the Committees of Appropriations of the Senate and the House containing an analysis of the economic impact on U.S. ethanol producers of the extension of credit and financial guarantees for the development of the ethanol dehydration plant in Trinidad and Tobago. Congress also required that this report determine whether such an extension will cause substantial injury to such producers, as defined in section 2(e)(4) of the Export-Import Bank Act of 1945.

In January of this year, the Export-Import Bank provided its report. In its report, the Export-Import Bank skirted around the issue of whether its credit guarantees for Angostura caused substantial injury to U.S. producers, and thus whether the approval of these guarantees was in compliance with the Export-Import Bank's authorizing statute. The Export-Import Bank skirted the issue by claiming that the Angostura plant will not ''produce'' dehydrated ethanol. Rather, the Export-Import Bank stated that this plant will merely ''process'' dehydrated ethanol by removing water from wet ethanol produced in Brazil, thus merely ''adding value'' to the wet ethanol from Brazil.

The Export-Import Bank's response to Congress was, to be polite, a curious one. The Export-Import Bank's linguistic gymnastics aside, Angostura's plant will clearly be producing dehydrated ethanol. This is common sense. An ethanol dehydration plant—of course—produces dehydrated ethanol.

Moreover, the Customs Service recognizes that ethanol dehydration plants in Caribbean Basin Initiative countries produce dehydrated ethanol.

From what I can see, the Export-Import Bank's approval of credit guarantees for Angostura's ethanol plant violated the Export-Import Bank's authorizing statute by causing substantial injury to U.S. producers of the same commodity, in violation of the law. Accordingly, it is only right that no further funds should be provided for this facility.

My amendment would simply provide that no funds made available under the 2006 Foreign Operations Appropriations Act may be used by the Export-Import Bank to approve or administer a loan or guarantee for Angostura's ethanol dehydration plant. The credit guarantees for Angostura were improperly approved. Angostura, and ultimately Brazilian ethanol producers, should not continue to benefit from credit guarantees that were improperly provided by this bank.

I urge my colleagues to support this amendment.

I send the amendment to the desk and ask that it be read.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Iowa [Mr. GRASSLEY] proposes an amendment numbered 1250.

Mr. GRASSLEY. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To prohibit the use of funds to approve or administer a loan or guarantee for certain ethanol dehydration plants)

On page 326 between lines 10 and 11 insert the following:

EXPORT-IMPORT BANK

SEC. 6113. None of the funds made available in this Act may be used by the Export-Import Bank of the United States to approve or administer a loan or guarantee, or an application for a loan or guarantee, for the development, or for the increase in capacity, of an ethanol dehydration plant in Trinidad and Tobago.

The PRESIDING OFFICER. The Senator from Montana is recognized.

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

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

INDEPENDENT SUPREME COURT

Mr. BAUCUS. Mr. President, in the Declaration of Independence, one reason our Founders decided for a revolution against King George was ''He has made judges dependent on his will alone.''

That same year, the Delaware Declaration of Rights and Fundamental Rules stated:

That the independence and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people.

In the Federalist Papers, explaining our great Constitution, Alexander Hamilton quoted Montesquieu to say:

There is no liberty, if the power of judging be not separated from the legislative and executive powers.

It is the independence of the Supreme Court that is at stake in the coming consideration of the Court's next nominee. Our Constitution embodies that independence of the Court in its separation of powers, in its checks and balances, and in its structure that provides of the President:

He shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court.

The Senate's active advice and consent role in the confirmation of a Supreme Court Justice helps to ensure that nominees have the support of a broad political consensus. The Senate's role helps to ensure that the President cannot appoint extreme nominees. The Senate's role helps to ensure that Justices are more independent from the President.

Time and time again the history of our Supreme Court has demonstrated the importance of that independence. Time and time again, it has mattered that the Supreme Court had brave men and brave women who were willing to rule against the interests of the President. Time and time again, it has mattered that the President had to appoint independent thinkers that would withstand the tough scrutiny of the Senate.

It mattered that we had an independent court when our Nation was young, in 1803, when the Supreme Court decided the case of Marbury v. Madison. It mattered that we had an independent court so that Chief Justice Marshall could write for the Court:

It is emphatically the province and duty of the judicial department [that is the judiciary] to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. . . . That is the very essence of judicial duty.

Today, most take for granted this bedrock principle of judicial review set forth in Marbury v. Madison. But recall the plaintiff in that case, William Marbury, challenged President Thomas Jefferson's administration. If the President, Thomas Jefferson, had been able to appoint Justices without an effective check by the Senate, then perhaps the President would have been able to appoint Justices who believed as he did—as Jefferson did—when he wrote, in 1820, a letter saying:

It is a very dangerous doctrine to consider the judges as ultimate arbiters of all constitutional questions.

