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Senate

The Senate met at 9:30 a.m. and was called to order by the Honorable SAM BROWNBACK, a Senator from the State of Kansas.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Eternal Spirit, the fountain of light and wisdom, without Whom nothing is holy and nothing prevails, You have challenged us to let our lights shine, so that people can see our good works and glorify Your Name.

Today, shine the light of Your presence through our Senators and illuminate our Nation and world. Permit this light to be a beacon of hope for emerging democracies and a gleam of encouragement for freedom fighters. Use this light to provide a model of patience and peace to a world searching for direction.

Lord, let this brightness bring hope where there is despair, unity where there is division, and joy where there is sadness. Remind each of us that it is better to light one candle than to curse the darkness. We pray in the Name of the One Who is the Light of the World. Amen.

PLEDGE OF ALLEGIANCE

The Honorable SAM BROWNBACK led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. STEVENS).

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, May 18, 2005.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable SAM BROWNBACK, a Senator from the State of Kansas, to perform the duties of the Chair.

TED STEVENS,
President pro tempore.

Mr. BROWNBACK thereupon assumed the Chair as Acting President pro tempore.

RESERVATION OF LEADER TIME

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

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. FRIST. Mr. President, today, we will begin debate on one of the judicial nominations pending on the Executive Calendar. In a moment, we will enter into a consent agreement to begin the consideration of Priscilla Owen to be United States Circuit Judge for the Fifth Circuit.

I have consulted with the Democratic leader, and we hope to have an orderly debate for Members to come to the floor to make their statements. To facilitate that process, we will rotate back and forth between the aisle every 60 minutes. I will have a short statement, the Democratic leader will have a statement following mine, and then we will begin the rotation back and forth. I look forward to this debate, and I hope all Members will take the opportunity to participate.

EXECUTIVE SESSION

NOMINATION OF PRISCILLA RICHMAN OWEN TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

Mr. FRIST. Mr. President, I ask unanimous consent that the Senate now proceed to executive session to consider calendar No. 71, the nomination of Priscilla Owen to be United States Circuit Judge for the Fifth Circuit; provided further that the first hour of debate, from 9:45 to 10:45, be under the control of the majority leader or his designee; further that the next hour, from 10:45 to 11:45, be under the control of the Democratic leader or his designee; and the time for debate rotate in a similar manner every 60 minutes; provided further that the Senate recess from 3:45 to 4:45 to accommodate an all-Senators briefing; provided further that the time from 5:45 to 7:15 be under the control of the Democratic leader and the time from 7:15 to 7:45 be under the control of the majority leader or his designee.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. REID. Mr. President, reserving the right to object, first of all, I would ask the distinguished majority leader to amend his unanimous consent request to have the time begin when we complete our statements today. We might not be at a quarter of the hour, but whenever that would be we would rotate on an hourly basis.

Mr. FRIST. Mr. President, I have no objection.

The ACTING PRESIDENT pro tempore. Is there objection to the modified request?

Mr. REID. Mr. President, I have another reservation.

The ACTING PRESIDENT pro tempore. The Democratic leader.

Mr. REID. Mr. President, I would ask the distinguished majority leader would we not be better off moving to

get rid of—I don't mean that in a pejorative sense—but clear the calendar of four, at this stage, noncontroversial judges? We could move to Thomas Griffith, who is on the calendar. We could move to discharge and consider the Michigan Circuit Court nominees, Griffin, McKeague, and Neilson. We could get time agreements on all those. We would have four circuit judges. They would be able to go to work within a few days—actually go to work. Otherwise, they are going to be waiting until we go through all of this. It would seem to me that would be the better thing to do. So I would ask the distinguished majority leader if he would agree that we could move to these, with reasonable time agreements, prior to moving to Priscilla Owen?

The ACTING PRESIDENT pro tempore. The majority leader.

Mr. FRIST. Mr. President, through the Chair, we have given careful consideration of which would be the most appropriate person to begin with. It is Priscilla Owen. So we will proceed with Priscilla Owen. There are five people on the Executive Calendar, and our intention would be to debate these nominees, one by one; and hopefully, as other nominees come out of the Judiciary Committee, to take them up as well. So we will be proceeding with Priscilla Owen.

Mr. REID. Mr. President, one further statement.

The ACTING PRESIDENT pro tempore. The Democratic leader.

Mr. REID. Mr. President, in that we have started this process, my friend, the distinguished majority leader, should be advised we will not agree to committees meeting during the time we are doing debate on Priscilla Owen.

The ACTING PRESIDENT pro tempore. Is there objection to the request, as modified?

Mr. KENNEDY. Reserving the right to object, Mr. President.

The ACTING PRESIDENT pro tempore. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I was wondering if our leader is familiar with the letter which members of our Judiciary Committee sent to the chairman of our committee that points out there are now some 30 vacancies on the Federal bench for which the President has not yet sent a nominee to the Senate. If he would work with Senators of both parties to identify qualified, consensus nominees for each of these spots, the vacancy numbers on our courts could be lowered even further. However, as much as we have offered to work with him finding these nominees and getting them confirmed, there has been absolutely no response.

I am just wondering whether, as we are addressing the issues of one nominee—and the issue that is before the Senate is filling vacancies on the courts—I am just interested if the majority leader has any information from the administration as to when we are going to be able to fill these other nominations.

The ACTING PRESIDENT pro tempore. The majority leader.

Mr. FRIST. Mr. President, I would be happy to look at the letter and request of the administration, what requests are made in the letter, and see what their response would be.

In the meantime, Mr. President, what I would like to do is proceed with Priscilla Owen, who is a qualified nominee, who is a nominee we are going to have a lot of debate on back and forth, to determine whether or not she is out of the mainstream, as people say. We will go through regular order and take these nominees the President has submitted to the Judiciary Committee, who have been fully evaluated in the Judiciary Committee, and who now are on the Executive Calendar ready for business.

So we are going to begin that debate shortly.

Mr. KENNEDY. Well, reserving my rights further, Mr. President, as I understand, there is a new nominee who is on the Executive Calendar, Brian Sandoval of Nevada, who has general broad support. Is he not a nominee we could confirm in a matter of moments here? We could at least take care of that vacancy.

Mr. FRIST. Mr. President, I do not believe he is on the Executive Calendar. To the best of my knowledge—at least he is not on the Executive Calendar as printed today.

The ACTING PRESIDENT pro tempore. Is there objection?

The Senator from Vermont.

Mr. LEAHY. Mr. President, reserving the right to object, and I shall not, but I would also remind everybody that the distinguished Democratic leader has said he had no objection to going to—this is a court of appeals judge—Thomas Griffith, of Utah, to be U.S. circuit judge for the District of Columbia circuit. While Mr. Griffith is one I would vote against, for reasons I have already stated, from the nose count I have, he would easily be confirmed.

I would also note that I have total agreement with the distinguished senior Senator from Nevada, who said he would be willing to do this in a relatively short time. I just mention that because I would not want anybody to think this is a person being held up, even though some of us object to him.

The ACTING PRESIDENT pro tempore. Is there objection?

The Democratic leader.

Mr. REID. Mr. President, I would also like to make a suggestion. The idea is not original with me. I wish it were. But we had a meeting last night. The distinguished majority leader was present at that meeting. My friend, the junior Senator from Utah, suggested that what might be good for this body is the same thing that happened when we had the difficult issue here 6½ years ago dealing with the impeachment of a President of the United States. At that time, we retired to the Old Senate Chambers. No staff was there, just 100 Senators. We worked through some very difficult problems, and it surprised everyone.

The distinguished Senator from Massachusetts and now retired Senator Phil Gramm were the people who saved the day—two people who battled ideologically for a combined total of 40 or 50 years. Basically, because of them, we resolved an extremely difficult issue as to how the impeachment would be handled.

So I would ask my distinguished friend, the Republican leader, to consider joining with me and having, in the next day or so—hopefully today—have all of us retire to the Chamber and sit down and talk through this issue and see if there is a way we can resolve this short of this so-called nuclear option. I think it would be good for the body. I think it would be good for the American public to see we are able to sit down in the same room and work things out. I am not sure that we could, but I think it would be worthy of our efforts. Nothing ventured, nothing gained. I would ask my friend if he would consider following the suggestion of Senator BENNETT of Utah.

The ACTING PRESIDENT pro tempore. The majority leader.

Mr. FRIST. Mr. President, as always, we will take into consideration all suggestions and be happy to talk to the leadership on both sides of the aisle as to whether that suggestion is the most appropriate way. We have engaged in negotiations and attempts to satisfy both sides over the last 4 months, 5 months, since these unprecedented filibusters came before this body. After 214 years of a threshold of 50 votes, all of a sudden, in the last Congress, it was radically changed by the other side to become 60 votes, denying the sort of people—a little bit akin to what we just heard over the last few minutes, where I am trying to move to a qualified nominee, Priscilla Owen, and we hear these attempts to delay, even right now, and to sidetrack and consider somebody else. That is the challenge.

That is why we are on the floor of the Senate, with the light of day, with the American people watching at this point, to take it to the body of the Senate and ask that fundamental question: Is Priscilla Owen out of the mainstream? Eighty-four percent of Texans think she is in the mainstream. Are 84 percent of Texans out of the mainstream? If the answer to that question is, no, they are not out of the mainstream, then all we want is a vote, an up-or-down vote—accept, reject; confirm, yes, no. That is all we are asking for.

We do not want the constitutional option. We did not ask for the constitutional option. What has happened is because of the other side of the aisle, in shattering the Senate tradition for 214 years, where the filibuster was never even contemplated, now it is being used on a routine basis. One out of every four of the President's nominees who have come over for the circuit

courts are filibustered, blocked, not given that courtesy of a vote, when that is our responsibility, to give advice and consent.

So in response to my good friend, the Democratic leader, yes, as proposals come forward, we will consider all. Both leaders spent 50 minutes or so, as the papers reported, today talking with people who are trying to come to some reasonable conclusion. We will continue to do that. So I would be happy to consider another idea.

I think what is important now, though, is to come to the floor of the Senate. Let's shed light on this. Let's do take this. Yes, it is an inside-the-Senate decision, and we make our own traditions and rules, but it is important for the American people to see is Priscilla Owen, is Janice Rogers Brown deserving of a vote, yes or no, on the floor of the Senate.

So I would recommend we continue discussions and let's proceed with this nominee, continue the debate over the course of the day, or it may be 2 days, and answer this question: Is she qualified? Does she deserve an up-or-down vote?

The ACTING PRESIDENT pro tempore. Is there objection to the request?

The Democratic leader.

Mr. REID. Mr. President, I know we need to move on. I want to briefly say we are following the rules. We believe in following the rules, not breaking the rules. And while it is good to talk about this up-or-down vote, the fact is if we move forward as contemplated by the majority, it is moving toward breaking the rules to change the rules. That is improper. It will change the Senate forever and that is not good.

Mr. KENNEDY. Mr. President, further reserving the right to object, I want to support our Democratic leader. I believe the record now is we have approved 96 percent of the judicial nominees of this administration. And as we know in terms of reading the Constitutional Convention our Founding Fathers expected this was going to be, we were going to exercise our own independent best judgment on nominees. And if I could ask the majority leader, is this the same Priscilla Owen which our current Attorney General suggested ''unconscionable acts of judicial activism?'' That is, our current Attorney General has accused this nominee of that kind of activity. Is this the same Priscilla Owen who is now being recommended, about which our current Attorney General made that comment not once, not twice, not three times, but 11 times?

Mr. MCCONNELL. Regular order, Mr. President.

The ACTING PRESIDENT pro tempore. Regular order has been called for. The Senator must either object or permit the request to move forward.

Is there objection? Without objection, it is so ordered.

Mr. KENNEDY. Reserving the right to object, I would not object——

The ACTING PRESIDENT pro tempore. The Senator cannot reserve the right to object. He must object or grant the request.

Is there objection? Without objection, it is so ordered.

The clerk will report the nominee.

The legislative clerk read the nomination of Priscilla Richman Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit.

The ACTING PRESIDENT pro tempore. The first hour of debate is now under the control of the majority leader or his designee.

The majority leader.

Mr. FRIST. Mr. President, I rise today as the leader of majority party of the Senate, but I do not rise for party. I rise for principle. I rise for the principle that judicial nominees with the support of the majority of Senators deserve up-or-down votes on this floor. Debate the nominee for 5 hours, debate the nominee for 50 hours, vote for the nominee, vote against the nominee, confirm the nominee, reject the nominee, but in the end vote.

Senators, colleagues, let's do our duty and vote. Judicial nominees deserve an up-or-down vote.

In this debate we will discuss two of the President's judicial nominees. These outstanding nominees, Priscilla Owen and Janice Rogers Brown, had the support of a majority of Senators in the last Congress, but they were denied, they were denied up or down votes. I expect we will also discuss such consequential topics as the meaning of the Constitution and Senate rules and procedures. No doubt this will be a spirited debate, as it should be. And I also hope it will be a decisive debate. So let us begin.

In the last Congress, for the first time in history a minority of Senators obstructed the principle of a fair up-or-down vote on judicial nominees. That was unprecedented. Never in 214 years of Senate history had a judicial nominee with majority support been denied an up-or-down vote. Yet it happened—again, and again, and again, and again, and again, and again. A minority of Senators denied an up-or-down vote not just once to one nominee but 18 times on 10 individual nominees. These men and women, these nominees are among the best legal minds in America and they all would be serving on the Federal bench today. All they needed was a vote. But they were not given the courtesy of an up-or-down vote on the floor of the Senate. The minority denied them a vote and set a new precedent. The minority in the last Congress rewrote the rules of advice and consent. They unilaterally increased the threshold for confirmation from 50 votes, where it had been throughout history, to 60 votes.

Now some in the minority say they will harden the precedent and obstruct judicial nominees in this Congress. And if they are not allowed to do so, if the Senate returns to the way it worked for 214 years, they will retaliate. They will obstruct the Senate's other business. They will obstruct the people's business. They will hold back our agenda to move America forward. An energy strategy to reduce our dependence on foreign oil, held back; an end to the medical lawsuit abuse to reduce the cost of health care, held back; a simpler, fairer Tax Code to create jobs and to encourage economic growth, held back. A minority of Senators will hold America back just because a majority of Senators, a majority of people in this body want to do what most Americans of all things expect us to do, and that is to vote.

The minority should allow Senators to fulfill our constitutional responsibility of giving advice and consent and vote. And they should allow America to move forward.

The principles that endured for 214 years do not endure because they appeal to one party or the other. They endure because they serve a vital purpose. In this case, the principle of an up-or-down vote ensures the President can fulfill his constitutional duty to appoint judges.

Let me read a passage in the Constitution.

> The President shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senate present concur, and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public ministers and consuls, judges of the Supreme court, and all other officers of the United States.

The Framers wrote in the Constitution that two-thirds of Senators must approve treaties, but they specifically did not require the same number of votes to confirm judicial nominees.

After much debate and compromise, the Framers concluded that the President should have power to appoint and the Senate should confirm or reject nominees by a simple majority vote. For 214 years Republican and Democratic minorities alike restrained themselves, they used restraint, they abided by the Framers' design and Senate tradition and gave nominees brought to this floor simple majority up-or-down votes. This was the practice.

Then came the last Congress. With its obstruction the minority set a new precedent—60 votes before the Senate could proceed to an up-or-down vote on a judicial nominee. For 214 years the threshold for advice and consent in the Senate was 50 votes, a majority. In the last Congress——

Mr. SCHUMER. Would my colleague yield for a question.

Mr. FRIST. Mr. President, I would like to proceed with my statement and would be happy to yield for a comment.

For 214 years the threshold for advice and consent in the Senate was 50 votes. In the last Congress the minority party radically increased that threshold to 60, and that is wrong, and we will restore the tradition.

This unprecedented threshold gave the minority a virtual veto, in effect control, over the judicial appointments of the President. The minority destroyed 214 years of Senate tradition,

defied the clear intent of the Constitution, and undermined the Democratic will of the American people. You can't get much more radical than that.

This new precedent cannot be allowed to stand in this Congress. We must restore the 214-year-old principle that every judicial nominee with majority support deserves an up-or-down vote.

Why? First, the American people elect their Senators for a reason. It is to represent them. And they expect us to do our job. The Senate is a deliberative body. We are a proudly deliberative body. But we also have certain responsibilities which include giving advice and consent on the President's judicial nominations. When a judicial nominee comes to this floor and has majority support but is denied a simple up-or-down vote, Senators are simply not doing their job. And the sad fact is we did not do our job in the last Congress. The minority's judicial obstruction has saddled President Bush with the lowest confirmation rate for appeals court nominees of any modern President. This is disgraceful. We owe it to the people we serve and to the Senate as an institution to do our job. We should vote up or down on judicial nominees.

Second, the judicial branch also has a job to do and it needs judges to do it. Right now there are 46 vacancies on the Federal bench. That includes 17 vacancies on appeals courts. But it is not just the vacancies. Qualified nominees who can fill those seats can't get up-or-down votes to be confirmed in the Senate.

Let me give you an example. Four of the 17 vacancies on Federal appeals courts are in the region that serves my home State of Tennessee—4 of the 17 vacancies. Those nominees have been waiting a combined 13 years for a simple up-or-down vote on this floor—13 years they have been waiting. Either confirm these nominees or reject the nominees but don't leave them hanging. Don't leave our courts hanging. Don't leave the country hanging. If nominees are rejected, fine, that is fair. At least rejection represents a vote. But give nominees the courtesy, the courtesy of a vote.

Third, judicial nominees deserve up-or-down votes because they deserve to be treated fairly. Let me tell you about the nominees we are about to consider, Priscilla Owen and Janice Rogers Brown. Priscilla Owen has been a Texas Supreme Court Justice for the last 10 years. She was reelected with 84 percent of the vote in 2000. Her service won praise from Members of both parties. Former Justice Raul Gonzalez, a Democrat, said:

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

Justice Owen has also been a leader for providing free legal service for the poor and she has worked to soften the impact of legal proceedings on children of divorcing parents.

On May 9, 2001, President Bush nominated Priscilla Owen to the Fifth Circuit Court of Appeals. To this day, more than 4 years later, even though a majority of Senators in this body support her, she has been denied an up-or-down vote. That is just plain wrong, and it is unfair. Priscilla Owen deserves a vote.

Now let me tell you about Janice Rogers Brown. She is the daughter of an Alabama sharecropper. She was educated in segregated schools and worked her way through college and law school. She went on to serve in prominent positions in California State government. Today Janice Rogers Brown is a justice on the California Supreme Court and she was retained as a justice by the people of California with 76 percent of the vote.

On July 25, 2003, President Bush nominated Justice Brown for the U.S. Court of appeals. To this day, nearly 2 years later, even though a majority of Senators support her, she has been denied an up-or-down vote on the floor of the Senate.

That is wrong. That is unfair. Janice Rogers Brown deserves a vote.

Janice Rogers Brown can get 76 percent of the vote in California, Priscilla Owen can get 84 percent of the vote in Texas, but neither can get a vote here on the floor of the Senate. Why? The minority says they are out of the mainstream. Are 76 percent of Californians and 84 percent of Texans out of the mainstream? Denying Janice Rogers Brown and Priscilla Owen a vote is what is out of the mainstream. Justice Brown and Justice Owen deserve better. They deserve to be treated fairly. They deserve the courtesy of a vote.

The consequences of this debate are not lost on any Member of this body. Soon we, 100 Senators, will decide the question at hand: Should we allow a minority of Senators to deny votes on judicial nominees who have the support of a majority of this body or should we restore the 214-year practice of voting up or down on all judicial nominees who come to this floor?

I have to believe the Senate will make the right choice. We will choose the Constitution over obstruction. We will choose principle over politics. We will choose votes over vacillation. And when we do, the Senate will be the better for it. The Senate will be, as Daniel Webster once described it:

> . . . a body to which the country looks, with confidence, for wise, moderate, patriotic, and healing counsels.

To realize this vision, we don't need to look as far back as the age of Webster or Clay or Calhoun. All we must do is look at the recent past and take inspiration from the era of Baker, Byrd, and Dole. For 70 percent of the 20th century, the same party controlled the White House and the Senate. Yet during that period, no minority ever denied a judicial nominee with majority support an up-or-down vote on this floor. Howard Baker's Republican minority didn't deny Democrat Jimmy Carter's nominees. Robert Byrd's Democratic minority did not deny Republican Ronald Reagan's nominees. Bob Dole's Republican minority did not deny Democrat Bill Clinton's nominees. These minorities showed restraint. They respected the appointments process. They practiced the fine but fragile art of political civility. Sure they disagreed with the majority at times, but they nonetheless allowed up-or-down votes to occur.

The Senate must do what is right. We must do what is fair. We must do the job we were elected to do and took an oath to do. We must give judicial nominees the up-or-down votes they deserve. Let us debate, and let Senators be heard. Let the Senate decide, and let this body rise on principle and do its duty and vote.

The PRESIDING OFFICER (Mr. DEMINT). The Senator from New York.

Mr. SCHUMER. Will my colleague from Tennessee yield for a question?

Mr. FRIST. Mr. President, I would be happy to.

Mr. SCHUMER. Mr. President, when I came on the floor, my colleague was talking about the 214 years of tradition of no filibusters. Isn't it correct that on March 8 of 2000, my friend from Tennessee voted to uphold the filibuster of Richard Paez?

Mr. FRIST. Mr. President, in response, the Paez nomination—we will come back and discuss it further. Actually, I would like to come back to the floor and discuss it. It really brings to, I believe, a point what is the issue. The issue is that we have leadership-led partisan filibusters that have obstructed not 1 nominee but 2, 3, 4, 5, 6, 7, 8, 9, 10 in a routine way. The issue is not cloture votes per se; it is the partisan leadership-led use of the cloture vote to kill, to defeat, to assassinate these nominees. That is the difference.

Cloture has been used in the past on this floor to postpone, to get more information, to ask further questions. But each and every time, the nominee, including Paez, got an up-or-down vote on the floor of the Senate where all 100 Senators could vote yes or no, confirm or reject.

Paez got an up-or-down vote. That is all that we ask on the floor, that Priscilla Owen, that Justice Brown get a simple vote, approved, disapproved, confirmed, rejected.

I yield the floor.

The PRESIDING OFFICER. The Democratic leader is recognized.

Mr. REID. Mr. President, the majority leader said that during the Dole years, Clinton nominees were treated fairly. Sixty-nine Clinton nominees were not even given the decency of a hearing. They never saw the light of day. We have participated in hearings. The matters have come to the floor. For my friend to say that Clinton was treated fairly under the Dole years is simply untrue.

Everyone should know that Priscilla Owen and Janice Rogers Brown have had votes right here on the Senate

floor in compliance with the rules of the Senate. They have had votes. It is as if we are retreating 50, 60 years. When you keep telling these falsehoods enough, people start believing them. The American people are not believing this. These two women about whom my friend speaks have had votes.

My friend from Massachusetts asked a question. The President's lawyer, Alberto Gonzales, and now the Attorney General of the United States and previously a member of the Texas Supreme Court, said on multiple occasions that Priscilla Owen's activism was unconscionable. Alberto Gonzales is a smart man. He knows what the word means, but in case someone doesn't, let me read what it does mean. Unconscionable: Shockingly unjust and unscrupulous. That is what the Attorney General of the United States of America says about Priscilla Owen. Mainstream? I think not. Shockingly unjust or unscrupulous—that is what Priscilla Owen is in the mind of the Attorney General of the United States.

I ask unanimous consent that my time be charged against the Democrats' time when we take that, approximately an hour from now.

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

Mr. REID. There will be a lot more said about Priscilla Owen, but I think a fairly good indication of the kind of judge she is should come from the Attorney General of the United States who says that her unconscionable activism is replete through her opinions. I assume he knows what it means. I am confident he does. He is a brilliant man. ''Shockingly unjust, unscrupulous''—those are not the words of the Senate Judiciary Committee, not some special interest group; those are the words of the Attorney General of the United States about Priscilla Owen. And she has had a vote here on the Senate floor.

Janice Rogers Brown, I am sure she has come from nothing to something. I think that is good. That is the way America should be. But before anyone starts crowing about the vote in California, she didn't have an opponent. It is a Missouri system. She had no opponent.

Her opinions, if they weren't on such serious matters, would be laughable—seriously, laughable. The California Supreme Court is made up of seven justices; six of them are Republicans. She has dissented, in the last 6 years alone, 31 different times.

Among other things, she has said: Supreme Court decisions upholding New Deal protections, like the minimum wage and the 40-hour workweek, are, in her words, ''the triumph of our own socialist revolution.'' Tell someone working at General Motors, tell someone working at Titanium Metals in Henderson, NV, that the 40-hour workweek is part of the socialist revolution. Tell somebody working on nights and weekends and holidays that they can't get time and a half, or tell somebody working at McDonald's or in a plastics factory in Fallon, NV, that they are not entitled to the minimum wage. That is Janice Rogers Brown, who has had a vote on the Senate floor.

Yesterday, I spoke about a statement the majority leader made calling the filibuster a procedural gimmick. Again, going to the dictionary, it defines gimmick as ''an ingenious new scheme or angle.'' The filibuster is not a scheme, and it certainly is not new. The filibuster is far from a procedural gimmick. It is part of the fabric of this institution we call the Senate. It was well known in colonial legislatures, before we became a country, and it is an integral part of our country's 214-year history.

The first filibuster in the Congress happened in 1790. It was used by lawmakers from Virginia and South Carolina who were trying to prevent Philadelphia from hosting the first Congress. Since then, the filibuster has been employed hundreds and hundreds and hundreds of times. It has been employed on legislative matters. It has been employed on procedural matters relating to the President's nominations for Cabinet and sub-Cabinet posts. And it has been used on judges for all those years. One scholar estimates that 20 percent of the judges nominated by Presidents have fallen by the wayside, most of them as a result of filibusters.

Senators have used the filibuster to stand up to popular Presidents, to block legislation and, yes, even, as I have stated, to stall executive nominees. The roots of the filibuster are found in the Constitution and in our own rules.

In establishing each House of Congress, Article I, section 5 of the Constitution states that:

Each House may determine the rules.

In crafting the rules of the Senate, Senators established the right to extended debate. And they formalized it with rule XXII almost 100 years ago. This rule codified the practice that Senators could debate extensively.

Under rule XXII, debate may be cut off under limited circumstances: 67 votes to end a filibuster of a motion to amend a Senate rule. That is what is being attempted here. But, no, we are not going to follow the Senate rules. No, because of the arrogance of power of this Republican administration, which controls the Supreme Court, the House, and the Senate. It is not enough that they come to the people's body and say: Let's take our chances by a fair ball game. They are going to change the rules in the middle of the ball game. Talk about people having votes—these nominees, all 10 of them, have had votes. It is unfair for the majority to continually say it is 10. Three of them either retired or withdrew. We have agreed for votes on two others. It is five people who are not in the mainstream. Janice Rogers Brown accuses senior citizens of blithely cannibalizing their grandchildren. That is in the mainstream? Priscilla Owen in the mainstream?

This administration is unwilling to play by the rules. It takes 67 votes to change a Senate rule when there is a filibuster in progress. But we are going to have CHENEY, the Vice President, come sit where the Presiding Officer is sitting now and say that it only takes 51. This great paragon of virtue is going to say it only takes a simple majority. We need 60 votes to end a filibuster against legislative business.

It doesn't take a legal scholar to know this. We have all read in the newspapers that this is a slippery slope. Once you have a rule changed—illegally—then you can do it again. There is precedent on the books. In the future, it will be changed. If we decide we don't like Bolton—the man who was chasing people down the hall throwing papers at them—to be a representative of the U.N., if we decide we want to filibuster him, we can change the rules to say he is the President's man and is entitled to a simple majority vote. You cannot do that. It may be an issue of importance to the President or the majority leader on a legislative matter, so just change the rule. The precedent will have been set. A simple majority is all that is necessary.

A conversation between Thomas Jefferson and George Washington I believe describes the Senate and our Founding Fathers' vision of this body in which we are so fortunate to serve. Jefferson asked Washington:

What is the purpose of the Senate? Washington responded with a question of his own:

Why did you pour that coffee into your saucer?

Jefferson replied:

To cool it.

To which Washington said:

Even so, we pour legislation into the senatorial saucer to cool it.

That is exactly what the filibuster does. It encourages moderation and consensus, gives voice to the minority so cooler heads may prevail. It also separates us from the House of Representatives, where the majority rules through the Speaker appointing the Rules Committee. It is very much in keeping with the spirit of the Government established by the Framers of our Constitution, limited government, separation of powers, and checks and balances. The filibuster is a critical tool in keeping the majority in check. The Presiding Officer, who is a new Member of the Senate, someday will be in the minority. That is the way it works.

This central fact has been acknowledged and even praised by Senators from both parties: The filibuster is a critical tool to keep the majority in check. In fact, another freshman Senator, my colleague from Georgia, Senator ISAKSON, recently shared a conversation he had with an Iraqi Government official. Senator ISAKSON asked this official if he was worried about the majority in Iraq overrunning the minority. The official replied:

No . . . we have the secret weapon called the ''filibuster.''

In recalling the conversation, Senator ISAKSON remarked:

If there ever were a reason for optimism . . . it is one of [the Iraq] minority leaders proudly stating one of the pillars and principles of our Government as the way they would ensure that the majority never overran the minority.

They were comparing what they were going to experience in Iraq to what we now have—the filibuster. Of course, he was right.

I spoke yesterday about Senator Holt and his 1939 filibuster to protect workers' wages and hours. There are also recent examples of the filibuster achieving good.

In 1985, Senators from rural States—even though there were few of them—used the filibuster to force Congress to address a major crisis in which thousands of farmers were on the brink of bankruptcy.

In 1995, 10 years later, the filibuster was used by Senators to protect the rights of workers to a fair wage and a safe workplace.

I cannot stand here and say the filibuster has always been used for positive purposes. It has not. Just as it has been used to bring about social change, it was also used to stall progress that this country needed to make. It is often shown that the filibuster was used against civil rights legislation. But civil rights legislation passed. Civil rights advocates met the burden. It is noteworthy that today, as I speak, the Congressional Black Caucus is opposed to the nuclear option—unanimously opposed to it.

For further analysis, let's look at Robert Caro. He is a noted historian and Pulitzer Prize winner, and he said this at a meeting I attended. He spoke about the history of the filibuster. He made a point about its legacy that was important. He noted that when legislation is supported by the majority of Americans, it eventually overcomes a filibuster's delay, as a public protest far outweighs any Senator's appetite to filibuster.

But when legislation only has the support of the minority, the filibuster slows the legislation—prevents a Senator from ramming it through, and gives the American people enough time to join the opposition.

