in the world, and our courts' ability to reach unpopular but just decisions is made possible only because of the deep wells of legitimacy they have dug.

I urge my colleagues to take the longer view for the good of the American people. Think carefully about what the result to our judiciary will be if we continue to pack our courts with extremists who ignore justice and the law. I implore my colleagues to take seriously their constitutional charge of advice and consent and to reject the nomination of Janice Rogers Brown.

Mr. JOHNSON. Mr. President, I rise today in opposition to President Bush's nomination of Janice Rogers Brown to be United States Circuit Court Judge to the Court of Appeals for the DC. Circuit.

This morning, the Washington Post editorialized against the nomination of Justice Brown, writing that she ''is that rare nominee for whom one can draw a direct line between intellectual advocacy of aggressive judicial behavior and actual conduct as a judge,'' I agree with this respected newspaper's assessment and ask unanimous consent that this editorial be printed in the RECORD at the end of my statement.

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

(See exhibit 1.)

Mr. JOHNSON. I have several concerns about Justice Brown's ability to serve on this important court. On the California Supreme Court, Justice Brown has proven to be an activist judge when it suits her political agenda. Consistently, and despite precedent to the contrary, Justice Brown has ruled on the side of corporations. For example, in a cigarette sales case, she ignored relevant law and protected corporations in lieu of protecting minors. In other cases she has placed corporate interests above law that intended to shield consumers and women.

Justice Brown has also attempted to remove protections for teachers, and has been hostile to such New Deal era programs as Social Security. She has called government assistance programs ''[t]he drug of choice for . . . Midwestern farmers, and militant senior citizens.'' These views are out of touch with most Americans and South Dakotans.

During today's debate, colleagues argued that because Justice Brown has been reelected by California voters by a 76 percent margin, she should not be considered ''out of the mainstream.'' This argument is misplaced. First, many other judges get reelected at a higher rate. It should also be noted that her retention reelection took place only 1½ years into her tenure on the California Supreme Court, at a time before her extreme views and activist agenda could have been known by voters.

Both the American Bar Association and the California Judicial Commission have questioned Justice Brown qualifications to serve on the bench. The California Judicial Commission specifically noted questions about her deviation from precedent and her ''tendency to interject her political and philosophical views into her opinions.'' We should note their concerns and seriously consider them.

Justice Brown's views and history of judicial activism is especially dangerous in the DC Circuit. She is a nominee who is far outside of the mainstream. For these reasons, I stand in opposition of the confirmation and lifelong appointment of Janice Rogers Brown.

REJECT JUSTICE BROWN

[From the Washington Post, June 7, 2005]

The Senate filibuster agreement guaranteeing up-or-down votes for most judicial nominees creates a test for conservatives who rail against judicial activism. For decades, conservative politicians have objected to the use of the courts to bring about liberal policy results, arguing that judges should take a restrained view of their role. Now, with Republicans in control of the presidency and the Senate, President Bush has nominated a judge to the U.S. Court of Appeals for the D.C. Circuit who has been more open about her enthusiasm for judicial adventurism than any nominee of either party in a long time. But Janice Rogers Brown's activism comes from the right, not the left; the rights she would write into the Constitution are economic, not social. Suddenly, all but a few conservatives seem to have lost their qualms about judicial activism. Justice Brown, who serves on the California Supreme Court, will get her vote as early as tomorrow. No senator who votes for her will have standing any longer to complain about legislating from the bench.

Justice Brown, in speeches, has openly embraced the ''Lochner'' era of Supreme Court jurisprudence. During this period a century ago, the court struck down worker protection laws that, the justices held, violated a right to free contract they found in the Constitution's due process protections. There exist few areas of greater agreement in the study of constitutional law than the disrepute of the ''Lochner'' era, whose very name—taken from the 1905 case of Lochner v. New York—has become a code word for judicial overreaching. Justice Brown, however, has dismissed the famed dissent in Lochner by Justice Oliver Wendell Holmes, saying it ''annoyed her'' and was ''simply wrong.'' And she has celebrated the possibility of a revival of ''what might be called Lochnerism-lite'' using a different provision of the Constitution—the prohibition against governmental ''takings'' of private property without just compensation.

In the context of her nomination, Justice Brown has trivialized such statements as merely attempts to be provocative. But she has not just given provocative speeches; ''Lochnerism-lite'' is a fairly good shorthand for her work on the bench, where she has sought to use the takings doctrine aggressively. She began one dissent, in a case challenging regulation of a hotel, by noting that ''private property, already an endangered species in California, is now entirely extinct in San Francisco.'' Her colleagues on the California Supreme Court certainly got what she was up to. In response, they quoted Justice Holmes's Lochner dissent and noted that ''nothing in the law of takings would justify an appointed judiciary in imposing [any] personal theory of political economy on the people of a democratic state.''

