That is what we should be doing, and that is why the surface transportation bill is so important for us to bring up and debate and pass.

And, quite frankly, the Senator from California had performed something unprecedented—well, not unprecedented but unusual here—in that she got bipartisan support from three committees, and we are working on the fourth now. Senator BOXER has gotten all the committees together, and so it is time to move this bill forward for jobs throughout America.

Mrs. BOXER. My very last question. I hope my friend is aware that right now the leadership is working very hard to take this very unwieldy list of amendments and get it down to some responsible number so we can begin, finally, in earnest. I have to point out that I don't understand how my Republican friends think it is appropriate to add to a highway bill the issue of birth control. I don't know how my friends on the other side think it is appropriate to repeal environmental laws on this highway bill. I don't understand, as my friend from Maryland pointed out, how they can say they can see a connection between a highway bill and what is happening in Egypt.

We care about all these issues, and the Senate will address these issues, but this is a jobs bill, a bipartisan jobs bill. So I want to end by thanking my friend for yielding to me, and I look forward to his remarks on judges, and I look forward to getting back to our transportation bill, which I am hopeful will happen at some point today.

Mr. CARDIN. I thank Senator BOXER.

Mr. President, I ask unanimous consent to speak for up to 10 minutes.

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

RUSSELL NOMINATION

Mr. CARDIN. Mr. President, I rise today to urge the Senate to confirm Judge George Levi Russell, III, of Maryland to be a United States District Judge for the District of Maryland.

The nomination of Judge Russell was reported out of the Judiciary Committee on February 16 by a voice vote, as the Acting President of the Senate knows. Judge Russell currently sits as a trial judge in the Baltimore City Circuit Court.

I take seriously the obligation of the Senate in terms of the advice and consent role we play. I am concerned that our judicial confirmation process in the Senate has broken down due to partisanship, particularly for noncontroversial judges. Judge Russell's nomination now joins a long list of backlogged, noncontroversial judicial nominations that are stuck on the Senate floor. As of yesterday, the Senate calendar contained 20 judicial nominations approved by the Senate Judiciary Committee which are still awaiting a final vote. Fifteen of these nominees have been pending since last year, and 18 of them have received strong bipartisan support from the Senate Judiciary Committee. These are noncontroversial nominees that are due the up-or-down vote on the floor of the Senate, and there is no justification for the delay in the Senate's carrying out its constitutional responsibilities.

The Senate is responsible for the rising vacancy rate in our Nation's article III courts. The victims here are not only the nominee and his or her family, who are waiting on final Senate action, but the American people are also victims. They face increasing delays in courts that are overburdened and understaffed. A higher vacancy rate means lack of timely hearings and decisions by our Federal courts, affecting our citizens' access to justice and a fair and impartial resolution of their complaints.

In Maryland, we are trying to fill a vacancy that was created during the end of President Bush's term of office when Judge Peter Messitte took senior status in 2008. So this vacancy has been there for a long time. It is time for us to act. Judge Russell is an excellent candidate. He received bipartisan support in the Judiciary Committee and is ready to take office upon being confirmed by the Senate. The time for action is now.

Judge Russell brings a wealth of experience to this position in both State and Federal courts. Earlier in his career, he served as a Federal prosecutor and as an attorney in a private law firm. He now sits as a State trial judge court in Maryland. He has the experience.

He graduated from Morehouse College with a B.A. in political science in 1988 and a J.D. from Maryland Law School in 1991. He passed the bar examination and was admitted to practice law in Maryland in 1991. He then clerked for Chief Judge Robert Bell on the Maryland Court of Appeals, our State's highest court.

He worked as a litigation associate for 2 years at Hazel, Thomas, and then briefly at Whiteford, Taylor. He then served as an assistant U.S. attorney for the District of Maryland from 1994 to 1999, handling civil cases. In that capacity, he represented various Federal Government agencies in discrimination, accident, and medical malpractice cases. He then worked as an associate at the Peter Angelos law firm for 2 years.

In 2002, he went back to the U.S. Attorney's Office handling criminal cases until 2007. He represented the United States in the criminal prosecution of violent crime and narcotics cases during the investigatory stage, at trial, and on appeal. This included the initiation and monitoring of wiretaps to infiltrate and break up violent gangs in Baltimore City. He also served as the Project Safe Neighborhood coordinator for the office from 2002 until 2005. He participated in community outreach programs, including attending community meetings on behalf of the office, and attending meetings with the Baltimore State's Attorney's Office to reduce violent crime in Baltimore neighborhoods.