Mr. President, the right to extended debate is never more important than when one party controls Congress and the White House. In these cases, the filibuster serves as a check on power and preserves our limited government.

Right now, the only check on President Bush is the Democrats' ability to voice their concern in this body, the Senate. If Republicans roll back our rights in this Chamber, there will be no check on their power. The radical rightwing will be free to pursue any agenda they want, and not just in judges. Their power will be unchecked on Supreme Court nominees, the President's nominees in general, and legislation such as Social Security privatization.

Of course, the President would like the power to name anybody he wants to lifetime seats on the Supreme Court and other Federal courts. It is interesting to note that the statistics used by the majority leader do not take into consideration the nominees who we have been willing to clear. Sure, you get statistics like that when they will not bring them forward.

Basically, that is why the White House has been aggressively lobbying Senate Republicans to change Senate rules in a way that would hand dangerous new powers over to the President over two separate branches—the Congress and the judiciary—and he and his people are lobbying the Senate to break the rules to change the rules. I am sorry to say this is part of a disturbing pattern of behavior by this White House and the Republicans in Washington, especially the leadership.

From DICK CHENEY'S fight to slam the doors of the White House so the American people are kept in the dark about energy policy while the White House has the lights turned on—between the public interests or the corporate interests, it is always the corporate interests—to the President's refusal to cooperate with the 9/11 Commission, to Senate Republicans' attempt to destroy the last check in Washington on Republican power, to the House majority's quest to silence the minority in the House, Republicans have sought to destroy the balance of power in our Government by grabbing power for the Presidency, silencing the minority, and weakening our democracy.

America does not work that way. The radical rightwing should not be allowed to dictate to the President and to the Republican Senate leaders, as they are trying to do.

For 200 years, we have had the right to extended debate. It is not some ''procedural gimmick.'' It is within the vision of the Founding Fathers of this country. They did it; we didn't do it. They established a government so that no one person and no single party could have total control.

Some in this Chamber want to throw out 214 years of Senate history in the quest for absolute power. They want to do away with Mr. Smith, as depicted in that great movie, being able to come to Washington. They want to do away with the filibuster. They think they are wiser than our Founding Fathers. I doubt that is true.

Mr. President, will the Senator notify us as to how much time the Republicans have in the first wave of statements and how much time the Democrats have when they are allowed to make statements?

The PRESIDING OFFICER (Mr. GRAHAM). The Republicans have 42 minutes and the Democrats have 41 minutes.

Mr. REID. I thank the Chair.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Parliamentary inquiry: It was my understanding that I was to have 1 hour because a good bit of time has been consumed by dialog and questions earlier today.

Mr. REID. Mr. President, I will respond, if I could. As indicated, that is why I asked the question. You have 42 minutes and we have 41. We need to stick to that. I would have no objection to your using the full time and deducting 15 minutes, or whatever it is, from the next hour that you have. That would be appropriate.

Mr. SPECTER. Mr. President, that would be acceptable to me. I am the manager, in my capacity as chairman of the Judiciary Committee, on Priscilla Owen. We would accommodate to have an equal amount of time allotted to the Democrats. It may be, Mr. President, that I will not use the full hour.

Mr. REID. I simply say, if the Senator needs the full hour, I ask that it be deducted so we can kind of keep on track here. We will use 42 minutes our first go-around. We ask that you deduct whatever time you use off of the second time that you are to be recognized.

Mr. FRIST. Mr. President, I ask the distinguished chairman this. We have 41 minutes on our side and 42 on the other side. If you don't complete your remarks in 41 minutes, then we will agree to yield an equivalent amount of time in the next hour, to deduct that equal amount of time in the next hour from both sides.

Mr. REID. We don't need the time on our side.

Mr. LEAHY. Mr. President, I think the suggestion the Senator from Pennsylvania made was a good one. Whatever time he uses beyond the 40 minutes, we get an equal amount of time here. That way we would also know where we stand. The distinguished Senator from Nevada—

Mr. REID. Then following the two managers making their statements, thereafter, we go to an hourly timeframe and we have to, I think—it would be good for the managers not to be extending the time because it makes it impossible when you have people scheduled to come over here. I agree to this under the extraordinary circumstances also of the two managers of this nomination—that they be given a full hour. Following that, the Republicans would be recognized for an hour, and the Democrats for an hour, and we go on that basis.

Mr. President, I have somebody here complaining that we have already set the schedule. We are entitled to the time by the rules.

Mr. FRIST. Mr. President, I ask if the chairman would try to keep his remarks within the time limit agreed to, about 42 minutes, and we can stay on schedule. I ask the Democratic leader, would that be acceptable? I ask unanimous consent that we, as agreed earlier, have 42 minutes on our side and 41 minutes on the other side.

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

The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, as we begin consideration of the nomination of Texas Supreme Court Justice Priscilla Owen for the U.S. Court of Appeals for the Fifth Circuit, the Senate Chamber is filled with anticipation that we may be embarking on a historic debate which could redefine minority rights in the Senate and impact our fundamental constitutional doctrine of separation of powers.

As we all know, if 60 votes are not obtained to invoke cloture to cut off debate on this nominee and three others to be called up sequentially for confirmation votes, a ruling is likely to be sought to change the required vote from 60 to 51, unless a compromise can first be reached.

This controversy did not arise, in my judgment, because Democrats concluded that Miguel Estrada and nine other President Bush circuit court nominees were unqualified, so they should be filibustered, but rather because it was payback time for Republican treatment of President Clinton's nominees.

While there have been a few scattered cloture votes in the history of the Senate, it is totally unprecedented for a party to engage in such a systematic pattern of filibusters. In almost 25 years on the Judiciary Committee, I have seen circuit court nominees confirmed routinely where their qualifications were no better than those under fire today. These filibusters are the combination of a power struggle between Republicans and Democrats as to which party can control the judicial selection process through partisan maneuvering.

As a starting point, it is important to acknowledge that both sides—Democrats and Republicans—have been at fault. Both claim they are the victims and that their party's nominees have been treated worse than the other's. Both sides cite endless statistics. I have heard so many numbers spun so many different ways that my head is spinning. I think even Benjamin Disraeli, the man who coined the phrase, there are ''lies, damn lies, and statistics,'' would be amazed at the creativity employed by both sides in contriving numbers in this debate.

In 1987, upon gaining control of the Senate and the Judiciary Committee, the Democrats denied hearings to seven of President Reagan's circuit court nominees and denied floor votes for two additional circuit court nominees. As a result, the confirmation for Reagan circuit nominees fell from 89 percent prior to the Democratic takeover to 65 percent afterwards.

While the confirmation rate decreased, the length of time it took to confirm judges increased. From the Carter administration through the first 6 years of the Reagan administration, the confirmation process for both district and circuit court seats consistently hovered at approximately 50 days. For President Reagan's final Congress, however, the number doubled to an average of 120 days for these nominees to be confirmed. The pattern of delay and denial continued for 4 years of President George H.W. Bush's administration. President Bush's lower court nominees waited on average 100 days to be confirmed, which is about twice as long as had historically been the case. The Democrats also denied hearings for more nominees.

President Carter had 10 nominees who did not receive hearings. For President Reagan, the number was 30. In the Bush senior administration, the number jumped to 58.

When we Republicans won the 1994 election and gained the Senate majority, we exacerbated the pattern of delay and blocking of nominations. Over the course of President Clinton's Presidency, the average number of days for the Senate to confirm judicial nominees increased even further to 192 days for district court nominees and 262 days for circuit court nominees. Through blue slips and holds, 70 of President Clinton's nominees were blocked.

During that time, I urged my Republican colleagues on the Judiciary Committee to confirm well-qualified Democrats. For example, I broke rank with my colleagues on the Republican side to speak and vote in favor of Marsha Berzon and Richard Paez.

After the 2002 elections, with control of the Senate returning to Republicans, the Democrats resorted to the filibuster on 10 circuit court nominations, which was the most extensive use of that tactic, really unprecedented, in the Nation's history.

The filibuster started with Miguel Estrada, one of the most competent and talented appellate lawyers in the country. The Democrats followed with filibusters against nine other circuit court nominees. During the 108th Congress, there were 20 cloture motions on 10 nominations, and all 20 failed.

To this unprecedented move, President Bush responded by making for the first time in the Nation's history two recess appointments of nominees who had been successfully filibustered by the Democrats. That impasse was broken when President Bush agreed to refrain from further recess appointments.

Against this background of bitter and angry recriminations, with each party serially trumpeting the other party to get even or really to dominate, the Senate now faces dual threats. One called the filibuster and the other the constitutional or nuclear option which rivals the U.S.-U.S.S.R. confrontation of mutual assured destruction. Both situations are accurately described by the acronym, MAD.

We Republicans are threatening to employ the constitutional or nuclear option to require only a majority vote to end judicial filibusters. The Democrats are threatening to retaliate by stopping the Senate agenda on all matters except national security and homeland defense. Each ascribes to the other the responsibility for blowing up the place.

This gridlock occurs at a time when we expect a U.S. Supreme Court vacancy within the next few months. If a filibuster would leave an eight-person Court, we could expect many 4-to-4 votes since the Court now decides cases with 5-to-4 votes. A Supreme Court tie vote would render the Court dysfunctional leaving in effect the circuit court decision with many splits among the circuits, so the rule of law would be suspended on many major issues.

Regardless of which side wins the vote on the constitutional or nuclear option, there would be serious consequences. If the option succeeds, first, the rights of the Senate's minority would be significantly diminished, and, second, reducing the cloture vote on nominees would inevitably and ultimately invite a similar attack on cloture on the legislative calendar which would change the nature of the Senate tremendously.

On the other hand, if the option fails, there are undesirable consequences. Then, any Senate minority party of 41 or more would be emboldened to institutionally and permanently revise the balance of power between the President's constitutional power of nominations and the Senate's constitutional authority for confirmation.

Second, I think it would embolden the Democrats to use the filibuster on other Presidential nominations, such as John Bolton whose nomination is pending before the Senate for ambassador to the U.N.

After a Democratic member of the Foreign Relations Committee put a hold on the Bolton nomination, the ranking member was quoted on a Sunday talk show as saying:

It's too premature to talk about filibustering Mr. Bolton.

Therefore, it is obvious that a filibuster on Bolton is not ruled out.

A vote on the constitutional or nuclear option could affect an imminent nomination or nominations to the Supreme Court. If a vote on the option failed, it would be a reaffirmation of the Democratic minority's power to filibuster any judicial nominee without necessarily showing substantial cause or extraordinary circumstances. If the option passed, it could give the President greater leverage, reducing his concern that his nomination could be thwarted.

Historically—and I believe this is of tremendous importance, Mr. President—historically, the constitutional separation of powers has worked best when there was a little play in the so-called joints. When both sides are unsure of the outcome, the result is more likely to be in the middle rather than at either extreme.

On the current state of the record, in my opinion, the outcome of a prospective vote on the constitutional or nuclear option is uncertain. I have not rendered a decision because I believe I can be most helpful on brokering a compromise by remaining silent. When neither side is confident of success—

and I think that is the case today—the chances for compromise are far greater.

As I see it, the national interest would be served by structuring a compromise to return to the status quo before 1987. When Senator HARRY REID, the Democratic leader, says his party would abandon the filibuster unless there are ''extraordinary circumstances,'' that escape clause should be narrowly defined and codified in a Senate rule instead of an agreement between the parties' leaders.

Even with a narrowly defined definition of what constitutes extraordinary circumstances, the final decision would necessarily reside with the individual Senators in the case of any perceived ambiguity. If we Republicans then concluded that there was not a good-faith exercise of extraordinary circumstances, we could regard the agreement as vitiated and feel free to resort to the constitutional or nuclear option.

To achieve a compromise, Senators must take the initiative without being unduly influenced by the far left or far right. It has not escaped attention that the so-called groups are using this controversy as major fundraising vehicles. I continue to be personally highly offended by the commercials, from Gregory Peck in 1987 to the ones broadcast this weekend in Pennsylvania, seeking to influence my own vote. Believe me, they are counterproductive or ineffectual at best and certainly insulting.

Senators, with our leaders, must take charge to craft a way out. The fact is, all or almost all of the Senators want to avoid the pending crisis. I have had many conversations with my Democratic colleagues about the filibuster of judicial nominees. Many of them have told me they do not personally believe it is a good idea to filibuster President Bush's judicial nominees in such a pattern. They believe this unprecedented use of a filibuster does damage to this institution and to the prerogatives of the President. Yet despite their concerns, they have given in to party loyalty and voted repeatedly to filibuster Federal judges in the last Congress.

Likewise, there are many Republicans in this body who question the wisdom of the constitutional or nuclear option. They recognize that such a step would be a serious blow to the rights of the minority that have always distinguished this body from the House of Representatives. Knowing that the Senate is a body that depends upon collegiality and compromise to pass even the smallest resolution, many of my Republican colleagues worry that the rule change would impair the ability of the institution to function.

I have repeatedly heard colleagues on both sides of the aisle say it is a matter of saving face. But as yet, we have not found a formula to do so. I suggest the way to work through the current impasse is to bring to the floor circuit court nominees one by one for up-or-down votes with both leaders explicitly releasing their Members from party-line voting.

There are at least five, and perhaps as many as seven, pending circuit court nominees who could be confirmed or at least voted up or down. If the straitjacket of party loyalty were removed, even more might be confirmed.

In moving in the Judiciary Committee to select nominees for floor action shortly after becoming chairman earlier this year, I first selected William Myers because two Democrats had voted to end debate in the 108th Congress and one candidate for the Senate in 2004 since elected made a campaign statement that he would vote to end the Myers filibuster and confirm him. Adding those 3 votes to 55 Republicans, we were within striking distance to reach 60 or more.

I carefully examined Myers' record. Noting that he had opposition from some groups such as Friends of the Earth and the Sierra Club, it was my conclusion that nonetheless his environmental record was satisfactory, or at least not a disqualifier, as detailed in my statement at the Judiciary Committee executive session on March 17.

To be sure, critics could pick at his record, as they could at any Senator's record, but overall, in my judgment, Mr. Myers was worthy of confirmation.

I then set out to solicit views on Myers, including the ranchers, loggers, miners, and farmers. In those quarters, I found significant enthusiasm for his confirmation. I then urged them to have their members contact Senators who might be swing votes. I then followed up with personal talks to many of those Senators and found several prospects to vote for cloture.

Then the screws of party loyalty were applied and tightened, and the prospects for obtaining the additional votes to secure 60 for cloture—the prospects vanished. I am confident that if the party pressure had not been applied, the Myers filibuster would have ended, and he would have been confirmed. That result could still be obtained if the straitjacket of party loyalty were removed on the Myers nomination.

Informally, but authoritatively, I have been told that the Democrats will not filibuster Thomas Griffith or Judge Terrence Boyle. Griffith is on the Senate calendar awaiting floor action and Boyle is on the agenda for Judiciary Committee action. Both could be confirmed this month.

There are no objections to three nominations from the State of Michigan for the Sixth Circuit, Richard Griffin, David McKeague and Susan Neilsen, but their confirmations are held up because of objections to a fourth nominee. I urge my Democratic colleagues to confirm these three uncontested Michigan Sixth Circuit nominees and fight out the fourth vacancy and the Michigan District Court vacancies on another day. The Michigan Senators do make a valid point on the need for consultation on the other Michigan vacancies, and I believe that can be accommodated.

In the exchange of offers and counteroffers between Senator FRIST and Senator REID, Democrats have made an offer to avoid a vote—on the nuclear option—by confirming one or perhaps two of the four filibustered judges: Priscilla Owen, Janice Rogers Brown, William H. Pryor, or William Myers, with the choice to be selected by Republicans. An offer to confirm any one or two of four nominees is an explicit concession that each is qualified for the court and that they are being held hostage as pawns in a convoluted chess game which has spiraled out of control.

If the Democrats really believe each one is unqualified, a deal for confirmation for any one of them is repugnant to the basic Democratic principle of individual fair and equitable treatment and violates Senators' oaths on the constitutional confirmation process. Such a deal on confirmations would only confirm public cynicism about what goes on in Washington behind closed doors.

Instead, let the Senate consider each of the four without the constraints of party-line voting. Let both leaders release their caucuses from the straitjacket of party-line voting and even encourage Members to vote their consciences on these issues of great national importance. Let us revert to the tried-and-tested method of evaluating each nominee individually.

In a ''press availability'' on March 10, Senator REID referred to the nuclear option and said:

> If it does come to a vote I ask Senator Frist to allow his Republican colleagues to follow their conscience. Senator Specter recently said that Senators should not be bound by Senate loyalty—they should be bound by Senate loyalty rather than by party loyalty on a question of this magnitude. I agree.

But Senator REID did not make any reference to my urging him to have the Democrats reject the party-line straitjacket on filibustering. If both parties were to vote their consciences without regard to the party line, I believe that the filibusters would disappear in the context of the current constitutional crisis and many, if not most, Republicans who do not like the constitutional/nuclear option would abandon it.

The fact is that any harm to the Republic, at worst by confirming all of the pending circuit court nominees, is infinitesimal compared to the harm to the Senate whichever way the vote would turn out on the nuclear/constitutional option. None of these circuit judges could make new law because all are bound and each agreed on the record to follow U.S. Supreme Court decisions. While it is frequently argued that circuit court opinions are, in many cases, final because the Supreme Court grants certiorari in so few cases, circuit courts sit in panels of three so that no one of these nominees could

unilaterally render an egregious decision, since at least one other circuit judge on the panel must concur.

If a situation does arise where a panel of three circuit judges makes an egregious decision, it is subject to correction by the court en banc, and then the case may always be reviewed by the Supreme Court if it is really egregious.

While it would be naive to deny that the quid pro quo or log rolling are not frequent congressional practices, these approaches are not the best way to formulate public policy or make governmental decisions. The Senate has a roadmap to avoid the nuclear winter in a principled way. Five of the controversial judges can be brought up for up-or-down votes on this state of the record, and the others are entitled to individualized treatment on the filibuster issue. It may be that the opponents of one or more of these judges may persuade a majority of Senators, including some Republican Senators, that confirmation should be rejected. A group of Republican moderates has, with some frequency, joined Democrats to defeat a party-line vote. The President has been explicit in seeking only up-or-down votes as opposed to commitments on confirmation.

The Senate has arrived at this confrontation by exacerbation, as each side ratcheted up the ante in delaying and denying confirmation to the other party's Presidential nominees. The policy of conciliation and consultation could diffuse the situation. One good turn deserves another. If one side realistically and sincerely takes the high ground, there will be tremendous pressure on the other side to follow suit. So far, offers by both sides have been public relations maneuvers to appear reasonable, to avoid blame and place it elsewhere.

Meanwhile, the far left and the far right are urging each side to the shun compromise. One side shouts ''pull the trigger.'' The other side retorts, ''filibuster forever.'' Their approach would lead to the extreme judges at each end of the political spectrum as control of the Senate inevitably shifts from one party to another.

Late yesterday afternoon, a group of so-called moderate Senators met with the leaders, and one idea which came from one of the Democratic Senators was to consider the five nominees—Owen, Brown, Pryor, and Myers, along with Judge Saad of Michigan—and then to either have three confirmed, two rejected; or two confirmed and three rejected.

The suggestion was then made that if all of the nominees could get a floor vote, that there might be a whip check to determine whether two might not pass on a rollcall vote, which is the way the Senate functions. That consideration I think is worth further exploration.

A well-known story is told about Benjamin Franklin. Upon exiting the Constitutional Convention in Philadelphia, he was approached by a group of citizens asking what sort of a government the constitutional delegates had created. Franklin responded, ''A Republic, if you can keep it.''

In this brief response, Franklin captured the essential fragility of our great democracy. Although enshrined in a written Constitution and housed in granite buildings, our government is utterly dependent upon something far less permanent, the wisdom of its leaders. Our Founding Fathers gave us a great treasure, but like any inheritance, we pass it on to successive generations only if our generation does not squander it. If we seek to emulate the vision and restraint of Franklin and the Founding Fathers, we can hand down to our children and grandchildren the Republic they deserve, but if we turn our backs on their example, we will debase and cheapen what they have given us.

At this critical juncture in the history of the Senate, let us tread carefully, choose wisely, and prove ourselves worthy of our great inheritance. Since the United States and the Union of Soviet Socialist Republics avoided a nuclear confrontation in the Cold War by concessions and confidence-building measures, why should not Senators do the same by crossing the aisle in the spirit of compromise?

Mr. President, I now turn to the specifics on the nomination of Texas Supreme Court Justice Priscilla Owen. She comes to the floor of the Senate for consideration with an outstanding academic record. She attended the University of Texas in 1972 and 1973. She graduated from Baylor University in 1975, cum laude, from the Baylor University School of Law in 1977, cum laude, evidencing an excellent academic record. She has a fine professional record with a practice of Sheehy, Lovelace and Mayfield, where she was a law clerk in 1976 and 1977, and then an associate and partner at Andrews, Kurth, Campbell and Jones from 1978 to 1994. From 1995 to the present, she has been a justice on the Supreme Court of Texas.

She was at the top of her law school class; in 5 years, completed law school and undergraduate, contrasted with the usual 7. She had the highest score on the statewide bar exam and was reelected with 84 percent of the vote and endorsement of every major newspaper.

The American Bar Association has unanimously rated her well qualified.

In the course of her work on the Texas Supreme Court, she has handed down many decisions which have demonstrated real analytical and real legal scholarship. She has been criticized on some of the decisions which she has rendered on the so-called judicial bypass.

Under the a Texas law, constitutional under U.S. Supreme Court precedent, a minor may have an abortion if there is notice to at least one parent.

Justice Owen has been criticized, with a very broad brush, for being hostile to Roe v. Wade, which on the record is simply not true.

In the case of Jane Doe (I), in the year 2000, she voted with the majority but filed a concurring opinion. The language she used was that the legislature intended for the minors to learn about arguments ''surrounding abortion'', and not ''against'' abortion. So, in handing down this decision, she was not urging that minors making their decision on obtaining an abortion hear the arguments against abortion, but rather ''surrounding,'' which would obviously state both sides.

On cases where she has denied judicial bypass, they have been in the context of sound judicial principle, where she has refused to overturn the findings of the lower court judge who had access to the witnesses and could see and hear exactly what was going on and had a much better basis for fact-finding.

Illustrative of this position is the case captioned In re Doe (II), a 2000 Supreme Court of Texas decision where the court reversed and ordered a judicial bypass.

It is true Justice Owen was one of three justices who dissented, but she did so because she concluded that the majority improperly reweighed the evidence and usurped the rule of the trial judge. As a sound legal principle, the trial judge is entitled to deference on the findings of fact because the trial judge, rather than the appellate court, has heard the witnesses.

There are other notable cases where Justice Owen has handed down thoughtful, informed, scholarly opinions. They have not pleased everyone, but that is what judges do. One case is particularly worthy of note, a case captioned Operation Rescue National v. Planned Parenthood of Houston and Southwest Texas. In this case, doctors and abortion clinics brought action for civil conspiracy, tortious interference, and invasion of privacy and property rights against anti-abortion groups and protesters, seeking injunctive relief and damages. The trial court entered a $1.2 million judgment on jury verdict and a permanent injunction creating buffer zones around certain clinics and homes in which protesters could not protest.

The issue was whether the jury verdict was based on a proper jury charge and whether the injunction infringed on the protesters' freedoms of expression. Justice Owen joined the 7 to 2 majority decision which affirmed the jury verdict was proper under Texas law.

The decision also upheld the injunction while modifying it in certain respects. Under the majority's opinion, a limited number of peaceful protesters could approach patients and act as sidewalk counselors who would seek to discuss the issues surrounding abortions with patients, as long as such discussions were ceased upon request of the patient. The majority concluded this type of protesting would not endanger patients' health and safety.

Following Justice Owen's nomination to the Fifth Circuit, pro-choice groups criticized the ruling as hostile to abortion rights. But at the time the ruling was handed down, Planned Parenthood of Houston and Southwest Texas hailed it as ''a complete and total victory.''

This case is illustrative of some of the difficult issues involved in that kind of a factual situation. In enjoining this kind of harassing practice, subject to certain limitations, and upholding a verdict in excess of $1 million, Justice Owen exercised judicial discretion and sensibility in arriving at the decision.

In the case of Ft. Worth Osteopathic Hospital, Inc. v. Reese, Justice Owen handed down decisions demonstrating respect for Roe v. Wade under a factual situation where plaintiffs brought wrongful death and survival action on behalf of a viable fetus who died in utero against the treating physicians and the hospital and also brought medical negligence claims in their individual capacities.

Justice Owen joined the Texas Supreme Court's 8-to-1 decision holding that the Texas wrongful death and survival statutes do not violate the equal protection clause by prohibiting parents of a stillborn fetus from bringing those claims. Justice Owen, in joining in that decision, was explicitly following the precedent of Roe v. Wade.

There is a series of cases which illustrates judicial temperament, judicial demeanor, a sound judicial philosophy, which I ask unanimous consent to have printed in the RECORD: First, *Chilkewitz* v. *Hyson*, 22 S.W.3d 825 (Tex. 1999); second, *In Re D.A.S.*, 973 S.W.2d 296 (Tex. 1998); third, *Abrams* v. *Jones* 35 S.W.3d 620 (Tex. 2000); fourth, *Quick* v. *City of Austin*, 7 S.W.3d 109 (Tex. 1999); fifth, *Hernandez* v. *Tokai Corporation*, 2 S.W.3d 251 (Tex. 1999); sixth, *NME Hospitals* v. *Rennels*, 994 S.W.2d 142 (Tex. 1999); next, *Kroger Company* v. *Keng*, 23 S.W.3d 347 (Tex. 2000); and, *Crown Life Insurance Company* v. *Casteel*, 22 S.W.3d 378 (Tex. 2000), all of which show Justice Owen to be a very sound jurist and worthy of confirmation to the Court of Appeals for the Fifth Circuit.

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

CHILKEWITZ V. HYSON

22 S.W.3D 825 (TEX. 1999)

Facts: Plaintiff brought suit against defendant doctor for medical practice. After the statute of limitations ran, the defendant moved for summary judgment on the basis that he was a professional association and because the plaintiff had not claimed the professional association as a defendant, the statute of limitations barred suit against him.

Issue: Whether the Texas Rules of Civil Procedure permitted a suit against a party's assumed name, in this case the doctor, if the plaintiff did not name the defendant's association as a defendant in the suit.

Outcome: A unanimous Texas Supreme Court, in an opinion written by Justice Owen, held that the rules of civil procedure permitted suit against a party in its assumed name. The court also held that there was evidence in this case that the defendant's professional association conducted business in the name of the individual doctor and the plaintiff's naming of the defendant's assumed name in the complaint was sufficient.

Note: Justice Owen stood up against formalism and allowed a Plaintiff to bring suit for medical malpractice.

IN RE D.A.S

973 S.W.2D 296 (TEX. 1998)

Facts: The defendants, two juveniles, challenged a ruling that held the Anders procedure, which requires defense counsel, if they find a case to be wholly frivolous, to request permission to withdraw and submit a briefing to the court with anything in the record that might arguably support the defendant's appeal, was inapplicable in juvenile cases. The defendants requested mandamus relief.

Procedural History: The Court of Appeals rejected the challenge and refused to allow the defense counsel to withdraw.

Issue: Whether the Anders procedure applies to juvenile cases.

Outcome: Justice Owen, writing for the 6–2 majority, held that the Anders procedure applied to juvenile proceedings because Anders protected the juveniles' statutory right to counsel on appeal. Justice Owen found that extending Anders to juvenile appeals properly balanced a juvenile's statutory right to counsel against the appointed counsels' obligation not to prosecute frivolous appeals. She also determined that Anders provided the juveniles with more protection because both the attorney and the court of appeals would have to determine whether there were any arguable issues on appeal.

Dissent: The dissent argued that mandamus relief was inappropriate. Judicial review through petition for review from the court of appeals' final decision was an adequate remedy for the juvenile defendants.

ABRAMS V. JONES

35 S.W.3D 620 (TEX. 2000)

Facts: In the midst of an acrimonious divorce, the plaintiff father sued his daughter's psychologist for access to his minor daughter's medical records.

Issue: Whether a parent has judicial recourse under Tex. Health & Safety Code Ann. § 611.0045(e) when a treating psychologist refuses to allow another psychologist, selected by the challenging parent, access to the minor-child's medical records.

Outcome: Justice Owen, writing for the 7–2 majority, reversed and denied access of the medical records to the father. Justice Owen held that the Texas legislature imposed some limits on the parent's right of access to confidential mental health records. Justice Owen found that the psychologist had presented sufficient evidence that the child would be harmed if the records were released to the father.

QUICK V. CITY OF AUSTIN

7 S.W.3D 109 (TEX. 1999)

Facts: Landowners challenged the City of Austin's Save Our Springs Ordinance, a water pollution control measure enacted in 1992. The landowners contested the ordinance because it was arbitrary, unreasonable, and inefficient. They also asserted that the Ordinance was void because it was enacted without a public hearing, it impermissibly regulated the number, use, and size of buildings in the City's extraterritorial jurisdiction, and the Texas Natural Resource Conservation Commission had not approved it.

Issue: Whether the City of Austin's ''Save Our Springs'' Ordinance was a valid exercise of city authority.

Outcome: Justice Owen joined the 5–4 majority, which held that the Ordinance was a valid legislative act that did not need to be approved by the Texas Natural Resource Conservation Commission to become effective and enforceable. While the Ordinance clearly affected land use, its methods were nationally recognized limitations and thus furthered the stated goal of protecting and preserving a clean water supply. The Court found that the Legislature did not limit the city's authority to set the ordinance's effective date; therefore, Austin was not required to obtain permission of the Commission before enacting the ordinance.

HERNANDEZ V. TOKAI CORP.

2 S.W.3D 251 (TEX. 1999)

Facts: Minor child misused a butane lighter and was injured. Suit brought against manufacturer and distributor of the lighters. The trial court granted summary judgment for the lighter manufacturer. On appeal, the 5th Circuit Court of Appeals submitted a certified question as to whether the action could proceed under Texas law.

Issue: Whether a defective-design products liability claim against the product's manufacturer may proceed if the product was intended to be used only by adults, if the risk that children might misuse the product was obvious to the product's manufacturer and to its intended users, and if a safer alternative design was available.

Outcome: The 5th Circuit Court of Appeals submitted a certified question as to whether the action could proceed under Texas law. Justice Owen joined the unanimous opinion of the court, holding that a defective-design claim may proceed for an injury caused by a product that did not have a child-resistant mechanism that would have prevented or substantially reduced the risk of injury from a child's foreseeable misuse if, with reference to the product's intended users, the design defect made the product unreasonably dangerous, a safer alternative design was available, and the defect was the cause of the injury.