Just think for a second what that means. President Thomas Jefferson, back in 1820, wrote that it was unfortunate and dangerous doctrine to consider judges as the ultimate arbiters of constitutional questions. If it wasn't he, who would it be? Clearly, Thomas Jefferson thought it would be he, the President, not the Supreme Court.

Without concern for the Senate's advice and consent, a more recent President might have appointed a Justice who believed as did former Attorney General Edwin Meese, 20 years ago, when Meese argued that the Supreme Court's interpretations of the Constitution, in his words, did not establish a ''supreme law of the land.'' That is Edwin Meese, who was U.S. Attorney General 20 years ago. And recall that Attorney General Meese asserted that the Reagan administration was free to rely on its own views on the meaning of the law.

That is revolutionary, and I don't use that word unadvisedly. It is a long-established principle that the Constitution is what the Supreme Court says it is. It has to be. The Constitution is not what the President says it is, it is what the Supreme Court says it is. The judiciary is a free, independent, third branch of Government.

It also mattered that we had an independent Supreme Court in 1952, when the Court decided Youngstown Sheet & Tube Company v. Sawyer, otherwise known as the ''steel seizure case.''

It was the time of the Korean War, and we faced a steel strike. President Truman tried to seize the steel companies in order to avert a strike. It mattered that we had an independent Supreme Court so that the Court could rule against President Truman—an independent arbiter saying: No, Mr.

President, that is not proper; the Constitution doesn't permit that.

It mattered that Justice Hugo Black was independent enough to write for the majority when he wrote:

The Constitution limits his [that is, the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

That is very clear. The Supreme Court stood up to the President and said, Mr. President, that is unconstitutional.

It mattered that we had an independent Supreme Court in 1974, when the Court heard U.S. v. Nixon, otherwise known as the Watergate tapes case. Let's go back and review those facts.

President Nixon fought against Special Prosecutor Leon Jaworski's subpoena to get the Watergate tapes. It mattered that we had an independent Supreme Court, so that the Court could rule against President Nixon's claim of executive privilege. The President thought he had that privilege. If he had his way, he would determine the rule of law in the United States. But, no, we had an independent third branch, the Supreme Court, which ruled that the President in his interpretation of the Constitution was incorrect. In effect, the Constitution was standing up for all of us as Americans, protecting our rights against Presidents who want to have their way, which Presidents want to do after they are in power after several years.

It mattered that Chief Justice Warren Burger was independent enough to write for the majority in that case:

Neither the doctrine of the separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.

That, in effect, is what President Nixon was asking for. The Supreme Court stood up for our rights against a President.

Earlier, in 1969, on appointing Justice Burger as Chief Justice of the Supreme Court, President Nixon had said:

Our Chief Justices have probably had more profound and lasting influence on their times and on the direction of the Nation than most Presidents.

Well, in the time of President Nixon, it certainly mattered that we had an independent Supreme Court.

It mattered that we had an independent Supreme Court in 1963. In that year, the Supreme Court decided Gideon v. Wainwright, which upheld the right of counsel in State courts for people who could not afford a lawyer. A President might not want lawyers questioning the Government's prosecutors. Most Presidents don't. It mattered that an independent Supreme Court ensured that they can.

It mattered that we had an independent Supreme Court in 1964, when that Court decided New York Times v. Sullivan. That case has a standard that public officials, including Presidents, would have to meet to sue those who criticize them for the conduct of their office.

It mattered that we had an independent Supreme Court so that the Court could establish a rule against the interest of public officials, something public officials don't like. That is a standard that we don't like in this body. We don't particularly like it, but people can use it. It is the right decision. It makes it uncomfortable at times. The Court could rule that the first amendment protects the publication of statements about public officials, except when made with actual malice—that is, with knowledge that they are false or in reckless disregard of whether or not they are false. That was an independent Supreme Court. So it mattered that Justice William Brennan was independent enough to write the majority in that opinion, and he said:

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official contact.

I imagine most Presidents don't like that if the Supreme Court says it is necessary in interpreting the Constitution to protect American rights.

It mattered when we had an independent Supreme Court in 1954 when the Court decided Brown v. Board of Education. A Court that was dependent on the President might have wanted to skirt that issue of segregation, to duck the injustice of racial segregation in our schools.

Why do I say that? Because Jim Newton, a Los Angeles Times editor and biographer of Chief Justice Earl Warren, has written that President Eisenhower, who appointed Chief Justice Warren, tried to influence the Chief Justice on that landmark case. Newton reports that during the period when the Court was considering Brown v. Board of Education, President Eisenhower invited Chief Justice Warren to join him at dinner with a number of guests. That was while that case was pending.