In January 2007, Governor Ehrlich, who I am sure you are aware was the Republican Governor of our State, appointed Judge Russell to serve as an associate judge of the Baltimore City Circuit Court for a term of 15 years. As a trial judge, Judge Russell has presided over hundreds of trials that have gone to verdict or judgment and has experience in handling jury trials, bench trials, civil cases, and criminal cases. He has the professional experience which has been recognized by a Republican Governor and a Democratic President. He should receive a vote on the floor of this body and he should be confirmed.

Judge Russell has strong roots, legal experience, and community involvement in the State of Maryland. He was born and raised in Baltimore City, and has extended family who live in Baltimore. He serves as director and trustee on the board of the Enoch Pratt Free Library, which serves the disadvantaged throughout the State of Maryland. He served on the board of directors of the Community Law Center, which is an organization designed to help neighborhood organizations improve the quality of life for their residents. So he brings experience as a community activist as well as his professional experience.

He has also served as a board member of several organizations that devote substantial resources to helping the disadvantaged, including Big Brothers and Big Sisters of Maryland. I know he has often spoken to young people in schools about the obligation, duty, and mandate of a judge, and tries to demystify the role of a judge in a black robe. Judge Russell is particularly concerned with addressing the drug violence and mental health problems that plague Baltimore City.

The reason I went through all of his qualifications right now, even though his nomination is not pending, is that we have to put a face on the people who are being denied the opportunity for an up-or-down vote before the Senate. You hear the numbers; I have mentioned them—20—backed up. That is a large number when you look at the vacancy rates on our courts. When you look at this vacancy that has been pending now for the people of Maryland for 3 years, they have a right to action on the floor of the Senate. They have a right to have these nominees heard in regular order. But I want the people to know about this one individual and how qualified he is to assume the position on the District Court of Maryland.

I urge my colleagues to do everything they can. Let's carry out our responsibility. I am absolutely confident that Judge Russell possesses the qualifications, temperament, and passion for justice that will make him an outstanding United States District Court

judge for the District of Maryland. He will serve the people very well in this position. I therefore urge my colleagues not only to allow us to vote on Judge Russell's confirmation, but let us vote on the 20 nominees who have been reported out of the Judiciary Committee, and show the American people we are ready to carry out our responsibilities.

I ask my colleagues on the other side of the aisle, my Republican friends: It is way past time for us to carry out our responsibility. Stop putting filibusters or holds on these judicial nominations. Let's vote on them and carry out our responsibilities as Senators.

Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Minnesota.

Ms. KLOBUCHAR. Mr. President, recently I came to the floor of the Senate to talk about the lack of faith the American people have in the political system and in our government. My focus that day was on campaign finance laws and the impact of the Citizens United decision by the Supreme Court 2 years ago.

Today I am here to discuss, along with my colleagues, another dynamic of Capitol Hill that is making people lose faith in Washington: the apparent inability of Congress to get routine business done; specifically, the failure of the Senate to fill the dozens of judicial vacancies that exist around the country.

This doesn't need to be a partisan debate. I know Senators on each side have their own reasons why it is the other party's fault. But we need to put those arguments behind us and agree to do the people's business.

We have actually done a good job, as Senator CARDIN has pointed out, on the Judiciary Committee with having a number of judges who have come through that committee and are waiting approval on the floor. But often, we approve judges and they don't get floor votes for months and months. Also, the vast majority of judges who get approved, get approved unanimously in committee. That was my experience with the judge I recommended from Minnesota who now is a judge. So we got her done, but there are so many more, as you know, and so many jurisdictions with heavy caseloads which are awaiting judges.

Once these judges get to the floor, almost all of them get a handful of no votes. Why is that? They have been vetted. They have been vetted, their records have been looked at, they have gone through a committee hearing, they have been looked at by Senators on both sides of the aisle in the Judiciary Committee. And if they have reached that point of being on the floor of the Senate, it is no surprise that they might get a few no votes. So I don't see this as a partisan issue, but it is an issue we must get done.

If almost all the Senators support almost all the judges, this isn't about pushing one side's agenda or judicial philosophy. These are extremely qualified judges who Senators believe will be fair, impartial jurists, committed to objectively interpreting the law. But the fact is that we are lagging way behind in the confirmation pace under previous Presidents of both parties and with the Senate controlled by either party. By this time in the Presidency of Bill Clinton, the Senate had confirmed 183 judges. By this time in the Presidency of George W. Bush, the Senate had confirmed 170 judges. And yet as of today, we have only confirmed 129 judicial nominees of President Obama.

It is important to note that President Bush actually ended up getting five more judges approved in his first term than President Clinton. So we don't have a case where there has suddenly been a decline over time with the judges' approval. In fact, it went up after Clinton and now, as we can see, it is going down. There doesn't seem to be any indication at this very moment in time that we are speeding up the process. While earlier in the year we did confirm a number of judges, there was an agreement. There are still way too many out there, and we need to move on them now.

Typically, the Senate will approve noncontroversial judicial nominees before the end of the session in December. But that did not happen this past year, and we have not made too much progress since returning in January. It doesn't take too long to approve a judge on the floor. Often, we have an hour or two of debate and then vote on two or three judges. So we can get these judges confirmed quickly if both sides consent.

Some people listening are probably thinking there must be an explanation; that I am somehow leaving out key numbers when I have just explained that we only need an hour or two for each of these 20-some pending judges. Maybe they are thinking there aren't as many vacancies as under previous Presidents. But, no, under President Clinton there were about 53 vacancies at this point in his Presidency. Under President Bush, there were 46 vacancies. Right now, under President Obama, there are in fact 85 judicial vacancies.

Maybe people at home are thinking the slow process is a result of controversial nominees but, no, it is not that, either. As I mentioned earlier, most of the judicial nominees awaiting a floor vote were approved unanimously by the Senate Judiciary Committee. That is not a committee, as the President knows from serving on that committee, of shrinking violets. There are people with very diverse views. And most of these nominees, as I explained, came through with all of their support. In fact, 16 of the 19 nominees waiting for a floor vote received unanimous votes in committee. They were approved by every single member of the Judiciary Committee from both parties.

Most of those unanimous judges have been waiting for a vote for months. We should confirm them right away. We should confirm them this week. We can have a vote so that the few people on the other side of the aisle who do not agree with those nominees can register their objection and vote no. But there is no reason to hold up all of these nominees for all of these jurisdictions across the country.

For the judges who have come out of committee more recently, I understand that Senators need time to look at their records and qualifications. That is an important part of the process. But after a reasonable period of time, let's move on to confirm the newer judges as well. Let's vote up or down on all of the judges and get them on the bench.

I also want to point out that the judicial nomination process is bipartisan. That may surprise some people watching at home. They may think I am making that up. But the truth is that nominees don't move forward in the Judiciary Committee unless both of the home State Senators sign off. So whether it is two Democrats or two Republicans or one from each party, both Senators have effective veto power over the judicial nominees from their State. And usually the judges proposed by the President first are recommended by Senators. So it is not a question of President Obama picking whomever he wants and appointing them to the judiciary. He has to pick people who are okay with both Senators regardless of party. It forces a President of either party to choose high-quality, well-respected mainstream judges.

I remain hopeful we can rectify this situation and start getting judges approved in a timely manner and catch up to where we were under previous Presidents. But it is not about keeping some scorecard from President to President, as much as I have loved using these statistics today, or from Congress to Congress. In truth, it is about justice. And we all know that. We are constantly hearing complaints about the slow pace of Federal courts. Those delays are real, and they impact people—real people—every day. Whether we are talking about people seeking to protect their rights under the Americans With Disability Act or companies trying to resolve commercial disputes—I have a few of them in my State—unreasonable delays in court proceedings undermine our system of justice, and things won't get any better if we understaff our Federal judiciary.

There are many problems facing our country that do not have simple solutions. There are many problems for which the two parties have vastly different solutions. But in this case with judicial vacancies, there is only one solution, and it is well within our grasp given that so many of these judges were noncontroversial.

This is the solution, Mr. President. It is two words: Let's vote. Let's vote on all of the pending nominees, and let's continue to vote as more nominees emerge from the Judiciary Committee.

If a Senator wants to vote no on a particular nominee, if he or she wants to give a long and glorious speech about why they are opposed to the nominee, please let them do that. Let them do that today. All we are asking for is a vote.

Mr. UDALL of New Mexico. Mr. President, I come to the floor today to discuss our broken judicial confirmation process. I know many of my colleagues will discuss individual nominees and how long they have languished on the executive calendar without a vote. We can point to many statistics about the length of time it takes to confirm President Obama's nominees versus President Bush's and how many nominees each had confirmed in their first term.

This is an important argument to make. And while these statistics are helpful in highlighting the problem, they are merely the symptoms of a much larger disease—a broken Senate. Since joining the Senate in 2009, I've said repeatedly that we must take decisive action to reform our rules in order to restore deliberativeness to this body.

At the beginning of this Congress, Senators HARKIN, MERKLEY, and I tried to do that. Ultimately, our success was limited. We didn't achieve the broad reforms we wanted. But we did initiate a debate that highlighted some of the most egregious abuses of the rules, including how the rules are manipulated to obstruct the confirmation process for judges and executive branch nominees.

There was some hope that the debate we had, along with the modest reforms that were adopted, would encourage both sides of the aisle to restore the respect and comity that is often lacking in today's Senate. Unfortunately, any goodwill rapidly deteriorated and the partisan rancor and political brinksmanship quickly returned.

That is why we are here again today, talking about yet another aspect of this body's dysfunction—the broken judicial confirmation process.

This is not a new problem, nor is it one on which either side can claim to be innocent. For about the past decade, the minority party—whether Republicans or Democrats—has gone to inexcusable lengths to slow or block judicial nominees who have strong majority support. This has lead to a new norm in the Senate—the need for any nominee to get at least 60 votes for confirmation. This directly conflicts with the Founders' intent and a plain reading of the Constitution.

The arguments my colleagues and I make today—that judicial nominees who have been approved by the Judiciary Committee deserve a vote by the full Senate—are the same arguments my Republican colleagues made when President Bush's nominees were held up by a Democratic minority.

In April 2003, the freshmen members of the 108th Congress sent a letter to Majority Leader Frist and Minority Leader Daschle. That freshman class was made up of nine Republicans and one Democrat. I'd like to read part of that letter. The senators wrote:

[W]e write to express our concerns about the state of the federal judicial nomination and confirmation process. The apparent breakdown in this process reflects poorly on the ability of the Senate and the Administration to work together in the best interests of our country. The breakdown also disserves the qualified nominees to the federal bench whose confirmations have been delayed or blocked, and the American people who rely on our federal courts for justice. . . . We seek a bipartisan solution that will protect the integrity and independence of our nation's courts, ensure fairness for judicial nominees, and leave the bitterness of the past behind us.

Regrettably, the rest of the Senate did not heed their advice and the confirmation process remained dysfunctional. Two years later, Senator HATCH, a former chairman of the Judiciary Committee, wrote an op-ed in the National Review Online that clearly outlined the problem. Senator HATCH's commentary began with the following:

Judicial nominations will be one of the most important issues facing the Senate in the 109th Congress and the question is whether we will return to the tradition of giving nominations reaching the Senate floor an up or down vote. The filibusters used to block such votes have mired the judicial-confirmation process in a political and constitutional crisis that undermines democracy, the judiciary, the Senate, and the Constitution.

He then went on to argue that there was a solution to address this crisis—using the Constitutional Option to amend the Senate rules. Just as I argued last year at the start of the session, Senator HATCH stated that at the beginning of a new Congress, a simple majority can invoke cloture and change the Senate rules. The rules weren't amended then, and they weren't amended last year, either. This is why we are here today, having the same debate about judicial nominations that the Republicans had when they were in the majority and President Bush's nominees were stalled.

It's time we stop having this debate and actually fix the process. Both sides have acknowledged the problem and offered solutions when they were in the majority. In the 108th Congress, Senator Frist introduced a resolution to change Rule XXII that would have gradually reduced the cloture threshold on nominations after successive votes over the course of several days of debate. That resolution was cosponsored by Senators MCCONNELL, KYL, and CORNYN—all members of the current minority leadership.

Last year, at the beginning of this Congress, Senators HARKIN, MERKLEY, and I introduced a resolution to reform the rules. It included reforms that would have addressed the broken confirmation process, including reducing the post-cloture time on nominees from thirty hours to two and requiring real debate in order to sustain a filibuster. Unfortunately, neither of these resolutions was adopted.

During the debate on our resolution last year, Senator HARKIN made a very good point. He said, ''I believe each Senator needs to give up a little of our pride, a little of our prerogatives, and a little of our power for the good of this Senate and the good of this country.'' Let's hope that someday enough of our colleagues will agree with him and we finally institute the reforms necessary to restore the Senate's reputation as the ''World's Greatest Deliberative Body.''

I ask unanimous consent that the letter from the freshman class of the 108th Congress and Senator HATCH's National Review op-ed be 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 30, 2003.

DEAR SENATORS FRIST AND DASCHLE: As the ten newest members of the United States Senate, we write to express our concerns about the state of the federal judicial nomination and confirmation process. The apparent breakdown in this process reflects poorly on the ability of the Senate and the Administration to work together in the best interests of our country. The breakdown also disserves the qualified nominees to the federal bench whose confirmations have been delayed or blocked, and the American people who rely on our federal courts for justice.

We, the ten freshmen of the United States Senate for the 108th Congress, are a diverse group. Among our ranks are former federal executive branch officials, members of the U.S. House of Representatives, and state attorneys general. We include state and local officials, and a former trial and appellate judge. We have different viewpoints on a variety of important issues currently facing our country. But we are united in our commitment to maintaining and preserving a fair and effective justice system for all Americans. And we are united in our concern that the judicial confirmation process is broken and needs to be fixed.

In some instances, when a well qualified nominee for the federal bench is denied a vote, the obstruction is justified on the ground of how prior nominees—typically, the nominees of a previous President—were treated. All of these recriminations, made by members on both sides of the aisle, relate to circumstances which occurred before any of us arrived in the United States Senate. None of us were parties to any of the reported past offenses, whether real or perceived. None of us believe that the ill will of the past should dictate the terms and direction of the future.

Each of us firmly believes that the United States Senate needs a fresh start. And each of us believes strongly that we were elected to this body in order to do a job for the citizens of our respective states—to enact legislation to stimulate our economy, protect national security, and promote the national welfare, and to provide advice and consent, and to vote on the President's nominations to important positions in the executive branch and on our nation's courts.

Accordingly, the ten freshmen of the United States Senate for the 108th Congress urge you to work toward improving the Senate's use of the current process or establishing a better process for the Senate's consideration of judicial nominations. We acknowledge that the White House should be included in repairing this process.

All of us were elected to do a job. Unfortunately, the current state of our judicial confirmation process prevents us from doing an

important part of that job. We seek a bipartisan solution that will protect the integrity and independence of our nation's courts, ensure fairness for judicial nominees, and leave the bitterness of the past behind us.

Yours truly,

John Cornyn; Mark Pryor; Lisa Murkowski; Lindsey Graham; Elizabeth Dole; Saxby Chambliss; Norm Coleman; James Talent; Lamar Alexander; John E. Sununu.

___

[From the National Review Online, January 12, 2005]

CRISIS MODE—A FAIR AND CONSTITUTIONAL OPTION TO BEAT THE FILIBUSTER GAME

(By Senator Orrin G. Hatch)

Judicial nominations will be one of the most important issues facing the Senate in the 109th Congress and the question is whether we will return to the tradition of giving nominations reaching the Senate floor an up or down vote. The filibusters used to block such votes have mired the judicial-confirmation process in a political and constitutional crisis that undermines democracy, the judiciary, the Senate, and the Constitution. The Senate has in the past changed its procedures to rebalance the minority's right to debate and the majority's right to decide and it must do so again.

Newspaper editorials condemning the filibusters outnumber supporting ones by more than six-to-one. Last November, South Dakotans retired former Senate Minority Leader Tom Daschle, in no small part, because he led the filibuster forces. Yet within hours of his election to succeed Senator Daschle as Minority Leader, Senator Harry Reid took to the Senate floor to defend them. Hope is fading that the shrinking Democratic minority will abandon its destructive course of using filibusters to defeat majority supported judicial nominations. Their failure to do so will require a deliberate solution.

If these filibusters were part of the Senate's historical practice or, as a recent NRO editorial put it, merely made confirming nominees more difficult, a deliberate solution might not be warranted. But this is a crisis, not a problem of inconvenience.

Senate rules reflect an emphasis on deliberation and debate. Either by unanimous agreement or at least 60 votes on a motion to invoke cloture under Rule 22, the Senate must end debate before it can vote on anything. From the Spanish filibustero, a filibuster was a mercenary who tries to destabilize a government. A filibuster occurs most plainly on the Senate floor when efforts to end debate fail, either by objection to unanimous consent or defeat of a cloture motion. During the 108th Congress, Senate Democrats defeated ten majority-supported nominations to the U.S. Court of Appeals by objecting to every unanimous consent request and defeating every cloture motion. This tactic made good on then-Democratic Leader Tom Daschle's February 2001 vow to use ''whatever means necessary'' to defeat judicial nominations. These filibusters are unprecedented, unfair, dangerous, partisan, and unconstitutional.

These are the first filibusters in American history to defeat majority supported judicial nominations. Before the 108th Congress, 13 of the 14 judicial nominations on which the Senate took a cloture vote were confirmed. President Johnson withdrew the 1968 nomination of Abe Fortas to be Supreme Court chief justice the day after a failed cloture vote showed the nomination did not have clear majority support. In contrast, Democrats have now crossed the confirmation Rubicon by using the filibuster to defeat judicial nominations which enjoy clear majority support.

Focusing on President Clinton's judicial nominations in 1999, I described what has been the Senate's historical standard for judicial nominations: ''Let's make our case if we have disagreement, and then vote.'' Democrats' new filibusters abandons this tradition and is unfair to senators who must provide the ''advice and consent'' the Constitution requires of them through a final up or down vote. It is also unfair to nominees who have agreed, often at personal and financial sacrifice, to judicial service only to face scurrilous attacks, trumped up charges, character assassination, and smear campaigns. They should not also be held in permanent filibuster limbo. Senators can vote for or against any judicial nominee for any reason, but senators should vote.

These unprecedented and unfair filibusters are distorting the way the Senate does business. Before the 108th Congress, cloture votes were used overwhelmingly for legislation rather than nominations. The percentage of cloture votes used for judicial nominations jumped a whopping 900 percent during President Bush's first term from the previous 25 years since adoption of the current cloture rule. And before the 108th Congress, the few cloture votes on judicial nominations were sometimes used to ensure up or down votes. Even on controversial nominees such as Richard Paez and Marsha Berzon, we invoked cloture to ensure that we would vote on confirmation. We did, and both are today sitting federal judges. In contrast, these new Democratic filibusters are designed to prevent, rather than secure, an up or down vote and to ensure that targeted judicial nominations are defeated rather than debated.

These filibusters are also completely partisan. The average tally on cloture votes during the 108th Congress was 53–43, enough to confirm but not enough to invoke cloture and end debate. Democrats provided every single vote against permitting an up or down vote. In fact, Democrats have cast more than 92 percent of all votes against cloture on judicial nominations in American history.

Unprecedented, unfair, and partisan filibusters that distort Senate procedures constitute a political crisis. By trying to use Rule 22's cloture requirement to change the Constitution's confirmation requirement, these Democratic filibusters also constitute a constitutional crisis.

The Constitution gives the Senate authority to determine its procedural rules. More than a century ago, however, the Supreme Court unanimously recognized the obvious maxim that those rules may not ''ignore constitutional restraints.'' The Constitution explicitly requires a supermajority vote for such things as trying impeachments or overriding a presidential veto; it does not do so for confirming nominations. Article II, Section 2, even mentions ratifying treaties and confirming nominees in the very same sentence, requiring a supermajority for the first but not for the second. Twisting Senate rules to create a confirmation supermajority undermines the Constitution. As Senator Joseph Lieberman once argued, it amounts to ''an amendment of the Constitution by rule of the U.S. Senate.''

But don't take my word for it. The same senators leading the current filibuster campaign once argued that all filibusters are unconstitutional. Senator Lieberman argued in 1995 that a supermajority requirement for cloture has ''no constitutional basis.'' Senator Tom Harkin insisted that ''the filibuster rules are unconstitutional'' because ''the Constitution sets out . . . when you need majority or supermajority votes in the Senate.'' And former Senator Daschle said that because the Constitution ''is straightforward about the few instances in which more than a majority of the Congress must vote. . . . Democracy means majority rule, not minority gridlock.'' He later applied this to judicial nomination filibusters: ''I find it simply baffling that a Senator would vote against even voting on a judicial nomination.'' That each of these senators voted for every judicial-nomination filibuster during the 108th Congress is baffling indeed.

These senators argued that legislative as well as nomination filibusters are unconstitutional. Filibusters of legislation, however, are different and solving the current crisis does not require throwing the entire filibuster baby out with the judicial nomination bathwater. The Senate's authority to determine its own rules is greatest regarding what is most completely within its jurisdiction, namely, legislation. And legislative filibusters have a long history. Rule 22 itself did not even potentially apply to nominations until decades after its adoption. Neither America's founders, nor the Senate that adopted Rule 22 to address legislative gridlock, ever imagined that filibusters would be used to highjack the judicial appointment process.

Liberal interest groups, and many in the mainstream media, eagerly repeat Democratic talking points trying to change, rather than address, the subject. For example, they claim that, without the filibuster, the Senate would be nothing more than a ''rubberstamp'' for the president's judicial nominations. Losing a fair fight, however, does not rubberstamp the winner; giving up without a fight does. Active opposition to a judicial nomination, especially expressed through a negative vote, is the best remedy against being a rubberstamp.

They also try to change the definition of a filibuster. On March 11, 2003, for example, Senator Patrick Leahy, ranking Judiciary Committee Democrat, used a chart titled ''Republican Filibusters of Nominees.'' Many individuals on the list, however, are today sitting federal judges, some confirmed after invoking cloture and others without taking a cloture vote at all. Invoking cloture and confirming nominations is no precedent for not invoking cloture and refusing to confirm nominations.

Many senators once opposed the very judicial nomination filibusters they now embrace. Senator Leahy, for example, said in 1998: ''I have stated over and over again . . . that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported.'' Since then, he has voted against cloture on judicial nominations 21 out of 26 times. Senator Ted Kennedy, a former chairman of the Judiciary Committee, said in 1995 that ''Senators who believe in fairness will not let a minority of the Senate deny [the nominee] his vote by the entire Senate.'' Since then, he has voted to let a minority of the Senate deny judicial nominees a vote 18 out of 23 times.

Let me put my own record on the table. I have never voted against cloture on a judicial nomination. I opposed filibusters of Carter and Clinton judicial nominees, Reagan and Bush judicial nominees, all judicial nominees. Along with then-Majority Leader Trent Lott, I repeatedly warned that filibustering Clinton judicial nominees would be a ''travesty'' and helped make sure that every Clinton judicial nomination reaching the full Senate received a final confirmation decision. That should be the permanent standard, no matter which party controls the Senate or occupies the White House.

The Senate has periodically faced the situation where the minority's right to debate has improperly overwhelmed the majority's right to decide. And we have changed our procedures in a way that preserves the minority's right to debate, and even to filibuster legislation, while solving the crisis at hand.

The Senate's first legislative rules, adopted in 1789, directly reflected majority rule. Rule 8 allowed a simple majority to ''move the previous question'' and proceed to vote on a pending matter. Invoked only three times in 17 years, however, Rule 8 was dropped in the Senate rules revision of 1806, meaning unanimous consent was then necessary to end debate. Dozens of reform efforts during the 19th century tried to rein in the minority's abuse of the right to debate. In 1917, President Woodrow Wilson described what had become of majority rule: ''The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. . . . The only remedy is that the rules of the Senate shall be altered.'' Leadership turned gridlock into reform, and that year the Senate adopted Rule 22, by which ⅔ of Senators present and voting could invoke cloture, or end debate, on a pending measure.

Just as the minority abused the unanimous consent threshold in the 19th century, the minority abused the ⅔ threshold in the 20th century. A resolution to reinstate the previous question rule was introduced, and only narrowly defeated, within a year of Rule 22's adoption. A steady stream of reform attempts followed, and a series of modifications made until the current 60-vote threshold was adopted in 1975. The point is that the Senate has periodically rebalanced the minority's right to debate and the majority's right to decide. Today's crisis, with constitutional as well as political dimensions and affecting all three branches of government, presents an even more compelling case to do so.

These filibusters are an unprecedented shift in the kind, not just the degree, of the minority's tactics. After a full, fair, and vigorous debate on judicial nominations, a simple majority must at some point be able to proceed to a vote. A simple majority can achieve this goal either by actually amending Rule 22 or by sustaining an appropriate parliamentary ruling.

The Senate exercises its constitutional authority to determine its procedural rules either implicitly or explicitly. Once a new Congress begins, operating under existing rules implicitly adopts them ''by acquiescence.'' The Senate explicitly determines its rules by formally amending them, and the procedure depends on its timing. After Rule 22 has been adopted by acquiescence, it requires 67 votes for cloture on a rules change. Before the Senate adopts Rule 22 by acquiescence, however, ordinary parliamentary rules apply and a simple majority can invoke cloture and change Senate rules.

Some object to this conclusion by observing that, because only a portion of its membership changes with each election, the Senate has been called a ''continuing body.'' Yet language reflecting this observation was included in Senate rules only in 1959. The more important, and much older, sense in which the Senate is a continuing body is its ongoing constitutional authority to determine its rules. Rulings by vice presidents of both parties, sitting as the President of the Senate, confirm that each Senate may make that decision for itself, either implicitly by acquiescence or explicitly by amendment. Both conservative and liberal legal scholars, including those who see no constitutional problems with the current filibuster campaign, agree that a simple majority can change Senate rules at the beginning of a new Congress.

An alternative strategy involves a parliamentary ruling in the context of considering an individual nomination. This approach can be pursued at any time, and would not actually amend Rule 22. The precedent it would set depends on the specific ruling it produces and the facts of the situation in which it arises.

Speculation, often inaccurate, abounds about how this strategy would work. One newspaper, for example, offered a common description that this approach would seek ''a ruling from the Senate parliamentarian that the filibuster of executive nominations is unconstitutional.'' Under long-standing Senate parliamentary precedent, however, the presiding officer does not decide such constitutional questions but submits them to the full Senate, where they are debatable and subject to Rule 22's 60-vote requirement. A filibuster would then prevent solving this filibuster crisis. Should the chair rule in favor of a properly framed non-debatable point of order, Democrats would certainly appeal, but the majority could still sustain the ruling by voting for a non-debatable motion to table the appeal.

Democrats have threatened that, if the majority pursues a deliberate solution to this political and constitutional crisis, they will bring the entire Senate to a screeching halt. Perhaps they see this as way to further escalate the confirmation crisis, as the Senate cannot confirm judicial nominations if it can do nothing at all. No one, however, seriously believes that, if the partisan roles were reversed, Democrats—the ones who once proposed abolishing even legislative filibusters—would hesitate for a moment before changing Senate procedures to facilitate consideration of judicial nominations they favored.

The United States Senate is a unique institution. Our rules allowing for extended debate protect the minority's role in the legislative process. We must preserve that role. The current filibuster campaign against judicial nominations, however, is the real attack on Senate tradition and an unprecedented example of placing short-term advantage above longstanding fundamental principles. It is not simply annoying or frustrating, but a new and dangerous kind of obstruction which threatens democracy, the Senate, the judiciary, and even the Constitution itself. As such, it requires a more serious and deliberate solution.

While judicial appointments can be politically contentious and ideologically divisive, the confirmation process must still be handled through a fair process that honors the Constitution and Senate tradition. If the fight is fair and constitutional, let the chips fall where they may. As it has before, the Senate must change its procedures to properly balance majority rule and extended debate. That way, we can vigorously debate judicial nominations and still conduct the people's business.

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

The ACTING PRESIDENT pro tempore. The Senator from Illinois.

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

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

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

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

HEALTH CARE REFORM

Mr. DURBIN. Mr. President, we were engaged in lengthy debate for months—maybe years—about health care in the United States, and I believe we passed a historic bill that addresses some of the most fundamental issues about health care: first, to address affordability because if you can't afford it, it doesn't matter how good medical care is; second, to make sure it was successful for people rich and poor alike; third, to make sure the basic health insurance policies being offered in America covered the most important things in a person's life. That was part of the debate, and an important part of it.

A fundamental principle of health care reform is to ensure Americans have access to a comprehensive package of health services—we call them essential benefits under the law—which includes maternity care, vaccinations, and preventive care.

Many years ago when I was a new lawyer working in the Illinois State Senate, someone approached me and said: Are you aware of the fact that you can buy a health insurance plan that covers a family and literally covers a newborn but exempts coverage for the first 30 days of their life in Illinois?

I said: No, that is impossible.

He said: No, that kind of health care is for sale, and it is a little cheaper because we all know that if a baby is born with a serious problem, the first 30 days can be extremely expensive.

They were literally selling health insurance plans that left that family and baby vulnerable for 30 days. We changed the law in Illinois and said: You can't offer a health insurance plan that covers maternity and newborns unless you cover them from the moment they are born. So it was written into the law as a protection against consumers who unwittingly would sign up for the cheaper policy that would never be there when they needed it.

When we talked about the Federal standards when it came to health insurance, we wanted to make certain that some of the most basic things—the essential services—were covered, and that includes maternity care, vaccinations, and preventive care for women.

There is an amendment we will consider this week offered by Senator BLUNT of Missouri that I am afraid will threaten the vital consumer protections in the health reform law. These protections ensure that women, men, and children have access to basic health care. The amendment by Senator BLUNT would allow any employer or insurance company to deny health insurance for any essential or preventive health care service they object to on the basis of ''undefined'' religious or moral convictions. That means an employer can not only deny access to family planning and birth control, but they could deny access to any health care services required under our new Federal health care reform law.

Many supporters of this amendment stress how the amendment will protect