority were responsible for a deadly auto accident. They said that the result was required by the "plain meaning" of Texas law. Justice Owen dissented, claiming that Texas should be

immune from these suits. Justice Gonzales again stated that her view misread the law, which he said was "clear and unequivocal."

In another case, Justice Gonzales joined a majority opinion that criticized Justice Owen for "disregarding the procedural limitations in the statute," and "taking a position even more extreme" than was argued by the defendant in the case.

In another case in 2000, private landowners tried to use a Texas law to exempt themselves from local environmental regulations. The court's majority ruled that the law was an unconstitutional delegation of legislative authority to private individuals. Justice Owen dissented, claiming that the majority's opinion "strikes a severe blow to private property rights." Justice Gonzales joined a majority opinion criticizing Justice Owen's view, stating that most of her opinion was "nothing more than inflammatory rhetoric which merits no response."

In another case, Justice Owen joined a partial dissent that would have limited the right to jury trials. The dissent was criticized by the other judges as a "judicial sleight of hand" to bypass the constraints of the Texas Constitution.

For the very important D.C. Circuit, the President has nominated another extreme right-wing candidate. Janice Rogers Brown's record on the California Supreme Court makes clear that—like Priscilla Owen—she's a judicial activist who will roll back basic rights. When she joined the California Supreme Court, the California State Bar Judicial Nominees Evaluation Commission had rated her "not qualified," and "insensitive to established legal precedent" when she served on the state court of appeals.

All Americans, wherever they live, should be concerned about such a nomination to this vital court, which interprets federal laws that protect our civil liberties, workers' safety, and our ability to breathe clean air and drink clean water in their communities. Only the D.C. Circuit can review the national air quality standards under the Clean Air Act and national drinking water standards under the Safe Drinking Water Act. This court also hears the lion's share of cases involving rights of employees under the Occupational Safety and Health Act and the National Labor Relations Act.

Yet Janice Rogers Brown's record shows a deep hostility to civil rights, to workers' rights, to consumer protection, and to a wide variety of governmental actions in many other areas—the very issues that predominate in the D.C. Circuit.

Perhaps most disturbing is the contempt she has repeatedly expressed for the very idea of democratic self-government. She has stated that "where government moves in, community retreats [and] civil society disintegrates." She has said that government leads to "families under siege, war in

the streets." In her view, "when government advances . . . freedom is imperiled [and] civilization itself jeopardized."

She has criticized the New Deal, which gave us Social Security, the minimum wage, and fair labor laws. She's questioned whether age discrimination laws benefit the public interest. She's even said that "Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system will permit them to extract." No one with these views should be confirmed to the Federal court and certainly not to the Federal court most responsible for cases affecting government action. It's no wonder that an organization seeking to dismantle Social Security is running ads supporting her nomination to the second most powerful court in the country.

Janice Rogers Brown has also written opinions that would undermine civil rights. She has held, for example, that the First Amendment prevents courts from granting injunctions against racial slurs in the workplace, even when those slurs are so pervasive that they create a hostile work environment in violation of Federal job discrimination laws. In other opinions, she has argued against allowing victims of age and race discrimination to obtain relief in state courts, or to obtain damages from administrative agencies for their pain and suffering. She has rejected binding precedent on the constitutional limits on an employer's ability to require employees to submit to drug tests.

President Bush has selected William Myers for the important Ninth Circuit Court of Appeals. Mr. Myers is a long-time mining and cattle industry lobbyist. He has compared Federal laws protecting the environment to "the tyrannical actions of King George" over the American colonies. He has denounced our environmental laws as "regulatory excesses." In the Interior Department, he served his corporate clients instead of the public interest. As Solicitor of Interior, he tried to give public land worth millions of dollars to corporate interests. He issued an opinion clearing the way for mining on land sacred to Native Americans, without consulting the tribes affected by his decision although he took the time to meet personally with the mining company that stood to profit from his opinion.

William Myers is a particularly inappropriate choice for the Ninth Circuit, which contains many of America's most precious natural resources and national parks, including the Grand Canyon and Yosemite National Park, and which is home to many Native American tribes. The Ninth Circuit decides many of the most important environmental disputes affecting America's natural heritage. It has a special role in safeguarding the cultural and religious heritage of the first Americans.

It deserves an impartial judge who will deal fairly with environmental claims, not a mining company lobbyist clearly opposed to environmental protections. The Ninth Circuit needs judges who will respect Native American rights, not a judge the head of the National Congress of American Indians has called the "worst possible choice" for Native Americans.

The nomination of Terrence Boyle is still pending in the Judiciary Committee. By all appearances, he was chosen for his radical views, not his qualifications. His decisions as a trial judge have been reversed or criticized on appeal more than 150 times, far more than any other district judge nominated to a circuit court by President Bush. The Supreme Court unanimously reversed him in a voting rights case, in which Justice Clarence Thomas wrote that he had ignored established legal standards.

In fact, he has made serious mistakes in cases that matter most to Americans' daily lives. Time and again, the conservative Fourth Circuit has ruled that Judge Boyle improperly dismissed cases asking protection for individual rights, such as the right to free speech, or the right of free association, or the right to be free from discrimination, or the right to a fair and lawful sentence in a criminal case. It's no wonder that his nomination is opposed by a broad coalition of organizations nationally and in his home state of North Carolina representing law enforcement officers, workers, and victims of discrimination.

Last, but by no means least disturbing, the President has renominated William Pryor to the Court of Appeals for the Eleventh Circuit. Mr. Pryor is no true "conservative." He has pushed a radical agenda contrary to much of the Supreme Court's jurisprudence over the last forty years, and at odds with important precedents that have made our country a fairer nation.

Mr. Pryor has fought aggressively to undermine the power of Congress to protect civil rights and individual rights. He's tried to cut back on the Family and Medical Leave Act, the Americans with Disabilities Act, and the Clean Water Act. He's been contemptuously dismissive of claims of racial bias in the application of the death penalty. He's relentlessly advocated its use, even for persons with mental retardation. He's even ridiculed the current Supreme Court justices, calling them "nine octogenarian lawyers who happen to sit on the Supreme Court." He can't even get his facts right. Only two of the nine justices are 80 years old or older.

Mr. Pryor has criticized Section 5 of the Voting Rights Act, which helps ensure that all Americans can vote, regardless of their race or ethnic background. He's even called the Voting Rights Act, which has been repeatedly upheld by the Supreme Court, "an affront to federalism." His hostility to voting rights belongs in another era—

not on a federal court. As Alabama's Attorney General, in a case involving a disabled man forced to crawl up the courthouse stairs to reach the courtroom, Mr. Pryor argued that the disabled have no fundamental right to attend their own public court proceedings. His nomination was rushed through the Committee despite serious questions about his ethics and even his candor before the Committee.

History will judge us harshly in the Senate if we don't stand tall against the brazen abuses of power demonstrated by these nominees. The issues at stake in these nominations go well beyond partisan division. The basic values of our society—whether we will continue to be committed to fairness and opportunity and justice for all—are at issue.

Many well-qualified, fair-minded nominees could be quickly confirmed if the Bush administration would give up its right-wing litmus test. Why, when there are so many qualified Republican attorneys, would the President choose nominees whose records raise so much doubt about whether they will follow the law? Why force an all-out battle over a few right-wing nominees, when the nation has so many more pressing problems, such as national security, the economy, education, and health care?

Our distinguished former colleagues, Republican Senator David Durenberger and Democratic Senator and Vice President Walter Mondale, recently urged the Senate to reject the nuclear option. They reminded us that "Our federal courts are one of the few places left where issues are heard and rationally debated and decided under the law."

Five words they used said it all—"let's keep it that way." To reach the goals important to the American people, let's reject the nuclear option, and respect the checks and balances that have served the Senate and the nation so well for so long.

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

The Senator from Nevada.

---

#### FILIBUSTER OF JUDICIAL NOMINEES

Mr. ENSIGN. Mr. President, I would like to think that if some of the finest and most respected jurists in our country's history were nominated today to sit on the Federal bench, their successful confirmation by the Senate would be guaranteed. I am talking about jurists such as Chief Justice John Marshall, Chief Justice Earl Warren, and Justice Oliver Wendell Holmes. Imagine where we would be today without their bright, insightful legal minds.

