change the Senate rules was with a two-thirds supermajority. As we saw last week, that's simply not true. Some call what occurred last week the ''constitutional option,'' while others call it the ''nuclear option.'' I think the best name for it might be the ''majority option.''

As I studied this issue in great depth, one thing became very clear—Senator Robert Byrd may have said it best during a debate on the floor in 1975 when he said, ''at any time that 51 Members of the Senate are determined to change the rule . . . and if the leadership of the Senate joins them . . . that rule will be changed.''

We keep hearing that any use of this option to change the rules is an abuse of power by the majority. However, a 2005 Policy Committee memo provides some excellent points to rebut this argument. And just to be clear, these citations are from a Republican Policy Committee memo.

Let me read part of the Republican memo:

This constitutional option is well grounded in the U.S. Constitution and in Senate history. The Senate has always had, and repeatedly has exercised, the constitutional power to change the Senate's procedures through a majority vote. Majority Leader Robert C. Byrd used the constitutional option in 1977, 1979, 1980, and 1987 to establish precedents changing Senate procedures during the middle of a Congress. And the Senate several times has changed its Standing Rules after the constitutional option had been threatened, beginning with the adoption of the first cloture rule in 1917. Simply put, the constitutional option itself is a longstanding feature of Senate practice.

The Senate, therefore, has long accepted the legitimacy of the constitutional option. Through precedent, the option has been exercised and Senate procedures have been changed. At other times it has been merely threatened, and Senators negotiated textual rules changes through the regular order. But regardless of the outcome, the constitutional option has played an ongoing and important role.

The memo goes on to address some ''Common Misunderstandings of the Constitutional Option.''

One misunderstanding addressed a claim we heard last week that, ''The essential character of the Senate will be destroyed if the constitutional option is exercised.''

The memo rebuts this by stating:

When Majority Leader Byrd repeatedly exercised the constitutional option to correct abuses of Senate rules and precedents, those illustrative exercises of the option did little to upset the basic character of the Senate. Indeed, many observers argue that the Senate minority is stronger today in a body that still allows for extensive debate, full consideration, and careful deliberation of all matters with which it is presented.

Changing the rules with a simple majority is not about exercising power but it is about restoring balance. There is a fine line between respecting minority rights and yielding to minority rule. When we cross that line, as I believe we have many times in recent years, the body is within its rights to restore the balance.

This is not tyranny by the majority, but merely holding the minority accountable when it abuses the rules to the point of complete dysfunction. Neither party should stoop to that level.

Many of my colleagues argue that the Senate's supermajority requirements are what make it unique from the House of Representatives, and other legislative body around the world. I disagree. If you talk to the veteran Senators, many of them will tell you that the need for 60 votes to pass anything is a recent phenomenon. Senator HARKIN discussed this in great detail during our debate in January and I highly recommend reading his statement.

Senator LEAHY raised the issue on the floor last week when he said;

I keep hearing this talk about 60 votes. Most votes you win by 51 votes, and this constant mantra of 60 votes, this is some new invention.

I think this gets at the heart of the problem. We are a unique legislative body but not because of our rulebook. Complete gridlock and dysfunction can't be what our Founders intended. Rather than a body bound by mutual respect that moves by consent and allows majority votes on almost all matters, we have become a supermajoritarian institution that often doesn't move at all.

With the tremendously difficult economic circumstances facing this country, the American people cannot afford a broken Senate. They are frustrated. And they have every right to be. This is not how to govern, and they deserve better. Both sides need to take a step back and understand that what we do on the Senate floor should not be about setting up the next Presidential election or winning the majority next November but about helping the country today.

Mr. President, I ask unanimous consent to have printed in the RECORD the Executive Summary of The Constitutional Option.

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

THE SENATE'S POWER TO MAKE PROCEDURAL RULES BY MAJORITY VOTE

EXECUTIVE SUMMARY

The filibusters of judicial nominations that arose during the 108th Congress have created an institutional crisis for the Senate.