It turned out that President Eisenhower had also invited one of the lawyers for the Southern States in the Brown case.

As the President and Chief Justice stood up from the table—this was dinner, remember, with one of the lawyers for the Southern States there, a private dinner, Chief Justice Warren was there, and President Eisenhower, who appointed Chief Justice Warren, was there—as they stood up from the table, the President took the Chief Justice by the arm. The President motioned to others in the room and then whispered into the Chief Justice's ear: ''These are not bad people.''

The President told the Chief Justice that they were only concerned about their ''sweet little girls'' having to sit in school beside African-American children.

That is what President Eisenhower said at that dinner to Chief Justice Warren when Brown v. Board of Education was pending. So it mattered that we had a Chief Justice who was independent enough not to listen to the President who appointed him.

It mattered that Chief Justice Warren was independent enough to write for the majority:

We conclude that in the field of public education the doctrine of ''separate but equal'' has no place. Separate educational facilities are inherently unequal.

On that point, I don't know if it is true or not, but there are many scholars who say that the current Chief Justice wrote a memo to his judge he was working with when he was a clerk advocating separate but equal. That memo did not come out until after the Chief Justice was appointed and confirmed by the Senate.

We here today can be justifiably proud that America has the oldest living written Constitution. When our Nation's Government was born, our Constitution was a novelty. Our Constitution created, in the words engraved over the west doorway of this Chamber, ''novus ordo seclorum''—''a new order of ages.''

As we examine the great variety of governments in the world today, Americans can still have pride that few nations possess such a charter. Few nations fervently protect their rights—very few, when you stop to think about it. It is astounding, it is amazing, and we do take it for granted. Few nations so preserve an independent supreme court.

Our Constitution is our foundation. It sets forth our basic rights. It preserves our liberties against the eternal danger of the power of the Executive, sometimes against the power of the Congress but many times against the power of the Executive.

Our Constitution preserves precious rights that must be protected, and that is why we must act zealously to ensure that the men and women we entrust to guard that valued heritage is truly independent. That is why we must remember, as Justice Charles Evans Hughes said in 1907:

[T]he judiciary is the safeguard of our liberty and of our property under the Constitution.

Our Constitution helps to preserve those rights through an ingenious system of checks and balances. Time and time again, our Constitution sets up structures that require two separate, coequal branches of Government to work together and agree before the Government can act. These structures were deeply rooted in the spirit of the times, back when the Constitution was written, that when two work together, one would propose and the other could veto.

You can see that spirit in the original clause where the House can propose revenue measures, but the Senate can amend them. You can see that spirit in the presentation clause where the Congress can propose legislation but the President can veto it. And you can see

that spirit in the nomination clause where the President can nominate judges but the Senate can block them. That was the ingenious development in the late 1700s to forge consensus; somebody can propose but the other can oppose. It forces cooperation, it forces consensus, it forces a better government.

Thus, when the Senate decides whether to confirm a Supreme Court nominee, it is not beholden to the concerns of the President but to the deepest concerns and needs of the people. This is particularly true given lifetime tenure of a Supreme Court Justice and the need for Justices to staunchly defend the people's rights and liberties.

My colleagues should recall that in the history of our Supreme Court, 13 Justices have served for more than 30 years. Justice Douglas served on the Court for more than 36 years, and the Justices appointed since 1970 have served for an average of 25 years. That is a long time. Therefore, it matters that we get good judges. It really matters.

Over the years, this has been one of the issues of greatest importance to me as a Senator, and that is why I worked to set up a merit selection system in my State of Montana that is truly apolitical, truly independent, to select the judges for whom I would then recommend to the bench.

It is very important to me. I said to the people helping me out: I don't care if they are Republicans or Democrats. I don't care if you recommend liberals or conservatives. You just give me the names of three of the very best people in our State who can then serve on the Federal bench because they are going to be there a long time, and they are so important.

I am very proud—twice this happened, and each time the group I put together, which was totally balanced, came up with three very good names. It was difficult for me in sitting down with each of the three to decide who was the best of the three because they were all so good. I did the best I could, and I felt the process worked out very well and was of great value to the people of Montana and to the country.

So it matters that we have an independent judiciary. To ensure we have an independent judiciary, it thus matters that Senators exercise their independent judgment in the nomination process. Senators should not act as rubberstamps for the President's choice. That would be a complete abrogation of senatorial responsibility—complete, total.