Note: Justice Owen held that a manufacturer of cigarette lighters has a duty to make certain that its products are child resistant—even though the lighters were only meant to be used by adults.

NME HOSPITALS, INC. V. MARGARET A. RENNELS, M.D.,

994 S.W.2D 142 (TEX. 1999)

Facts: The plaintiff doctor sued NME Hospitals for unlawful employment discrimination under the Act and conspiracy to violate the Act. The defendant hospital filed for summary judgment because it was not her direct employer under the Texas statute.

Procedural History: The lower trial court granted summary judgment for the hospital. The appeals court reversed.

Issue: Whether a plaintiff may sue someone other than her own employer for an unlawful employment practice under Texas Labor Code §21.055, the Texas Commission on Human Rights Act

Outcome: In a case of first impression, the Texas Supreme Court unanimously held that to have standing under the Texas statute the plaintiff must show: (1) that the defendant is an employer within the statutory definition of the Act; (2) that some sort of employment relationship exists between the plaintiff and a third party; and (3) that the defendant controlled access to the plaintiff's employment opportunities and denied or interfered with that access based on unlawful criteria. Finding that the plaintiff met these criteria, the Court held that the plaintiff had standing to sue the client of her employer for unlawful employment practice.

KROGER CO. V. KENG

23 S.W.3D 347 (TEX. 2000)

Facts: Plaintiff brought suit against the defendant grocery store, a workers' compensation nonsubscriber, alleging that the

store's negligence proximately caused her to suffer injuries during an on the job accident. Kroger denied the allegations and responded that plaintiff's conduct either caused or contributed to the incident, entitling Kroger to protection under the comparative responsibility statute.

Issue: Whether a non-subscriber to workers' compensation insurance is entitled to a jury question regarding its employee's alleged comparative responsibility for his or her injuries.

Outcome: Justice Owen joined the Texas Supreme Court's unanimous opinion, affirming the court of appeals' decision and holding that a non-subscribing employer was not entitled to a jury question on its employee's alleged comparative responsibility. The court relied on the legislative intent of Texas' comparative responsibility statute and deference to the legislature in reconciling a Texas Court of Appeals' circuit split.

Note: Justice Owen ruled for the plaintiff and a plaintiff's right not to have her workers compensation claims reduced for comparative negligence.

CROWN LIFE INSURANCE CO. V. CASTEEL

22 S.W.3D 378 (TEX. 2000)

Facts: Casteel sold insurance policies as an independent agent of Crown Life Insurance Company. One of the policies sold by Casteel led to a lawsuit by policyholders against Casteel and Crown. In that lawsuit, Casteel filed a cross-claim against Crown for deceptive trade practices. The trial court rendered judgment that Casteel did not have standing to bring suit against Crown, holding that Casteel was neither a ''person'' as defined under Article 21.21 of the Texas Insurance Code, nor a ''consumer'' under the Deceptive Trade Practices Act (DTPA), and therefore lacked standing to bring suit under those statutes. The court of appeals held that Casteel was a ''person'' with standing to sue Crown under Article 21.21, but that Casteel did not have standing to sue under the incorporated DTPA provisions because he was not a ''consumer.''

Issue: Whether an insurance agent is a ''person'' with standing to sue an insurance company under Article 21.21 and whether an insurance agent must also be a ''consumer'' to have standing to recover under Article 21.21 for incorporated DTPA violations.

Outcome: Justice Owen joined a unanimous Texas Supreme Court in holding that an insurance agent does not have standing to sue as ''consumer'' for violations of the DTPA. However, the court also held that despite not having standing to bring suit under the DPTA, an insurance agent is a ''person'' with standing to sue an insurance company for violations of Article 21.21 of the Insurance Code.

Note: Illustrates Justice Owen's willingness to rule against the insurance and allow the plaintiff to bring suit.

Mr. SPECTER. In conclusion, Mr. President, I know my time is nearly up. I had a chance to talk at some length with Justice Priscilla Owen. She is an intelligent, articulate lawyer who has had very substantial experience on the Supreme Court of her State for some 10 years. She has been endorsed by 84 percent of the electorate of Texas. She has recognized the Supreme Court decision in Roe v. Wade and is bound to apply it and has recognized its principles and is not at all hostile to Roe v. Wade.

In the 24 years and 4 months I have served on the Judiciary Committee, I have voted on many, many, many circuit judges. If Priscilla Owen had come before this Senate in any other context for consideration, except get-even time in response to the way President Clinton's nominees were treated, with some 70 rejected, in a spiraling context which started the last 2 years of President Reagan's administration, had she come here at any other time, she would have moved through this Senate on a voice vote or been unanimously confirmed.

I suggest a careful reading of her record and a careful analysis, aside from the tumult and turmoil of the Senate today, supports her confirmation.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, how much time is available to the Senator from Vermont?

The PRESIDING OFFICER. There is 39 minutes.

Mr. LEAHY. I thank the Presiding Officer.

It is my understanding the distinguished Senator from Pennsylvania did not use extra time?

The PRESIDING OFFICER. That is correct.

Mr. LEAHY. Mr. President, I recommend all the Republicans and Democrats listen to the speech given by the distinguished Senator from Pennsylvania. I said to him earlier this morning if it were he and I who were allowed to work this out, we could work it out probably in less than an hour. I said the same thing to the President and to our two leaders.

Hopefully everyone understands the significance of this debate and what the Republican leader, the majority leader is doing. He has decided to trigger the nuclear option. That is what it is. This nuclear option is something any Senate majority could have done any time over the past 50 years. It boils down to the Republican Senate leader declaring the Senate rules governing filibusters are out of order.

The nonpartisan Senate Parliamentarian has indicated that would violate the Senate rules. It would. The nonpartisan Congressional Research Service has studied this and concluded it is unprecedented. Why? Because it amounts to breaking the rules.

We are talking about judging whether nominees will be fair and impartial judges who will follow the law and the majority is willing to break the rules to do that. When you have a slim majority and are willing to use parliamentary brute force, if you want to break the rules, you can. It does not make it right. It makes it wrong, but you can do it.

The American people ought to recognize this for what it is, an abuse of power to advance a power grab. It is an effort by the White House and the Republican Senate majority to undercut the checks and balances of the Senate. They intend to use majority power to override the rights of the minority.

Actually, it is not an isolated effort. It is part of a sustained effort by this administration and partisan operatives in the Congress to consolidate power in one branch, the executive branch, and ignore our constitutional history of three separate branches acting as checks and balances on each other. It is an effort at one-party rule. It undercuts the rights of the minority in the Senate, it undermines the role of the Senate as a check on the executive, and it leads to a Republican rubberstamp on a less independent judiciary.

The constitutional protections of the American people are at stake in this debate, not just someone's political future, the constitutional protections of the American people. At stake are the protections provided for the American people by the judicial branch against overreaching by the political branches; by the Senate against an aggressive executive branch, and by the minority against the tyranny of the majority.

As this debate begins, I urge the American people to be involved because it is their rights that are at stake. It is the independence, fairness, and nonpartisan protection of the judiciary that protects their rights that is being threatened. It is a constitutional check that the Senate was intended by the Founders to keep the executive from acting like a king, that is being threatened by curtailing the rights of the minority.

This is an exercise in breaking the rules to change the rules. Note that as this debate begins, it begins in accordance with the Senate rules, including rule XXII, the longstanding rule the Republican majority intends to override by the end of this process by parliamentary brute force.

The Senate is now being threatened with a fundamental change through a self-inflicted wound. ''Master of the Senate'' author Robert Caro recalled an important chapter in the Senate and the Nation's history. Consider this and contrast it with what is happening here today.

When Senator Lyndon Johnson of Texas left the Senate, he was the most powerful majority leader in the history of this country. When he was elected Vice President with President Kennedy and he was preparing to leave the Senate, he told his protege and successor, Senate Mansfield of Montana, that he, Johnson, would keep attending the Democratic luncheons and help his successor as majority leader in running the Senate. Senator Mansfield said no, Vice President Johnson was no longer a Member of the Senate, but an officer of the executive branch and by means of that office was accorded the privilege of presiding over the Senate.

What a contrast Senator Mike Mansfield's respect for the separation of powers and checks and balances is from those in power today. I say that as one who was privileged to serve here with Senator Mansfield.

Instead, this White House took an active role in naming the present Senate leadership and this White House regularly sends Vice President CHENEY and

Karl Rove to Republican caucus luncheons to give the Republican majority its marching orders. What a difference from the days of Mike Mansfield and Lyndon Johnson.

The current Republican majority leader, who is my friend, announced that he intends to leave the Senate next year. He made no secret of his intent to run for the Republican nomination for President. With that in mind, he is apparently prepared to become the first majority leader in the history of the Senate whose legacy would be a significantly weakened Senate. Every other majority leader has left the Senate stronger than it was or at least as strong as it was, as a check and balance against an executive. This would be the first time it would be left weaker.

Many, unfortunately, on the other side—many but not all—are apparently ready to sacrifice the Senate's role in our constitutional system of checks and balances. It is my hope that our system of checks and balances will be preserved with a handful of Republican Senators voting their conscience and standing up to the White House and its pressure. I know the zealotry of the narrow special interest leaders who are demanding this mutilation of the Senate's character. I am one of many who have been the target of their brutal and spurious personal attacks.

My hope is that a number of the fine women and men of both parties with whom I am privileged to serve as a custodian of our Nation's liberties will act in the finest traditions of the Senate. One of their number has come to this floor in recent days to remind all Senators of senatorial profiles in courage. Sadly, it is that courage that will be necessary to avert the overreaching power grab now underway.

There have been other recent threats to our system of government. Republican partisans in the House, in a standoff with President Clinton, shut down the Government in 1995. A few years later, they impeached a popularly-elected President for the first time in our history. Fortunately, the Senate stood up and functioned as it was intended during that trial and rejected those efforts. I was privileged to be one of those who worked with both sides to make sure that trial ended the way it did.

In 2000, a divided nation saw an election decided by the successful litigation of the Republican Party and the intervention of a narrow activist decision of the Supreme Court to stop vote counting in Florida. Then we witnessed Senator JEFFORDS virtually driven out of the Republican caucus. We have seen an aggressive executive branch that has been aided by a compliant congressional majority.

If the Senate's role in our system of coequal branches of the Federal Government is to be honored, it is going to take Republican Senators joining others in standing up for the American people's rights, the independence of the judiciary, the rules of the Senate, and the rights of the minority.

During the last several days, we have seen the Democratic leader make offer after offer to head off this showdown. We have heard stirring speeches from Senator BYRD, Senator INOUYE, Senator KENNEDY, Senator BIDEN, Senator BAUCUS, Senator MURRAY, Senator BOXER, Senator FEINSTEIN, and others, who have come to this floor to set the record straight. But this is a setting in which Democratic Senators alone will not be able to rescue the Senate and our system of checks and balances from the breaking of the Senate rules being planned. If the rights of the minority are to be preserved, if the Senate is to be preserved as the greatest of parliamentary bodies, it will take at least six Republicans standing up for fairness and for checks and balances.

Now I know from my own conversations that a number of Republican Senators know in their hearts this nuclear option is the wrong way to go. I know Republican Senators, with whom I have had the privilege to serve for anywhere from 2 years to more than 30 years, know better. I hope more than six of them will withstand the political pressures being brought upon them and do the right thing and the honorable thing, and that they will put the Senate first, the Constitution first, but especially the American people first. History and those who follow us will carefully scrutinize these moments and these votes. Those voting to protect the rights of the minority will be on the right side of history.

Like the senior Senator from Pennsylvania, I remember President Kennedy's publication of ''Profiles in Courage.'' Along with so many Americans, I remember reading about those Senators who stood up to their party to vote against the conviction of President Andrew Johnson. More recently, I witnessed the strength it took for my friend, Senator Mark Hatfield, a distinguished Republican, to cast a vote of conscience against amending the Constitution. He did it under intense and unfair pressures. I believe we are now seeing the current Senate leadership taking the Senate to another precipice. It will take the votes of independent and conscientious Republican Senators, such as Senator Hatfield, to prevent the fall.

The Framers of the Constitution warned against the dangers of factionalism undermining our structural separation of powers. Some in the Senate have been willing to sacrifice the historic role of the Senate as a check on the President in the area of nominations.

Under pressure from the White House, over the last 2 years we saw the former Republican chairman of the Senate Judiciary Committee lead Senate Republicans in breaking with longstanding precedent, in breaking the rules, even committee rule IV, which was put in there at the request of Republicans to protect minorities. But when the Republicans took the majority, they violated the rules, longstanding precedent and Senate tradition. With the Senate and the White House under control of the same political party, we have witnesses committee rules broken or misinterpreted away. The broken committee rules and precedent include the way that homestate Senators were treated, the way hearings were scheduled, the way the committee questionnaire was unilaterally altered, and the way the Judiciary Committee's own historic protection of the minority by rule IV was repeatedly violated. In the last Congress, the Republican majority of the Judiciary Committee destroyed virtually every custom and courtesy that used to help create and enforce cooperation and civility in the confirmation process. I ask unanimous consent to have printed in the RECORD a recent article from the Wall Street Journal noting some of these developments.

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

[From the Wall Street Journal, May 3, 2005]

WAR OVER JUDGES IS NO LONGER A SUBTLE FIGHT

WASHINGTON.—Just 10 years ago, a Senate minority had several avenues for affecting a president's judicial nominations, from closed-door maneuvers within the Judiciary Committee to quiet negotiations with the White House.

Now there is only one sure way, and it isn't quiet at all: the filibuster.

The gradual disappearance of other levers of influence is an often overlooked cause of the battle over judicial nominations that is raging in Washington. Both parties have played a part, with the result that the Senate stands on the brink of a governmental crisis.

Some analysts say the consequences could be deep and lasting. Republicans are threatening to choose the ''nuclear option'' of using Senate rules to bar judicial filibusters. In the short term, Democrats have threatened to bottle up Republican legislative priorities. But over the long term, some analysts say, the ban could dilute the Senate's power and smooth the way for judicial choices reflecting the dominant ideological blocs within the party holding the White House.

The filibuster once was a seldom-used threat that forced competing political camps to compromise—''the shotgun behind the door,'' says Charles Geyh, a law professor at Indiana University. If it is disarmed, he adds, ''The long-term impact is pretty scary. These devices have been stabilizing influences on the process for a long time.''

The chipping away at minority influence began in the 1970s when Democratic Sen. Ted Kennedy of Massachusetts, then chairman of the Senate Judiciary Committee, attempted to dilute the ability of a senator to employ a common tactic for blocking unwelcome nominations. It was called the ''blue slip''—named for the color of the paper used by the chairman to inform senators not on the committee that the White House had submitted a judicial nominee from their states.

A senator could object by checking off his or her disapproval or by refusing to return the blue slip to the chairman. For decades, opposition from a home-state senator was enough to kill a nomination. As a result, the blue slip was most commonly employed as a

lever for forcing negotiations with the White House.

As President Jimmy Carter sought to put his stamp on the federal bench in the late 1970s, Mr. Kennedy proposed a new blue-slip policy. It allowed the Judiciary chairman to override a home-state senator's objection if he concluded that opposition was based on race or sex. The Massachusetts liberal met only mixed success, however, as other senators continued to respect the traditional blue-slip process.

Two decades later, with Republicans in charge of the Judiciary Committee, they began using their clout to exercise what Democrats called a ''shadow filibuster'' by simply refusing to give about 60 of President Bill Clinton's judicial candidates a hearing or vote on the Senate floor.

Republicans argue that the White House shared blame for some of the delays, saying some nominees hadn't undergone background checks when they were forwarded to the committee. But Republican Sen. Mitch McConnell of Kentucky recently conceded on the Senate floor that the Democrats have ''a legitimate complaint'' about how the Clinton appointees were treated.

In 2003, Republican Judiciary Chairman Orrin Hatch of Utah changed the practice further. He proceeded with hearings on Bush judicial nominees even if they were vigorously opposed by senators from the nominee's home state.

That change reduced the need for the White House to negotiate with the Senate. The result was diminished consultation between the president and the minority within the chamber, a practice that started with President George Washington, and extended through the Clinton administration. Mr. Clinton consulted with Mr. Hatch even on his two U.S. Supreme Court nominees, Ruth Bader Ginsburg and Stephen Breyer.

In the last Congress, five judicial nominees had blue-slip problems, including four receiving negative recommendations from both of Michigan's Democratic senators. Even so, all five of them were approved by the committee on party-line votes and advanced to the full Senate, according to committee records. Democrats blocked final votes on all of them.

Before the current stalemate, the filibuster had been used effectively against a judicial nominee just once. In 1968, a minority coalition of Republicans and Southern Democrats blocked President Lyndon B. Johnson's attempt to elevate Supreme Court Justice Abe Fortas, a supporter of civil rights and the Great Society programs, to the chief justice's chair. After a cloture vote to end the filibuster failed, 45–43, Mr. Fortas asked the president to withdraw his name.

Republicans today discount the significance of that vote, arguing it wasn't clear Mr. Fortas would have been approved by the full Senate if the filibuster had been overcome. By contrast, there is little doubt that President George W. Bush's contested nominees could attract a majority in the chamber, where Republicans hold 55 seats.

Yet even in that 1968 debate, some senators recognized the possibility that the Fortas stalemate would echo in future debates. ''If we, for the first time in our history, permit a Supreme Court nomination to be lost in a fog of a filibuster,'' cautioned Democratic Sen. Philip Hart of Michigan, ''I think we would be setting a precedent which would come back to haunt our successors.''

After the Fortas battle, senators gradually began reaching for the filibuster weapon. According to a 2003 analysis by the Congressional Research Service, the Senate held 17 votes to halt filibusters on judicial nominees between 1969 and 2002, although many were intended to force negotiations on legislation or judicial candidates rather than defeating the nominees.

None of the filibusters succeeded until the Democrats managed to block 10 of Mr. Bush's first-term appellate-court nominees. After his re-election, Mr. Bush resubmitted the names of seven of those candidates. Those are the nominees in contention today.

Mr. LEAHY. We suffered through 3 years during which Republican staff stole Democratic files off the Judiciary computer servers. It is as though those currently in power believe they are above our constitutional checks and balances and they can reinterpret any treaty, law, rule, custom, or practice. If they don't like it or they find it inconvenient, they set it aside. It was tragic that the committee that judges the judges did not follow its own rules but broke them to achieve a predetermined result.

It was through these means that divisive and controversial judicial nominees were repeatedly brought before the Senate in the last Congress. It was through these abuses that the majority acted as handmaidens to the administration to create confrontation after confrontation over controversial nominees. They dragged the judiciary, which should be above politics, into the political thicket and did so for partisan gain.

I applaud the Senator from Pennsylvania who has worked to bring us back in the Senate Judiciary Committee to following our rules in the comity that makes it work. I regret that filibusters have been necessary in the past 2 years. I wish Republicans would not have followed their years of secret holds and pocket filibusters of more than 60 of President Clinton's nominees, judicial nominees, and more than 200 of his executive nominees. I wish they would not have flipped the script once a Republican became President and dismembered the rules and traditions of the Judiciary Committee.

I have urged consultation and cooperation over the last 4 years. I had the privilege of chairing the Senate Judiciary Committee for 17 months with President Bush in the White House, and we confirmed 100 of President Bush's judicial nominees, including a number of controversial nominees, including some I was opposed to. I voted against them, but I made sure they got hearings.

The President and his enablers in the Senate cannot seem to take ''yes'' for an answer. The Senate has confirmed 208 of his judicial nominees and we are withholding consent on 5.

He rejects our advice, but he demands our consent. That is wrong, and that goes against the Constitution. The Constitution speaks of advice and consent, not order and rubberstamp.

What the White House ignores is that President Bush completed his first term with the third highest total of confirmed judges in our history—in our history—and more Federal judges on the courts than at any time in our history. The truth is, Senate Democrats have cooperated extensively in confirming more than 95 percent of this President's judicial nominees—208 of them.

George Washington, the most popular and powerful President in our history, was not successful in all of his judicial nominations. The Senate rejected President Washington's nomination of John Rutledge to be Chief Justice of the Supreme Court. For example. And certainly I would hope that the current President would not assume he stands higher in our history books than George Washington.

The truth is, in President Bush's first term, the 204 judges confirmed were more than were confirmed in either of President Clinton's two terms, more than during the term of this President's father, and more than Ronald Reagan's first term when he had a Republican majority in the Senate. By last December, we had reduced judicial vacancies from the 110 vacancies I inherited in the summer of 2001 to its lowest level, lowest rate, and lowest number in decades, since President Ronald Reagan was in office.

Unfortunately, this President has chosen confrontation over cooperation. In fact, it is mid-May, and he has only sent one new nomination to the Senate all year. Im connection with that nomination, Democrats on the Judiciary Committee have written to the Chairman urging a prompt hearing. With the support of the nominee's home-state Senators, one a Democrat and one a Republican, the nomination of Brian Sandoval will be added to the long list of judicial confirmations.

But that leave 30 judicial vacancies without nominations. Back on April 11, the Democratic leader and I wrote to the President urging him to work with Senators of both parties to identify nominees for these 30 vacancies. To date, he has not responded. Instead he, his Vice President, his Chief of Staff and his spokesperson continue to prod the Senate toward triggering the nuclear option. I ask unanimous consent to have that letter printed in the RECORD.

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

U.S. SENATE,
Washington, DC, April 11, 2005.

Hon. GEORGE W. BUSH,
President,
Washington, DC.

DEAR MR. PRESIDENT: There are currently 28 vacancies on the Federal courts of appeals and district courts for which you have not forwarded nominees to the Senate. We write to offer to help you obtain consultation and advice from the Senate on these vacancies so that you may select nominees who will generate strong, bipartisan support.

This evening the Senate is scheduled to consider your nomination of Paul Crotty to become a federal judge in New York. We expect Mr. Crotty to be confirmed with the support of his home-state Senators and an overwhelming vote. We have each been urging you for some time to work with the Senate to fill federal judicial vacancies with qualified, consensus nominees. It is now imperative that we do so.

When you met with Russian President Putin earlier this year, you noted that

checks and balances and an independent judiciary are among the fundamental requirements of democracy. We agree. We therefore urge you to make clear to Senate Republican leaders that you do not favor the so-called ''nuclear option'' which would remove an important check on executive power. Instead, let us work together to identify consensus judicial candidates. Let us preserve our independent judiciary, which is the envy of the world.

Respectfully,

HARRY REID,
Democratic Leader.
PATRICK LEAHY,
Ranking Member.

Mr. LEAHY. When it comes to the judiciary, the independent judiciary, the branch of Government always looked at with most favor and most respect by Americans, wouldn't it be good if the President, in making his nominations, would act as a uniter, not as a divider? Instead, the President has acted as a divider, not a uniter. He has sent the Senate divisive and controversial nominees. When the Senate debates them and withholds consent, he stubbornly renominates them over and over again. Rather than work with us to find consensus nominees, which usually pass this Senate 100 to nothing, he disparages us and exploits the issue as a partisan matter.

Under our Constitution, the Senate has an important role in the selection of our judiciary. The brilliant design of our Founders established the first two branches of Government would work together to equip the third branch to serve as an independent arbiter of justice. As George Will once wrote: ''A proper constitution distributes power among legislative, executive and judicial institutions so that the will of the majority can be measured, expressed in policy and, for the protection of minorities, somewhat limited.''

The structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus. Despite the razor-thin margin of recent elections, the majority party is not acting in a measured way but in complete disregard for the traditions of bipartisanship that are the hallmark of the Senate. When these traditions are followed, I can tell my colleagues from 31 years of experience, the Senate works better, and the American people are better served. Instead, the current majority is seeking to ignore precedents and reinterpret longstanding rules to its advantage.

The practice of ''might makes right'' is wrong. The Senate's rules should not be toyed with like a playground game of King of the Hill, to be changed at the whim of any current majority.

The Senate majority leader seems intent on removing the one Senate protection left for the minority, the protection of debate in accordance with the longstanding tradition of the Senate and its standing rules. In order to remove the last remaining vestige of protection for the minority, the Republican majority is poised to break the Senate rules, violate the Senate rules, overturn the Senate rules, and end the filibuster by breaking those rules. They are intent on doing this—why?—to force through the Senate this President's most controversial and divisive judicial nominees.

As the Reverend Martin Luther King, Jr. wrote in his famous Letter From A Birmingham Jail:

> Let us consider a more concrete example of just and unjust laws.
>
> An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is difference made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is sameness made legal.

Fair process is a fundamental component of the American system of law. If we cannot have a fair process in these halls or in our courts, how will the resulting decisions be viewed? If the rule of law is to mean anything, it must mean that it applies to all equally. The rule of law must apply the same to Republicans and Democrats. The rule of law must apply the same to all Americans. And certainly the rule of law must apply on the floor of the U.S. Senate.

No man and no party should be above the law. That has been one of the strengths of our democracy. Our country was born in reaction to the autocracy and corruption of King George, and we must not forget our roots as a nation of both law and liberty. The best guarantee of liberty is the rule of law, meaning that the decisions of government are not arbitrary and that rules are not discretionary or enforced to help one side and then ignored to aid another.

Mr. President, nothing I will ever do in my life will equal the opportunity, the honor, the privilege to be one of the 100 serving in this Senate. But not one of this 100—who are privileged to serve at any given time to represent 280 million Americans—none of us owns the Senate. The Senate will be here once we leave. It is our responsibility to leave the Senate as strong as it was when we came in. It is our responsibility, our sworn responsibility, to leave the Senate the body that has always been a check and balance.

How can any Senator look himself or herself in the mirror if they weaken the Senate, if they allow the Senate to no longer be the check and balance it should be? Why would anyone want to serve here if they come to this body with that in mind?

James Madison, one of the Framers of our Constitution, warned in Federalist Number 47 of the very danger that is threatening our great Nation, a threat to our freedoms from within:

> [The] accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.

That is what they are trying to do, put all the power into one hand. All of us should know enough of history to know we should not do that.

George Washington, our great first President, reiterated the danger in his famous Farewell Address to the American People:

> The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.

Now, our freedoms as Americans are the fruit of too much sacrifice to have the rules broken in the Senate, especially to break them in collusion with the executive branch. What ever happened to the concept of separation of powers? We all give great speeches on the separation of powers. Don't just give the speeches, do not just talk the talk, let's walk the walk.

The effort to appoint loyalists to courts in the hope that they will reinterpret precedents and overturn the very laws that have protected our most fundamental rights as Americans is base and wrong. The American people deserve better than what we have seen with the destruction of rule after rule by a majority willing to sacrifice the role of the Senate as a check and balance in order to aid a President determined to pack the Federal courts. It is the courts themselves that serve as the check on the political branches. Their independence is critical and must be preserved.

Look at what we are talking about, Mr. President. We have confirmed 208 judges. We are saying no to five. Is this a judicial crisis that should allow the majority to destroy the Senate? The record of 208 confirmations and reduction of judicial vacancies to an historic low provide no basis on which to break the rules of the Senate. The Democratic leader's efforts to make additional progress demonstrate there is no reason for the majority to take the drastic and irreversible step of ending protection of the minority through the tradition of extended debate in the Senate.

The White House and Senate Republican leadership's campaign for the nuclear option seeks to end the role of the Senate serving as a check on the executive. That is so shortsighted. It is so wrong. It is so unjustified. We fought a revolution in this country to have a Constitution that is designed to have the Senate provide balance and act as a check.

I will have more to say about these important matters and about the nomination that the Judiciary Committee previously rejected and that the Senate has previously debated as we proceed over the next several days. There is one other aspect of this matter I need to mention. I will say this in my individual capacity as a Senator from Vermont, as a man of faith, as a man who cares deeply about this institution, our country, our Constitution, our first amendment and our constitutional provision that does not allow a religious test for those who serve.

Supporters of a power-hungry executive have gone so far as to seek to inject an unconstitutional religious test

into the debate. All Americans should fear this. They have characterized those who oppose the most extreme of the President's nominees as being against faith, against people of faith. They have called for mass impeachment of judges and other measures to intimidate the judiciary, to remove the independence of the judiciary. I commend the President for personally rejecting at least that demagoguery at a recent press conference. I wish he would go further and tell those making these charges and inflammatory claims to stop.

A Republican clergyman, Pat Robertson, said he believes Federal judges are ''a more serious threat to America than Al Qaeda and the September 11 terrorists'' and ''more serious than a few bearded terrorists who fly into buildings'' and ''the worst threat America has faced in 400 years—worse than Nazi Germany, Japan, and the Civil War.''

For shame. For shame. This is the sort of incendiary rhetoric that is paving the way to the nuclear option. It is wrong. It is destructive. Further, injecting religion into politics to claim a monopoly on piety and political truth by demonizing those you disagree with is not the American way.

As Abraham Lincoln has said:

I know that the Lord is always on the side of the right, but it is my constant anxiety and prayer that I and this nation should be on the Lord's side.

He was so right. We all would do well spending a little more time wondering whether we are on God's side and less time declaring infallibly that He is on ours.

Those driving the nuclear option engage in a dangerous and corrosive game of religious McCarthyism in which anyone daring to oppose one of this President's nominees is being branded as anti-Christian or anti-Catholic or against people of faith.

Dr. Dobson of Focus on the Family said of me, ''I do not know if he hates God but he hates God's people.''

I wonder every Sunday when I am at mass, what planet is this person from?

When Senator HATCH was attacked during his Presidential campaign on his religion, I came to his defense. When Senator LOTT was under attack, Senators JEFFORDS and SPECTER spoke in his defense.

When they charge us with being against people of faith for opposing nominees, what are they saying about the 208 Bush judicial nominees whom Democrats have voted for and helped confirm? Are they saying the five we oppose are people of faith but the 208 we voted for are not? Are they by definition people without faith?

These kinds of charges, this virulent religious McCarthyism, is fraudulent on its face. It is contemptible. It is contemptible.

Chief Justice Rehnquist is right to refer to the Federal judiciary as the crown jewel of our system of government. It is an essential check and balance, a critical source of protection of the rights of all Americans, including our religious freedom.

Just this morning the distinguished senior Senator from Pennsylvania and the distinguished senior Senator from Illinois conducted a hearing in the Judiciary Committee where they heard the testimony of Judge Joan Lefkow of Chicago. She is the Federal judge whose mother and husband were murdered in their home. The hearts of all of us go out to her. She asked that we repudiate the gratuitous attacks on the judiciary, and I do so, again, here today. I ask those members of Congress who are so quick to take the floor and say let's impeach judges or let's condemn judges or specific judges, to stop it. Listen to what Judge Lefkow said:

In this age of mass communication, harsh rhetoric is truly dangerous. Fostering disrespect for judges can only encourage those that are on the edge, or on the fringe, to exact revenge on a judge who ruled against them.