Until 2003, Democrats and Republicans had worked together to guarantee that nominations considered on the Senate floor received up-or-down votes.

The filibustering Senators are trying to create a new Senate precedent—a 60-vote requirement for the confirmation of judges—contrary to the simple-majority standard presumed in the Constitution.

If the Senate allows these filibusters to continue, it will be acquiescing in Democrats' unilateral change to Senate practices and procedures.

The Senate has the power to remedy this situation through the ''constitutional option''—the exercise of a Senate majority's constitutional power to define Senate practices and procedures.

The Senate has always had, and repeatedly has exercised, this constitutional option. The majority's authority is grounded in the Constitution, Supreme Court case law, and the Senate's past practices.

For example, Majority Leader Robert C. Byrd used the constitutional option in 1977, 1979, 1980, and 1987 to establish precedents that changed Senate procedures during the middle of a Congress.

An exercise of the constitutional option under the current circumstances would be an act of restoration—a return to the historic and constitutional confirmation standard of simple-majority support for all judicial nominations.

Employing the constitutional option here would not affect the legislative filibuster because virtually every Senator supports its preservation. In contrast, only a minority of Senators believes in blocking judicial nominations by filibuster.

The Senate would, therefore, be well within its rights to exercise the constitutional option in order to restore up-or-down votes for judicial nominations on the Senate floor.

Mr. UDALL of New Mexico. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from Iowa.

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

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

NOMINATION OF JANE MARGARET TRICHE-MILAZZO

Mr. GRASSLEY. Mr. President, today we are going to consider the nomination of Jane Margaret Triche-Milazzo to be U.S. district judge for the Eastern District of Louisiana. Before I make my remarks regarding the nomination, I want to respond to some comments made on the floor last Thursday evening because I am really amazed and very disappointed by the continuing allegations that Senate Republicans are delaying, obstructing, or otherwise blocking judicial nominations. One Member stated that we ''filibuster everything and require 60 votes on everything, including judges.'' That statement is without merit, and so I am here to set the record straight.

We are making very good progress in the consideration and confirmation of President Obama's judicial nominations. In fact, we have taken positive action on 84 percent of President Obama's judicial nominees. We heard from five judicial nominees in committee last week, reported five more to the floor, and continue to hold regular votes on judicial nominees. President Obama's circuit court nominees are waiting, on average, only 66 days to receive a hearing. Now, compare that to the 247 days President Bush's circuit nominees were forced to wait. The same can be said for district court nominees, who have only waited 79 days under President Obama. Nominees

from President Bush waited on average 100 days for a hearing. You can understand why I am disturbed because some people say there is a Republican effort not to cooperate on moving these judges.

The reporting process has also favored President Obama's judicial nominees. On average, President Obama's circuit court nominees have only waited 116 days to be reported out of committee. President Bush's circuit court nominees waited over 369 days to be reported. District court nominees are no different. President Obama's nominees for the district courts have waited 129 days, while President Bush's district court nominees waited over 148 days.

The accusations that we are filibustering or requiring 60 votes on everything including judges is not supported by the facts. We have confirmed 43 judicial nominees this year. With the vote today we will have confirmed over 66 percent of President Obama's judicial nominees since the beginning of his administration. During our consideration of the 98 judicial nominations submitted during this Congress, there have been two cloture votes. One of those nominees was confirmed. The other was withdrawn.

In the last Congress there were four cloture motions made in relationship to 105 judicial nominations submitted. I remind my colleagues that at least 18 of President Bush's judicial nominations were subjected to cloture motions, many of them having multiple cloture votes. According to my count, there were approximately 30 cloture votes on Bush judicial nominees.

There has to be a double standard on the part of my colleagues who somehow forget the history or somehow do not know how to count or sometimes, if they do read the numbers, do not know what the numbers mean.