Unfortunately, in today's bitter and partisan atmosphere, I don't see how any of them would make it through this grueling, humiliating, and endless judicial nomination process. That is a disturbing thought. We must put an end to this mockery of our system be-

fore it becomes impossible to undo the damage.

I am sure a lot of Americans believe this is politics as usual. It is not. Filibustering of judicial nominations is an unprecedented intrusion into the long-standing practice of the Senate's approval of judges.

We have a constitutional obligation of advise and consent when it comes to judicial nominees. While there has always been debate about nominees, the filibuster has never been used in partisan fashion to block an up-or-down vote on someone who has the support of a majority of the Senate.

In our history, many nominees have come before us who have generated strenuous debate. Robert Bork and Clarence Thomas are two of what the other side would consider more controversial figures to be considered for a position on the Federal bench. It is important to note that both of these men, despite the strong feelings they generated from their supporters and their detractors, received an up-or-down vote. Now, sadly, due to the efforts of the Democrats in the Senate, the 214-year tradition of giving each Federal candidate for judge a solid "yea" or "nay" is at risk.

Senate tradition is not the only thing at risk here, though. The quality of our judiciary is at grave risk. It is and should continue to be an honor to be nominated to serve on the Federal bench. Nominees are aware of the rigorous process that goes along with their nomination—intense background checks and the opening of one's life history to the public. However, highly qualified and respected nominees do not sign on to being dragged through a bitter political battle. If we allow the filibustering of nominees to continue, I fear that those highly qualified candidates will decline to put themselves and their families through the abyss of this process. The American judicial system will be sorely hurt should this happen. And it already happened with Miguel Estrada, who was an outstanding nominee. We cannot afford to let this happen and let it continue.

I believe that anyone who has been nominated by the President and is willing to put his or her name forward and be subjected to the rigorous confirmation process deserves a straight up-or-down vote on his or her nomination in both committee and on the floor of the Senate. Guaranteeing that every judicial nominee receives an up-or-down vote is truly a matter of fairness. It doesn't mean that there is no debate or opportunity to disagree. It does mean fair consideration, debate, and a decision in a process that moves forward.

I say that today with the Republican President in the White House and a Republican majority in the Senate, but I know we will uphold the up-or-down vote when we eventually have Democrats back in control. That is because this is the fairest way to maintain the health of the judicial nomination process and the quality of our courts.

Our Founding Fathers set up a form of Government with three separate branches, and they were all very distinct. The current state of affairs in the Senate threatens the very balance of power. Although the up-or-down vote is critical to maintaining that balance, there is a need to reform the committee process as well. Each committee should discharge nominees, whether it is with a positive or a negative vote. But at some point, that nominee deserves to have a vote of the full Senate on the floor. The committee should not have the power to kill a nominee on its own.

I sincerely hope we can put an end to this crisis, judge judicial nominees on the basis of their character, qualifications, and experience, and return to fulfilling our constitutional duty.

I understand that the majority leader has just put forward a proposal to correct the unfair treatment of judges. Senator FRIST's proposal will ensure that each and every nominee will be treated fairly. It will ensure that each nominee will receive a fair up-or-down vote, whether a Republican President or a Democrat President nominates him or her.

I commend Senator FRIST for his leadership. His proposal ensures future nominees are treated fairly. I urge my colleagues to adopt Senator FRIST's proposal.

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

The PRESIDING OFFICER (Mr. VITTER). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. CRAPO. Mr. President, I would like to take a few moments to discuss the issue that seems to be the major topic of debate now in the Senate. It is that of the question of how we approach the nomination and confirmation of judges.

Frankly, I think that the level of hostility and the level of debate that has increased around this issue is becoming alarming to the American people—not so much necessarily because of their objection or concern about the various positions being taken but because of the concern about how the Senate is running, the question of whether we in the Senate are working on the business of the American people in a way that is in the best interest of public discourse, or whether the dynamic in the Senate is deteriorating into a highly partisan, highly personal, and highly difficult climate in which we are increasingly facing gridlock.

Mr. President, I would like to go back through the debate because a lot has been said about what the role of the filibuster is as we approach the issue of confirmation of judges. I believe it is important because, frankly, I notice in some of the advertising that