We should stop those kinds of speeches, whether it is on this floor or the other body. They are beneath, us, all of us.

I remember Justice Sandra Day O'Connor made a similar observation. I recently spoke with her and told her how much I appreciated that.

The Senator from Pennsylvania spoke about Benjamin Franklin. Let me reiterate. In September 1787, as the Constitutional Convention drew to a close, someone came up to Benjamin Franklin to ask whether all of the arduous work of drafting the Constitution produced a republic or a monarchy. Benjamin Franklin told them, ''A Republic, if you can keep it.''

We have fought world wars, a civil war, we have gone through elections, assassinations, changes in Government, we have gone through all these traumas, the Great Depression, and attacks on our soil. In all of it we have joined together to keep this Republic. We have kept our freedoms through checks and balances, checks and balances woven through our constitutional system so brilliantly by our Founders. Those checks and balances can easily be unthreaded and unwoven by the abuse of power. Let us hope that never happens. Remember, it can happen not just through big steps, it can happen through small steps.

This action that is being proposed to the Senate, the nuclear option, is a large step, a large abuse of power, a step with consequences we can only begin to imagine. It would be a vote for confrontation over consensus. I hope each of us will reflect on its consequences, and then, in the end, such a travesty will never befall the Senate.

Mr. President, how much time is remaining to the Senator from Vermont?

The PRESIDING OFFICER. There is 10½ minutes.

Mr. LEAHY. Mr. President, I see the distinguished deputy Democratic leader in the Chamber and I will yield the remainder of my time to the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. I thank the Senator from Vermont, not only for his excellent statement this morning, but also for his leadership in the Senate Judiciary Committee. It has been my honor to serve with him on that committee during my tenure in the Senate.

The point he made at the close of his remarks bears repeating. We are debating an important constitutional principle of checks and balances. We are considering for the first time in over 200 years the so-called ''nuclear option'' which will destroy one of the rules of the Senate which has been used so many times on so many occasions for so many different things. This is a strategy that has been put together by the leadership in the Senate and it undoubtedly will occasion great debate in this Chamber for many hours.

But I would like to admonish my colleagues on both sides of the aisle to take care in the words they use during the course of this debate. This morning, unfortunately, the majority leader came to the floor and said the following:

The issue is not cloture votes per se; it is the partisan leadership-led use of cloture votes to kill, to defeat, to assassinate these nominees.

I know the majority leader. I know him to be a man of genuine caring and humanity. He has proven that so many times in his personal life as a doctor, as a surgeon, as a person who has taken on humanitarian causes which many in the Senate would shrink from. And so I know those words, if they were given to him by someone, do not reflect his heart. And if they were said in a moment without thinking, it is something we could all make a mistake and do. But I would urge him and urge each and every one of us to choose words carefully in the debate about judges.

We were reminded this morning with the testimony of Judge Lefkow before the Senate Judiciary Committee how important words can be. She called for a variety of things we can do to protect judges across America, but she also went to the question of words. She said:

Frankly, I ask you—

The Senate Judiciary Committee—

to publicly and persistently repudiate gratuitous attacks on the judiciary such as the recent statement of Pat Robertson on national television and, unfortunately, some Members of Congress, albeit in much more measured terms.

Judge Lefkow understands as I do and every Member of the Senate that we live in a country that prides itself on freedom, the freedom to express yourself, the freedom for people to say things without fear that the Government will come down on them, even if we hate every word they say. But the point she was making was to take care, to denounce those comments that cross the line.

When we hear in this debate about changing the rules of the Senate as it

relates to judges, let us take care to understand there are differences of opinion as to whether these men and women who are being discussed share the views of many Americans, whether their views are extreme. But the issue is not about them personally.

Some have suggested you can't oppose a judicial nominee here unless you oppose that nominee's gender, that nominee's religion, that nominee's race, that nominee's ethnic background, that nominee's upbringing. All of those things are false. My consideration of these nominees has gone to the heart of the issue. I consider myself to be without prejudice. I hope I am. I do my best to avoid it in everything I say and do. But for those who come to the floor and say you can't oppose this nominee unless you are in a position where you disagree with their religion, that is just plain wrong. There are so many lines that are crossed between religious and political belief. The issue of the death penalty in my Catholic religion is one that is hotly debated among Catholics. Many of the leading Catholic legislators, Republican and Catholic, disagree in their votes with the church's official position. But it is a public issue that should be discussed and it doesn't reflect on the nominee or the religion of a Congressman or Senator when we discuss it.

So when words are expressed during the course of the debate that those of us who oppose these nominees are setting out to kill, to defeat, or to assassinate these nominees, those words are inappropriate. Those words go too far.

Let me remind those who follow this debate, as I said earlier, the majority leader is a good man, a humane man, a sensitive man who has been closer to life and death than any of us in this Chamber, and I believe those words given to him were inappropriate, and if they were said in a careless moment I am sure do not reflect his heart.

But let us take care during the course of this debate to understand that our differences as to these nominees come down to issues of law and public policy which members of the judiciary decide. If I disagree with one of these nominees or any judge as to their opinions, it is not going to reflect anything on them personally. It reflects on the fact that we have to make decisions as to whether they should serve on the bench.

This is a historic moment in the Senate. There may never be another one like it. We are considering a change in the Senate, a change in this institution which, sadly, will ripple out as a pebble in a pond for generations to come. This is not an isolated case involving one, two, or five judges. It is a change in the Senate rules that will uniquely change this special institution.

I fear that many of the people in the White House and on the floor of the Senate who are grabbing for this political victory don't realize it is going to change an important institution we have counted on throughout our history. Those Founding Fathers who wrote the Constitution made the Senate a special institution, an institution where, in fact, minority rights and the minority's opportunity to speak would always be protected. To take away those minority rights by Vice President CHENEY making a casual ruling from the Chair, to sweep away 214 years of precedent and rules so that someone can score a quick victory in terms of even 1, 2, or 10 judges is entirely inappropriate.

I hope there will be enough Members on the other side of the aisle who understand our special responsibility. It is an historic responsibility. It goes beyond this President. It goes beyond any political party, and it certainly goes beyond the press release of the day. It goes to the heart of why we are entrusted with this responsibility to serve in the Senate. We are hoping that when the nuclear option comes, there will be Senators willing to stand up for this tradition and for these constitutional values.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I have been listening to the debate. The people who may be listening to this across the country and around the world on television, to the extent they are following it, may be forgiven if they wonder what is going on. People are talking about what we are doing on the floor in such breathless and nearly apocalyptic terms, referring to the nuclear option. This is not about America's foreign policy. This is about the rules of the Senate and the power of the Senate to determine for itself the rules by which we are governed. It is certainly an important matter, but we should tone down our rhetoric a little and try to address squarely the issue.

I worry when I hear Senators use words such as ''despicable,'' ''Neanderthal,'' ''scary,'' or ''kook'' in describing nominees by this President to the Federal bench. I would have thought that kind of rhetoric was unbecoming to a body such as the Senate, sometimes called the world's greatest deliberative body. I hope during the course of the debate we will take a deep breath, as we try to calmly but deliberately address the issues that lie before us. That is what I will strive to do for my part.

I want to talk in particular about Priscilla Owen. Before I do, I neglected to ask unanimous consent that I be allotted 20 minutes out of our side's time.

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

Mr. CORNYN. I want to respond first to an argument made earlier this morning. This is in the category of we can disagree about matters of opinion and matters about policy, but we should not disagree about the facts, when the facts are so plainly there before us and evident.

Richard Paez, a nominee of President Clinton, has been held up as perhaps one of the examples of our side treating a Democratic President's nominee unfairly. As this chart aptly demonstrates, if we would agree to treat Priscilla Owen exactly the way that Paez was treated, then Priscilla Owen would be sitting on the Fifth Circuit today, just as Judge Paez is now serving on the circuit court in the Federal judiciary. In other words, this is not an example justifying the actions being taken against this President's nominees. This is an example of why the obstruction we have seen is wrong and unfair. All we are asking for in this debate is a simple up-or-down vote for this President's nominees.

Priscilla Owen has been waiting 4 years for that simple up-or-down vote, which is all we are asking for. As I said, 4 years ago, Priscilla Owen was nominated to serve on the U.S. Circuit Court of Appeals. She serves currently and has served on the Texas Supreme Court, where I had the honor of serving with her. She is an exceptional jurist, a devoted public servant, and an extraordinary Texan. Yet after 4 years, she still awaits an up-or-down vote on the Senate floor.

This is the irony of where we find ourselves. Although a bipartisan majority stands ready to confirm her nomination, a partisan minority obstructs the process and refuses to allow a vote. What is more, this partisan minority insists for the first time in history that she must be supported by a supermajority of 60 Senators, rather than the constitutional standard and Senate tradition of a majority vote.

I know Priscilla personally. It is hard for me to reconcile the caricature that most people have seen drawn of her by some of the rhetoric used, certainly, with what I know about her personally. Those who know her would not recognize her from the caricature being created in the Senate and elsewhere when talking about this outstanding nominee.

She is a distinguished jurist and a distinguished public servant. She has excelled at virtually everything she has undertaken. She was a top graduate of her law school class at the remarkable age of 23 years and received the top score on the Texas bar examination. She entered the legal profession at a time when few women did. After a distinguished record in private practice, she reached the pinnacle of the Texas bar, which is the Texas Supreme Court. She was supported by a larger percentage of Texans in her last election than any of her colleagues—84 percent—after enjoying the endorsement of virtually every newspaper in the State. She has been honored as the Young Lawyer of the Year by her alma mater, as well as an outstanding alumna of Baylor University.

The irony in this partisan obstruction of a bipartisan majority who stand ready to confirm her is that Priscilla Owen enjoys bipartisan support in the State of Texas. Three former Democratic judges on the Texas Supreme

Court, as well as a bipartisan group of 15 past presidents of the State bar of Texas support this nominee.

The Houston Chronicle, one of our major newspapers, in the year 2000 called her ''[c]learly academically gifted,'' stating that she ''has the proper balance of judicial experience, solid legal scholarship, and real-world know-how to continue to be an asset on the high court.''

The Dallas Morning News, another major newspaper in our State, wrote on September 4, 2002:

> She has the brainpower, experience and temperament to serve ably on an appellate court.

The Washington Post wrote in 2002:

> She should be confirmed. Justice Owen is indisputably well qualified.

Priscilla Owen is not just intellectually capable and legally talented, she is also a fine human being with a big heart. The depth of her humanity and compassion is revealed through her significant free legal work and community activity. In fact, she has spent most of her life devoted to her community. She has worked, for example, that all citizens be ensured access to justice, as the Texas Supreme Court's representative on the mediation task force of that court, as well as her service on statewide committees of lawyers and her successful efforts to prompt the Texas Legislature to provide millions of dollars per year for legal services to the poor.

She was instrumental in organizing a group known as Family Law 2000, which seeks to find ways to educate parents about the effect that divorce can have on their children and to lessen the negative impacts therefrom. She teaches Sunday school at her church, St. Barnabas Episcopal Mission in Austin, TX, where she is an active member. It is plain, from these and so many other examples, that Justice Owen bears no resemblance to the caricature that has been painted of her in the Senate. She is, in fact, a fine person and a distinguished leader of the legal community.

One would think that after 4 long years, she would be afforded the simple justice of an up-or-down vote. I remain optimistic, hopeful, that this violation of many years of Senate tradition, the imposition of a new supermajority requirement of 60 votes, will be laid aside in the interest of proceeding with the people's business, a job my colleagues and I were elected to faithfully execute.

For more than 200 years, it was a job that we faithfully executed when it came to voting on a President's judicial nominees. Senators from both sides of the aisle exercised mutual restraint and did not abuse the privilege of debate out of respect for two coequal branches of government—the executive, that has a constitutional right to choose his or her nominees, and an independent judiciary.

Until 4 years ago, colleagues on both sides of the aisle consistently opposed the use of the filibuster to prevent judicial nominees from receiving an up-or-down vote. One of our colleagues, the senior Senator from Massachusetts, said in 1998:

> Nominees deserve a vote. If our . . . colleagues don't like them, vote against them. But don't just sit on them—that is an obstruction of justice . . .

The senior Senator from Vermont, in 1998, said:

> I have stated over and over on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.

I could not agree more with those comments made in 1998 from the very same colleagues who today oppose the same principle they argued for a few short years ago. We are doing a disservice to the Nation and a disservice to this fine nominee in our failure to afford her that up-or-down vote.

The new requirement the partisan minority is now imposing—that nominees will not be confirmed without the support of 60 Senators—is, by their own admission, unprecedented in Senate history. The reason for this is simple. The case for opposing this fine nominee is so weak that using a double standard and changing the rules is the only way they can hope to defeat her nomination. What is more, they know it.

Before her nomination was caught up in partisan special interest politics, the ranking Democrat on the Judiciary Committee predicted that Priscilla Owen would be swiftly confirmed. On the day of the announcement of the first group of nominees, including Justice Owen, he said he was ''encouraged'' and that ''I know them well enough that I would assume they'll go through all right.''

Notwithstanding the change of attitude by the partisan minority, this gridlock is really not about Priscilla Owen. Indeed, just a few weeks ago the Democratic leader announced that Senate Democrats would give Justice Owen an up-or-down vote, albeit only if other nominees were defeated or withdrawn. Obviously, with these kinds of offers being made based on cutting deals and pure politics, this debate is not about principle. It is all about politics. It is shameful.

We should all subscribe to the notion that any nominee of any President, if they enjoy majority support in the Senate, should get an up-or-down vote. I am talking about whether we have a Democrat in the White House or a Republican, whether we have Democrat majorities in the Senate or Republican.

The rules should apply across the board exactly the same to all nominees, regardless of who wins and who loses from a political consideration.

But what bothers me most is that any fair examination of Justice Owen's record demonstrates how unconvincing and unjustified the critics' arguments are against her specifically.

For example, she was accused of ruling against injured workers, employment discrimination plaintiffs, and other sympathetic parties on a variety of occasions. Never mind the fact that good judges, such as Justice Owen, do their best to follow the law, regardless of which party will win and which party will lose. That is what good judges do. Never mind that many of her criticized rulings were unanimous or near-unanimous decisions of a nine-member Texas Supreme Court. Never mind that many of these rulings simply followed Federal precedents authored or agreed to by appointees of President Carter and President Clinton, or by other Federal judges unanimously confirmed by the Senate. And never mind the fact that judges often disagree, especially when a law is ambiguous and requires careful and difficult interpretation.

One of the focal points on Justice Owen's record is a criticism of enforcing a popular Texas law that requires parental notification before a minor can obtain an abortion. Her opponents allege in the parental notification case that then-Justice Alberto Gonzales, our current Attorney General, accused her of ''judicial activism.'' I heard that argument again this morning on the floor, notwithstanding the fact the charge is demonstrably untrue.

For any Member to repeat this argument that is simply not true, in spite of the fact that it has been demonstrated that it is not true, is to me an unconscionable act of distortion of the facts. Here again, we can disagree about the policies, and we can even decide to vote differently on a nominee, but let's not disagree on the facts when they are so clear. Not once did Alberto Gonzales say Justice Owen is guilty of judicial activism. To the contrary, he never even mentioned her name in the particular opinions that are being discussed. Furthermore, our current Attorney General has since testified under oath that he never accused Justice Owen of any such thing.

What's more, the author of the parental notification law that was at issue supports Justice Owen for this nomination, as does the pro-choice, Democratic law professor who was appointed to the Texas Supreme Court advisory committee who was supposed to write rules, and did write rules, to implement the law. In her words, Owen simply did ''what good appellate judges do every day. . . . If this is activism, then any judicial interpretation of a statute's terms is judicial activism.''

Mr. President, I ask unanimous consent that this letter be printed in the RECORD at the end of my remarks.

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

(See exhibit 1.)

Mr. CORNYN. Mr. President, the American people know judicial activism when they see it. They know a controversial ruling that is totally out of step with a judge's accepted role in our form of government when they see it,

whether it be the redefinition of marriage, the expulsion of the Pledge of Allegiance from our classrooms and other expressions of faith from the public square, the elimination of the three-strikes-and-you're-out law, and other penalties for convicted criminals, or the forced removal of military recruiters from college campuses. Justice Owen's rulings come nowhere near those examples of judicial activism that we would all recognize clearly and plainly.

There is a world of difference between struggling to interpret the ambiguous expressions of a statute and refusing to obey a legislature's directives altogether, or substituting one's personal views or agenda for the words of a statute.

It is clear, then, that Justice Owen's record deserves the broad and bipartisan support that she has gotten, and it is equally clear that her opposition only comes from a narrow band on the far-left fringes of the political spectrum.

So if the Senate were simply to follow more than 200 years of consistent Senate and constitutional tradition, dating back to our Founders, there would be no question about her being confirmed; she would be. Legal scholars across the political spectrum have long concluded what we in this body know instinctively, and that is to change the rules of confirmation, as the partisan minority has done, badly politicizes the judiciary and hands over control of the judiciary to special interest groups.

Mr. President, 4 years is a long time. The majority leader and those who support this nominee's confirmation have shown extraordinary patience during this debate. But there is a point at which patience ceases to be a virtue, and I suggest that we have reached that point. We need a resolution of this issue. We need for Senators to step up and to vote ''yes'' or vote ''no.'' But we simply need for them to vote.

The record is clear. The Senate tradition has always been majority vote, and the desire by some to alter that Senate tradition has been roundly condemned by legal experts across the spectrum.

Professor Michael Gerhardt, who advises Senate Democrats about judicial confirmations, has written that a supermajority requirement for confirming judges would be ''problematic, because it creates a presumption against confirmation, shifts the balance of power to the Senate, and enhances the power of the special interests.''

D.C. Circuit Judge Harry Edwards, a respected Carter appointee, has written that the Constitution forbids the Senate from imposing a supermajority rule for confirmations. After all, otherwise, ''[t]he Senate, acting unilaterally, could thereby increase its own power at the expense of the President'' and ''essentially take over the appointment process from the President.'' Edwards thus concluded that ''the Framers never intended for Congress to have such unchecked authority to impose supermajority voting requirements that fundamentally change the nature of our democratic processes.''

Georgetown law professor Mark Tushnet has written that ''[t]he Democrats' filibuster is . . . a repudiation of a settled, pre-constitutional understanding.'' He has also written: ''There's a difference between the use of the filibuster to derail a nomination and the use of other Senate rules—on scheduling, on not having a floor vote without prior committee action, etc.—to do so. All those other rules . . . can be overridden by a majority vote of the Senate . . . whereas the filibuster can't be overridden in that way. A majority of the Senate could ride herd on a rogue Judiciary Committee chair who refused to hold a hearing on some nominee; it can't do so with respect to a filibuster.''

And Georgetown law professor Susan Low Bloch has condemned supermajority voting requirements for confirmation, arguing that they would allow the Senate to ''upset the carefully crafted rules concerning appointment of both executive officials and judges and to unilaterally limit the power the Constitution gives to the President in the appointment process. This, I believe, would allow the Senate to aggrandize its own role and would unconstitutionally distort the balance of powers established by the Constitution.''

She even wrote on March 14, 2005: ''Everyone agrees: Senate confirmation requires simply a majority. No one in the Senate or elsewhere disputes that.''

Mr. President, the record is clear. The Senate tradition has always been majority vote, and the desire by some to alter that Senate tradition has been roundly condemned by legal experts across the political spectrum.

Throughout our Nation's more than 200-year history, the constitutional rule and Senate tradition for confirming judges has been majority vote—and that tradition must be restored. After four years of delay, giving Justice Priscilla Owen an up-or-down vote would be an excellent start.

EXHIBIT 1

MAY 3, 2005.

Re Priscilla Owen.

Hon. JOHN CORNYN,
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR CORNYN: I write in support of the nomination of Priscilla Owen to the United States Court of Appeals for the Fifth Circuit. I write as a law professor who specializes in constitutional law. I write as a pro-choice Texan, who is a political independent and has supported many Democratic candidates. And I write as a citizen who does not want the abortion issue to so dominate the political debate that good and worthy judicial candidates are caught in its cross hairs, no matter where they stand on the issue.

Justice Owen deserves to be appointed to the Fifth Circuit. She is a very able jurist in every way that should matter. She is intelligent, measured, and approaches her work with integrity and energy. She is not a judicial activist. She does not legislate from the bench. She does not invent the law. Nothing in her opinions while on the Texas Supreme Court could possibly lead to a contrary conclusion, including her parental notification opinions. I suspect that Priscilla Owen's nomination is being blocked because she is perceived as being anti-choice on the abortion issue.

This perception stems, I believe, from a series of opinions issued by the Texas Supreme Court in the summer of 2000 interpreting the Texas statute that requires parental notification prior to a minor having an abortion. The statute also provides for what is called a ''judicial bypass'' to parental notification. Justice Owen wrote several concurring and dissenting opinions during this time. She has been criticized for displaying judicial activism and pursuing an anti-choice agenda in these opinions. This criticism is unfair for two reasons.

First, the Texas statute at issue in these cases contains many undefined terms. Further, the statutory text is not artfully drafted. I was a member of the Texas Supreme Court's Advisory Committee that drafted rules in order to help judges when issuing decisions under this parental notification statute. My involvement in this process made it clear to me that in drafting the parental notification statute, the Texas Legislature ducked the hard work of defining essential terms and placed on the Texas courts a real burden to explicate these terms through case law.

Moreover, the statute's legislative history is not useful because it provides help to all sides of the debate on parental notification. Several members of the Texas Legislature wanted a very strict parental notification law that would permit only infrequent judicial bypass of this notification requirement. But several members of the Texas Legislature were on the other side of the political debate. These members wanted no parental notification requirement, and if one were imposed, they wanted courts to have the power to bypass the notification requirement easily. The resulting legislation was a product of compromise with a confusing legislative history.

In her decisions in these cases, Justice Owen asserts that the Texas Legislature wanted to make a strong statement supporting parental rights. She is not wrong in making these assertions. There is legislative history to support her. Personally, I agree with the majority in these cases. But I understand Justice Owen's position and legal reasoning. It is based on sound and clear principles of statutory construction. Her decisions do not demonstrate judicial activism. She did what good appellate judges do every day. She looked at the language of the statute, the legislative history, and then decided how to interpret the statute to obtain what she believed to be the legislative intent.

If this is activism, then any judicial interpretation of a statute's terms is judicial activism. Justice Owen did not invent the legislative history she used to reach her conclusion, just as the majority did not invent their legislative history. We ask our judges to make hard decisions when we give them statutes to interpret that are not well drafted. We cannot fault any of these judges who take on this task so long as they do this work with rigor and integrity. Justice Owen did exactly this.

Second, we must be mindful that the decisions for which she is being criticized had to do with abortion law. I do not know if Justice Owen is pro-choice or not, but it does not matter to me. I am pro-choice as I stated before, but I would not want anyone placed on the bench who would look at abortion law

decisions only through the lens of being pro-choice. Few categories of judicial decisions are more difficult than those dealing with abortion. A judge has to consider the fact that the fetus is a potential human, and this potential will be ended by an abortion. All judges, including those who are pro-choice, must honor the spiritual beauty that is potential human life and should grieve its loss. But a judge has other important human values to consider in abortion cases. A judge also has to consider whether a woman's independence and rights may well be unconstitutionally compromised by the arbitrary application of the law. All this is further compounded when a minor is involved who is contemplating an abortion. I want judges who will make decisions in the abortion area with a heavy heart and who, therefore, will make sure of the legal reasoning that supports such decisions.

I think the members—all the members—of the Texas Supreme Court did exactly this when they reached their decisions in the parental notification cases. I was particularly struck by the eloquence of Justice Owen when she discussed the harm that may come to a minor from having an abortion. She recognized that the abortion decision may haunt a minor for all her life, and her parents should be her primary guides in making this decision. Surely, those of us who are pro-choice have not come to a point where we would punish a judge who considers such harm as an important part of making a decision on parental notification, especially when legislative history supports the fact that members of the Texas Legislature wanted to protect the minor from this harm. As a pro-choice woman, I applaud the seriousness with which Justice Owen looked at this Issue.

If I thought Justice Owen was an agenda-driven jurist, I would not support her nomination. Our founders gave us a great gift in our system of checks and balances. The judicial branch is part of that system, and it is imperative that it be respected and seen as acting without bias or predilection, especially since it is not elected. Any agenda-driven jurist—no matter the issue—threatens the honor accorded the courts by the American people. This is not Priscilla Owen. So even though I suspect Justice Owen is more conservative than I am and even though I disagree with some of her rulings, this does not change the reality that she is an extremely well-qualified nominee who should be confirmed.

It would be unfair to place Priscilla Owen in the same category with other nominees who, in my opinion, are judicial activists and who I do not support. Some of these other nominees appear to want to dismantle programs and policies based on a political or economic agenda not supported by legal analysis or constitutional history. They appear to want to push their views on the country while sitting on the bench. Priscilla Owen should not be grouped with them. Justice Owen possesses exceptional qualities that have made and will make her a great judge. I strongly urge her confirmation.

Sincerely,

LINDA S. EADS,
Associate Professor of Law.

The PRESIDING OFFICER. The Senator has used his time.

Mr. CORNYN. I see my colleague, the senior Senator from Texas, on the floor, and she intends to speak on the same subject.

I yield the floor.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from Texas, Mrs. HUTCHISON, is recognized.

Mrs. HUTCHISON. Madam President, I am very pleased my colleague, Senator CORNYN, has made a wonderful statement about Priscilla Owen. He is one of the few people who has actually served with her, being a member of the Texas Supreme Court with her. So having his insight into her as a professional is, I think, very enlightening for the record of this debate. I thank my colleague from Texas, who is one of the few people in the Senate who actually has been a state Supreme Court justice. I think that gives him a particular advantage in talking about her as a judge with judicial temperament, the demeanor of a judge, and her qualities as a judge. I thank my colleague.

Mr. President, I am going to talk today about Priscilla Owen as a person. I think it is a part of this debate that has never really been brought forth. I am here to support her because she has been a stellar representative of the judges in our country, as she has waited more than 4 years since she was nominated to have an up-or-down vote by the Senate. We have voted on Priscilla Owen, and she has won confirmation four times in the Senate. But here we are again trying to get a vote that will put her in the office to which she has been nominated and for which she has received the majority vote.

I have heard my colleagues, and some interest groups, use very extreme language to describe Priscilla Owen. These statements are coming, in many cases, from people who have never met her and whose minds were made up before they ever learned one thing about her. I want to spend a few minutes talking about Priscilla Richman Owen, the person that is known to those of us in Texas who have seen her as a professional.

Last month, I was sent an interesting document. It was the newsletter of the graduating class of Texas A&M University, the class of 1953. A prominent story had the headline: ''Pat Richman's Legacy.'' It told a story almost nobody in the class knew—that Pat Richman, of Palacious, TX, who had died tragically only 2 years after their graduation from Texas A&M and had left a baby daughter, that daughter of their beloved classmate is now at the center of a national controversy.

Pat Richman was a leader of the Corps of Cadets at Texas A&M, first sergeant of his company, and later its battalion commander. He was one of the stars of the class, one of its most promising leaders. Pat Richman entered active duty in the U.S. Army upon graduation and was shipped to Korea eight months later, but not before marrying his long-time sweetheart. When the boat left, his wife was pregnant.

Pat returned from Korea in May, 1955, having served his country, having done his duty to our Nation. Priscilla was 7 months old. He had never seen his baby daughter. On the way back across the Pacific, news came to the ship. Researchers, led by Jonas Salk, had created a vaccine to combat the scourge of polio. One of Pat's best friends remembers him exclaiming: ''This is wonderful. This means my daughter will never have to worry about being crippled by that disease.''

When Pat arrived back in Texas and was discharged, he accepted a job with the extension service that took him to south Texas. Suddenly, over a single weekend, he contracted bulbar polio. He was rushed into an iron lung—and died in a Houston hospital. Priscilla Owen was 10 months old.

As you would expect, the sudden death of this promising young man sent his entire family into shock, especially his wife. Priscilla's mother retreated to a family farm in Collegeport, Texas. She stayed there for five years grieving and trying to reassemble her life. Eventually, she remarried, and the small family moved to what was considered the big city, Waco, Texas. That is where Priscilla Richman Owen grew up and went to school.

Priscilla became a top student. She was a class officer. She worked part time in high school and college at her stepfather's insurance business, and she sent out premium notices and posted payments. During summers, she returned to Collegeport, helping run cattle and work in the rice field. As a teenager, she spent long days during the rice harvest driving the auger wagon, taking rice from the wet fields to a kiln and drying them.

Priscilla Richman started college at the University of Texas at Austin. After a year, though, she returned home to Waco to be closer to her family, and she enrolled at Baylor University. Her academic record was good, we should say, but it was not perfect. It was not perfect. She got one B-plus—one B-plus in all of her days in college and law school. The rest were A's. Priscilla Owen advanced to law school after only three years of college. She was named editor of the Baylor Law Review.

She finished college and law school after five years and three months, and when she took the Texas bar exam in 1977 at age 23, she got the highest score in the State.

Priscilla Owen was recruited into the Andrews Kurth law firm, one of the biggest in Houston, as a litigator at a time when women were not really in the courtroom very much. She was highly successful, creating a statewide reputation in oil and gas litigation. She chaired the firm's recruitment committee and was made a partner of the firm at the age of 30.

In 1993, when she had been at Andrews Kurth for 17 years, she was asked to run for election to the Texas Supreme Court as a Republican. Although judicial nominees run by party in Texas, she was really apolitical. She had made donations to judicial candidates in both parties just trying to be a contributor and a community leader.

I am amused when I hear interest groups say that Priscilla Owen is a partisan, an ideologue. In 1993, when she was asked to run for the Supreme Court of Texas, she could not remember in what primary she had voted. It would have been determined by the judge races at the time and whether there was a race in the Democratic or Republican primaries. She was told it would be difficult to run on the ticket if she had not voted in the primary in the previous election, and she had to go down to the courthouse to find out in which primary she had voted. It was Republican, and so she said yes.

As it happened, in 1994, when she was running, I was running for reelection, and we campaigned together. I invited her to join me on campaign trips. I have to tell you, she is not a rabble-rousing speaker. Priscilla Owen is a judge. She is soft spoken. She is scholarly. She is what you would want a judge to be. She managed to win with 53 percent of the vote and became an immediate leader on the Texas Supreme Court.

She also became a leader in a cause that makes me smile because I hear people on the other side of the aisle describing her as if she is some big partisan. She writes articles and lobbies the Texas Legislature to do away with partisan election of judges because, as she said in her articles, she thinks it taints the ability of the court to provide impartial justice.

This is actually a controversial position for a judge in our State to say that we should do away with partisan elections, because most of the Republicans in Texas think we should keep partisan elections. But she is not a politician, she is a judge—exactly what we would want in a person nominated for the circuit court of appeals.

When she was up for reelection in 2000, something happened that really had not happened very often to a Republican running statewide in Texas. The Democrats did not even put an opponent against her. She had a libertarian opponent, and virtually every major newspaper in Texas endorsed her. She was returned to office with 84 percent of the vote.

We will have a lot of opportunity on the Senate floor to discuss her court opinions, especially the mischaracterizations of those opinions that various interest groups have made. But I want to share with you what she does when she is not hearing and deciding cases because I believe it will shed light on the character of this person whom I do not recognize when I hear her described on this floor by many who have not even met with her.

She gave up a highly lucrative private practice a dozen years ago at the height of her earning power to run on a reform platform for our State's highest court because there were scandals on the supreme court at the time and we were trying to recruit top-quality people to bring back the integrity and dignity of our supreme court. So she sought a State government salary and gave up her big law firm partner share.

The Code of Judicial Ethics restricts her off-bench activities. She cannot help raise funds even for her church. But she has devoted countless hours toward helping the less fortunate, those in need, and improving access to the judicial system.

For example, Justice Owen is a dog enthusiast and serves on the board of Texas Hearing and Service Dogs. This organization rescues dogs from pounds, provides expensive training for them, and then gives the dogs to quadriplegics, paraplegics, and the hearing and sight impaired—people who cannot afford these trained animals on their own. The dogs perform all sorts of tasks that allow these disabled people to live more independent lives.

She is a founding member of the St. Barnabas Episcopal Mission in Austin, Texas. She serves as head of the church's altar guild. And she teaches Sunday school to preschool, kindergarten, and grade school children. On any given Sunday, you can find Justice Owen hopping on one leg, reading stories, and helping these children find ways to make the right choices in their conduct.

Justice Owen has also worked to ensure that all Texas citizens are now provided access to justice. Yesterday at a press conference, a former president of the Texas Bar Association, one of 15 former State bar presidents—Republicans and Democrats—who support her, told an interesting story. In the mid-1990s, the Congress sharply reduced funding for the Legal Services Corporation. The Texas legal aid system for the poor, including migrant workers, was in serious jeopardy. Priscilla Owen led a committee that persuaded the Texas Legislature to provide millions in additional funding for legal services for the poor. The funding filled gaps caused by the Federal cut to help give legal help for housing, domestic abuse, and food assistance eligibility to thousands of low-income Texans who otherwise would not have been able to have that help.

Priscilla Owen was the supreme court's representative on the Mediation Task Force. The group worked countless hours over many months to resolve differences between lawyer and non-lawyer mediators. As we know, mediation often provides an effective alternative to expensive, full-blown trials, thus making justice more accessible to people who cannot afford expensive lawyers.

Justice Owen is a member of the Gender Bias Reform Implementation Committee and the Judicial Efficiency Task Force on Staff Diversity. She was instrumental in organizing Family Law 2000 to educate parents about the effect of divorce and to lessen the negative impact on children.

These are not headline-grabbing assignments. There is no public glory in this quiet work. I do not see pictures of Justice Owen in the newspapers about all of these activities she has undertaken just to make our State and her community a better place to live. Justice Owen is not a particularly public person. In fact, as you may have read in the press last week, members of her church had no idea what she did for a living until a story appeared about her and this controversy in the Austin newspaper.

Throughout her four years awaiting a Senate vote, Priscilla Owen has not complained, not in public, not in private. She has sat quietly by as people who do not have the faintest idea what she is really like have vilified her, distorted her opinions, and questioned her motives.

Many of my colleagues on the other side of the aisle have declined any opportunity to meet with this lovely person. They have refused to sit down and ask her questions, to see if the person who is portrayed in the propaganda is really the same person. It is their loss because they are missing the opportunity to know a truly exceptional human being.

Over two years ago, an ordinary Texan named Nancy Lacy, who is Priscilla Owen's sister, attended her long-delayed confirmation hearings before the Judiciary Committee in Washington. She sat behind Justice Owen, and she later gave the Dallas Morning News a summary of what she saw. She said:

> It was eye opening. . . . It was a hard experience because no matter what she said, they were going to stick with the propaganda. It was obvious. I was hoping they were going to really give her a shot, try to get to know who she really is, ask thoughtful questions.
>
> But the information they had was wrong to begin with. I felt sorry for them at times; their staffs didn't do a very good job. It was obvious the special interest groups gave them the information, and they didn't research to see if it was true. The handwriting was on the wall.

You know, Madam President, it makes you stop and think when real people come before committees in this Congress how they must feel when they are tortured and pricked and badgered the way we often do without realizing that these are good people. They are people willing to serve, even if you might disagree with them. They are willing to serve our country and they have not been treated well. I believe Priscilla Owen, especially, has not been treated well by this Senate.

I am going to end with a wrap-up of the beginning of the speech that I have made. The Texas A&M class of 1953 held their annual reunion at a hotel in San Antonio last month. Priscilla Richman Owen, known to the group as Pat Richman's daughter, was their special guest. She was able to hear contemporaries of her father tell stories about him that she had never heard before to get a better idea of what he would have been like if he had lived into his seventies instead of dying when she was 10 months old. It was, by all accounts, a moving experience.

I hope that when the class of 1953 and the people who went with Pat Richman to serve our country in Korea meet again, that Pat Richman's daughter will come back and she will be a member of the Court of Appeals, of the Fifth Circuit Court of Appeals of the United States. I think she deserves confirmation.

I thank the chair. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. ALLEN. Madam President, I ask unanimous consent the order for the quorum call be rescinded.

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

Mr. ALLEN. Is it true that the pending business before the Senate is the nomination of Priscilla Owen and other judges?

The PRESIDING OFFICER. That is correct.

Mr. ALLEN. Madam President, in my view there are four pillars that are absolutely essential for a free and just society. The first of those pillars is freedom of religion, where people's rights are not enhanced or diminished on account of their religious beliefs. The second pillar is freedom of expression, where people say what they want without retribution. Third is private ownership of property. And the fourth pillar for a free and just society is the rule of law, where disputes are fairly adjudicated and our God-given rights are protected.

I believe it is absolutely essential that we have judges on the bench at the Federal level and indeed all levels of Government who understand that their role is to adjudicate disputes fairly and honestly, to apply to the facts and the evidence of the case the laws that were made by elected representatives. We are a representative democracy. Judges ought to apply the law, not invent the law, not serve as a superlegislature, not to use their own personal views as to what the law should be. It is absolutely essential for our country, for the rule of law, for the stability one would want for the rule of law, for the credibility and the fair administration of justice, that we have judges who understand this basic principle.

When it comes to the appointment of judges and the election of judges, in some States they are elected, in some they are appointed. At the Federal level, the way it has been since the beginning of the Republic is the President nominates a man or a woman for a particular vacancy. That individual is examined very closely by the Judiciary Committee. They question and try to determine what is their temperament and what will they become once they put on a robe. Especially at the Federal level it is important because they are given lifetime appointments, so there is questioning done as to their scholarship and their judicial philosophy. That is very important.

If that person passes muster in the Judiciary Committee, the procedure, for the past 200 years, was that the nominee get a favorable recommendation. Once in a while they come out of the committee with no recommendation. But ultimately what happens is 100 Senators vote. They vote up or down on these nominations. That is our responsibility. It is my responsibility to the people of the Commonwealth of Virginia who elected me to confirm judges or deny confirmation—but ultimately vote.

What has happened in the last three years, though, is an abrogation of this approach and fair consideration of judicial nominees. We have seen unprecedented obstruction and a requirement, in effect, of a 60-vote margin, particularly for circuit court judges.

Wendy Long, the counsel to the Judicial Confirmation Network, observed a month ago:

> It is abundantly clear that the American people are tired of the partisan, political maneuvering and the unwarranted character assassinations against qualified candidates for the Federal bench.

She observed, and I agree:

> People see through these aggressive negative attacks waged by some individuals and groups on the left and they want it to end. They want Senators to do their jobs and hold a straight up-or-down vote on nominees based on their qualifications, not the baseless negative rhetoric of the left.

I agree. I think the people of America believe these nominees deserve a fair vote based on their qualifications. I think my colleagues should take notice.

Two of the nominees who have suffered at the hands of the opposition are Judges Priscilla Owen and Janice Rogers Brown. First, in respect to Justice Owen, I listened to the heartfelt views of Senator HUTCHISON of Texas about Justice Owen. Senator HUTCHISON knows her better than I do, but I strongly support Justice Owen; not just her nomination but her confirmation. In fact, she is arguably one of the best nominees President Bush has nominated to the appellate court. Even the American Bar Association agrees. They unanimously rated Judge Owen well qualified, their highest rating.

Sadly, Justice Owen was the first unanimously approved well-qualified ABA nominee who was held up a few years ago in the Judiciary Committee.

What are some of the reasons why the Democrats are opposing Justice Owen? The Number one reason I have heard is it was because of her interpretation of Texas' parental notification statute. The Democrats and her opponents have charged Justice Owen is found to be an activist in cases involving the interpretation of the Texas parental notification statute that was enacted in 1999.

If you want to look at that statute, it says as follows. It requires notice to a parent when a minor woman seeks an abortion, but allows exceptions when the trial court judge concludes the minor is mature and sufficiently well informed to make the decision without notification of a parent; that notification would not be in the best interests of the minor; or that notification may lead to physical, sexual, or emotional abuse of the minor.

From reading Justice Owen's opinions with respect to the statute, I found that Justice Owen interpreted the parental notice statute in Texas and its exceptions fairly and neutrally, in accord with the plain legislative language, as well as relying on precedent from the Supreme Court of the United States. She expressly relied on U.S. Supreme Court cases addressing similar laws to interpret the statutory exceptions. In fact, even the Washington Post has opined that:

> While some of Justice Owen's opinions—particularly on matters related to abortion—seem rather aggressive, none seems to us beyond the range of reasonable judicial disagreement.

That is the Washington Post and I would hardly call the Washington Post a bastion of conservative philosophy.

Justice Owen's record in these cases is far from that of an activist. In fact, it demonstrates her judicial restraint and her understanding of the proper role of an appellate judge. Under the Texas statute, the Supreme Court of Texas does not review judicial bypass cases unless the bypass has already been rejected at the trial and the intermediate appellate court level. In other words, every time Justice Owen voted to deny a judicial bypass, she was simply upholding the rulings of lower courts. That means she upheld the ruling of the trial judge, the only judge who actually saw and heard the case, a decision with which at least two out of three appellate court judges agreed.

This type of deference is entirely appropriate in cases such as this, where the determination turns largely on the factual findings and the credibility of the witnesses. The trial judge who actually observes and hears the testimony of a plaintiff in a judicial bypass case is best positioned to determine the credibility of that evidence and that witness.

By deferring to the trial court's judgment on factual questions, Justice Owen has appreciated, obviously, the proper role of an appellate judge. However, when a trial judge commits a clear error, Justice Owen has not hesitated to reverse the judgment and order a bypass, or remand for further proceedings, as she has done on three occasions.

My colleagues, I understand this parental notification issue. As Governor of Virginia, I worked for the passage and signed Virginia's requirement to notify parents if their unwed minor daughter, 17 or younger, is planning an abortion. Opponents of this attacked me and said things very similar to what you hear about Justice Owen. They said we were trying to tear down Roe v. Wade. That is quite contrary from my standpoint. I want the record

to note that Justice Owen has repeatedly demonstrated adherence to Supreme Court precedent, including Roe v. Wade. In fact, almost 80 percent of the American people believe a parental notification statute for a minor is reasonable.

I asked my staff to look back in my documents to find the speech I gave before I signed the bill on March 22, 1997. Here is the reasoning that motivated me and the people of Virginia to finally pass a parental involvement measure—and I am for parental consents even better, but our statute is similar to Texas. I said on the steps of Mr. Jefferson's capital in Richmond, VA:

> Today we are signing legislation affirming the importance and the necessity of a parent's guidance and counsel if their young daughter is facing the trauma of an abortion. Ladies and gentlemen, parents have the right and the responsibility to be involved with important decisions in their young children's lives, especially those that affect their physical and emotional health.

It was hard to get this bill passed. It was 17 years before it actually passed, a true parental notification bill. This was logical law. When one considers that for a minor to get their ears pierced, one needs parental consent, it makes a great deal of sense to me that if a young daughter, unwed, 17 or younger, is going through a trauma of abortion, a parent ought to be involved. That is what the Texas law was about. When daughters are going through this trauma, parents ought to know as opposed to being in the dark.

But I want to stress that the Texas statutes and the Virginia statutes are merely parental notice statutes. Those statutes express the views of the people of the State of Texas, the Commonwealth of Virginia, and indeed the more than 40 States that have some sort of parental involvement statutes on their books. In fact, they reflect the views of this country. In fact, they believe what Justice Owen was doing was correct in applying this statute as she did.

In summation, Justice Owen is a person with outstanding qualifications. She graduated at the top of her class at the Baylor Law School and subsequently earned the highest score in the State on the December 1977 Texas Bar Exam. After graduation she practiced commercial litigation for 17 years and became a partner at one of the most respected law firms in the State of Texas. Finally, in 1994, Justice Owen was elected to the Texas Supreme Court. In 2000, she won reelection by an overwhelming 84 percent of the vote, and was endorsed by every major newspaper in Texas.

Her support is wide and it is bipartisan, ranging from a number of former Democratic judges on the Supreme Court of Texas to a bipartisan group of 15 past presidents of the State Bar of Texas.

It is important that we act on Justice Owen's nomination because the Judicial Conference of the United States has designated the seat Justice Owen is nominated for as a judicial emergency. Justice Owen is well qualified to be a judge on the Fifth Circuit Court of Appeals, and the longer the opposition keeps holding up this nomination—and this has been going on now for 4 years—the longer average citizens will have to wait to have their cases heard. She deserves a fair up-or-down vote.

With respect to Justice Janice Rogers Brown, she has been nominated by the President to the U.S. Court of Appeals for the DC Circuit, where currently one-fourth of that court is vacant. Her qualifications are impeccable. In the past years I talked about Miguel Estrada, another outstanding nominee who had unanimous support, the highest recommendation from the American Bar Association, and who was denied, year after year, the fairness of an up-or-down vote. He was a modern-day Horatio Alger story.

Justice Brown is an American success story as well. She reflects the fact that with hard work and determination you can succeed if you put your mind to it. Her rise from the humble beginnings she had in the segregated South to becoming the first African-American woman to serve on the highest court in the largest State in the country is truly an inspiring American success story.

In her 9 years on the California Supreme Court, Justice Brown has earned the reputation of being a brilliant and fair jurist who is committed to the rule of law. That reputation has returned her to the court when she was supported by 76 percent of California voters, which was the largest margin of any of the four justices up for retention that year. Her reputation has also led the Chief Justice of the California Supreme Court to call on Justice Brown to write the majority opinion more times, in 2001 and 2002, than any other justice on the Supreme Court of California. When someone gets 76 percent of the vote and is called on to write the majority opinion more times than any other justice on that court, that means you are well respected and you are doing a good job and that you are clearly within the mainstream, not out of the mainstream as is asserted by those who obstruct her vote.

Justice Brown's opponents would like the American people to think she is a radical, an ideological extremist in her opposition to government. I contend if she was so extreme, why did 76 percent of California voters support her? Sadly, her opponents continually attack her for her opposition to government even though she has stated for the record that she does not hate government. If she hates government, why is she a part of it?

A thorough analysis of her opinions clearly indicate she is capable of dissecting her personally held views of her dislike of expansive government, from her opinions that seek to apply the law as it exists and defer to the legislative judgments on how best to address social and economic problems.

Justice Brown has been extremely cooperative with the Senate Judiciary Committee. She testified for nearly 5 hours at her hearing and answered every charge leveled against her. Justice Brown is clearly qualified for this job, and her colleagues, Republican and Democrats alike, agree.

Twelve of her colleagues wrote the following about her:

> We who have worked with her on a daily basis know her to be extremely intelligent, keenly analytical and very hard working. We know she is a jurist who applies the law without favor, without bias and with an even hand.

Now, isn't that what one would want in a judge? This quote best summarizes my faith that many people, including myself, have in Justice Brown. In an October 17, 2003 letter to Senator HATCH, Judge Talmadge R. Jones of the Sacramento Superior Court wrote:

> More importantly, the exceptional judicial performance of Justice Brown as a Circuit Judge will readily be apparent to everyone, and a worthy tribute to the confidence placed in her by both the President and the United States Senate.

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

Mr. ALLEN. I ask unanimous consent to be allowed 5 more minutes.

Mr. SCHUMER. I object.

The PRESIDING OFFICER. The objection is heard.

Mr. SCHUMER. If the Senator wants to arrange to go for the next hour under Republican time, that is just fine.

I would like to accommodate my friend, but we have a set schedule. We come at different times and places and we have stuck by it. We are already 2 or 3 minutes over, so I have to object.

Mr. ALLEN. Madam President, I ask Unanimous Consent that I be allowed 1 minute and add 1 minute to the Democrats' side to sum up.

Mr. SCHUMER. I will accept that.

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

Mr. ALLEN. I thank my colleagues.

In summation, Priscilla Owen, Janice Rogers Brown, and all of the President's nominees, deserve a fair up-or-down vote.

The people all across this country, whether they are down in Cajun county in Louisiana, whether they are down in Florida, whether they are in the Black Hills of South Dakota, or whether they are in the Shenandoah Valley of Virginia, expect action on judges. As much as people care about less taxation and energy security for this country and wanting us to be leaders in innovation, they really expect the Senate to act on judges. It is a values issue. It is a good government issue. It is a responsibility-in-governing issue that needs to be addressed.

As I said earlier, there is no reason to filibuster these nominations. As Senators we have a responsibility to vote. These nominees deserve fair consideration, fair scrutiny, but ultimately we have a responsibility to get off our

haunches, show the backbone, show the spine, vote yes or vote no, and be responsible to our constituents.

I thank you, Madam President, and I yield the floor.

Mr. SCHUMER. I believe I now have 30 minutes?

The PRESIDING OFFICER (Mr. THUNE). The minority has 61 minutes remaining.

Mr. SCHUMER. But I have 30 of that, or 31. I yield 3 minutes to my colleague from the State of Washington, and then 1 minute to my colleague from the State of California, and then I will take the remaining 26 minutes.

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

The Senator from Washington.

Mrs. MURRAY. Mr. President, I thank my colleague from New York for yielding me just a few minutes. I was over in my office a few minutes ago listening to the debate on both sides, and I heard my good friend and colleague, the Senator from Texas, talk about her tremendous friendship and passion for the woman whose nomination is in front of the Senate today, Priscilla Owen.

I have tremendous respect for Senator HUTCHISON and all of her passion she has put in here. All Senators have been in a position of fighting hard for something we believe in, someone we care about. Sometimes we win, sometimes we have lost.

One of the things that was said was that many of the colleagues on this side of the aisle, many of my colleagues have declined any opportunity to meet with this lovely person. They have refused to sit down and ask her questions to see if the person that is portrayed and the propaganda is really the same person.

Mr. President, I want to set the record straight. I did sit down and meet with Judge Owen yesterday at the request of the Senator from Texas. I could not agree more, she was a lovely person. But this is not a debate about a lovely person. This is a debate about a record on judicial decisions and about whether that record merits promoting someone to a lifetime appointment.

I will later today join with my colleagues to give more specifics, but I have sat down with Priscilla Owen. I have asked her questions, and I have reviewed the record. This is not about a person. This is about a record. It is about a record that is outside the mainstream on parental consent, which we have heard about. But not just that, it is about victims' rights, which any of us can be. It is about workers' rights, about a bias about campaign contributions. We will be setting that record straight throughout this debate.

It is especially important for all to recognize a record says what someone will be and what decisions they will make about any one of us in this country in the future. That is what I dispute. That is what I will discuss later today when I have more time to outline.

We can all agree that lovely people deserve opportunities, but when it comes to our courts and when it comes to making decisions about us, our family, about women, about children, about rape victims, about workers, the many things that come before a court, a record is what we have to look at and what we have to stand on.

I thank my colleague from New York for giving me an opportunity to respond.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, I will rebut something that my friend from Virginia, Senator ALLEN, said about Janice Rogers Brown. He said she was in the mainstream. This is a woman who has served on the California Supreme Court that is made up of six Republicans and one Democrat. She has dissented a third of the time because her Republican friends on that court are not radical enough for her. Thirty-one times she stood alone on the side of a rapist, on the side of energy companies against the consumers, against women who were seeking to get contraception. It goes on and on—against workers. She said it was fine for Latinos to have racial slurs used against them in the workplace.

This is a woman with an inspiring personal life story. But it is what she has done to other people's lives that makes her far out of the mainstream.

I thank my colleague for yielding. I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, this debate is not only about Priscilla Owen and whether she should become an appellate judge, but it is about something much more momentous. If the situation in the Senate were not so grave, there might be some humor in the fact my strict constructionist Republican friends who daily claim to be against activist judges are, through the nuclear option, engaging in the most activist reading of the Constitution to seat an activist judge on the appellate court. That is breathtaking hypocrisy.

But we are more profound than that. We are on the precipice of a crisis, a constitutional crisis. The checks and balances which have been at the core of this Republic are about to be evaporated by the nuclear option, the checks and balances which say if you get 51 percent of the vote you do not get your way 100 percent of the time. It is amazing. It is almost a temper tantrum by those on the hard right. They want their way every single time, and they will change the rules, break the rules, misread the Constitution so they will get their way.

That is not becoming of the leadership of the Republican side of the aisle, nor is it becoming of this Republic. That is what we call abuse of power.

There is, unfortunately, a whiff of extremism in the air. In place after place, the groups that were way out of the mainstream with their disproportionate influence on the White House and the Republican leadership in this Senate seem to push people to abuse power.

It happened in the Schiavo case, and there was a revulsion in America. It happened with threats against judges, both made by some of my colleagues in this body and certainly by some well-known activist religious figures. It has happened on Social Security where there is an attempt to undo a very successful government program. And that is why the popularity, the respect that this Republican leadership has in America, goes down every day. I know, as chair of the DSCC, because I keep an eye on those things.

I make a plea. It is to the seven or eight Republicans on that side of the aisle. Every one of them has told us they know the nuclear option is wrong. It is a plea to have the courage to stand up for what is right. There are many others of our colleagues on the other side of the aisle who have already said they know the nuclear option is wrong, but they say they cannot resist the pressure. I understand it. We have had times on the Democratic side where groups on the left extreme have had undue influence. But it is in yours and America's detriment and to our party's detriment.

We are on the precipice of a constitutional crisis. It rests on the shoulders of three or four men or women on the other side of the aisle. We hope we will not fall into the abyss.

Judges are now under siege. Our Constitution is under attack. Our precious system of checks and balances is under assault. Some of my colleagues seem to have forgotten we in the Senate have a constitutional role to play, and we will. The Founding Fathers did not intend us to march lockstep like lemmings behind every Presidential appointee no matter how many times he or she is put before the Senate. The Founding Fathers, whom many of us like to cite, foresaw collaboration between the President and the Senate in the seating of judges. The Founding Fathers expected, because of the advice and consent clause, the President would be judicious, that he would talk to the Senate about nominees.

This President has done none of that. No President has nominated judges more through an ideological spectrum than this President. When he asks why he doesn't get cooperation from the Democrat side, he has reaped what he has sown. No consultation, no discussion, and nominees who tend to be way over at the extreme.

As Hamilton wrote in the Federalist Papers about the importance of the Senate's role in approving judicial nominees, the possibility of rejection of nominees would be a strong motive to use care in proposing. But this President, instead of taking that care that the Founding Fathers sought, has seen some of his nominees—a handful—rejected, and now instead of accepting that as a consequence of no consultation and of nominating extreme judges,

he seeks to encourage the majority leader and others to change the rules in this hallowed institution.

Why are we at this crisis point? The bottom line is that no President in memory has taken so little care in the proposing of judges.

What about abuse of power? I will talk for a moment, before I talk about Priscilla Owen, about the nuclear option. If there ever was something that signified an abuse of power, a changing of the rules in midstream simply because you could not get your way on every judge, it is this nuclear option. There is now a desperate attempt on the other side of the aisle not to call it the nuclear option, but it was my colleague from Mississippi, the former majority leader, who gave it that name—with justification. You won't change the name. To call it the constitutional option is hypocrisy. There is nothing in the Constitution that talks about filibuster or majority vote when it comes to judges in the Senate.

It is a nuclear option because it will vaporize whatever is left of bipartisanship and comity in the Senate.

Now, let me ask a question: How much power does the Republican leadership need? How much power is it entitled to? Does a 1- or 2-percent point victory in the last election, does a margin of five Senators give them the right to get their way all the time and then to change the rules if they can't?

The American people are understanding this. There are only three branches of Government. The Republican Party has a tight grip on all three. Republicans control the Presidency, they control the House, they control the Senate. They already have control of the courts.

As the chart shows, of all of our judicial circuits, only two have slight Democratic majorities. The sixth is even. And all the others have Republican majorities.

The circuit courts, the courts of last resort, are overwhelmingly Republican already in terms of their appointees. And on the new judges they have been able to fill, they have gotten their way 95 percent of the time. As one of my colleagues said, if your child came home and said they got a 95 on their test, would you pat them on the head and say ''good job'' or would you say ''go change the rules, cheat until you get 100 percent''? That is what the other side is doing.

Ninety-five percent should make this President very happy. And maybe it would if he was left to his own devices. But the group of hard-right extremists, who seem to have disproportionate sway, are not happy unless they have 100 percent.

Now, let me talk a little bit about calling it a ''constitutional option.'' The other side will, with a straight face, either tomorrow or the next day, invoke our democracy's chief charter, the Constitution, in ruling that judicial filibusters are prohibited by the Constitution. There is only one problem. There is nothing in the Constitution that supports the nuclear option. There is nothing in the Constitution that requires a majority vote for every judicial nominee. Republicans know this.

The Senator from Tennessee, our majority leader, who got on the floor earlier today and said for 214 years there have not been filibusters of judges, has a very short memory. I asked him this morning, Did you not, on March 8, 2000, vote in favor of a filibuster of Richard Paez to the Ninth Circuit Court of Appeals? Here is a copy of the vote. Voting no: FRIST, Republican of Tennessee. Did he think it was unconstitutional then? He said on the floor, in answer, Well, some are successful, some are not. I have never known the Constitution to say that something is unconstitutional if it fails and constitutional if it succeeds. When we talk about attempted murder or robbery or larceny, it is still a crime.

So I would like to ask my colleague to answer during this debate, How can he distinguish as unconstitutional our votes to block judges, and it is perfectly acceptable, 5 years ago, his vote to block a judge, or the scores of votes by other Republicans in favor of filibusters over the years, including those against Paez and Berzon and Fortas? Were they unconstitutional? I do not think so.

Furthermore, have judges never been blocked? All the time. One out of every five Supreme Court nominees did not make it to the Supreme Court. That is part of the tradition of this country. Should the Senate have majority say? No. Should we have the say the majority of the time? No. Should we have the say some of the time? Yes. And there is the balance. The more a President consults, the more the President nominates moderate nominees, the more likely his nominees will succeed. Bill Clinton had a little trouble, but he consulted ORRIN HATCH regularly. PATRICK LEAHY has not been consulted by the President at all.

Another interesting point. It seems the only people who seem to cling to the nuclear option are those in elected office who are susceptible to the power and sway of these extremist groups. Conservatives who are not in public office, retired elected officials, commentators, have repeatedly said the nuclear option is not constitutional.

How about George Will—hardly a liberal—one of the country's most foremost commentators. Here is what he said:

> Some conservatives say the Constitution's framers ''knew what supermajorities they wanted''—the Constitution requires various supermajorities, for ratifying treaties, impeachment convictions, etc.; therefore, other supermajority rules are unconstitutional. But it stands—

Listen to this.

> But it stands conservatism on its head to argue that what the Constitution does not mandate is not permitted.

Of course. The people who advocate this are the greatest activists of all. And it is an unbelievable turnaround, an unbelievable act of hypocrisy, that all of a sudden activism, which means interpreting things in the Constitution which are not in the writings of the Constitution, is OK when you want to get your way. It is wrong.

Now, let me talk a little bit about Priscilla Owen. She is the nominee before us today. This is the third time we have considered the nomination of Priscilla Owen. Each previous time she got an up-or-down vote. She did not get 60, but she sure got an up-or-down vote. Everyone's vote was on the record. This was not being done, what was done in the Clinton years, which was not even letting judges come up for a vote. Here we are again.

Why are we doing Priscilla Owen again? Because 95 percent is not good enough for the President or for the leadership here in the Senate. On the merits, nothing has changed. There is no question she is immoderate and that she is a judicial activist. I continue to believe Justice Owen will fail my litmus test, my only litmus test in terms of nominating judges; that is, will they interpret law, not make law? Will they not impose their own views and have enough respect for the Constitution and the laws of this land that they will not impose their own views?

Well, do not ask me. Ask the people who served with Justice Owen. They believe that she, time and time again, cast aside decades of legal reasoning, miles of legislation, to impose her own views. If there was ever a judge who would substitute her own views for the law, it is Judge Owen. Her record is a paper trail of case after case where she thinks she knows better than hundreds of years of legal tradition.

In one case, In re Jane Doe, Judge Owen's dissent came under fire from her colleagues in the Texas Supreme Court. They referred to her legal approach as an effort to ''usurp the legislative function.'' That was a very conservative court, and they still said Justice Owen put her views ahead of the law.

Even more troubling, of course, is what Attorney General Alberto Gonzales said. He sat on the same court with Judge Owen. He wrote a separate opinion in which he chastised the dissenting judges, including Justice Owen, for attempting to make law, not interpret the law. These are Judge Gonzales' words, not mine. He said that to construe the law as the dissent did ''would be an unconscionable act of judicial activism.'' Those are not my words. Those are the words of the man the President has appointed as Attorney General.

In another case, Montgomery Independent School District v. Davis, the majority ruled in favor of a teacher who had been wrongly dismissed, and the majority, including Judge Gonzales, wrote that:

> the dissenting opinion's misconception . . . stems from its disregard—

Not its misinterpretation; ''its disregard''—

of the [rules] the Legislature established.

In a third case, Texas Department of Transportation v. Able, Justice Gonzales also took Justice Owen to task for her activism, indicating she had misunderstood the plain intent of the State legislature.

The list goes on and on. And there is nothing to indicate she has backed off from her activist tendencies.

As extreme as Justice Owen is, Justice Janice Rogers Brown is even more so.

The things she has said are unbelievable. She is an activist judge, more committed to advancing her own extreme beliefs and ideas than guaranteeing a fair shake for millions of Americans who would be affected by her decisions on the DC circuit. There was the Lochner case which threw out as unconstitutional a law that said bakery workers could not work a certain number of hours. That was a New York law, so we are not even dealing with federalism. It was decided in 1906 or 1901, close to 100 years ago. If you go to law school, it is called the worst Supreme Court decision of the 20th century.

She said it was decided correctly. Judge Janice Rogers Brown believes that if an employer wanted to employ a child for 80 hours in awful conditions, that would be that employer's constitutional right.

Justice Brown's views on economics make Justice Scalia look very liberal. She doesn't want to roll back the clock to the 1950s or even the 1930s. She wants to go back to the 1800s. She has been nominated to the most important court in the country when it comes to enforcing Government laws and rules—environmental, labor—and yet she abhors Government.

Here is what she once wrote:

> Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies.

Does the kind of person who thinks that way belong on any court of appeals, and particularly on the DC Court of Appeals? Absolutely not.

For those reasons, the American Bar Association gave her one of the lowest rankings any of this administration's circuit court judges have ever received.

We stand on the edge. This is an amazing time. I wake up in the morning, sometimes with butterflies in my stomach, thinking the Senate might actually attempt to do this. If there was ever a time where the power grab has been so harsh, so real, and so unyielding, it is now. It is not simply that we have a disagreement of ideas and we argue vehemently. It seems much more that the leadership on the other side can't stand the fact that they don't always get their way and that they have to change the rules to do it.

People who hate activist judges are becoming activist themselves in the sense that they read into the Constitution things that are never there. People who say that they respect bipartisanship are going to undo whatever is left of bipartisanship here in the Senate.

Amazingly enough, with all of the smoke pumped by the radical right's media machines, talk radio, the American people have a deep understanding. The only solace I have, as we are on the edge of this crisis and the eve of a great vote in the Senate, is that the American people understand what majority leader FRIST is up to. They understand this is a power grab. They understand this is a breaking of the rules. They understand the checks and balances will go by the wayside. What was good enough 4 years ago, votes on filibusters, is not acceptable today.

I believe the nuclear option, even if it should pass on the floor this week or next week, will not stand, that the American people will understand what is attempting to be done, they will rise up and, whether it is at the polls or just in the court of public opinion, cause the nuclear option to be undone.

That is the faith I have in the Government we have and the people who are governed. But let us not go through that. We will stop progress in the Senate. We will ruin bipartisanship, whatever is left of it, and we will be playing with fire when it comes to the constitutional checks and balances that are at the core of our Constitution and our Republic.

I will have plenty more to say in the upcoming weeks, but it is a momentous time. I appeal once again to my colleagues: Think of what you are doing. Think of its consequences. Maybe we won't have to live with this, the greatest undoing of the Constitution that this Senate has seen in decades.

I yield the remaining time to my colleague from California.

The PRESIDING OFFICER. The Senator from California is recognized.

Mrs. FEINSTEIN. Mr. President, I thank the Senator from New York. He serves as the ranking member of the Subcommittee on Administrative Oversight and the Courts of the Judiciary Committee, and he more or less heads all of the hearings with respect to these judges. He has done an excellent job. He is thorough. As everybody knows, he is a smart and intelligent man. He has made a very eloquent statement. So I thank him.

Last week I came to the floor and discussed the nuclear option. I recognize today that we are now faced with going down this path. I am concerned that once begun, it is going to be hard, if not impossible, to reverse it.

I find it ironic in his statement the majority leader said:

> All Members are encouraged to ensure that rhetoric in this debate follows the rules and best traditions of the Senate.

That is exactly what this side of the aisle is fighting for—the rules and the traditions of the Senate. We are standing up to those in the other party who want to break the rules and precedent of the Senate. So in reality, it is those of us on this side of the aisle who are asking the majority leader to follow all the rules and precedents of the Senate, not just the one he supports or any other group of Members might support.

Some have argued this debate is too inside baseball or, more appropriately perhaps, too inside the beltway and that Americans don't care about it. However, I believe that is wrong. To date, I have received about 16,000 phone calls, and they are running three to one in favor of opposing the nuclear option. The reason is, people are beginning to understand this debate is built on the very foundation of why we are here, why our democracy has been successful over 200 years, and why our Constitution is looked at as a model across the world in emergent democracies.

Let me try to explain, once again, why Senators take their role of advise and consent so seriously and what this nuclear option will mean, not only for the Senate and the judiciary but for our Constitution and our country.

First, Federal judges' decisions impact laws that affect our everyday lives—privacy protection, intellectual property, laws of commerce, civil rights, environmental regulations, highway safety, product liability, the environment, retirement security. And those are just a few examples. Who we confirm is important because their ability to interpret basic law, based on the Constitution of the United States, is critical to our functioning. Their independence to do that is critical.

Secondly, Federal judges enjoy lifetime appointments. They don't come and go with administrations, as do Cabinet Secretaries. They cannot be removed from the bench, except in extremely rare circumstances. In fact, in our Government's over 200-year history, only 11 Federal judges have been impeached and, of those, only 2 since 1936.

Thirdly, Federal judges are meant to be independent. The Founding Fathers intentionally embedded language in the U.S. Constitution to provide checks and balances. Inherent in our Government is conflict and compromise, and that is the fundamental principle in the structure of our Government. The judiciary is meant to be an independent, nonpartisan third branch.

I think John Adams, in 1776, made it very clear on the point of checks and balances and an independent judiciary, when he said:

> The dignity and stability of government in all its branches, the morals of the people and every blessing of society, depends so much upon on upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checked upon that . . . [The judges'] minds should not be distracted with jarring interests; they should not be dependent upon any man or body of men.

Now, that is the clearest statement of intent from our Founding Fathers, that the judiciary should be and must be independent. That is what is being

eroded with the partisanship and with the nuclear option. The Senate was meant to play an active role in the selection process. The judiciary was not solely to be determined by the executive branch. Last week, I described how, in the Constitutional Convention, the first effort put forward was actually to have the Senate nominate and appoint judges. Then it was later on, with the consideration of others, changed to allow the President to nominate. But the explanation in the Federalist Papers is all centered around the Senate having the real power to confirm, and that power is not a rubberstamp.

Because of these fundamental concerns, for centuries there have been heated and important debates surrounding judicial nominations. Today, rather than utilizing and preserving the natural tension and conflict our Constitution created, some in the Republican Party want to eviscerate and destroy that foundation. Blinded by political passion, some are willing to unravel our Government's fundamental principle of checks and balances to break the rules and discard Senate precedent.

The nuclear option, if successful, will turn the Senate into a body that could have its rules broken at any time by a majority of Senators unhappy with any position taken by the minority. It begins with judicial nominations. Next will be executive appointments, and then legislation.

A pocket card being passed around in support of the nuclear option states this:

The majority continues to support the legislative filibuster.

Yes, they do today, but what happens when they no longer support it tomorrow or the next day? If the nuclear option goes forward and they break Senate rules and throw out Senate precedent, then any time the majority decides the minority should not have the right to filibuster, the majority can simply break the rules again. Fifty-one votes are not too hard to get. Get the Vice President, have a close Senate, and you get it. That will be new precedent again in the Senate. So once done, it is very hard to undo. That is why precedent plays such a big part in everything we do because we recognize that once you change it, you open that door for all time. It can never be shut again. If this is allowed to happen—if the Republican leadership insists on enforcing the nuclear option, the Senate becomes ipso facto the House of Representatives, where the majority rules supreme and the party in power can dominate and control the agenda with absolute power.

The Senate is meant to be different. In my talks, I often quote George Washington and point out how the Senate and House are often referred to as a cup of coffee and a saucer. The House is a cup of coffee. You drink your coffee out of the cup. If it is too hot, you pour it into the saucer—the Senate—and you cool it. The Senate is really formed on the basis that no legislation is better than bad legislation and that the debates and disagreements over judicial nominations ensures that the Senate confirms the best qualified candidates.

So the Senate is meant to be a deliberative body, and the rights of the minority, characterized by the filibuster, are purposely designed to be strong. Others describe the Senate as a giant bicycle wheel with 100 spokes. If one Senator—one spoke—gets out of line, the wheel stops and, in fact, that is true. In our rules, any Senator can put a hold on a piece of legislation and essentially force the majority to go to a cloture vote—essentially, force a 60-vote necessity for any matter to be brought to the floor. This distinguishes us from the House. Because we know it is such a strong right, we are very reluctant and very reserved in the use of that right. This is what has produced comity in this House, the collegiality. Everybody knows if you put a hold on something too often, you are going to jeopardize things you want. So what goes around comes around and comity, such as it may be, exists.

Now, when one party rules all three branches, that party rules supreme. But now one party is saying that supreme rule is not enough, that they must also completely eliminate the ability of the minority to have any voice, any influence, any input.

This is not the Senate envisioned by our Founding Fathers. It is not the Senate in which I have been proud to serve for the last 12 years. And it is not the Senate in which great men and women of both parties have served with distinction for over 200 years. We often refer to the longest filibuster in history, which was conducted by Senator Strom Thurmond and lasted for more than 24 hours. That was an actual filibuster, standing on the floor and orating, or asking the clerk to read the bill, or reading the telephone directory, and doing it hour after hour after hour, sending the message that you are stopping debate, that on the great wheel of comity one spoke is sticking out and stopping it. People listen because, unlike the House, debate and discussion has been important. It has been fundamental in our being, and our ability to stand up on the floor of the Senate and discuss issues of import before the world on television, for the CONGRESSIONAL RECORD, for all of the people who watch on closed circuit television, becomes a signal, I think, on Capitol Hill.

When Democrats were in the White House—I will talk for a moment on Senate procedure—Republicans used the filibuster and other procedural delays to deny judicial nominees an up-or-down vote. So denying a judicial nominee an up-or-down vote is nothing new. It has been done over and over and over again. I speak as a member of the Judiciary Committee for 12 years, and I have seen it done over and over and over again. So why suddenly is an up-or-down vote now the be all and end all?

Last administration, Republicans used the practice of blue slips or an anonymous hold, which I have just described, to allow a single Senator—not 41 Senators, but 1—to prevent a nomination from receiving a vote in the Judiciary Committee, a 60-vote cloture vote on the floor, or an up-or-down vote on the floor of the Senate. This was a filibuster of one, and it can still take place within the Judiciary Committee.

The fact is, more than 60 judicial nominees suffered this fate during the last administration. In other words, over 60 Clinton judges were filibustered successfully by one Senator, often anonymous, often in secret, no debate as to why. It was an effective blackball.

This is not tit-for-tat policy, but it is important to recall that Senate rules have been used throughout our history by both parties to implement a strong Senate role and minority rights, even the right of one Senator to block a nomination.

Republicans have argued that the nominations they blocked are different because in the end, some, such as Richard Paez and Marsha Berzon, were confirmed. This ignores that it took over 4 years to confirm both of them because of blue slips and holds.

In addition, if a party attempts to filibuster a nomination and a nominee is eventually confirmed, that does not mean it is not a filibuster. Failure does not undo the effort. I pointed out earlier where, in 1881, President Hayes nominated a gentleman to the Supreme Court. That was successfully filibustered throughout President Hayes' term. When President Garfield then came into office, he renominated the individual, and the Senate then confirmed that individual. But that does not negate the filibuster. It was the first recorded act of a filibuster of a judicial nominee, and it, in fact, took place and was successful for the length of President Hayes' term.

More importantly, while some of Clinton's nominations eventually broke through the Republican pocket filibuster, 61 of President Clinton's judicial nominations were not confirmed because of Republican opposition. Not only were they not confirmed, they were not given a committee vote in Judiciary. They were not given a cloture vote here or an up-or-down vote on the floor. So these are really crocodile tears.

Republicans have also argued that the reason the nuclear option is needed now is because the Clinton nominees were not defeated by a cloture vote. In essence, because different procedural rules were used to defeat a nominee, it does not count.

On its face, this argument is absurd. To the nominee, whatever rule was used, their confirmation failed and the result is the same: They did not get a

vote, and they are not sitting on the Federal bench.

As I said, 61 Clinton nominees, in the time I have sat on the Senate Judiciary Committee—so I have seen this firsthand—were pocket filibustered by as little as one Senator in secret and, therefore, provided no information about why their nomination was blocked. There was no opportunity to address any concern or criticism about their record and qualifications.

Just to straighten out the record because I debated a Senator yesterday: 23 of these were circuit court nominees and 38 were district court nominees. In addition, unlike what some have argued, this practice was implemented throughout the Clinton administration when Republicans controlled the Senate, not just in the last year or final months of the tenure of the President.

The reason I mention this is because there is sort of an informal practice in the Judiciary Committee—it is called the Thurmond rule—that when a nominee is nominated in the fall of year of a Presidential election, that nominee does not generally get heard. But I am not only talking about nominees at the tail end; I am talking about nominees who were nominated in each of the 6 years of the Clinton Administration in which the Republican party controlled the Senate.

The following is a list of President Clinton's judicial nominees who were blocked:

Nominees	Court nominated to	Date nomination first submitted to Senate
Circuit Court		
Charles R. Stack	Eleventh Circuit	10/27/95
J. Rich Leonard	Fourth Circuit	12/22/95
James A. Beaty, Jr	Fourth Circuit	12/22/95
Helene N. White	Sixth Circuit	01/07/97
Jorge C. Rangel	Fifth Circuit	07/24/97
Robert S. Raymar	Third Circuit	06/05/98
Barry P. Goode	Ninth Circuit	06/24/98
H. Alston Johnson, III	Fifth Circuit	04/22/99
James E. Duffy, Jr	Ninth Circuit	06/17/99
Elena Kagan	DC Circuit	06/17/99
James A. Wynn, Jr	Fourth Circuit	08/05/99
Kathleen McCree Lewis	Sixth Circuit	09/16/99
Enrique Moreno	Fifth Circuit	09/16/99
James M. Lyons	Tenth Circuit	09/22/99
Allen R. Snyder	DC Circuit	09/22/99
Robert J. Cindrich	Third Circuit	02/09/00
Kent R. Markus	Sixth Circuit	02/09/00
Bonnie J. Campbell	Eighth Circuit	03/02/00
Stephen M. Orlofsky	Third Circuit	05/25/00
Roger L. Gregory	Fourth Circuit	06/30/00
Christine M. Arguello	Tenth Circuit	07/27/00
Andre M. Davis	Fourth Circuit	10/06/00
S. Elizabeth Gibson	Fourth Circuit	10/26/00
District Court		
John D. Snodgrass	Northern District of Alabama.	09/22/94
Wenona Y. Whitfield	Southern District of Illinois	03/23/95
Leland M. Shurin	Western District of Missouri	04/04/95
John H. Bingler, Jr	Western District of Pennsylvania.	07/21/95
Bruce W. Greer	Southern District of Florida	08/01/95
Clarence J. Sundram	Northern District of New York.	09/29/95
Sue E. Myerscough	Central District of Illinois	10/11/95
Cheryl B. Wattley	Northern District of Texas	12/12/95
Michael D. Schattman	Northern District of Texas	12/19/95
Anabelle Rodriguez	District of Puerto Rico	01/26/96
Lynne R. Lasry	Southern District of California.	02/12/97
Jeffrey D. Colman	Northern District of Illinois	07/31/97
Robert A. Freedberg	Eastern District of Pennsylvania.	04/23/98
Legrome D. Davis	Eastern District of Pennsylvania.	07/30/98
Lynette Norton	Western District of Pennsylvania.	04/29/98
James W. Klein	District of Columbia	01/27/98
J. Rich Leonard	Eastern District of North Carolina.	03/24/99
Frank H. McCarthy	Northern District of Oklahoma.	04/30/99
Patricia A. Coan	District of Colorado	05/27/99
Dolly M. Gee	Central District of California.	05/27/99
Frederic D. Woocher	Central District of California.	05/27/99
Gail S. Tusan	Northern District of Georgia	08/03/99
Steven D. Bell	Northern District of Ohio	08/05/99
Rhonda C. Fields	District of Columbia	11/17/99
S. David Fineman	Eastern District of Pennsylvania.	03/09/00
Linda B. Riegle	District of Nevada	04/25/00
Ricardo Morado	Southern District of Texas	05/11/00
K. Gary Sebelius	District of Kansas	06/06/00
Kenneth O. Simon	Northern District of Alabama.	06/06/00
John S.W. Lim	District of Hawaii	06/08/00
David S. Cercone	Western District of Pennsylvania.	07/27/00
Harry P. Litman	Western District of Pennsylvania.	07/27/00
Valerie K. Couch	Western District of Oklahoma.	09/07/00
Marian M. Johnston	Eastern District of California.	09/07/00
Steven E. Achelpohl	District of Nebraska	09/12/00
Richard W. Anderson	District of Montana	09/13/00
Stephen B. Lieberman	Eastern District of Pennsylvania.	09/14/00
Melvin C. Hall	Western District of Oklahoma.	10/03/00

Mrs. FEINSTEIN. Mr. President, the overwhelming question I have—and let me ask everybody here—is the public interest better served by 41 Senators stating on the floor of the Senate why they are filibustering a nominee, as Senator SCHUMER did, as others have done earlier, and the reasons hang out in public? Everybody can hear the reasons; they can be refuted. There are reasons given with specificity. They are based on opinions, they are based on speeches, they are based on writings, and they are discussed right on the floor in public. Or is the public interest better served by one Senator, in secret, putting a hold on a nominee or blue-slipping the nominee and preventing that nominee from ever having a hearing, from ever having a markup, from ever having a vote in the Senate, and it is all done on the QT, no discussion, no debate. It is, as I said, the epitome of blackballs that exists in the Senate.

All during the Clinton years, Republicans did not argue that checks and balances had gone too far. In fact, the opposite occurred. Republicans went to the floor to defend their right to block nominations. Senator HATCH is a good friend of mine, but nonetheless here is his 1994 statement about the filibuster:

It is one of the few tools that the minority has to protect itself and those the minority represents.

That was on judges. That was the chairman of the Judiciary Committee.

In 1996, Senator LOTT, then the leader, stated:

The reason for the lack of action on the backlog of Clinton nominations—

That is an admission there were backlogs of Clinton nominations—

was his steadily ringing office phones saying ''No more Clinton Federal judges.''

Also, in 1996, Senator CRAIG said:

There is a general feeling that no more nominations should move. I think you'll see a progressive shutdown.

Now there are crocodile tears and people are upset because 41 of us—not 1—41 want to debate in public. We have voted no on cloture because we believe our views are strong enough, that our rationale is strong enough and substantive enough to face public scrutiny and warrant an extended debate in the true tradition of the Senate.

We may not all agree. Our country is based on a foundation that protects the freedom to disagree, to debate, to require compromise. Neither party will always be right when it comes to the best policies for our country, and neither party will always be in power. So, as I said initially, it is important to put this political posturing in context. I believe filibusters should be far apart and few, and should be reserved for the rare instances for judicial nominations that raise significant concerns.

I voted against cloture in my Senate career of 12 years on only 11 judicial nominations and voted to confirm 573. I believe judicial nominees must be treated fairly and evenhandedly. I also believe it is the duty of the Senate to raise concerns or objections when there are legitimate issues that need to be discussed.

Discharging our obligation to advise and consent is not an easy task, especially when it involves making a choice to oppose a nomination. As I discussed earlier, I strongly believe the use of the blue slip and anonymous holds has been abused in previous Congresses. During the reorganization of the Senate in 2000, Senators DASCHLE and LEAHY worked to make the process more fair and public. At that time, a blue slip was no longer allowed to be anonymous and instead became a public document. This refining forced Senators opposed to a nominee to be held accountable for their positions. They could not hide behind a cloak of secrecy. This step also wiped out many of the hurdles that had been used to defeat nominations, so many of the tools used by Republicans in the past, and referred to as a way to draw distinctions with a public cloture vote, are no longer available.

Today the blue slip is still used. However, with each chairmanship, its effectiveness and its role has been modified. Each chair of the Judiciary Committee says they are going to adhere to the blue slip in a different way. That is the anomaly in this process. One person in Judiciary decides what the rules are going to be. This is what we ought to change.

Recently, Senator SPECTER, for example, has indicated he will honor negative blue slips. It is a piece of paper that Senators from a nominee's home state send in. If you do not send them in or if you say you do not favor the nominee, that nominee does not proceed. So Senator SPECTER has said he will honor negative blue slips when they are applied to district court nominees and that even one negative blue slip will be considered dispositive. However, when it comes to circuit court, blue slips will be given great weight but will not be dispositive on a nomination.

Given that the meaning and effect of a blue slip has changed, and I suspect will continue to change depending on which party controls the Senate and which party is in the White House, I believe the blue slip process should be eliminated altogether. In reality, its usefulness has already been lost.

Instead, I have long supported the creation of a specific timeline for how judicial nominations should be considered. Three months after nominations are submitted by the President, they should be given a hearing in the Judiciary Committee. In 6 months they should be given a vote in the committee. And in 9 months, floor action should be taken on the nomination. But the filibuster should remain the basic right of this institution. I believe implementing this timeframe would go a long way toward alleviating the tension that has plagued the consideration of judicial nominees.

I would like to spend a few moments, since I believe I have the time, on one nominee. It is the nominee who comes from California. Of course I represent California. This is very hard for me to do, but I believe this nominee clearly indicates the legitimacy of our position. I would like to turn to the President's choice for a seat on the most powerful appellate court in the Nation, the DC Circuit, Janice Rogers Brown.

In the case of this particular nominee, out of all the nominations, Justice Brown, in my view, is the clearest cut. She has given numerous speeches over the years that express an extreme ideology, I believe an out-of-the-mainstream ideology. In those speeches she has used stark hyperbole, startlingly vitriolic language. That has been surprising, especially for a judge, let alone a State Supreme Court justice from my State. But statements alone would not be enough for me to oppose her nomination, because there are many nominees whose opinions I have strongly disagreed with and voted to confirm. Jeffrey Sutton and Thomas Griffith immediately come to mind.

Rather, my concern is that these views expressed in Justice Brown's speeches also drive her legal decisionmaking. On far too many occasions she has issued legal opinions based on her personal political beliefs, rather than existing legal precedent. Let me give some instances.

In a speech to the Institute for Justice on August 12, 2000, Justice Brown stated this:

> Today, 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.

From the context of the speech, it is clear Justice Brown is referring to Social Security and Medicare, two essential programs that protect individuals in their retirement, and two programs that today's senior citizens have been contributing to financially for decades.

Unfortunately, her legal decisions reflect the same visceral hostility toward the rights of America's seniors. Let me give you an example.

In Stevenson v. Superior Court, Justice Brown wrote a dissenting opinion that would have changed California law to make it more difficult for senior citizens to demonstrate age discrimination. A Republican justice, writing for the majority of the California Supreme Court, criticized Justice Brown's opinion and he stated this:

> The dissent's real quarrel is not with our holding in this case, [meaning the majority] but with this court's previous decision . . . and even more fundamentally with the legislature itself. . . . The dissent [of Justice Brown] refuses to accept and scarcely acknowledges these holdings.

''These holdings'' being the law of the State of California.

Justice Brown's open disdain toward Government is also disturbing, especially in light of her nomination to the District of Columbia Circuit. Let me explain why this is so important. The DC Circuit is the most prestigious and powerful appellate court below the Supreme Court because of its exclusive jurisdiction over critical Federal constitutional rights and Government regulations. Given this exclusive role, the judges serving on this court play a special role in evaluating Government actions.

Janice Brown's statements on the Federal Government raise serious concerns about how she would perform on the DC Circuit if given a lifetime position. Let me illustrate.

At a 2000 Federalist Society event, Justice Brown stated:

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

We asked her about these statements in the Judiciary Committee. Her answer was, ''Well, I write my own speeches.'' So these are her words. These are her words, of somebody going on the DC Circuit with enormous hostility to virtually anything the Government would do, and saying the Government is responsible for the loss of civility, the triumph of deceit.

Justice Brown's statements and actions demonstrate that she is an activist judge with an unfortunate tendency to replace the law as written with her own extreme personal beliefs. This is not the kind of judge who should be on the nation's second most powerful court.

The PRESIDING OFFICER. The Senator's time is expired.

Mrs. FEINSTEIN. I will yield the floor, but if an opportunity comes up, I will ask to recover it again.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, we are debating in the Senate today a very important issue. It is an issue that we must deal with and one that may take days of debate.

For a series of reasons, it has become more and more of interest to the American people the nature and quality of judges that we appoint. That has resulted in a serious concern about the role of courts, the critical doctrine of separation of powers; that is, what judges do and what they should do and what their prerogatives are and what their responsibilities are as a judge.

President Bush, in his campaigns both times, made absolutely clear that he believed the judge should be a neutral arbiter, a fair referee and, as such, not have an agenda when they go on the bench. He has appointed and nominated judges that share that view. And they have been doing splendid jobs—the judges that have been confirmed. He has not asked that they promote his agenda, his politics, his view of the social policies of America, he has simply asked that they do the jobs they were appointed to do—that they serve in the judicial branch of our government.

It is true, however, that the American people have seen some things in the judicial branch that have troubled them. They have seen, for a number of years, two judges on the Supreme Court consistently dissent in death penalty cases. They don't like the death penalty so they dissent in cases that uphold its use. They declare, in every case they consider, that the death penalty cruel and unusual, and therefore, prohibited by the Constitution of the United States. But they failed to note that in that very same Constitution there are eight or more references to capital crimes, permitting the taking of a person's life with due process of law, there are multiple references to the death penalty in the Constitution and I think it is important to note that every State, at the time the Constitution was adopted, had a death penalty and virtually every country had one as well.

Therefore, it is inconceivable to me how a judge who would follow his oath to obey the commands of the Constitution could ever interpret the phrase ''cruel and unusual''—certainly it was not unusual if it was the law of every State in the Nation at that time and the Federal Government had laws supporting the death penalty. So we know that some judges continue to conclude that the death penalty is cruel and unusual. That is activism. They have allowed their personal opposition to the death penalty to solely drive them, and they have manipulated the words of the Constitution to make it say something it plainly does not say.

Now we are seeing cases of judicial activism on a whole raft of issues. We have seen the Pledge of Allegiance struck down by a Federal court. We have seen the erosion of rights of property protected by the fifth amendment that says you cannot take someone's property without paying them for it. We have had courts redefine the meaning of marriage under the guise of interpreting a constitutional phrase that absolutely was never ever intended to

affect the definition of marriage. It was probably the last thing in their minds when the people ratified the Constitution.

We have had judges cite as authority proceedings in the European Union, but it is our Constitution we ratified. It is our Constitution, not some other. How can they define and make rulings based on opinions in Europe when they go against the very document that orchestrates and organizes our Government?

We have consent decrees in prisons and schools and mental health hospitals where Federal judges dominate whole Government agencies and state legislatures for 30 years. We have had judges say you cannot have a Christmas display because it violates the first amendment. And, we know that jackpot verdicts are all too common.

The American people are concerned about these things. These things are bigger than Republican and Democrat, they go to the heart of the separation of powers doctrine. President Bush was honest and direct, and many of the people he has nominated have had an objection to their nomination because, on occasion, they have written something or have made a speech that indicates they share the view that a judge should show restraint and not promote their own personal agenda from the bench.

That is the way it has been for 200 years. I remember when this debate got kicked off, I saw ''Meet the Press,'' when Hodding Carter was on it, and used to be on the staff of President Carter, and he said: Well, I have to admit we liberals are at the point we are asking the courts to do for us that which we can no longer win at the ballot box.

Too often that is what this is about. A lot of these issues that are being decided by courts and judges would never ever prevail at the ballot box. They would not be passed by the Congress.

People say they are nice folks. They are smart people. If you criticize a judge, you are doing something that is highly improper; you should never criticize a judge. That is not the history of the Republic. What the American people need to understand, I cannot emphasize this too much, the principle on these issues I have just talked about is very deep. What we are suggesting is, and what is being implicated here is, that unelected judges who are given a lifetime appointment by which they are independent and unaccountable to the public, should not set social and political policy in this country.

Is that too much to ask? We have seen too much of that. It is being taught in the law schools that the good judges are the ones that step out in a bold way and move the law forward to higher realms, they would say. But have they forgotten that the people, if they wish to have a death penalty and it is consistent with a Constitution, their opinion makes little difference? They have one vote in the election, as everyone else does. If their views do not get ratified, so what?

Some people say: Well, the courts had to act because the legislature did not act. But when the legislature does not act, that is an act. That is a decision, a decision not to change an existing law, and it deserves respect.

Our judges are people who take their office on trust. We have some exceedingly fine ones and most do show discipline, but I do believe this is a point in our history when the American people and the Congress need to decide together what we expect out of judges. Do we expect them to be the avant-garde of social and political policy? Or do we expect them to be faithful and true arbiters of legitimate disputes to interpret the law as they find it?

There is only one way, consistent with our Constitution and our history and our body politic, for our system to continue to work, and that is that judges show restraint. That is what this debate is about. It is not about Republicans. It is not about Democrats or such things.

One of the things that has occurred in this confirmation process, for now nearly 20 years, has been the influence of outside hard-left activist groups who have a clear agenda with regard to the Judiciary. They know exactly what they want from the Judiciary, and they are determined to get it. They have banded together. They build dossiers on nominees. They systematically take out of context their comments and their statements and their positions. They release that to the public. Frequently, they have support from the major liberal news organizations in the country to the sensational charges they make and they sully the reputations of nominees who are good and fine nominees.

It is a very difficult to turn the tide on that. It is unfair. We will talk about that some today. But we have to recognize this.

If I criticize my colleagues on the other side of the aisle, I would say this: Those people were not elected to the Senate. They have not taken an oath to advise and consent and to do so honestly and with intellectual integrity. They did not do that. They are advocates. They raise money by trying to demonstrate to those who would contribute to them that President Bush's nominees are extreme and out of the mainstream. They should not be calling the shots here. Frankly, my view is, too often they have. Too often they have taken nominees, and they have smeared them up, muddied them up, and then our Senators have not stepped back and given them a fair shake. I do not mean that personally to my colleagues, but I think that is a fair observation. I believe too often that has occurred.

Two of the things that are typical of that can be seen in an ad now being run on television against Priscilla Owen—I don't know in how many States—by People For the American Way. Let me remind you that Justice Priscilla Owen, from Texas, was given the highest possible rating by the American Bar Association. She finished at the top of her class in law school. She made the highest possible score on the Texas bar exam. A lot of people take that exam. That is a big deal, in my opinion. She got 84 percent of the vote in her reelection. She had the support of every major newspaper in Texas, and many of them are not Republican newspapers. She is a superb, magnificent nominee.

However, the People for the American Way TV ad wants you to believe that she is an activist judge, even though we know that for her whole career her whole philosophy of law is that judges should follow the law and not legislate from the bench. That is her deepest abiding principle—be faithful to it and not depart from it, whether or not she agrees with it.

The People for the American Way cites as proof of her activism a fellow justice on that court, now the Attorney General of the United States of America, Alberto Gonzales, who they say accused her of being an activist in an opinion he wrote. So they declare: Ah, she is an activist. The President's own Attorney General said she is an activist. That is simply not so.

Let me just talk about the facts of this opinion for a minute. We need to drive this home because so far as I can tell that is the only charge that has been made against her that amounts to anything at all that has ever been consistently raised by those who oppose her nomination.

In the opinion the People for the American Way cites as their evidence, what happened was this—the Texas Supreme Court was evaluating the meaning of the Texas parental notification law on abortion for a teenager or a minor. Minors in Texas have to notify at least one of their parents before they undergo the significant medical procedure of an abortion, unless there is a bypass to the parental notification requirement granted by a court. And minors are allowed to ask for that judicial bypass for many reasons. This process allows them to set forth the reasons and not have to tell their parents that they are going to have an abortion.

Well, in this circumstance, a trial judge heard the case. He saw the child who wanted to bypass and not tell her parents, and he concluded that she did not meet the statutory requirements and should tell her parents. Lets be clear—the Texas parental notification requirement does not give the parents veto power, it does not mean they have to ''consent.'' She could still have the abortion, just as long as she told them, ''notified'' them, of what she was about to do. The reason to have this kind of law is simple—there is a serious concern that if you cannot give a child an aspirin at school without parental permission, surely we ought not to be having doctors perform abortions on children without at least having the parents notified of it.

That is what Texas voted to have as their law. The Supreme Court has upheld parental notification statuses as constitutional. So, in Texas, there became a fuss over the meaning of the law and Justice Owen concluded that the trial judge was correct in their decision that the girl did not meet the requirements for parental notification and should notify her parents before the abortion. Justice Owen dissented from the main opinion and concluded that the trial judge was correct and the child should notify her mama or daddy that she was going to have an abortion. Whereas, Judge Gonzales's opinion said that he had studied the Texas statute and I have concluded that—it is not perfectly clear, but I have concluded the legislature intended A and B. Therefore, if I don't rule the other way, since I have concluded the legislature intended A and B, then I will be an activist even though I personally hate to see this child not tell her parents.

So, to help us clear up this matter, he came before the Judiciary Committee, of which I am a member, and testified about this case. Senator BROWNBACK, who is in the Chamber, asked him about it as Attorney General. And he was rock solid. He has written a letter saying he was not referring to Justice Owen when he made that comment in his opinion about activism; certainly, did not mean to. He was referring to his own self, that if he had concluded that the legislature meant these things, then he was compelled to rule against the trial judge or he would be labeling himself an activist. Justice Owen did not agree, she had not concluded the same things about the legislation that Judge Gonzalez had.

An SMU law professor wrote a beautiful letter on behalf of Justice Owen. She said:

> I am pro-choice, absolutely, but I believe she followed the law carefully. She was a scholar. She thought it through like a judge should think it through, and, absolutely, this is not evidence of activism and it, absolutely, should not be held against her.

Mr. President, I want to know what the time agreement is and where we are.

The PRESIDING OFFICER (Mr. SUNUNU). The Senator has 43½ minutes remaining.

Mr. SESSIONS. Mr. President, I see Senator BROWNBACK is in the Chamber. I will finish within my 30 minutes. I believe he will be speaking in the next 30 minutes; is that correct—or in that 40 minutes?

The PRESIDING OFFICER. That is an appropriate division of time.

Mr. SESSIONS. I wish to share a little bit about Justice Janice Rogers Brown. She grew up not too far from where I grew up in rural Alabama, in Greenville, AL. She, as a young African-American child, had parents who were sharecroppers. They had a tough life. She ended up moving, as a teenager, to California, where she went through the school system there, did exceedingly well, went to UCLA Law School and achieved great success there, and eventually became a judge. It is terrific, the story of her life and her achievements.

She has served for 9 years now on the California Supreme Court. She does, every day on the California Supreme Court, the same kind of things which President Bush has nominated her to do on the Court of Appeals here in DC. As such, she reviews the transcripts of the trials of cases conducted by trial judges under them to see if there was an error in the conduct of that trial. The California Supreme Court does not conduct trials. They do not make opinions. They review trials below them to make sure they were conducted properly, that the judge followed the law and did not commit errors.

I think she has been trained exceedingly well. As a member of the California Supreme Court she reads briefs. She listens to arguments by counsel, and then writes opinions as they make those judgments. Those opinions should be unbiased and I believe hers have been and will continue to be. We need judges who write well and follow the law and rule consistent with the law. If you look at Justice Brown's career, I do not think anyone can contend she has performed other than admirably on the bench. She has written beautifully and thoughtfully. She graduated from UCLA, one of the Nation's finest law schools.

In February of 2004, last year, the alumni of that not so conservative law school presented Justice Brown with an award for public service. In recognizing her, her fellow UCLA alumni—the people who know her—they did not condemn her for being some extremist. They said this:

> Janice Rogers Brown is a role model for those born to prejudice and disadvantage, and she has overcome adversity and obstacles and, since 1996, has served as a member of the California Supreme Court. The professional training she received at UCLA Law School has permitted her, even now, when decades remain to further enhance her career, to have already a profound and revitalizing impact upon the integrity of American jurisprudence.

I will repeat that:

> She has even now been found to have already a profound and revitalizing impact upon the integrity of American jurisprudence.

I could not agree more. They go on to say this:

> Despite her incredible intellect, work ethic, determination, and resultant accomplishments, she remains humble and approachable.

That is important in a judge. A lot of judges get to the point they think they were anointed and not appointed, but she has been on the bench for 9 years, and they still say she keeps her perspective and remains approachable to all. That is not the Janice Rogers Brown you will be hearing about from those who want to tar and feather her.

I will take the word of the people who know her, who have actually studied her record, over the rhetoric of the interest groups who are not the least bit interested in the integrity of the judiciary. They are interested in their agenda. From my observation, one of their guiding principles is that the ends justify the means.

After law school, Justice Brown served as a deputy legislative counsel in California for 2 years. She then spent 8 years as a deputy attorney general in the office of the California Attorney General, where she wrote briefs and participated in oral arguments before appellate courts on behalf of the State's criminal appeals. So she learned a lot about criminal law, and she prosecuted criminal cases in court and litigated a variety of civil issues. Her keen intellect and work ethic made her a rising star on the California legal scene.

In 1994, then-Governor Pete Wilson tapped her as his legal affairs secretary. Governor Pete Wilson came to Washington last week. For the most part, he was here to affirm Justice Brown. He thinks she is a magnificent nominee. He absolutely supports her. He said he couldn't be more proud of her service on the court and that it was outrageous what they were saying about this fine nominee's record.

She was then nominated and confirmed as an associate justice on the California Third District Court of Appeals. And in 1996, as a result of her superior performance on the appellate court, Governor Wilson elevated her to the California Supreme Court.

I ask to be notified after 30 minutes have been consumed.

The PRESIDING OFFICER. The Senator has 7 minutes remaining.

Mr. SESSIONS. Since she was appointed to the Supreme Court, a couple things have happened that provide confidence in her good performance.

During the 1998 election, she was on the ballot and had to win the majority of the vote to stay on the bench. The people of California, who didn't vote for President Bush and certainly are not a rightwing electorate, voted to keep Justice Janice Rogers Brown on the court with 76 percent of the vote. That is a big vote by any standard. Probably 20 percent of the people in California vote against anybody on the ballot. Other judges were on the ballot. She got a higher percentage of the vote than any of the other four judges on the ballot. That is an affirmation by the people of California.

In 2002, for example, Justice Brown's colleagues on the supreme court relied on her to write the majority opinion for the court more times than any other justice. What happens on a court, such as a supreme court, once the court votes on how a case should be decided, they appoint a member of the court to write the opinion. If you write the opinion, you have to be on the majority side. If some don't agree and the majority agrees, then somebody writes the majority opinion for the court.

We have had the suggestion that this justice of the California Supreme Court

is somehow out of the legal mainstream, but in 2002, more than any other justice on the court, she was called on to write the majority opinion. That speaks volumes for the fact that she is not out of the mainstream. And there are few courts in the United States more liberal than the California Supreme Court.

Professor Gerald Ullman, who is a law professor in California, wrote a beautiful letter supporting her. His statement sums up what we ought to think about as we consider this nomination. He said:

I don't always agree with her opinions.

And then he said this:

I have come to greatly admire her independence, her tenacity, her intellect, and her wit. It is time to refocus the judicial confirmation process on the personal qualities of the candidates, rather than the hot button issues of the past. We have no way of predicting where the hot buttons will be in the years to come, and our goal should be to have judges in place with a reverence for our Constitution who will approach these issues with independence, an open mind, and a lot of commonsense, a willingness to work hard, and an ability to communicate clearly and effectively. Janice Rogers Brown has demonstrated all these qualities in abundance.

Her colleagues support her. A bipartisan group of Justice Brown's former judicial colleagues, including all of her colleagues on the court of appeals for the Third Circuit in California, have written in support of her nomination. Twelve current and former colleagues wrote a strong letter to the committee stating:

Much has been written about Justice Brown's humble beginnings, and the story of her rise to the California Supreme Court is truly compelling. But that alone would not be enough to gain our endorsement for a seat on the Federal bench. We believe that Justice Brown is qualified because she is a superb judge. We who have worked with her on a daily basis know her to be an extremely intelligent, keenly analytical, and a very hard worker. We know that she is a jurist who applies the law without favor, without bias, and with an even hand.

That was received by the committee October 16, 2003, when this process began.

Justice Owen and Justice Brown are both immensely qualified to serve on the Federal bench. They deserve fair consideration by this body. That should come in the form of an up-or-down vote, not a filibuster. I trust we will have that soon. They certainly deserve it.

I yield the floor.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. Mr. President, I thank my colleague from Alabama for his presentation and his work on the Judiciary Committee since the time we have both been in the Senate. He has served for some time and has done an excellent job. He brings a lot of good sense to it. We are both very familiar with Janice Rogers Brown and Justice Owen. They have been in front of us for years now. Priscilla Owen was in front of us when I was last on the Judiciary Committee over 2 years ago. I can remember that during her confirmation hearing, she gave a law school professor dissertation to almost every question that came up. She had the answers. She responded directly to our colleagues. She is a brilliant lady, both on resume and in person.

Something you said earlier caught my attention, because it is what a lot of this battle is about. The left in America doesn't get this agenda through the legislative or executive branch, so they go through the courts.

And that is really what we are fighting about now, it seems to me—you have judges we are putting forward for confirmation who are strict constructionists, meaning they will rule within the letter of the law of the Constitution. The left wants people who will be super legislators, legislating from the bench. In your experience on the Judiciary Committee, have you heard that debate taking place, or is it always pretty much underneath the water, you really don't see it? Have you heard that debate rise up where people say, well, we cannot change the marriage definition in the U.S. Congress or in the States, so we are going to do it through the courts?

Mr. SESSIONS. This motive is not talked about regularly in an open way, but in a way it did become open. Shortly after Justice Owen was nominated, the Republicans lost a majority in the Senate. I was chairing at that time the Court Subcommittee of the Judiciary Committee, and that changed and Senator SCHUMER became chairman of the committee. He announced that all judges were basically driven by their politics, and they all had ideologies, and that we ought to just consider their politics when we are confirming them. We had a hearing on the politics of ideology and how we should handle it. I thought the witnesses were uniform, including Lloyd Cutler, counsel to Jimmy Carter and to President Clinton, in their rejection of that principle.

They all agreed that the classical American rule of law says that judges are to be nonpartisan, that they are referees and arbiters and objective interpreters of the law, and it would undermine that principle to start treating them like politicians. So it was discussed in a way that was honest, actually, and I think the overwhelming result from the ABA and the witnesses was that considering politics during the judicial confirmation process would not be a good way to go.

I know Senator BROWNBACK is aware that a lot of the groups that drive the objections to these nominees are very agenda-driven groups, they are activists, and I think that is pretty obvious to anybody who is watching.

Mr. BROWNBACK. Mr. President, that has been my view of what has been taking place recently. Individuals increasingly have said we cannot win this legislative fight in the States or in the Congress, so we are going to take it to the courts. A judge who is a strict constructionist would ask, is this within our purview under the Constitution? And if it is not, the case would be thrown out, rather than the judge saying that the Constitution is an organic, living document, and I can look at this law imaginatively, how I want to, and then somehow find a way to reach the conclusion I want.

To me, that is what the frustration of the public has been—that somehow they are now thrown out of the process. They can vote for or against the Senator from Alabama or the Senator from Kansas or the Senator from New Hampshire or the Senator from Massachusetts on the basis of a policy issue. But they don't have any right or ability to be able to contact a judge. Yet you have these massive issues that directly impact people regarding marriage and life. We have a bill up now where a Federal court has said that the Congress has appropriated this money and that is inappropriate and they must give these moneys out. Under the Constitution, the appropriation powers are clearly given to the Congress. The court is now stepping into that.

My question to my colleague would be, Where does this stop if you don't start putting on judges who are judges rather than super legislators? Where does it stop?

Mr. SESSIONS. I could not agree more with the Senator. He stated that so beautifully and, I believe, so fairly. It is the real question here. As you know—and I am not sure most of the people in our country have fully thought it through—once a judge says the Constitution means that marriage should be redefined and every legislative finding to the contrary is void, the only recourse the American people have is to try to pass a constitutional amendment that requires, as you know, a two-thirds vote of both Houses of Congress and three-fourths of the States. It is a monumental task. And then if you criticize the judge for their ruling, people say: Oh, you are violating the separation of powers. I think when the courts tread into those areas and start imposing political views, they can only expect that there will be criticism in return.

Mr. BROWNBACK. I would think they would expect criticism on that. But that has been the built-up frustration, where people say the only way we can go is to amend the actual Constitution in the process. I do not believe that is the right way for our democracy to be going. I appreciate my colleague from Alabama and his work on these issues. I believe that is really at the core of these matters.

Mr. President, I note that we have had a lot of debate on Priscilla Owen and Janice Rogers Brown. I don't think anyone who listens to any of this debate is unfamiliar with these two individuals. I am going to talk some more, as well, about these individuals and answer some questions and comments made from the other side about these two individuals.

At the end of the day, we need to recognize what this is about. I believe President Bush responded to this well at his last press conference when he was asked: Why do you think the Senate Democrats are opposing your nominees? Do you think it is based on the religious preference of your nominees? Some of these are people of faith who have religious conviction. He said: No, I think it is because they would interpret the law rather than trying to rewrite the law, that these are people who would stay within the construction of the law and the construction of the Constitution and not try to rewrite it.

I believe that is what really is at stake here. Are you going to have a super legislative judiciary, or are you going to have one where it is the role of a judiciary to determine what is constitutional within the framework of the Constitution, not what some sort of expansive living document reading of the Constitution would be? That really is the heart of the matter we are debating here today. It is a very live issue in front of us right now.

I note to those who may be listening to these proceedings right now, last week, a Federal judge in the State of Nebraska ruled that the State constitutional amendment that the people in Nebraska had passed defining marriage as the union of a man and a woman—the people of Nebraska passed a State constitutional amendment with 70 percent of the vote, which is a high mark in any election, saying, yes, we agree that the union of a man and woman is the definition of marriage in Nebraska. A Federal court in Nebraska ruled that is not only unconstitutional under several different provisions, but that civil unions must be granted to people of the same gender. The Federal court is saying you must give that.

So it is not just saying that the State of Nebraska is wrong and cannot define marriage, which we have left up to the States in the history of the Republic, but it is also saying that the U.S. Constitution, in some reading of it, actually requires the recognition of same-sex civil unions. Where was that ever written in the Constitution? Where was that ever considered in any sort of constitutional debate? Why is that, at this point in time in our Constitution, seen as somehow in this organic document of where we are today?

I think we have had 17 States now directly vote on the issue of marriage, and every one of them said marriage is the union of a man and a woman. Now you have a Federal court that says, no, that is not allowable for States to determine. States in every place and every region in the country have passed this when the people were allowed to vote. Now you see again the issue-setting of an activist judiciary going in and saying: We know what the people think and what the people vote on this, but we say different. You are going to create yet another festering frustration among the people of America if the court starts walking—and apparently it has—into this issue of the definition of marriage. These are things, if properly left to legislative bodies to determine, look at and figure, wrestle with, and have elections about, which people can have an impact on and say, I think this should be a certain way, and a determination is then made by the people. That has been left up to the people, and it should be.

When the court steps in and makes a new determination, makes a new ruling on it, that is going to build to that festering. It happened in 1973 in Roe v. Wade, where the Court discovers this right to privacy that is a constitutional right to abortion, which cannot be limited in any means, by any State, by the Federal Government, by the Congress.

Prior to that period of time, it had been held valid, constitutional, and appropriate for States to regulate and to deal with this issue, so we had different States ruling different ways prior to Roe v. Wade. This is what would happen again if and when Roe v. Wade is overturned; the States simply would then handle this issue as they did prior to 1973. But once the Court discovers this constitutional right to privacy that is interpreted to mean there is a right to abortion, the states cannot decide for themselves at all.

We are starting down the same path with marriage. We can look around the country and ask: Why are people fired up about the judiciary? Why, during the last election cycle, was the lead applause line for President Bush's rallies about appointing judges who will stay within the laws rather than rewriting them?

The reason is people have this deep-felt frustration at how the courts are coming at all of these opinions, so contrary to the feelings of the vast majority of people in the United States. And where is it written within the Constitution, if it is within the document, that we should have a constitutional right to abortion? Bring it to this body, with two-thirds of the House and two-thirds of the Senate, three-fourths of the States passing it. That is how you amend the Constitution, not by a majority vote of the Supreme Court. That is the durable way we amend the Constitution and deal with it, instead of this building up of frustrations to the point where people say: I have been disenfranchised. I thought the people voted, that the people ruled, within the parameters of the Constitution.

Remember, the Constitution gives a broad swath of power to the people and limits government. That is the role of the Constitution. It gives broad authority and power to the people and limits the role of the government.

We have embarked today upon addressing this issue. Really what we are seeing take place now are these large plates pushing against each other. Political scientists for years have debated the issue of Presidential power taking away from legislative power. That has always been the debate over the years. During a war, a President is stronger; the legislative body is considered weaker. Outside of war, it reverses and the legislature assumes more authority over the executive branch. And for years political scientists have debated this back and forth—who is gaining, who is receding. Yet we have seen taking place now over the past 40 years an ever-increasing encroachment of the judicial branch within these purviews reserved under the Constitution for the legislative and the executive branches.

I spoke of one just previously with my colleague from Alabama, and that is the appropriation of money. In the Constitution, the appropriation of money is given to the legislative body. That is specifically stated within the Constitution.

Jerry Solomon, a former Congressman from New York who passed away, observed that a number of colleges in the United States were not allowing military recruiters to come on to their college campuses. He said they ought to at least have them come on to the campuses and have their voices heard. The colleges said no.

Congressman Solomon put forward an amendment that if a college decides to bar military recruiters from its campus, that is its right, but it then cannot receive certain Federal appropriations. The amendment said if you are not going to let military recruiters on campus, then we have the right to withhold these Federal funds. If you are not going to give them a chance at free speech, we think there is some price to be paid with that.

It is the authority of the Congress to appropriate money. That was done with the Solomon amendment. It passed by a majority vote. It passed by a majority vote in the Senate and was signed into law by the President of the United States.

Now a Federal court says, no, Congress, you cannot do that. The money must go to those colleges in spite of the Solomon amendment. How many places across the country are courts allocating money for States? These are specific authorities and powers reserved to the legislative body, and the reason is, the Founders, in all their wisdom, said legislators are elected by the people, and the allocation of money is one of the key power for any governmental entity that should belong to the elected representatives of the people. But now we have the courts continually taking, taking, taking. The judiciary continues to come in to areas reserved for the executive and legislative branches, and so we come to where we are today: President Bush seeking to appoint judges, bright judges, well-qualified judges, balanced judges, ones who say the law should be interpreted as to what the law is, not what they choose for it to be or what outside groups want it to be. The Constitution is what it is, and it is not something through which I can invent new rights, however much as I think they should be in the Constitution. If that right is

to be, it should be passed by two-thirds of the House, two-thirds of the Senate, three-fourths of the States, and then it becomes a constitutional amendment, not by a majority vote at the Supreme Court.

This is what these judges generally stand for. It is what we should get the judiciary back to. And yet nominees who would do that are being blocked, they are being filibustered inappropriately.

Priscilla Owen, Janice Rogers Brown—we have a group of four judges who collectively have been filibustered for a total of 13 years. It is amazing that they would be filibustered for that period of time.

This is a key, defining moment for us as a country. Will the judiciary be the judiciary, or is it to continue to accumulate power and become more of a superlegislative body? That is much of the debate that is in front of us today with the judges. That is taking place in the form of Priscilla Owen, Janice Rogers Brown, and several other judges. That remains the issue.

When a Supreme Court position comes open, will we appoint somebody who will stay within the letter of the law of the Constitution or not? Will it require 60 votes to approve a Supreme Court judge, something that is never required, or will it be a majority vote? Must we have a supermajority?

If you want a supermajority to approve a Supreme Court judge, then amend the Constitution to state that it requires a supermajority, like we do with respect to treaties, what it takes to approve a treaty. The Founders did not say that. They said advise and consent. They did not say a supermajority or two-thirds vote of the body. They said advise and consent. Do you anywhere interpret a supermajority vote to be required to approve a Supreme Court nominee? No, that is not within the reading and understanding of the document. But because this role of judges as legislators keeps coming back up, particularly from the left, it is going to continue to be pushed.

There have been a number of issues raised regarding the nominees. I now want to address what has been raised.

It has been asserted that current Attorney General Alberto Gonzales accused Priscilla Owen of judicial activism. He is Attorney General of the United States and was on the Texas Supreme Court with Justice Owen. I asked the Attorney General in his confirmation hearing for Attorney General if that was something he had said about Priscilla Owen. He said no. He testified under oath that Justice Owen is a great judge he never accused of judicial activism. That is Alberto Gonzales, under oath, in front of the Judiciary Committee of the Senate.

I think that should put that to sleep. He testified under oath that he had never accused Justice Owen of engaging in judicial activism.

Justice Brown was accused of justice activism in supporting the Lochner case. Again, I want to put that issue to rest. Indeed, Justice Brown has taken issue with the Lochner decision. This is considered a judicial activism case. She is being accused of supporting it, when in fact she actually stated in an opinion that:

> The Lochner court was justly criticized for using the due process clause as though it provided a blank check to alter the meaning of the Constitution as written.

That is Justice Janice Rogers Brown, in a written opinion on Lochner. She cannot be accused of this. Maybe her words in a speech are accused, saying she is supportive of Lochner, but her actual stated written opinion says, no, that the Court was justly criticized for the Lochner case. I think those are important things to put clearly in the record.

Mr. President, I inquire of the Chair how much time remains of my allocation?

The PRESIDING OFFICER. The Senator from Kansas has 10 minutes remaining.

Mr. BROWNBACK. Mr. President, I want to cover some of the ground on Janice Rogers Brown that is well known in this situation because she has been in front of us so much, so long, but I think it bears repeating. She was born to sharecroppers, came of age in the Jim Crow era, went to segregated schools. Do you know what motivated her to become a lawyer? It was her grandmother's stories of NAACP lawyer Fred Gray, who defended Rosa Parks, and her experience as a child of the South.

When she was a teenager, Justice Brown's family moved to Sacramento, CA. She received her bachelor's degree in economics from California State in Sacramento in 1974 and her law degree from the UCLA School of Law in 1977. These are all well-known matters.

I don't know if people know as well all of her public service, but they probably cannot because it is so extensive. All but 2 years of her 28 years in her legal career have been in public service. This is a public servant of 26 years standing.

I ask the Presiding Officer or anybody listening, if you serve as a public servant for 26 years in the State of California, how can you be a radical conservative out of the mainstream judicial thought? Can that be while you are serving for 26 years in public service in the State of California in various capacities? She began her career in 1977 and served 2 years as a deputy legislative counsel in the California Legislative Counsel Bureau. From 1979 to 1987 she was deputy attorney general in the office of the attorney general of California. Governor Pete Wilson selected her to serve as his legal affairs secretary from 1991 to 1994. She then served on the State court of appeals for 2 years before joining the California Supreme Court where she served with distinction until 1996. Then she was involved in her community.

So we have 26 years of public service in the State of California. I do not see how that person could be somebody out of the mainstream of thought and serve in so many capacities in that State. That seems to me to defy logic.

She has performed a lot of community service. She served as a member of the California Commission on the Status of African-American Males, focused on ways to correct inequities in the treatment of African-American males in employment and in the criminal justice and health care systems. Is this out of the mainstream? She was a member of the Governor's Child Support Task Force which reviewed and made recommendations on how to improve California's child support system. Out of the mainstream? She was a member of the Community Learning Advisory Board of the Rio Americano High School and developed a program to provide government service internships to high school students in Sacramento. Out of the main stream? She taught Sunday school at the Cordova Church of Christ for more than 10 years, just as former President Carter teaches Sunday school. Out of the mainstream?

Given the impressive range of her activities and legal and personal experiences, it is no surprise that the President would nominate her. What is surprising is that she would be labeled somehow out of the mainstream. I think this is simply and demonstrably ridiculous. If Janice Rogers Brown is an extremist, the people of California, I guess, must be so, too. In 2002 they overwhelmingly approved her in a retention election with 76 percent of the vote. Her support was more than any other justice on the ballot in that election.

If Janice Rogers Brown is extremist, so, too, must be a bipartisan group of 15 California law professors who wrote to the Senate Judiciary Committee in support of Janice Rogers Brown, knowing her to be:

> . . . a person of high intellect, unquestionable integrity and evenhandedness.

She is not out of the mainstream. She is extraordinarily qualified, and this is just an attempt to smear a good candidate.

I turn, finally, to one issue about the approval rate of court of appeals judges under President Bush. We heard a lot of numbers thrown around about judges and the number who have been approved by this administration and what happened under the remainder of the Clinton years administration. I want to put up one chart about this and talk briefly about it.

We have a Republican President and a Republican Senate. I am delighted. I think we are going to make good progress for the American people and show progress in moving things forward. I want to go back to two other Democrats, two Democratic Presidents who had Democratic Senates under them, an appropriate comparison of apples and apples, and look at the approval rate of circuit court judges. Remember you have federal district court

judges, circuit court judges, and then Supreme Court Justices. Circuit court and Supreme Court jurists are the ones who have the most latitude on enforcement, interpretation, or rewriting of laws.

Look what we had under Democrat President Johnson, a Democrat President: 95 percent approval rate of circuit court judges. President Carter, Democrat President, Democrat Senate: 93 percent approval rate. President Bush, Republican President, Republican Senate: 67 percent approval rate of circuit court judges.

What changed during this period of time? I suppose some would say they are nominating a different sort of nominees who are not qualified or outside the mainstream, but I think that argument has been put to rest. What you have taking place is the unprecedented use and threat of the filibuster that has never been used before and is targeted at the circuit court, not at the lower Federal court, the finders of fact at the district court level, but at the appellate level so that continued broad interpretation of laws by which some would seek to put their own views more in, can continue to be expressed: 95, 93, 67.

Others will argue, What about the Clinton years? You have a Republican Senate and a Democrat President. There are obviously differences of opinion that will occur during that period of time, more so than when you have a body that is of the same party. But even then, we move forward large numbers of Clinton nominees. This is unprecedented, 67 percent, the falloff from what has taken place because of the use of the filibuster.

This needs to change back to where the filibuster is not used against judicial nominees. Actually, I encourage my colleagues on the other side of the aisle not to use the filibuster on this so we can move forward with up-or-down votes and leave the institution intact, the way it has been for two centuries, where the filibuster is not used on the advice and consent provisions of judges that is required. Filibuster means supermajority vote on circuit court or Supreme Court nominees. That is not contemplated, it is not considered, it is not appropriate under the Constitution.

It is time to move these judges on forward. We are going to have a robust debate for the next several days about this. The issue underlying that is really going to be about the role of the judiciary, whether it is expansive in rewriting broadly laws and the Constitution, or if it is more strict constructionist, staying within the roles and boundaries of what the judiciary should be.

I offer to have the American people decide what role the judiciary has, what role the United States Senate has on appointing people to the judiciary. I regret we are at this point. I regret this chart shows this way. But nonetheless it is what it is. It is something that now we have to deal with. It will be a robust debate, and I hope at the end of the day what we will have is the approval of circuit court judges who are mainstream and who are consistent; the role of the judiciary being appropriate as it was designed by the Framers of the Constitution and the Founders of the Republic and within the lines of the Republic. If that is what we will get back to, their proper roles, the legislative, executive, and judicial branches, it will be a long time coming. But I think it is important and it is worth doing.

Mr. President, I thank my colleagues and yield the floor.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Mr. President, it has always been a great privilege for me to come to the floor of the Senate and engage in debate. I graduated from a high school senior class of nine students—in the top five, by the way. I come from a town of 350 people in the southwest ranching corner of North Dakota. I think it is a great privilege to be here, and a wonderful opportunity.

The reason the Senate is such an extraordinary opportunity—and I have had the privilege to serve in both the House and the Senate—is that the Senate is the place of debate, unlimited debate. Yes, there is the opportunity for a filibuster in the Senate, but that is what forces compromise in the Senate. Unlike the House, there is a forcing of compromise, which is what makes Government work.

I have been listening to this discussion. It is quite remarkable. This is a big issue. This is a serious issue. I have been listening attentively to the speakers. Our former colleague, the late Senator Moynihan, once said, everyone is entitled to their own opinion, but they are not entitled to their own set of facts. What is happening here is the continuation of the development of a book of fiction by the majority side.

They come to us and say the filibuster with respect to judicial nominations is very unusual, it is unprecedented, it is unconstitutional. Total fiction. How can they say that with a straight face? At least you would think they would laugh from time to time about what they are trying to pull over the American people.

They have filibustered. They have delayed. They have blocked forever judicial nominations when there was a Democrat in the White House.

Let me read a few names: Snodgrass, Whitfield, Shurin, Bingler, Greer, Sundram, Stack, Wattley, Beaty, Rodriguez, Lasry, Klein, Freedberg, Norton. I could read 60 of these. These are the names of lifetime appointments to the bench the President sent down to this Chamber in the 1990s, most of which never even got 1 day of hearings, not 1 day of hearings. Some of them, by the way, were filibustered, but most were not even given the courtesy of 1 day of hearings because the majority party did not like them, and did not want them confirmed. So they used their control of the Judiciary Committee to make sure they were not confirmed. There were over 60 of them.

Now, the current President, President George W. Bush, has sent 218 names for a lifetime appointment on the Federal bench. We have approved 208. Yes, that is right, 218 names the President has sent and we have approved 208.

The Constitution says something about this. It is not what my colleagues have described. They misread the Constitution. The Constitution provides a two-step process for putting someone on the Federal bench for a lifetime: One, the President nominates; and, two, the Congress decides. That is called advice and consent. It is not the President who decides who goes on the Federal bench for a lifetime. It is a two-step process. The candidate for a lifetime appointment must survive both, must get a Presidential nomination and then must be approved by the Senate.

My colleagues say there is a requirement in the Constitution that there be an up-or-down vote that you cannot filibuster. First, unlike my colleagues on that side of the aisle, many of whom have voted for filibusters—and I will not embarrass them by reading their names, but I could because they have voted for filibusters previously on judicial nominations. Unlike those circumstances, we have voted on all of these judges. The 10 who were not approved had a vote in the Senate on a motion to proceed, on a motion to invoke cloture. It required 60 votes and they did not get the 60 votes so the nomination did not proceed.

The majority party is upset about that. They believe democracy is one-party rule, the same party in the White House, the House, and the Senate. They want their way and if they do not get their way, they intend to violate the Senate rules to change the rules. They will not ask the Parliamentarian when they make the motion. Why? Because they are wrong and they know it, and they will violate the rules of the Senate, so they put their person in the Presiding Officer's chair, the President of the Senate, and by 51 votes they will violate the rules of the Senate for the first time in 200 years. Why? Because their nose is bent out of shape because they have not gotten every single judge on the court they wanted. They have only gotten 208 out of 218.

Let me describe some I have opposed. I actually opposed one who was sent to us by President Bush who wrote that he believed a woman is subservient to a man. I voted against that one. I guess I don't want someone on the Federal bench for a lifetime who believes a woman is subservient to a man. One of the keenest, finest minds of the 18th century, but not someone suited to go to the Federal bench for a lifetime now, in my judgment. That person actually did get through the Senate, I regret to say.

Let me talk about a couple because the majority has brought them to town recently and they have been on television. Let me describe the record of a couple of these nominees.

First let me talk about Janice Rogers Brown. She did not get the 60 votes. Let me describe why. Ms. Brown, as described by the last speaker, has a wonderful life story, but she has served at some great length in the State of California, and her views are so far out of the mainstream that one wonders what would have persuaded the President to send her name down.

Let me give an example. She believes zoning laws represent theft of property. Let me explain that to you. Zoning laws decide if you move into a residential area and you have a house in a residential area and the lot right next door to you is empty, you can have some confidence they are not going to move a porn shop into that next lot. Or there is not going to be a massage parlor in that next lot, or somebody is not going to bring an automobile salvage company and put it on the lot next to your house. Zoning laws. She thinks zoning laws are a theft of property.

Do Americans want someone who believes there ought not be zoning? Or if you decide you should not have a porn shop next to a school, you ought to pay the person who owns the property in order to avoid having the porn shop locate next to a school? Or a massage parlor next to the nursing home? That is so preposterous. What on Earth is that kind of thinking and why do we have a nomination of someone who thinks like that?

That same nominee says, by the way, the Medicare Program and Social Security Program are the last vestiges of socialism, the last of the New Deal socialistic impulses of our country, and says that these are cannibalizing from our grandchildren. That we are cannibalizing from our grandchildren because we have things such as Social Security and Medicare.

Am I pleased to oppose a nominee with those views? Of course I am. We have a right in this Chamber and that right is in the Constitution to prevent someone such as that from going on the Federal bench. The majority party says no, you do not have that right. They say they have what is called the constitutional option.

Let me ask, in the hours in which we debate this, if one Member of the Senate, just one—I am not asking for five, three or two, just one member of the Senate will come to the Chamber of the Senate with the Constitution in their pocket. Yes, you can put it in your pocket. It is a rather small document. If you cannot read it, we will get remedial reading or have someone read it to you. Come down to the Senate and tell us where it says that the minority in the Senate does not have the right to invoke the rules of the Senate to prevent someone from going on the bench for a lifetime? Where does it say that in the Constitution?

I was on a television program with one of my colleagues from the other side. That colleague was saying it is unconstitutional for us to filibuster a court nominee. That very colleague has previously voted to filibuster a court nominee. I wonder how they can stop from grinning—at least? I understand where a full-bellied laugh would not occur on the Senate floor—but how can you avoid grinning when you stand up and perpetrate these fictions?

They know better.

Again, as my colleague, the late Senator Moynihan said, everyone is entitled to their opinion, but not everyone is entitled to their own set of facts. Let's at least deal with the truth in the Senate.

There is much we ought to do in the Senate. My colleagues on the floor are colleagues most often who stand up and talk about the real issues. I am talking about Senator KENNEDY and Senator DAYTON and others on the issues of jobs, the jobs going overseas at a record pace, health care, health care costs that are devastating to people and to their budgets and to businesses. Energy, the price of gasoline, the fact we are held hostage by the Saudis and Kuwaitis and Iraqis and Venezuelans for oil we put through our transportation system and through gasoline that we run through our fuel injectors, and yet is there any discussion of that in the Senate? No, no, not at all. Not at all. This is an agenda driven outside this Chamber by interest groups that have forgotten the Ninth Commandment. Yes, there were Ten Commandments, and the Ninth says: Thou shalt not bear false witness.

I ask my fellow citizens, turn on your television and see what they are running on television: advertisements coming from religious organizations that fundamentally misrepresent—and they know they misrepresent—the facts with this issue. The Ninth Commandment says: Thou shalt not bear false witness. The truth is this. The truth is, that this Congress has a right to an equal voice in who spends a lifetime on a Federal bench. The truth is, we have cooperated to an extraordinary degree with this President. We have approved 208 Federal judges. Let me say, two of them are sitting on the Federal bench in North Dakota. I was proud to work for both of them. They are both Republicans. I am a Democrat. I am pleased they are both on the Federal bench. I worked with the White House to get them there. I supported them, as I have done with most of the nominees coming from this President.

But we have every right to decide, when this President sends us the name of a nominee so far outside the mainstream—and that is the case with the two they are talking about now, one from Texas, one from California—we have a right to decide not to advance those names to give them a lifetime appointment on the Federal bench.

To those who stand up on the floor of the Senate and say: Well, there has never been a filibuster before—you know better than that. If they keep doing it, I am going to come down and read the names of all of them on the majority side that have voted for the filibuster. And I will read the names of all 60 judges into the RECORD—I should not say 60 judges—60 nominees the last President sent down here that, in many cases, did not even have the courtesy of a hearing.

This position is hypocrisy, and it needs to change. This so-called nuclear option is called ''nuclear,'' and it was coined by the majority party. It is called ''nuclear'' because nuclear relates to almost total destruction. And some of them are gleeful now that they are headed toward a nuclear approach on the floor of the Senate.

This is a great institution. I am proud to be part of it. But this is not a proud day. America's greatest moments are not found in circumstances such as this. America's greatest mistakes are often wrapped in the zeal of excessive partisanship, and that is what we find here. And America's greatest mistakes are almost always—almost always—preceded by a moment, a split second, when it is possible to change your mind and do the right thing.

That moment, that split second exists now for the majority leader and those who feel as he does, that they ought to exercise the total destructive option they call the nuclear option.

We ought to, in my judgment, work together. Mr. President, 208 of 218 judges means we have worked together and done the right thing. There are no apologies from this side for exercising our constitutional right to make sure we have men and women on the Federal bench whom we are proud of, who represent the mainstream of this country. We have done that time and time and time again with President George W. Bush, and will continue to do that. But we will not give up the right to exercise our responsibilities here on the floor of the Senate on these important issues.

Mr. President, I believe my time has expired. I believe the Senator from Massachusetts follows me today. I yield the floor.

The PRESIDING OFFICER (Mr. MARTINEZ). The Senator from Massachusetts.

Mr. KENNEDY. I thank the Chair.

Mr. President, I would like to ask the Chair to remind me when I have 10 minutes remaining.

The PRESIDING OFFICER. The Senator currently has 45 minutes.

Mr. KENNEDY. Mr. President, I commend my friend and colleague from North Dakota for the excellent presentation he made. As a member of the Judiciary Committee, I remember the well over 60 nominees who were denied the courtesy to be considered and to have a hearing and go to the Senate and have a debate and discussion on the floor of the Senate.

I do not think any of us who are strongly opposed to what the Senator

has referred to as the nuclear option are interested just to retaliate against these Republican judges, the half a dozen or so who have been mentioned, debated, and discussed today, in return for the way the over 60 nominees were treated under the previous administration. But it does respond to the suggestions that have been made here on the floor that somehow institutionally our friends on the other side have always been for fairness in the consideration of these nominees and considerate of the President in meeting his responsibility of advising the Senate.

I think many of us believe very deeply that if there are Members in this body who, as a matter of conscience, feel strongly that those nominees or any nominee fails to be committed to the fundamental core values of the Constitution, that they ought to be able to speak to it, they ought to be able to speak to it and not be muzzled, not be gagged, not be silenced. That is the issue that is before the Senate now and will be addressed in these next few days, and why it is enormously important for the country to pay attention to this debate and this discussion.

There is no breakdown in the judicial confirmation process. Democrats in this closely divided Senate have cooperated with the President on almost all his nominations. The Senate has confirmed 208 of President Bush's 218 nominees in the past 4 years, most of whom are not people we would have chosen ourselves. Ninety-five percent have been confirmed.

Only a handful did not receive the broad, bipartisan support needed for confirmation. Their records show they would roll back basic rights and protections. Janice Rogers Brown, William Pryor, Priscilla Owen, and William Myers would erase much of the country's hard-fought progress toward equality and opportunity. Their stated values—subordinating the needs of families to the will of big business, destroying environmental protections, and turning back the clock on civil rights—are not mainstream values.

Democrats have, under the Senate's rules, declined to proceed on those nominees to protect America from their radical views.

The President has renominated William Pryor for the 11th Circuit, which includes the States of Florida, Alabama, and Georgia. Mr. PRYOR's record makes clear that his views are far outside the legal mainstream. Mr. PRYOR is no conservative. Instead, he has pushed a radical agenda contrary to much of the Supreme Court's jurisprudence over the last 40 years.

Mr. PRYOR has fought aggressively to undermine Congress's power to protect individual rights. He has tried to cut back on the Family and Medical Leave Act, the Americans with Disabilities Act, and the Clean Water Act. He has criticized the Voting Rights Act. He has been contemptuously dismissive of claims of racial bias in the application of the death penalty. He has relentlessly advocated its use, even for persons with mental retardation. He has even ridiculed the 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 2 of the 9 Justices are 80 or older.

Mr. PRYOR's opposition to basic protections for the rights of the disabled is particularly troubling. In one case, Justice Scalia, for a unanimous Court—a unanimous Court—rejected his position that the Americans With Disabilities Act does not apply to State prisons.

In another case, the Supreme Court rejected his view that provisions of the act ensuring that those with disabilities have access to public services are unconstitutional.

In that case, a plaintiff who uses a wheelchair challenged the denial of access to a courthouse where he had to crawl up the stairs to reach the courtroom. Mr. Pryor claimed that the Congress could not require States to make public facilities accessible to the disabled. He said that because the disabled have ''no absolute right'' to attend legal proceedings affecting their rights, denying them access to courthouses does not violate the principle of equal protection.

The Supreme Court also rejected his radical view that executing retarded persons is not cruel and unusual punishment. And later the Eleventh Circuit court, a court dominated by conservative Republican appointees, unanimously rejected Mr. Pryor's attempt to evade the Supreme Court decision. He had tried to prevent a prisoner with an IQ of 65, who even the prosecution agreed was mentally retarded, from claiming that he should not be executed.

On women's rights, Mr. Pryor has criticized constitutional protections against gender discrimination. He dismissed as ''political correctness'' the Supreme Court's decision that a State-run military academy could not deny admission to women because of stereotypes about how women learn.

Mr. Pryor has an especially troubling record on voting rights. In a 1997 statement to Congress, he opposed section 5 of the Voting Rights Act, an indispensable tool for assuring that all Americans have the right to vote regardless of race or ethnic background. He called this important law an ''affront to federalism'' and ''an expensive burden that has far outlived its usefulness.''

In March, we commemorated the 40th anniversary of Bloody Sunday when Martin Luther King, Jr., Congressman John Lewis, and others were brutally attacked on a peaceful march in Mr. Pryor's home State of Alabama in support of voting rights for all, regardless of race. Yet now the administration wants our consent to a nominee who opposes the Voting Rights Act. There is too much at stake to risk confirming a judge who would turn back progress on protecting the right to vote.

It is no surprise that civil rights leaders oppose Mr. Pryor's nomination, including Rev. Fred Shuttlesworth, a leader in the Alabama movement for voting rights, and many of Rev. C. T. Vivian's and many of Dr. King's other close advisers and associates.

There can be no doubt that Mr. Pryor sees the Federal courts as a place to advance his political agenda. When President Bush was elected in 2000, Mr. Pryor gave a speech praising his election as the ''last best hope for federalism.'' He ended his speech with these words:

> . . . a prayer for the next administration: Please God, no more Souters.

In another speech he said he was thankful for the Bush v. Gore decision:

> I wanted Governor Bush to have a full appreciation of the judiciary and judicial selection so we can have no more appointments like Justice Souter.

His call to politicize the Supreme Court shows that he views the courts as places to make laws, not interpret them.

The real question is why, when there are so many qualified Republican attorneys in Alabama, the President would choose such a divisive nominee. Why pick one whose record raises so much doubt as to whether he will be fair? Why pick one who can muster only a rating of ''partially unqualified'' from the American Bar Association? The administration has given us no good answers to these questions because there are none. Mr. Pryor is clearly on the far fringe of legal thinking and not someone who should be given a lifetime appointment to the court of appeals.

Of course, we oppose the attempt to break the Senate rules to put Mr. Pryor on the court. That is what our Founding Fathers would have wanted us to do, not to act as a rubber stamp for the administration.

Priscilla Owen, whose nomination the Senate is debating today, is another candidate on the far fringes of legal thinking. Her record raises equally grave concerns that she would try to remake the law. Four times the Senate has declined to confirm her because of concerns that she won't deal fairly with a wide range of cases that can come before the Fifth Circuit, especially on issues of major concern to workers, consumers, victims of discrimination, and women exercising their constitutional right. Yet the President chose to provoke a fight in the Senate by renominating her, among other plainly unacceptable nominees whom the Senate declined to confirm in the last Congress.

Nothing has changed since we last reviewed her record to make Justice Owen worthy of confirmation now. Her supporters argue that she is being opposed solely because of her hostility to women's constitutionally protected right to choose. In fact, her nomination raises a wide range of major concerns because she so obviously fails to approach cases fairly and with an open mind.

As the San Antonio Express News has stated, her ''record demonstrates a results-oriented streak that belies supporters' claims that she strictly follows the law.''

It is not just Senate Democrats who question her judicial activism and willingness to ignore the law. Even newspapers that endorsed her for the Texas Supreme Court now oppose her confirmation, after seeing how poorly she served as judge.

The Houston Chronicle wrote:

Owen's judicial record shows less interest in impartially interpreting the law than in pushing an agenda.

And that she, it continues, ''too often contorts rulings to conform to her particular conservative outlook.''

It noted that:

It's worth saying something that Owen is a regular dissenter on a Texas Supreme Court made up mostly of other conservative Republicans.

The Austin American Statesman, in their editorial, said Priscilla Owen ''is so conservative that she places herself out of the broad mainstream of jurisprudence'' and that she ''seems all too willing to bend the law to fit her views . . . ''

The San Antonio Express News said:

[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 the nominee.

These are the San Antonio Express News, the Austin American Statesman, and the Houston Chronicle.

Her colleagues on the conservative Texas Supreme Court have repeatedly described her in the same way. They state that Justice Owen puts her own views above the law, even when the law is crystal clear.

Her former colleague on the Texas Supreme Court, our Attorney General Alberto Gonzales, has said she was guilty of ''an unconscionable act of judicial activism.'' This is what the current Attorney General of the United States said when he was on the supreme court: Justice Owen's opinion was ''an unconscionable act of judicial activism.''

Justice Gonzales's statement that her position in this case was ''an unconscionable act of judicial activism'' was not a random remark. Not once, not twice, but numerous times Justice Gonzales and his other colleagues on the Texas Supreme Court have noted that Priscilla Owen ignores the law to reach her desired result.

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

In 2000, Justice Gonzales and a majority of the Texas Supreme Court upheld a jury award holding the Texas Department of Transportation and the local transit authority responsible for a deadly auto accident. He explained that the result was required by the plain meaning of the Texas law. Owen dissented, claiming that Texas should be immune from these suits. Justice Gonzales wrote that she misread the law, which he said was clear and unequivocal.

In another case, Justice Gonzales joined the court's majority that criticized Justice Owen for disregarding the procedural limitations in the statute and taking a position even more extreme than had been argued by the defendant.

In another case in 2000, landowners claimed a Texas law exempted them from local water quality regulations. The court's majority ruled the law was an unconstitutional delegation of legislative authority to private individuals. Justice Owen dissented and sided with the large landowners, including contributors to her campaign. Justice Gonzales joined a majority opinion criticizing her, stating that most of her opinion was nothing more than inflammatory rhetoric, which merits no response.

Justice Gonzales also wrote an opinion holding that an innocent spouse could recover insurance proceeds when her coinsured spouse intentionally set fire to their insured home. Justice Owen joined a dissent that would have denied the coverage of the spouse on the theory that the arsonist might somehow benefit from the court's decision. Justice Gonzales's majority opinion stated that her argument was based on a ''theoretical possibility'' that would never happen in the real world, and that violated the plain language of the insurance policy.

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

Priscilla Owen is one of the most frequent dissenters on the conservative Texas Supreme Court in cases involving basic protections for workers, consumers, and victims of discrimination. That court is dominated by Republican appointees, and is known for frequently ruling against plaintiffs. Yet, when the Court rules in favor of plaintiffs, Justice Owen usually dissents, taking the side of the powerful over individual rights.

She has limited the rights of minors in medical malpractice cases. She has tried to cut back on people's right to relief when insurance company claims are unreasonably denied, even in cases of bad faith. Her frequent dissents show a pattern of limiting remedies for workers, consumers, and victims of discrimination or personal injury.

She dissented in a case interpreting a key Texas civil rights law that protects against discrimination based on age, race, gender, religion, ethnic background, and disability. Justice Owen's opinion would have required employees to prove discrimination was the only reason for the actions taken against them—even though the law clearly states that workers need only prove that discrimination was one of the motivating factors. Justice Owen's view would have changed the plain meaning of the law to make it nearly impossible for victims of discrimination to prevail in civil rights cases.

She joined an opinion that would have reversed a jury award to a woman whose insurance company had denied her claim for coverage of heart surgery bills. Many other such cases could be cited.

Justice Owen also dissented in a case involving three women who sought relief for intentional infliction of emotional distress on the job because of constant humiliating and abusive behavior by their supervisor.

The supervisor harassed and intimidated employees by the daily use of profanity; by screaming and cursing at employees; by charging at employees and physically threatening them; and by humiliating employees, including making an employee stand in front of him in his office for as long as thirty minutes while he stared at her. The employees he harassed suffered from severe emotional distress, tension, nervousness, anxiety, depression, loss of appetite, inability to sleep, crying spells and uncontrollable emotional outbursts as a result of his so-called supervision. They sought medical and psychological help because of their distress.

Eight Justices on the Texas court agreed that the actions, viewed as a whole, were extreme and outrageous enough to justify the jury's verdict of intentional infliction of emotional distress. Justice Owen wrote a separate opinion, stating that while she agreed that there was evidence to support the women's case, she thought most of it was ''legally insufficient to support the verdict.''

Justice Owen's record is particularly troubling in light of the important issues that come before the Fifth Circuit, which is also one of the most racially and ethnically diverse Circuits, with a large number of low-income workers, Latinos, and African-Americans. It is particularly vital that judges on the court are fair to workers, victims of discrimination, and those who suffer personal injuries.

Some have said that those who raise questions about Justice Owen's record are somehow smearing her personally. That's untrue and unfair. Each of us has a responsibility to review her record and to take seriously the problems we find.

That means taking seriously the rights of persons like Ralf Toennies, who was fired at age 55, and found that Justice Owen wanted to impose obstacles to his age discrimination claim that were nowhere in the statute. We must take seriously the rights of the women employees criticized by Justice Owen for their testimony on workplace harassment in the emotional distress

case. We can't ignore the rights of the millions of families who live in the Fifth Circuit States of Texas, Louisiana, and Mississippi.

Finally, Justice Owen's supporters have also suggested that she should be confirmed to the Court of Appeals because Texas voters elected her to their Supreme Court.

Obviously, there is a huge difference between State judges who must submit to local elections to keep their positions and Federal judges who are lifetime appointees, and are not meant to respond to popular opinion. If we confirm Justice Owen to the Fifth Circuit, she will serve for life. So our responsibility as Senators is very different. The record of each nominee for a Federal judgeship is carefully considered by Senators from all 50 States.

Likewise, the fact that she received a high rating from the American Bar Association or did well on the bar exam does not erase her disturbing record. Priscilla Owen's record raises major questions about her commitment to the basic rights guaranteed by the Constitution to all our citizens.

Mr. President, I want to take a few moments now to go over with the Senate some of the rules that are going to have to be broken by the majority in order to try to change the rules of the Senate.

I want to review very quickly what we are faced with here. I will give two examples of individuals who I think failed to meet the standard for approval in the Senate, that they have a commitment to the core values of the Constitution. We have just seen examples and statements and comments from both individuals and from newspapers and other sources that I think established convincingly these individuals do not have that kind of core commitment required and should not be given lifetime appointments.

Neither the Constitution, nor Senate rules, nor Senate precedents, nor American history provide any justification for the majority leader's attempt to selectively nullify the use of the filibuster to push through these radical nominees. Equally important, neither the Constitution, nor the rules, nor precedent, 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 the executive will have to ask its allies in the Senate to break or ignore in order to turn the Senate into a rubberstamp for the 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 Senate rules and precedent 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 floor.

To accomplish their goal by 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 that ''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, oil industry, pharmaceutical industry, 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.

One of the greatest privileges of my life is serving the people of Massachusetts in the Senate. I am reminded every day of my obligation to speak up for them and fight for their concerns, their hopes, and their values in this Chamber. Many brave leaders from Massachusetts have held the seat I hold today in the Senate. This seat was held by John Quincy Adams, who went on to become the sixth President and was a great champion of free speech. He debated three Supreme Court nominees and voted to confirm them all. He refused to be silenced.

Charles Sumner was the Senate's leading opponent of slavery. He was beaten to within an inch of his life for speaking up for his convictions. It took him 3 years to recover from the injuries and return to the Senate to speak out against slavery once again. He debated 11 Supreme Court nominees and voted for 10 of them. He refused to be silenced.

Daniel Webster was one of our Nation's greatest orators and the architect of the Great Compromise of 1850. He spoke up for a united America with the words ''liberty and union, now and forever, one and inseparable.'' You can hear his words ringing through these halls even now. He debated 12 Supreme Court nominations; he voted to approve 8 and opposed 4. He refused to be silenced.

Henry Cabot Lodge, the Republican, opposed President Wilson's efforts to join the League of Nations. He was the leading Republican voice on foreign policy in his time. He debated 20 Supreme Court nominees, voted for 18, and he opposed 2. He refused to be silenced.

John Kennedy not only was a champion for working men and women in Massachusetts, but he also battled intolerance, injustice, and poverty during his time in the Senate. He debated and supported four Supreme Court nominees. He, too, refused to be silenced.

These great Senators are remembered and respected in our history because they spoke up for their convictions. They were not intimidated. They did not back down from their beliefs. They were not muzzled. They were not gagged. They would not be silenced. And it will be a sad day for our democracy if the voices of our Nation's elected representatives can no longer be heard.

Mr. President, I yield the remaining time to my friend and colleague, the Senator from Montana.

The PRESIDING OFFICER. The Senator from Montana is recognized.

Mr. BAUCUS. Mr. President, I thank my good friend from Massachusetts.

The Book of Proverbs teaches:

Do not boast of tomorrow, for you do not know what the day will bring.

In the play ''Heracles,'' the great playwright Euripides wrote:

All is change; all yields its place and goes.

And the Greek philosopher Heraclitus said:

Change alone is unchanging.

I urge my colleagues to bear the constancy of change in mind as they consider the proposal to break the rules to change the rules of the Senate. Many in the Senate's current majority seem bent on doing that. They seem quite certain that they shall retain the Senate majority for quite some time thereafter.

But as Bertrand Russell said:

Most of the greatest evils that man has inflicted upon man have come from people feeling quite certain about something, which, in fact, was false.

My colleagues do not need to strain their memories to recall changes in the control of the Senate. Most recently, the Senate changed from Democratic to Republican control as a result of the 2002 election. Democrats did control the Senate throughout the sixties and the seventies, but since then the Senate has governed under six separate periods of one party's control. The Senate switched from Democratic to Republican control in 1980, back to Democratic control in 1986, back to Republican control in 1994, back to Democratic control in 2001, and back to Republican control again in 2002.

Similarly, some in the Senate can remember the decade after World War II. The Senate switched from Democratic to Republican control in 1946, back to Democratic control in 1948, back to Republican control in 1952, and then back to Democratic control again in 1954. Senators who served from 1945 to 1955, a mere 10 years, served under five separate periods of one party's majority control.

One cannot always see that change is coming, but change comes nonetheless. For example, in November 1994, Washington saw one of the most sweeping changes in power in Congress of recent memory. Very few saw that coming. The majority in the House and the Senate changed from Democratic to Republican.

It is by no means easy to see that change coming. In March of 1994, just several months before the election, voters told the Gallup poll that they were going to vote Democratic by a ratio of 50 percent Democratic to 41 percent Republican. That same month, March of 1994, voters told the ABC News poll that they were going to vote Democratic by a ratio of 50 percent Democratic to 34 percent Republican. As late as September of 1994, voters told the ABC News poll that they were going to vote Democratic by a ratio of 50 percent Democratic to 44 percent Republican. On the first Tuesday in November 1994, however, more than 52 percent of voters voted Republican for Congress. Democrats lost 53 seats in the House and 7 seats in the Senate.

In 1980, the Senate changed hands from Democratic to Republican control, but in August of 1980, voters in States with a Senate election told the ABC News-Louis Harris poll that they would vote for Democrats for the Senate by a margin of 47 percent for Democrats and 45 percent for Republicans. And on the first Tuesday in November 1980, Democrats lost 12 seats in the Senate.

In November 2002, the voters gave the Republican Party victory in the Senate. But my colleagues in the majority would do well to remember.

After a victorious campaign, Roman generals used to be rewarded with a triumph—a triumphant parade through the streets of Rome. Citizens acclaimed them like gods. But tradition tells us that behind the general on his chariot stood a slave who whispered: Remember that you are mortal.

In the ceremony of a Pope's elevation, they used to intone: Sic transit gloria mundi: ''So the glory of this world away.'' At that very moment, they would burn a handful of flax. The burning flax would symbolize how transitory the power in this world is.

In an address in Milwaukee in 1859, Abraham Lincoln said:

It is said an Eastern monarch once charged his wisemen to invent him a sentence, to be ever in view, and which should be true and appropriate in all times and situations. They presented him with the words: ''And this, too, shall pass away.'' How much it expresses! How chastening in the hour of pride! How consoling in the depths of affliction!

Mr. President, I urge my colleagues to remember that this Senate majority, too, shall pass away. This truth may console us in the minority, should the majority choose to break the rules to change the rules. But better still, better still would it be if the truth of constant change would chasten the current majority into abiding by the rules that protect Senators when they are in the majority and when they are in the minority alike.

We should protect the rules to protect minority rights, for no one can ''know what the day will bring.''

We should protect the rules that protect minority rights, for ''all yield [their] place and go.''

And we should protect the rules that protect minority rights, for it is true of majority control, as it is true of all things, that ''change alone is unchanging.''

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. BAUCUS. Mr. President, I yield the remainder of time on our side. I understand we have an order to go to recess.

The PRESIDING OFFICER. The Senator is correct.

RECESS

The PRESIDING OFFICER. Without objection, the Senate will stand in recess until 4:45 today.

Thereupon, the Senate, at 3:43 p.m., recessed until 4:45 p.m. and reassembled when called to order by the Presiding Officer (Mr. COBURN).

EXECUTIVE SESSION

NOMINATION OF PRISCILLA RICHMAN OWEN TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

The PRESIDING OFFICER. Under the previous agreement, the majority controls the next 60 minutes. The Senator from Georgia.

Mr. CHAMBLISS. Are we in morning business or are we prepared to proceed?

The PRESIDING OFFICER. We are on nominations.

Mr. CHAMBLISS. Let me start by asking, what is the pending business before the Senate?

The PRESIDING OFFICER. The nomination of Priscilla Owen to be U.S. Circuit Judge.

Mr. CHAMBLISS. Mr. President, I would like to take some time to discuss the nominations of two nominees, actually, to the Federal Court of Appeals. First, Justice Priscilla Owen of the Supreme Court of the State of Texas to the U.S. Circuit Court of Appeals for the Fifth Circuit, and then Justice Janice Rogers Brown of the Supreme Court of California to the U.S. Circuit Court of Appeals for the District of Columbia, along with why we need to move forward to a fair up-or-down vote on the nominations.

I would like to start with Judge Priscilla Owen.

Justice Owen's qualifications to serve on the Fifth Circuit Court are readily apparent to anyone who looks at her background and experience. Speaking to her in person—as I did 2 years ago, shortly after I came over to the Senate—only reinforces her obvious capabilities as a judge.

Justice Owen graduated cum laude from Baylor Law School and then proceeded to earn the highest score on the Texas Bar exam that year.

She practiced law for 17 years and became a partner with Andrews & Kurth, a highly respected law firm in Texas, before being elected to the Supreme Court of Texas in 1994.

Before I talk any more about Justice Owen's qualifications as a judge, I want to speak briefly about Priscilla Owen and the kind of person she is. Priscilla Owen has spent much of her life devoting time and energy in service of her community. She serves on the board of Texas Hearing & Service Dogs, and is a