Another colleague of mine stated last Thursday night that he could not remember a time during his long service in the Senate when judges would sit on the calendar for months. It was not that long ago, while the current majority party was in the minority, when qualified nominees sat on the Senate calendar for months. In most cases, when finally afforded a vote, they received unanimous support. These included Juan Sanchez, who was nominated for the Eastern District of Pennsylvania; William Duffey, Jr., who was nominated for the Northern District of Georgia; Mark Filip, who was nominated for the Northern District of Illinois; Gary Sharpe, who was nominated for the Northern District of New York; and James Robart, who was nominated for the Western District, State of Washington. These are just a few of President Bush's district court nominees who sat on the calendar for well over 3 months, yet received unanimous support in their confirmation votes.

I wonder if my colleagues remember William Haynes, President Bush's nominee to sit on the Fourth Circuit. He waited 638 days on the Senate calendar in the 108th Congress alone before being returned to the President. All in all, Mr. Haynes put his life on hold for 1,173 days without ever receiving an up-or-down vote.

Another of President Bush's circuit court nominees, Raymond Kethledge, waited 23 months before being confirmed by the Senate and was then confirmed—can you believe it—on a voice vote.

I am not providing these facts to engage in a tit-for-tat, but when I hear colleagues misstate facts and can't understand numbers and can't count, I have to set the record straight.

Shortly we will vote on Jane M. Triche-Milazzo, who is nominated to be the U.S. district judge for the Eastern District of Louisiana. She graduated magna cum laude with a bachelor's degree from Nicholls State University in 1977 and then worked for some time as an elementary school teacher before beginning to work in her father's law office. In 1992, Judge Triche-Milazzo graduated with a juris doctorate from Louisiana State University, Paul M. Herbert Law Center. She spent the entirety of her legal career practicing at Risley Triche, LLC, first as an associate and later to become a partner.

In 2008 she was elected judge for Louisiana's 23rd judicial district. She is a Louisiana State District Court judge for Division D of the 23rd judicial district bench. She was the first female judge elected to that judicial district bench. Judge Triche-Milazzo received a unanimous ''qualified'' rating from the ABA Committee on the Federal Judiciary, so I am pleased to support this fine nominee and thank her for her service.

Mr. LEAHY. Mr. President, in a few moments the Senate has the opportunity to proceed to the American Jobs Act. The bill the President asked us to pass a month ago includes bipartisan proposals that have received broad approval in the past from Members of both parties, including road and bridge repairs, teacher retentions and extensions of tax relief for businesses to encourage hiring. We should answer the President's call and the American people's needs and act to help get Americans back to work and grow the economy.

There is another unacceptable rate that we can help change to the benefit of all Americans. That is the judicial vacancy rate. It now stands at nearly 11 percent, with 92 vacancies on Federal courts around the country. I will ask to have printed in the RECORD an editorial on this topic entitled ''The Other Federal Crisis'' that appeared in McClatchy—Tribune papers last week.

We can act today to bring down that rate dramatically by considering and confirming 26 judicial nominations approved by the Senate Judiciary Committee that are awaiting final Senate action.

Today we are voting on only one of those judicial 26 nominees. With Republican agreement, all 26 could have been voted on today. Of the 25 judges who will remain on the Executive Calendar after today's vote, 21 were reported with the unanimous support of all Democrats and all Republicans serving on the Judiciary Committee. All of them have the support of their home State Senators, 10 include Republicans home State Senators.

Today, the Senate will finally vote on the nomination of Jane Triche-Milazzo to serve as a district judge in the U.S. District Court for the Eastern District of Louisiana. While I am pleased that we are finally having a vote on Judge Triche-Milazzo's nomination, after 3 months of unnecessary delay, more than two dozen well-qualified, consensus nominees still await a Senate confirmation vote. At a time when vacancies on Federal courts throughout the country have remained near or above 90 for more than 2 years, delaying votes on these nominees needlessly undermines the ability of our Federal courts to provide justice to Americans around the country.