Justice Brown is that rare nominee for whom one can draw a direct line between intellectual advocacy of aggressive judicial behavior and actual conduct as a judge. Time was when conservatives were wary of judges who openly yearned for courts, as Justice Brown puts it, ''audacious enough to invoke higher law''—instead of, say, the laws the people's elected representatives see fit to pass. That Justice Brown will now get a vote means that each senator must take a stand on whether some forms of judicial activism are more acceptable than others.

Mr. President, I suggest the absence of a quorum.

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

The assistant legislative clerk proceeded to call the roll.

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

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

MORNING BUSINESS

Mr. FRIST. I ask unanimous consent that there now be a period of morning business with Senators permitted to speak for up to 10 minutes each.

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

PENSION SECURITY

Mr. REID. Mr. President, throughout this Congress, I have argued that the Senate ought to spend less time debating radical judges and more time focusing on issues that can improve the lives of working Americans. One such issue is the gradual erosion of retirement security. Instead of working to replace Social Security's guaranteed benefit with a risky privatization scheme, we should work to strengthen retirement by shoring up our pension system. In no industry is this looming pension crisis more acute than the airline industry. The Finance Committee held a hearing on pension problems facing the airline industry this morning, and I hope that the committee will move soon on legislation to fix those problems.

Last month we learned just how worrisome this issue is, as the Pension Benefit Guaranty Corporation and United Airlines agreed to terminate the four pension plans maintained by the airline as that company struggles to emerge from bankruptcy. At the same time, Northwest, Delta and American Airlines face similar pension liabilities and are requesting Congress' help so that they can avoid bankruptcy. To their credit they are fighting to preserve their workers' pensions but need some time to allow them to recover from the effects of the post-9/11 travel downturn.

While the pension funding problems facing the airline industry are substantial, the industry is not alone in inadequately funding their employee pension plans. Congress needs to carefully review the rules that apply to the broad spectrum of employers that offer pension plans to their employees. Congress needs to make sure that those rules are strengthened to require greater funding for the pension promises

being made. Let me be very clear about one thing; the pension promises made by companies to their employees carry with them an obligation to make sure those promises are kept. An employer's obligation is to have sufficient funds set aside to meet the pension promises it has made, not merely to have met the minimum funding requirements of the tax code or ERISA.

As Congress strengthens the pension funding rules, we also need to be cognizant of the potential negative consequences of these changes. Pension plans, like all employee benefits, are voluntarily offered by employers. Congress created tax and other incentives that encourage companies to offer pension plans because it believes these are important benefits for employees. Many of the administration's proposals go too far and will discourage companies from maintaining and offering these important benefits. The proposal Congress considers must be more balanced. We should join together to enhance retirement security for all Americans by strengthening Social Security, shoring up our pension system and encouraging more Americans to save.

ADMINISTRATIVE SUBPOENAS AND PATRIOT ACT REAUTHORIZATION

Mr. KYL. Mr. President, I understand that the senior Senator from Oregon, Mr. WYDEN, spoke yesterday regarding the reauthorization of the USA PATRIOT Act. I look forward to the Senate acting later this year on PATRIOT Act reauthorization, but today I just want to address one aspect of the Senator's speech, his opposition to administrative subpoena power.

In his speech, the Senator argued that any reauthorization should not extend those subpoena powers to FBI terrorism investigators. He correctly noted that Intelligence Committee Chairman ROBERTS has held hearings about extending this authority, which is common within the Government, to FBI agents investigating terrorism. I was happy to see Chairman ROBERTS do this because last year I cosponsored S. 2555, the Judicially Enforceable Terrorism Subpoenas Act. On June 22, 2004, I chaired a hearing in the Judiciary Subcommittee on Terrorism, Technology, and Homeland Security that examined this subpoena power and heard testimony regarding how the subpoenas work and how the government protects civil liberties when using them.

One of the things that struck me as I learned about administrative subpoena power was how widespread it is in our Government and how unremarkable a law enforcement tool it really is. It was for that reason that I asked the Senate Republican Policy Committee, which I chair, to examine this issue in greater detail, to study the constitutional and civil liberties questions that critics have raised, and to identify the other contexts where the Federal Government has this power. The resulting report was consistent with my previous research and the testimony that I had heard during my subcommittee hearings. We give this subpoena power to postal investigators and Small Business Administration bank loan auditors and IRS agents, and we do not have a problem with Government abuse or deprivation of civil liberties. Shouldn't we also give it to those who are charged with rooting out terrorism before it strikes our neighborhoods?

I look forward to the upcoming debate on PATRIOT Act reauthorization, and I certainly intend to support it. At the same time, I commend Chairman ROBERTS for his efforts and hope that we will have the opportunity to ensure that our FBI terrorism investigators are not hamstrung as they continue to work to protect our Nation.

I ask unanimous consent that this policy paper, dated September 9, 2004, be printed in the RECORD.

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

SHOULD POSTAL INSPECTORS HAVE MORE POWER THAN FEDERAL TERRORISM INVESTIGATORS?

INTRODUCTION

Congress is undermining federal terrorism investigations by failing to provide terrorism investigators the tools that are commonly available to others who enforce the law. In particular, in the three years after September 11th, Congress has not updated the law to provide terrorism investigators with administrative subpoena authority. Such authority is a perfectly constitutional and efficient means to gather information about terrorist suspects and their activities from third parties without necessarily alerting the suspects to the investigation. Congress has granted this authority to government investigators in hundreds of other contexts, few of which are as compelling or life-threatening as the war on terror. These include investigations relating to everything from tax or Medicare fraud to labor-law violations to Small Business Administration inquiries into financial crimes. Indeed, Congress has even granted administrative subpoena authority to postal inspectors, but not to terrorism investigators.

This deficiency in the law must be corrected immediately. Postal inspectors and bank loan auditors should not have stronger tools to investigate the criminal acts in their jurisdictions than do those who investigate terrorist acts. The Senate can remedy this deficiency by passing legislation like the Judicially Enforceable Terrorism Subpoenas (JETS) Act, S. 2555. The JETS Act would update the law so that the FBI has the authority to issue administrative subpoenas to investigate possible terrorist cells before they attack the innocent. The Act would ensure more efficient and speedy investigations, while also guaranteeing that criminal suspects will have the same civil liberties protections that they do under current law.

TERRORISM INVESTIGATORS' SUBPOENA AUTHORITY IS TOO LIMITED

Federal investigators routinely need third-party information when attempting to unravel a criminal enterprise. In the context of a terrorism investigation, that information could include: financial transaction records that show the flow of terrorist financing; telephone records that could identify other terrorist conspirators; or retail sales receipts or credit card statements that could help investigators uncover the plot at hand and capture the suspects. When third parties holding that information decline to cooperate, some form of subpoena demanding the information be conveyed must be issued. The Supreme Court unanimously has approved the use of subpoenas to gather information, recognizing that they are necessary and wholly constitutional tools in law enforcement investigations that do not offend any protected civil liberties. [See unanimous decision written by Justice Thurgood Marshall in *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984).]

There are different kinds of subpoenas, however, and under current law, the only way that a terrorism investigator (typically, the FBI) can obtain that third-party information is through a ''grand jury subpoena.'' If a grand jury has been convened, investigators can usually obtain a grand jury subpoena and get the information they need, but that process takes time and is dependent on a number of factors. First, investigators themselves cannot issue grand jury subpoenas; instead, they must involve an assistant U.S. Attorney so that he or she can issue the subpoena. This process can be cumbersome, however, because assistant U.S. Attorneys are burdened with their prosecutorial caseloads and are not always immediately available when the investigators need the subpoena. Second, a grand jury subpoena is limited by the schedule of a grand jury itself, because the grand jury must be ''sitting'' on the day that the subpoena demands that the items or documents be returned. Grand juries do not sit at all times; indeed, in smaller jurisdictions, the only impaneled grand jury may meet as little as ''one to five consecutive days per month.'' [See United States Dept of Justice, Federal Grand Jury Practice, at §1.6 (2000 ed.). For example, in Madison, Wisc., the federal grand jury only meets a few days every three weeks. See Clerk of the Court for the Western District of Wisconsin, ''Grand Jury Service,'' revised April 15, 2004.]

The following hypothetical illustrates the deficiency of current law. Take the fact that Timothy McVeigh built the bomb that destroyed the Oklahoma City Federal Building while he was in Kansas; and take the fact that under current practices, grand juries often are not sitting for 10–day stretches in that state. If FBI agents had been tracking McVeigh at that time and wanted information from non-cooperative third parties—perhaps the supplier of materials used in the bomb—those agents would have been unable to move quickly if forced to rely on grand jury subpoenas. McVeigh could have continued his bomb-building activities, and the FBI would have been powerless to gather that third-party information until the grand jury returned—as many as 10 days later. [Information on Kansas federal grand jury schedules provided to Senate Republican Policy Committee by Department of Justice. In addition, Department of Justice officials have testified to another scenario: even where grand juries meet more often (such as in New York City), an investigator realizing she urgently needs third-party information on Friday afternoon still could not get that information until Monday, because the grand jury would have gone home for the weekend. See Testimony of Principal Deputy Assistant Attorney General Rachel Brand before the Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security on June 22, 2004.]

The current dependence on the availability of an assistant U.S. Attorney and the schedule of a grand jury means that if time is of the essence—as is often the case in terrorism