It is our Founders' dream of an independent Supreme Court, helping to exercise the Constitution's intricate systems of checks and balances, that is at stake in this nomination process. The Senate's active involvement in the confirmation of Justices helps to ensure that the Supreme Court can lead that independent branch of Government. And in case after case, that independence of the Supreme Court, in turn, has ensured our personal rights and our liberties. We cannot take that for granted.

The Senate can honor that independence by taking its constitutional responsibility to advise and consent very seriously. The Senate can honor that independence by withholding judgment on a nominee until the Judiciary Committee has conducted full and fair hearings. And the President can honor that independence by putting forth a nominee who meets three basic criteria: professional competence, personal integrity, and a view of important issues that is within the mainstream of the contemporary judicial thought. And the Senate can honor the independence of the Supreme Court by holding a nominee to each of these criteria before voting on whether to confirm.

Let me review those three criteria.

First, professional competency: The Supreme Court must not be the testing ground for the development of a jurist's basic values. He cannot learn on the job, nor should a Justice require further training. The stakes are simply too high. He must be very professionally competent on day one.

Second, personal integrity: Nominees to our Nation's highest Court must be of the highest caliber.

And, third, the nominee should fall within the mainstream of contemporary judicial thought. The next Justice must possess the requisite judicial philosophy to be entrusted with the Court's sweeping constitutional powers.

A Senator should not oppose a nominee just because a nominee does not share that Senator's particular judicial philosophy. But the Senate must determine whether a nominee is within the broad mainstream of judicial thought—not an idealogue of the far left, not an idealogue of the far right but mainstream.

Why? Because that is where America is. Also, we need a Judge who can exercise good judgment during the entire time he or she is on the Court. The average tenure since 1970 is 25 years. Times have changed. We don't want an idealogue who has one view or tends to have one view but, rather, somebody who is wise, above the fray, has perspective, listens, has good judgment, deeply understands the history of our country, especially its beginnings when our Constitution was written.

The Senate must determine whether a nominee is committed to the protection of the basic constitutional values of the American people.

So what are some of those values? One is the separation of powers of our Federal Government, including the independence of the Court itself.

Another is freedom of speech. Boy, is that important, stronger in this country than any other on the face of this Earth. It is so important—so important. It helps make America what it is.

Another is freedom of religion, the other side of the establishment clause. Freedom of religion, both direct and indirect, so people are free to worship whomever they choose and in whatever manner they wish.

Equal opportunity, enshrined in the 14th amendment, is the basic bedrock American principle. Again, this is what made this country great. We are great for a lot of reasons, but one is because people want to come to this country and live. We don't see very many Americans heading for the door to get out of America. Americans want to stay in America, and other people want to come to America. Why is that? I submit largely it is opportunity, it is the freedom of opportunity, and no discrimination. Anybody who wants to make something out of himself or herself in America can. There are some practical limitations sometimes, but by and large, if you have the stuff in America, you are going to get there. It is freedom of opportunity.

Another value is personal autonomy, the right to be left alone. That is very basic in America when we talk about freedoms in America. They are so important. Another freedom is the right to be left alone.

Another is an understanding of the basic powers of the Congress to pass important laws, such as those providing for the protection of the environment. We are one country. General laws, especially under the commerce clause, are so important so that all of America can share in matters, not just the equal protection clause, but the commerce clause, sharing and protecting the environment. It is very important. We are one country. That is becoming more and more important each passing day.

Why? Because of integration and large advances in communication technologies, all kinds of technologies. We are all so much of the same country together.

Mainstream philosophy matters because some on the extreme would argue, as Justice Thomas did last month, that the Constitution's establishment clause in the Bill of Rights does not even apply to the States. Think of that for a moment. Justice Thomas said the Constitution's establishment clause in the Bill of Rights—that is the first amendment—does not even apply to the States.

What does that mean? That means States can set up their own laws respecting the establishment of religion. I thought we were one country. I thought that issue was decided long ago. I thought most of the provisions of the Bill of Rights that applied to the Federal Government also applied to States. I thought that. I thought we were American.

To even contemplate the thought of going backward, to even contemplate

the thought that the establishment clause does not apply to States in and of itself sends shivers, I am sure, down the spines of virtually every American, let alone to advocate it as Justice Thomas has, and my recollection is not once but I think twice.

Mainstream philosophy matters because some on the extreme would seek to abolish the right to privacy that the Court recognized 40 years ago in that famous case of Griswold v. Connecticut. There is an inherent right to privacy in the Constitution.

Mainstream philosophy matters because some on the extreme would argue that the Congress cannot pass laws such as the Endangered Species Act or the Clean Water Act pursuant to the Constitution's commerce clause. They say the commerce clause prevents the Clean Water Act; the commerce clause prevents Congress from passing the Endangered Species Act. Think for a moment what that means and how far that could go.

Many of us are concerned that this Court is a couple or three steps away from if not virtually eliminating the commerce clause and therefore Congress's ability to enact statutes, but going so far in that direction it is going to create havoc in this country. We will have more States doing separate sets of statutes because the commerce clause does not apply.

Now, come on. Stop and think a second. That is revolutionary. Yet there are many who advocate that in this country, I am sure hoping the President appoints a nominee with just that view. I will bet dollars to donuts there are many pushing that view upon the President right now.

These are extreme views. They are not mainstream. And the stakes are high. The Senate has a duty to ensure that the nominee will defend America's mainstream constitutional values. We have that duty. It is our responsibility as Senators.

It is only fitting that the Senate set a very high standard. It is only fitting that the Senate distinguish Supreme Court nominations from other nominations, especially those for administrative positions. Administrative positions, that is the President's team, in deference to the President having his own people. We are not talking about the judicial branch. There is no deference to have your own people because we have established we want independent people. We want one's own people. We do not want the President's own people. We do not want the Congress's own people. We want independent people who are in and of themselves their own people.

It is so important the Senate act with very high standards. Because of the importance of an independent Supreme Court, the President is not entitled to have the Senate confirm his nominee. There is no entitlement there.

With some sadness, I have noted over the last several years that that trend is developing. It is becoming almost assumed that the Senate must confirm the President's nominee, that the President has that right. There is no right. The right is for the American people to stand up under the Constitution and do what is right for their people. And, yes, support a nominee who is truly independent, has personal integrity and is competent but, no, not support a nominee for the Supreme Court who does not have those requisite criteria. That is what is right. The Senate must set a very high standard.

The next Supreme Court Justice will affect all of us and our children. This Justice will exercise extraordinary power. We must ensure that Justice's independence.

The independence of the Supreme Court is a doctrine with deep roots in the history of our Nation. In 1765, the great British legal jurist, Sir William Blackstone, published his Commentaries, a book that was well read by our Founders. Every law student in America knows about Blackstone. Blackstone wrote:

> In this distinct and separate existence of the judicial power, in a . . . body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.

In explaining our newly minted Constitution, Alexander Hamilton wrote in Federalist No. 78:

> [T]he judiciary is beyond comparison the weakest of the three departments of power. . . .[T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that ''there is no liberty, if the power of judging be not separated from the legislative and executive powers.''

That says we in Congress cannot have our people on the Court. It also says the President cannot have his person on the Court. Rather a process so that the judge is his person on the Court, his own person.

Hamilton continued:

> [L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments. . . .

That is pretty profound. And Hamilton warned:

> [F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches. . . .

Marbury v. Madison years later helped establish the independence of the judiciary, saying the Constitution is what the Court says it says, and that has helped. But we all know Presidents have tried to change the Court in their own ways because they did not like what the Court was doing. FDR tried his court-packing plan. He did not like what the Supreme Court was deciding so he tried to influence the Court with court packing, and that did not work. Presidents have all kinds of ways to influence the Court. As I mentioned earlier, President Eisenhower very much tried to influence Justice Warren in Brown v. Board of Education. Fortunately, Justice Warren, who was appointed by President Eisenhower, stood up and said, no, separate but equal is not the law of the land. Rather, we should integrate.

Hamilton then concluded:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

So I call on the President, I call on my colleagues to defend that ''main preservative of . . . liberty.'' I call on the President, I call on my colleagues to defend the independence of the courts. I call on my colleagues in this Senate to actively exercise their constitutional duties of advice and consent.

There are not many times in our lives as Senators when rising up and exercising our responsibilities is as important as this, not be a rubberstamp, but not vote no just because we have a different view of that person's judicial philosophy but, rather, doing the right thing, and the right thing is to make sure we have nominees of utmost personal integrity who are clearly professionally competent and who are in the mainstream and will not cater to extreme views of either the right or the left but stand above it all and decide cases in the right way.

I yield the floor and I suggest the absence of a quorum.

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

The assistant legislative clerk proceeded to call the roll.

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

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

MORNING BUSINESS

Mr. MCCONNELL. Mr. President, I ask unanimous consent there now be a period for morning business with Senators permitted to speak for up to 10 minutes each.

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

AMENDMENT NO. 1224, AS MODIFIED, TO H.R. 2360

Mr. MCCONNELL. Mr. President, I ask unanimous consent that notwithstanding passage of H.R. 2360, amendment No. 1224, which was previously agreed to, be modified with the change at the desk.