The Senate could take significant steps today to address this ongoing crisis in judicial vacancies just by acting on the nominations thoroughly vetted by the Judiciary Committee and reported with bipartisan support. This week, with Republican cooperation, the Judiciary Committee could report five more consensus nominees to fill judicial emergency vacancies on the Eleventh Circuit and in Utah, as well as vacancies in Missouri, Nebraska, and Washington. I have repeatedly noted Senator GRASSLEY's willingness to work with me to make sure that the Judiciary Committee makes progress on nominations. Regrettably, the Judiciary Committee's efforts to act on nominations have not been matched by action by the Senate, where the Republican leadership has refused promptly to consider even consensus nominations. They are delayed for months. The Republican leadership's refusal to promptly schedule votes on pending judicial nominations is a departure from the Senate's action in regularly considering President Bush's nominations, which we did whether the Senate had a Democratic or Republican majority. At this point in George W. Bush's presidency, the Senate had confirmed 162 of his nominees for the Federal circuit and district courts, including 100 during the 17 months that I was chairman of the Judiciary Committee during his first term. By this date in President Clinton's first term, the Senate had confirmed 163 of his nominations to circuit and district courts. In stark contrast, after today's vote, the Senate will have confirmed only 105 of President Obama's nominees to Federal circuit and district courts. In the next year, we need to confirm 100 more of his circuit and district court nominations to match the 205 confirmed during President Bush's first term.

We can and must do better to address the serious judicial vacancies crisis affecting Federal courts around the

country. Nearly half of all Americans—136 million—live in districts or circuits that have a judicial vacancy that could be filled today if the Senate Republicans just agreed to vote on the nominations currently pending on the Executive Calendar. As many as 21 states are served by Federal courts with vacancies that would be filled by nominations stalled on the Senate calendar. Millions of Americans across the country are being harmed by delays in overburdened courts. The Republican leadership should explain to the American people why they will not consent to vote on the qualified, consensus candidates nominated to fill these extended judicial vacancies.

The unnecessary delays in our consideration of judicial nominations have contributed to the longest period of historically high vacancy rates in the last 35 years. The number of judicial vacancies rose above 90 in August 2009, and it has stayed near or above that level ever since. Vacancies are twice as high as they were at this point in President Bush's first term when the Senate was expeditiously voting on consensus judicial nominations. We must bring an end to these needless delays in the Senate so that we can ease the burden on our Federal courts so that they can better serve the American people.

Last week, the Senate voted to confirm Judge Jennifer Guerin Zipps, who was nominated to fill the emergency judicial vacancy created by the tragic death of Judge Roll in the Tucson, AZ, shootings. I was pleased that, with cooperation from Republican Senators, the time from when the Judiciary Committee reported Judge Zipps' nomination to full Senate consideration was less than a month even including a recess period. All nominations should move at that rate. It should not take a tragedy to spur us to action to fill a judicial emergency vacancy. Indeed, the time it took the Senate to consider Judge Zipps' nomination was in line with the average time it took for the Senate to consider President Bush's unanimously reported judicial nominations, 28 days. Her nomination would not have been an exception during those years as it regrettably has become today. President Obama's consensus nominations, reported with the unanimous support of every Republican and Democrat on the Judiciary Committee, have waited an average of 79 days on the Executive Calendar before consideration by the Senate. Today's nominee is a good example. She was reported unanimously on July 14. That was nearly 3 months ago.

Last week, I invited Justice Scalia and Justice Breyer to appear before the Judiciary Committee and discuss the important role that judges play under our Constitution. Justice Scalia agreed that the extensive delays in the confirmation process are already having a chilling effect on the ability to attract talented nominees to the Federal bench. Chief Justice Roberts has also described the ''persistent problem of judicial vacancies in critically overworked districts.'' Hardworking Americans are denied justice when their cases are delayed by overburdened courts. While people appearing in court are waiting years before a judge rules on their case, they feel they are being forced to live the old adage ''justice delayed is justice denied.''

Today the Senate will confirm an experienced, consensus nominee who could and should have received a vote prior to the August recess. Jane Triche-Milazzo is nominated to fill a vacancy in the U.S. District Court for the Eastern District of Louisiana. Currently a Louisiana State court judge, she previously spent 16 years in private practice in her family's law firm in Napoleonville, LA. Judge Triche-Milazzo has the bipartisan support of her home State Senators, Democratic Senator MARY LANDRIEU and Republican Senator DAVID VITTER. The Judiciary Committee favorably reported her nomination without a single dissenting vote almost 3 months ago. I expect that the Senate will confirm her unanimously today.

We must do more to make progress in considering the other 25 judicial nominations pending on the Senate's Executive Calendar. The excessive number of vacancies has persisted in Federal courts throughout the Nation for far too long. The American people should not have to wait for the Senate to do its constitutional duty of confirming judges to the Federal bench. With millions of Americans currently affected by the vacancy crisis in our courts, there is serious work to be done.

Mr. President, I ask unanimous consent to have printed in the RECORD the editorial to which I referred.

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

[From the Miami Herald, Oct. 2, 2011]

THE OTHER FEDERAL CRISIS

In the month since Congress returned from the summer recess, the crisis over the deficit and federal spending has been the focus of attention, with ideological gridlock obstructing progress. But partisan politics has also produced a separate crisis in the nation's federal courts.

During September, the Senate confirmed a grand total of three federal judges—leaving 95 vacancies in courthouses around the country. This means that there are simply not enough federal judges to handle the judicial workload, resulting in justice delayed in both criminal and civil cases. In 35 of those instances, including two district seats in the Southern District of Florida, the courts have declared a judicial emergency, meaning the dockets are overloaded to the breaking point.

According to a recent report by the Congressional Research Service, this is a historically high level of vacancies, and the prolonged slowness in filling the empty seats makes the Obama presidency the longest period of high vacancy rates in the federal judiciary in 35 years.

Clearly, the Senate is not fulfilling its constitutional duty to confirm judges. Some 58 Obama administration nominees are pending in the Senate to fill the 95 vacancies. Republican senators have complained that there should be a nominee for every vacancy—fair enough—but that does not explain why so many of the nominations have been stalled for so long.

The Senate, of course, has a duty to ensure that nominees are qualified. No one wants a ''fast-tracked'' judge hearing cases. But it's hard to escape the conclusion that partisan politics rather than the quality of the nominees is the root of the problem when even consensus candidates must wait for prolonged periods.

This Monday, for example, the Senate is expected to fill some of those vacancies when six of the nominations go to the floor for a vote, meaning there has been a preceding agreement not to block the vote.

That generally leads to confirmation. Of those six, five have been pending since May and June—and all of them were approved with a unanimous vote by Democratic and Republican members of the Senate Judiciary Committee. In other words, there is no question that the nominees have the qualifications to do the job—so why the delay?

In the past, Democrats have been slow to approve nominees from Republican presidents. But the record shows that approvals for nominees by the last Republican president, George W. Bush, moved faster even when Democrats had the power to block confirmation.

At this point in the presidency of President Bush, 144 federal circuit and district court judges had been confirmed. By comparison, according to Vermont Sen. Patrick Leahy, chairman of the Judiciary Committee, total confirmations of federal circuit and district court judges during the first three years of the Obama administration have been only 98. ''The Senate has a long way to go before the end of next year to match the 205 confirmations of President Bush's judicial nominees during his first term,'' he said.

This is a problem senators can solve easily. First, vote on all 27 pending nominees who have already won committee approval, beginning with those who received a unanimous vote. Then move the other nominations to the floor without unreasonable delay. The deterioration of the federal judiciary because of partisan politics is inexcusable.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant editor of the Daily Digest proceeded to call the roll.

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

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

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

EXECUTIVE SESSION

NOMINATION OF JANE MARGARET TRICHE-MILAZZO TO BE UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF LOUISIANA

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider