Governor and Justice Gerrard was serving on the Nebraska Supreme Court. As a matter of fact, the court has concurred in establishing an execution date to take place this March 6 in the State of Nebraska.

Issuing and executing a death sentence is one of the most solemn responsibilities the judicial and executive branches are entrusted with. In every instance, Justice Gerrard has ruled on the death penalty, he has been balanced, even-handed and, most important, faithful to the Constitution. In fact, Judge Gerrard has confirmed for the record that the U.S. Supreme Court and the Nebraska Supreme Court have repeatedly held that the death penalty is an acceptable punishment as long as the laws for imposing it are followed and the constitutional limitations imposed by the U.S. Supreme Court are respected.

Finally, Judge Gerrard has stated, and the record shows, he has voted to confirm a number of sentences and convictions of those sentenced to death, and he has authored more than one State court opinion upholding the constitutionality of Nebraska's death penalty law. In my view, Judge Gerrard's answers and his clear record more than adequately address any concerns about his ability or willingness to both apply the law with impartiality and to carry out the law effectively .

To sum up, John Gerrard deserves to be confirmed by the Senate because he has an outstanding legal record, he possesses the proper temperament needed on the Federal bench, and he will follow legal precedent to carry out the law rather than interpret as he sees it. He has been and will be an impartial judge, not an activist. So I urge his confirmation by my colleagues.

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

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

The legislative clerk proceeded to call the roll.

Mr. JOHANNS. 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 President, I ask unanimous consent that the order for the quorum call be rescinded.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. JOHANNS. Mr. President, I am very pleased today to rise in support of a man who has proven himself worthy to serve as a Federal judge on the U.S. district court.

Justice John Gerrard has experience, integrity, and respect for the Constitution—all of which are necessary for someone serving on our Federal bench.

He has earned the respect and the admiration of the people of Nebraska. He consistently receives top ratings from the Nebraska State Bar Association, and the people of Nebraska have expressed their confidence in him not once, not twice, but three times, voting to retain him on the bench.

Justice Gerrard has authored hundreds of opinions throughout his 16 years as a member of the Nebraska Supreme Court. These decisions reveal with clarity his philosophy regarding the powers and limitations of a judge. They reflect his commitment to adhere to the Constitution and the laws of our great Nation.

When asked about judicial restraint after his nomination to the U.S. district court, Justice Gerrard responded:

I firmly believe that a judge should rely on the admissible evidence and applicable law (and nothing else) when rendering a decision.

He further responded:

I do not believe a judge should consider his or her own values or policy preferences in determining what the law means—and I have never done so at any time in my judicial career.

This unequivocal statement says a lot. Justice Gerrard knows that his more than 450 opinions are a matter of public record and that they are open to everyone's scrutiny. He has welcomed that. He has welcomed it with humility.

You will not hear him boast about being the youngest person ever appointed to my home State's high court, nor will you hear him boast about his successful years as a private attorney and city attorney—and they were successful. He is absolutely unassuming. He is reflective and he is articulate. He speaks with great reverence about the oath he took to uphold the Constitution.

I did not know Justice Gerrard prior to his appointment to the Nebraska Supreme Court, but he quickly developed a reputation as a disciplined judge who renders very well researched opinions.

I believe Justice John Gerrard is a worthy member to join the U.S. district court, and so I stand here today urging my colleagues to vote in favor of his confirmation.

I would also like to take a moment to talk about the process that brought us here this afternoon. In this regard, I would like to offer my appreciation and thanks to my colleague from Nebraska, the senior Senator, BEN NELSON. Senator NELSON called me before this nomination was made and asked for my input. I took that opportunity to sit down with Judge Gerrard and to talk to him. After our meeting and knowing what I knew about the justice, it was my decision to support his nomination to the U.S. district court. In fact, I would say, if I had total control of this nomination, I would do it all over again.

This is a fine man. This is a man who I hope will have strong bipartisan support this afternoon when we vote on making him a U.S. district judge. He is a good man, and he deserves a strong bipartisan vote. He is going to adhere to the laws of our Nation with integrity, humility, and a strict adherence to the law.

I yield the floor.

I 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.

Mr. SESSIONS. 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.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.

EXECUTIVE SESSION

NOMINATION OF JOHN M. GERRARD TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEBRASKA

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The assistant legislative clerk read the nomination of John M. Gerrard, of Nebraska, to be United States District Judge for the District of Nebraska.

The ACTING PRESIDENT pro tempore. Under the previous order, there will be 90 minutes for debate, with 60 minutes divided in the usual form and 30 minutes under the control of the Senator from Alabama.

Mr. SESSIONS. Mr. President, I ask that I be notified after 12 minutes.

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

Mr. SESSIONS. Mr. President, by all accounts, Judge Gerrard of the Nebraska Supreme Court is a good man with a good family and many friends, and he has done a pretty good job over the years—maybe a good job over the years—as a capable practicing jurist now on the Supreme Court of Nebraska.

I will vote against that nomination, reluctantly. I really do not want to in one sense, but his nomination raises an important issue about the duty of a judge to be faithful to the law and to commit to serve under the law and under the Constitution, as the oath of a Federal judge requires. In other words, as a judge you are a servant to the law.

You honor the law. You venerate the law. You follow the law whether or not you like it, whether or not you think it is a good idea, whether or not had you been at the Constitutional Convention in the 1700s, you would have voted for that phrase or not voted for that phrase or whether if you had been in the House or the Senate you would have worked to change the Constitution or change the law of the State of Nebraska. Those are matters that are outside the province of a judge. If judges choose to be involved in policy-setting, then they ought to invest themselves in the policy-setting branches, the legislative and executive branches.

So judges are, as Justice Roberts said so wonderfully, ''neutral umpires.'' They do not take sides in the game; they enforce the rules of the game. How those rules have been written and established and what motivation caused the Congress to pass them is not the critical issue. So there is a very troubling matter to me which reveals an activist tendency in this judge, and it was the case of State v. Moore.

The case of State v. Moore in Nebraska is very significant because it raises quite clearly these very issues. In the Moore case, Judge Gerrard took an active role as one of the members of the court. Mr. Moore had been on death row since 1980. He had confessed to murdering two people. He had appealed to the Nebraska Supreme Court three times. Three times the Nebraska Supreme Court had denied his appeals. He had quit appealing. In fact, he filed a motion and said he did not desire any more appeals. His pleading said he no longer wished to challenge his sentence, and he was being set for an execution that by law he deserved.

Judge Gerrard intervened on his own motion and stayed that execution even though no pleading had been filed. He did it on the basis that while Moore was set for electrocution, he was aware that another case that was coming up to the Supreme Court of Nebraska dealt with the constitutionality of the death by electrocution statute. Apparently the judge did not like the death by electrocution statute. But he stopped it. Technically, I am not sure that was correct. He was criticized by three members of the court, but he did that.

Then the case came before the court, this other case, the Mata case. The judge then confronted the fundamental question of whether the utilization of electrocution was a constitutional matter.

Now in Nebraska and in most States there are two types of constitutions: the U.S. Constitution and the Nebraska Constitution. As is often the case, the exact same words with regard to the death penalty are in the U.S. and Nebraska Constitutions: that the Constitution prohibits the carrying out of a death penalty by cruel or unusual means. ''Cruel and unusual'' actually is the phrase. So it must be cruel and it must be unusual to be unconstitutional, otherwise States can all carry out death penalties as they choose.

In fact, at the time the Constitution was adopted, every colony, every State that formed our Union had a death penalty. The U.S. Government had a death penalty. There are multiple references in the U.S. Constitution to the imposition of a death penalty. It says, for example, that you cannot deny a person ''life'' without due process. It makes reference to ''capital crimes,'' which are death penalty crimes. There are several, multiple references to that. Implicit in the Constitution itself is a constitutional acceptance of the ability of the Congress or the State legislatures to impose a death penalty.

The Constitution was in no way ever thought to be a document that would have prohibited all death penalty cases. But there became a movement in the middle of the last century and later that the death penalty was bad and that judges should overthrow it. Actually two judges on the Supreme Court opposed every death penalty case because they said it was cruel and unusual.

That was not the Constitution. They were allowing their personal views about the wisdom, or lack of it, of the death penalty to influence their judicial decisionmaking. How can we say the Constitution prohibits the death penalty when it makes multiple references to the death penalty? Every State and the Federal Government have been utilizing the death penalty since the time the Republic was founded.

So I am not debating the death penalty. I am not debating the death penalty. Good people can disagree. It ought to be brought up on the floor of this Congress, on the floor of the legislatures of Nebraska, Alabama, Texas, and New York, and they can decide whether they want to have one and how it will be carried out.

The Constitution does say, however, that we cannot use cruel and unusual methods of carrying out the death penalty because they understood that. They did not want people to be drawn and quartered and chopped up and things like that—burned in fires. The accepted penalty at that time was firing squad and hanging, generally. That is what was approved in most States. We still have States—at least one State today—that allows firing squad. I think we still have some that have hanging. But most States have gone more and more to lethal injection, and a number, quite a number, still have electrocution.

So the question of electrocution was brought up. The guy was defending a person who had been sentenced to die as a result of his crimes. They objected, saying electrocution was cruel and unusual in 1890. In 1890 the Supreme Court ruled that it was not unconstitutional. Then again it was ruled in 1947 that electrocution was not cruel and unusual punishment. Since that time, up until recent years, most—I would say perhaps even a majority of States—used electrocution as being less painful and more consistent with our values than a firing squad or hanging. So it was seen as a reform, a better way to carry out the severe penalty of death.

The Supreme Court of the United States has since repeatedly denied appeals to seek to raise again electrocution as being unconstitutional.

This other case came up in Nebraska, State v. Mata. It squarely challenged the constitutionality of electrocution as a method of execution. Although he acknowledged the Nebraska Supreme Court had always held that electrocution was not cruel and unusual, Judge Gerrard asserted in the Moore case that ''a changing legal landscape raises questions regarding the continuing vitality of that conclusion.''

I am not aware of anything in the landscape that would justify any change in that. I think 1 State in the United States out of 50 has held that electrocution is not appropriate. I don't know how it violates the cruel and unusual clause. I am not sure how they possibly so ruled, but they did. So it came up before this court. The Mata case came up before the court and, to sum it up, let me just say they concluded, contrary to the previous rulings of the Nebraska Supreme Court, contrary to the rulings of the U.S. Supreme Court, that electrocution amounts to a cruel and unusual punishment and eliminated and stayed the execution of two individuals, Mr. Mata and Mr. Moore.

I guess what I will say is this: We all in this body have to make a decision about whether judges make errors—which they sometimes do—and then how serious those errors are and what those errors reflect about the ability of the judge to fulfill the oath they take. The oath, remember, is to serve under the Constitution, under the laws of the United States, and to do equal justice to the rich and the poor and to follow the law, in effect, whether you like it or not.

I think this was not a little bitty matter. I think the people of the United States and judges on the Supreme Court of the United States have dealt with death penalty cases for some time, and the American people have been called upon on a number of occasions to eliminate death penalties in their States. A few have; most have not.

Mr. President, 30 minutes has been set aside for me, correct?

The ACTING PRESIDENT pro tempore. That is correct. The Senator has used just over 13 minutes.

Mr. SESSIONS. I ask to be notified after 7 additional minutes.

The ACTING PRESIDENT pro tempore. The Chair will notify the Senator.

Mr. SESSIONS. Mr. President, it is not a little bitty matter. These matters have gone to the Supreme Court. Electrocution was passed by legislatures and voters for one reason. They thought it was a way to carry out a grim death penalty sentence in a way less painful than a firing squad and hanging. That is why they did that. It was not any more cruel and unusual but less cruel and unusual. Death is instantaneous, and it is an effective method and is consistent with our Constitution, as the Supreme Court held and as the Nebraska Supreme Court previously held.

Here we are in this body and we have heard the debates. A lot of good people with very plausible arguments—I don't agree with them, but I respect them—

say we should not have a death penalty. This is a debate we should have and talk about with the American citizens. It is not a matter for judges to effectively decide by altering the plain meaning and principles of the U.S. Constitution because they think it is not right. They are not legislators. This is a big issue around the country and people are tired of it. They say people are not happy with the judges and they don't understand the law. Well, they understand the death penalty. They have considered it. Their elected representatives have voted on it. It has been approved in most States. They expect their judges to carry out the law, unless it plainly violates the Constitution of their State or the Nation.

I just suggest that I believe this decision was a product of an ill will or a bias against the death penalty, consistent with the effort of a lot of people working around the legal system every day. I was the attorney general of Alabama, chief prosecutor in the State. I was a U.S. attorney for 12 years. So I have wrestled with these issues. I know how the deal works. Everybody in the system understands what this is.

For the Supreme Court of Nebraska to hold that electrocution violates the cruel and unusual clause of the Constitution of Nebraska or the Constitution of the United States—they said in this case, Nebraska, which has exactly the same language as the U.S. Constitution; for them to rule that way, I believe, is outside the bounds of what I am willing to accept. We have people saying the evolving standards of decency, evolving legal principles, and evolving national and international law says we ought to change. No, the American people rule and they elect their representatives and they pass laws; and judges have one obligation, which is to enforce the law, unless it is plainly contrary to the Constitution. My opinion, as someone who has been in the legislature and had to defend death penalties as the attorney general of the State of Alabama—my opinion is that declaring electrocution to be an unconstitutional method of imposing the death penalty steps out of objective, neutral judging and evidences a plain activist tendency to promote a result.

I think it is compounded by the fact that the judge went out of his way, contrary to other judges' wishes on the court, to lead an effort to stay one execution until they could take up this case and then to rule over the Chief Judge's dissent that it was indeed unconstitutional.

Mr. Moore remains now, since 1980, even today, still on death row. People are unhappy about that. They rightly think the law is not working and that there is too much politics in it, and people are undermining duly enacted law. There was no question of this defendant's guilt. He murdered two people and he confessed to it.

That is the way I feel about this. I can see a lot of other people saying Judge Gerrard is a good man, a smart lawyer, and he will do a good job on the bench—and I hope he does—but I am not voting for judges, as I have said before, who will not establish that they are willing to follow the law even if they don't like it. Particularly, I am very reluctant to support judges who, I believe, in this most controversial area where much debate has occurred, in one form or another, take extraordinary, unlawful steps in my view, to undermine the death penalty because they don't like it.

You say: Somebody else said that may have been a mistake, but it is not disqualifying. I respect other people's opinions. I am not calling on other people to reject Judge Gerrard. As I said, by all accounts, he is a good man. I am saying I don't feel comfortable voting for someone based on a legal issue such as this that I personally dealt with over the years. I would not oppose him if he personally opposes the death penalty. That is fine. But as a judge he is required to carry it out in an effective way. We have had far too much obstruction of the death penalty, and I hope we will see an end to it and get judges on the bench who will follow the law.

I reserve the remainder of my time.

The ACTING PRESIDENT pro tempore. The Senator from Nebraska is recognized.

Mr. JOHANNS. Mr. President, I ask if the Senator from Alabama will yield me 3 minutes to speak on Judge Gerrard.

Mr. SESSIONS. I will. I appreciate my colleague's interest in this matter. I believe there is considerable time left on the other side. He can certainly have that on my time.

The ACTING PRESIDENT pro tempore. There is about 10 minutes.

Mr. SESSIONS. Mr. President, I yield what time I have to the Senator from Nebraska.

Mr. JOHANNS. Mr. President, I thank the Senator from Alabama for yielding the time. One thing I wish to say, to start out with, is that the Senator from Alabama and I would almost always agree about judicial appointments. It is a very unusual situation that we would be in any kind of disagreement. Many times I come to the floor and seek out the Senator from Alabama and ask his thoughts on things or to tell me more about a nominee. I am here this afternoon with great respect for the Senator from Alabama and his views of judicial nominees.

I have very strong feelings, though, about Justice Gerrard. I have had an opportunity to watch this man on the Nebraska Supreme Court for many years. In my view—and I doubt there would be many who would disagree with this—judges, especially Federal judges, should follow the law and not their own inclinations or personal preferences or their own personal feelings on a matter or controversy before them. I think we need to examine this issue very carefully.

There has been some suggestion that Justice Gerrard might seek to craft his own preferred outcomes instead of following the law. I wish to respond to that. The concerns, of course, relate to a case out of Nebraska, State of Nebraska v. Moore.

In that case, Justice Gerrard ordered a stay of a death warrant pending the outcome of another case the Nebraska Supreme Court was considering. At issue in the second case was whether the death penalty by electrocution, as provided by Nebraska statute, was consistent with the Nebraska Constitution. Because the defendant in Moore was scheduled to die by electrocution, Justice Gerrard stayed the warrant pending the court's decision in that second case. In the majority opinion in Moore, Justice Gerrard noted that the court was using its inherent authority to stay the warrant.

If I might, let me take a moment to explain what Justice Gerrard was saying there.

Some have concluded that what he was saying was he was calling on some nebulous, indistinct legal authority merely to cloak his own wishes. But I would suggest respectfully that Justice Gerrard has fully and very satisfactorily explained exactly what he meant by the specific choice of those words. He was, in fact, carefully using authorities granted to him by Nebraska law. As the judge explained in a letter, Nebraska law provides that the Nebraska Supreme Court is directly responsible for issuing the order of execution of prisoners sentenced to death. So when Judge Gerrard used his inherent authority to stay the execution at issue in Moore, he was using authority granted by Nebraska statute to order the execution in the first place. In other words, the Nebraska Supreme Court, by Nebraska law, has the power to issue the order and then deal with that order in the future.

This is what Judge Gerrard said in his letter in a series of questions that were posed to him relative to his nomination for the U.S. district court:

> The ''inherent authority'' referred to in the Moore order was only the court's inherent authority to control the implementation of its own orders, just as any court, at any level, can control its own orders.

I should note also that Judge Gerrard makes plain that he considers the death penalty to be the law of the land, one that he must uphold.

On the question of whether the death penalty is constitutional, Justice Gerrard writes:

> I am aware of no authority, nor any persuasive evidence, supporting the conclusion that the death penalty itself is unconstitutional. Our court has concluded in multiple cases that the death penalty itself is constitutional, and I have joined in (and authored many) of those decisions.

Mr. President, as I have indicated in my remarks in support of this nominee, I do believe Judge Gerrard will base his decisions on the evidence before him and the applicable law. I have

had an opportunity to watch him do that for years and years. That is what he will do. He will base his decisions on the evidence before him and the applicable law and nothing else. Furthermore, he has earned the respect and support of Nebraskans, who three times voted to return him to the bench. I believe he is well qualified to serve our Nation in the Federal courts as a district judge. Justice Gerrard's nomination deserves our support, and I again urge my colleagues to support him today.

Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Vermont.

Mr. LEAHY. Mr. President, I wish to compliment the Senator from Nebraska for his comments. I totally agree with him.

As last year drew to a close, I spoke about the Senate's lost opportunity to take long overdue steps to address the serious vacancies crisis on Federal courts throughout the country. With nearly one out of every 10 Federal judgeships vacant, the Senate should not have adjourned with 21 judicial nominations on the calendar and stalled from having a vote. Regrettably, Senate Republicans chose to end last year using the same obstructionist tactic that they used the year before. They continue to delay final confirmation votes on consensus judicial nominees for no good reason. Such delaying tactics are a disservice to the American people and prevent the Senate from doing its constitutional duty and ensuring the ability of our Federal courts to provide justice to Americans around the country.

The result of the Senate Republicans' inaction is that the people of New York, California, West Virginia, Florida, Nebraska, Missouri, Washington, Utah, the District of Columbia, Nevada, Louisiana, and Texas are without the judges they need. The result is that judicial emergency vacancies in Florida, Utah, California, Nevada and Texas remain unfilled. Last year it took us until June to make up the ground we lost when Senate Republicans refused to complete action on judicial nominees at the end of 2010. The Senate starts this year with 19 judicial nominees awaiting final Senate action, all but one of them reported with significant bipartisan support, 16 of them unanimously. They should have been confirmed last year.

By repeating its obstruction and refusing to consent to votes on consensus nominees before the end of the year, Senate Republicans have again ratcheted up the partisanship in connection with filling judicial vacancies. While once Republican Senators threatened to blow up the Senate to force votes on a handful of President Bush's most extreme ideological picks, Senate Republicans now stall and block even President Obama's mainstream, consensus nominees across the board. Those they delayed are the kind of qualified, consensus nominees who in the past would have been considered and confirmed by the Senate within days of being reported with the support of their home state Senators and the support of both Democrats and Republican on the Senate Judiciary Committee.

Last year, final consideration of qualified, consensus judicial nominees took months because Senate Republicans refused to consent to confirmation votes. They took this to a new extreme by ending the year by refusing to hold votes on any judicial nominees. Meanwhile, the millions of Americans who are served by the Federal courts in those districts and circuits whose vacancies could be filled with qualified, consensus nominees are left with overburdened courts and unnecessary delays in having their cases determined.

I thank the Majority Leader for arranging for final consideration of Justice John Gerrard's nomination. Since 1995, Justice Gerrard has served on the Supreme Court of Nebraska, and his nomination received the highest possible rating from the ABA's Standing Committee on the Federal Judiciary, unanimously ''well qualified.'' He received a near-unanimous vote before the Senate Judiciary Committee back in mid-October last year and has had the support of his home state Senators, a Democrat and a Republican, from the outset. Recently, the senior Senator from Nebraska announced that this will be his last year in the Senate. I have always enjoyed working with Senator NELSON. He has worked hard and represented the people of his state well. He has been diligent with respect to judicial nominations for vacancies in Nebraska and tirelessly pressed to fill vacancies there to ensure that cases before the Federal courts in Nebraska were not needlessly delayed. I am sorry that confirmation of this judicial nomination, one he has so strongly supported, has been needlessly delayed more than three months while the Federal trial court for the District of Nebraska remains overburdened.

More than half of all Americans live in districts or circuits that have a judicial vacancy that could be filled today if Senate Republicans just agreed to vote on the nominations that have been voted out of the Senate Judiciary Committee and have been awaiting a final confirmation vote by the Senate since last year. It is wrong to delay votes on these qualified, consensus judicial nominees. The Senate should be helping to fill these numerous, extended judicial vacancies, not delaying final action for no good reason.

Our courts need qualified Federal judges not vacancies, if they are to reduce the excessive wait times that burden litigants seeking their day in court. It is unacceptable for hard-working Americans who are seeking their day in Federal court to suffer unnecessary delays. When an injured plaintiff sues to help cover the cost of medical expenses, that plaintiff should not have to wait for three years before a judge hears the case. When two small business owners disagree over a contract, they should not have to wait years for a court to resolve their dispute. With one in 10 Federal judgeships currently vacant, the Senate should have come together to address the serious judicial vacancies crisis on Federal courts around the country.

Professor Carl Tobias makes the point in his column at the end of last year entitled, ''Judicial Openings Erode U.S. Justice System.'' He correctly observed: ''The Senate recessed without considering any of the 21 nominees, 16 of whom the Committee unanimously reported, on its calendar because Republicans refused to debate and vote on them.'' He goes on to describe some of the slowdown tactics Senate Republicans have employed and concludes: ''Most problematic has been Republican refusal to vote on uncontroversial nominees.'' I ask consent that a copy of Professor Tobias' column be included at the conclusion of my statement.

In his 2010 Year-End Report on the Federal Judiciary, Chief Justice Roberts rightly called attention to the problem of overburdened courts across the country. Indeed, the workload in our Federal trial courts has increased 5 percent during President Obama's term in office and 22 percent over the last 10 years. Senate Republicans have shown no interest in adding the judgeships that the Judicial Conference, Chief Justice Rehnquist and Chief Justice Roberts have requested. To the contrary, they have been stalling needed Federal judges and keeping judicial vacancies at historically high levels for unprecedented lengths of time. Unfortunately, the unprecedented obstruction of consensus judicial nominations by Senate Republicans continues. They have dramatically departed from the Senate's longstanding tradition of regularly considering consensus, noncontroversial nominations. Their obstruction marks a new, dark chapter in what Chief Justice Roberts had called the ''persistent problem of judicial vacancies in critically overworked districts.''

Chief Justice Rehnquist had chastised Senate Republicans for their stalling tactics on judicial nominees during the Clinton administration. In his 2001 Year-End Report on the Federal Judiciary, Chief Justice Rehnquist reiterated his critical comments from 1997 and 1998 when Senate Republicans were responsible for stalling scores of qualified, needed judicial appointments. By the next year, Senate Democrats had completed confirmations of 100 of President Bush's nominees and reduced judicial vacancies throughout the country to 60. By the end of the third year of the Bush administration, the Chief Justice reported that he was pleased by the progress being made filling vacancies and focused his attention on seeking to raise judicial salaries. With respect to judicial vacancies, he

noted that the Federal trial courts had only 27 vacancies.

Regrettably, that progress is not being replicated despite President Obama's efforts to work with home state Republican Senators and to nominate qualified, mainstream candidates. A New York Times editorial from January 4, 2011, properly noted that Senate Republicans' ''refusal to give prompt consideration to noncontroversial nominees'' in 2010 was a ''terrible precedent.'' Regrettably, Senate Republicans continued that tactic through 2011. They replicated the blockade of consensus judicial nominees they had conducted at the end of 2010 by again blocking consensus nominees across the board at the end of 2011. At the end of 2010, they blocked 17 judicial nominees who should have been confirmed in 2010 but had to be carried over for months before finally being acted upon by the Senate. In 2011, Senate Republicans ended the year needlessly stalling another 19 judicial nominees, including 18 who were by any measure consensus nominees, who should have been confirmed.

Their partisan tactics are at odds with the professed concern about caseloads that Republican Senators contended justified their filibuster of Caitlin Halligan and prevented a vote on her nomination to the D.C. Circuit. The Washington Times' banner headline last December 7th correctly proclaimed that with the Senate Republican filibuster of that nomination ''GOP Ends Truce on Judicial Hopefuls.'' Of course, if caseloads were really what mattered to Senate Republicans, they would not have blocked the Senate from voting to confirm consensus nominees to fill judicial emergency vacancies around the country.

If caseloads were really what mattered to Senate Republicans, they would have consented to consider the nomination of Judge Adalberto Jordan of Florida, which was reported unanimously last October, to fill a judicial emergency vacancy on the Eleventh Circuit. If they were really concerned with caseloads, they would have consented to move forward to confirm Judge Jacqueline Nguyen of California, a well-qualified nominee to fill a judicial emergency vacancy on the Ninth Circuit, the busiest Federal appeals court in the country. Judge Nguyen is nominated to fill the judicial emergency vacancy that remains after another Republican filibuster, that against the nomination of Goodwin Liu, now a Supreme Court Justice in California. If they cared about caseloads, they should also have consented to votes on the nominations of Michael Fitzgerald to the Central District of California, David Nuffer to the District of Utah, Miranda Du to the District of Nevada, Gregg Costa to the Southern District of Texas, and David Guaderrama to the Western District of Texas, all nominations to fill judicial emergency vacancies in our Federal trial courts.

If Republican Senators were concerned about ensuring that our courts have the judges they need to administer justice for the American people, they would not have refused consent for the Senate to consider qualified, consensus judicial nominees. Republicans' consent is what was needed to vote to fill these judicial vacancies and support the Federal judiciary, to help them deal with what Chief Justice Roberts calls ''demanding dockets'' and to further public confidence in the integrity and responsiveness of our Federal justice system. Instead, Senate Republicans' refusal to confirm 18 qualified, consensus judicial nominees before adjourning last year, reminds me of the Republican pocket filibusters that blocked more than 60 of President Clinton's judicial nominations from Senate consideration.

When I became Chairman in 2001 and made the Committee blue slip process public for the first time and worked to confirm 100 judicial nominees of a conservative Republican President in 17 months, I hoped we had gotten past these partisan tactics. I am disappointed after working for more than a decade to restore transparency and fairness to the process of considering judicial nominations that Senate Republicans are again using partisan holds to block progress at filling judicial vacancies.

If Republican Senators were concerned about ensuring that our courts have the judges they need to administer justice for the American people, they would do what Democrats did during President Bush's first term. During President Bush's first term we reduced the number of judicial vacancies by almost 75 percent. When I became Chairman in the summer of 2001, there were 110 vacancies. By the time Americans went to the polls in November 2004 there were only 28 vacancies. Despite 2004 being an election year, we were able to reduce vacancies to the lowest level in the last 20 years.

In November of 2008, when I was Chairman with a Republican president, we again reduced judicial vacancies to only 37. I was willing to accommodate Senate Republicans and held expedited hearings and votes on judicial nominations, even as late as September 2008. By working together, even in an election year, we were able to reduce the number of judicial vacancies.

It is wrong to dismiss the delays resulting from the Senate Republicans' obstruction as merely tit for tat. This is a new and damaging tactic Senate Republicans have devised. They are stalling action on noncontroversial nominees and have been doing so for the last three years. Meanwhile, millions of Americans across the country who are harmed by delays in overburdened courts bear the cost of this obstruction.

I had hoped and urged that such damaging obstruction not be repeated. I had urged that before the Senate adjourned last year at least the 18 judicial nominees voted on by the Judiciary Committee who are by any measure consensus nominees be confirmed. With vacancies continuing at harmfully high levels, the American people and our Federal courts cannot afford these unnecessary and damaging delays. So while I am pleased to see John Gerrard's nomination voted on today, there remain another 17 qualified, consensus judicial nominees still being stalled from last year.

For the last two years in a row, Republicans have rejected the Senate's traditional, longstanding practice of taking final action on consensus nominations before the end of the Senate session. Senate Democrats consented to consider all of the consensus nominations at the end of President Reagan's third year in office and President George H.W. Bush's third year in office, when no judicial nominations were left pending on the Senate Executive Calendar. That is also what the Senate did at the end of the 1995 session, President Clinton's third year in office, when only a single nomination was left pending on the Senate calendar.

That is also what we did at the end of President George W. Bush's third year. Although some judicial nominations were left pending, they were among the most controversial, extreme and ideological of President Bush's nominees. They had previously been debated extensively by the Senate. The standard then was that noncontroversial judicial nominees reported by the Judiciary Committee were confirmed by the Senate before the end of the year. That is the standard we should have followed in 2010 and 2011, but Senate Republicans would not. They set a new and destructive standard to hold up qualified, consensus judicial nominees for no good reason.

The Senate remains far behind where we should be in considering President Obama's judicial nominations. Three years into his first term, the Senate has confirmed a lower percentage of President Obama's judicial nominees than those of any President in the last 35 years. The Senate has confirmed just over 70 percent of President Obama's circuit and district nominees, with more than one in four not confirmed. In stark contrast, the Senate confirmed nearly 87 percent of President George W. Bush's nominees, nearly nine out of every 10 nominees he sent to the Senate over two terms. That was a higher percentage of judicial nominees confirmed than President Clinton achieved and is far higher percentage than for President Obama's nominees, most of whom are mainstream, consensus choices.

We remain well behind the pace set by the Senate during President Bush's first term. By the end of his first term, the Senate had confirmed 205 district and circuit nominees. At the beginning of his fourth year in office, the Senate had lowered judicial vacancies to 46 and already confirmed 168 of his judicial nominees. In contrast, the Senate

has confirmed only 124 of President Obama's district and circuit nominees, leaving judicial vacancies at more than 80. The vacancy rate remains nearly double what it had been reduced to by this point in the Bush administration.

Senate Republicans have returned to the strategy of across-the-board delays and obstruction of the President's judicial nominations, again leading to persistently high judicial vacancies. In 2009, the Senate was allowed to confirm only 12 Federal circuit and district court judges, the lowest total in 50 years. In 2010, the Senate was allowed to confirm 48 Federal circuit and district judges. That has led to the lowest confirmation total for the first two years of a new presidency in 35 years. As a result, judicial vacancies rose again over 110 and stayed at about 90 for the longest period of historically high vacancies in 35 years.

Last year, we worked hard to overcome filibusters and delays and improve the number of confirmations. They included 17 confirmations that should have taken place in 2010 but were delayed. That resulted in only 47 judicial nomination confirmations from hearings conducted last year. Even including the 17 confirmations in last year's total that should not have been delayed from the previous year, the total lags far behind the total in President Bush's second year in office when the Senate Democratic majority confirmed 72 Federal circuit and district court judges. It was lower than the total in President Bush's third year in office, when Senate Democrats worked with the Senate Republican majority to confirm 68 Federal judges. And it was lower than the 66 Federal judges the Senate Democratic majority confirmed in the last year of President George H.W. Bush's presidency during a presidential election year.

The Senate starts this year with 18 qualified, consensus judicial nominations that should have been confirmed last year. Senate action on those 18 qualified, consensus judicial nominations would have gone a long way to helping resolve the longstanding judicial vacancies that are delaying justice for so many Americans in our Federal courts across the country. I urge Senate Republicans to abandon these destructive practices and join with us to confirm the qualified, consensus judicial nominations they have stalled. This cycle of unnecessary delays must end.

Mr. President, I ask to proceed in morning business to speak about an important effort to help the American economic recovery and preserve American jobs.

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

PROTECT IP ACT, S. 968

Mr. President, rogue websites, primarily based overseas, are stealing American property, harming American consumers, hurting the American economic recovery and costing us American jobs. Stealing and counterfeiting are wrong. They are harmful. The Institute for Policy Innovation estimates that copyright infringement alone costs more than $50 billion a year, and the sale of counterfeits online is estimated to be several times more costly. The AFL–CIO estimates that hundreds of thousands of jobs are lost to these forms of theft.

And this is not just an economic and jobs problem for Americans. This is a consumer safety issue. According to a study released earlier this year, a couple dozen websites selling counterfeit prescription drugs had more than 141,000 visits per day, on average. Counterfeit medication, brake linings and other products threaten Americans' safety. These are serious concerns. These are the concerns I have kept in mind over the last several years as I have worked with Senators on both sides of the aisle to help resolve these serious problems.

I admire and respect the marvelous advances of technology and, in particular, those represented by the Internet. I have promoted its democratizing impact around the world. I have fought to keep the Internet free and open, as it has become the incredible force that it is today. I have promoted its potential for access in rural areas, for distance learning, for increasing points of view and allowing all voices to be heard and as a means for small start ups and firms in Vermont and elsewhere to market quality products. Nor is this a newfound interest or passing fancy. I started and chaired a Judiciary Committee panel two decades ago on technology and the law and was a founder of the bipartisan, bicameral congressional Internet Caucus. Yesterday, The Washington Post got it right in its editorial entitled ''Freedom on the Internet'':

> A free and viable Internet is essential to nurturing and sustaining the kinds of revolutionary innovations that have touched every aspect of modern life. But freedom and lawlessness are not synonymous. The Constitution does not protect the right to steal, and that is true whether it is in a bricks-and-mortar store or online.''

Last week, a Wall Street Journal editorial was like-minded, noting:

> The Internet has been a tremendous engine for commercial and democratic exchange, but that makes it all the more important to police the abusers who hijack its architecture.
>
> . . . Without rights that protect the creativity and innovation that bring fresh ideas and products to market, there will be far fewer ideas and products to steal.''

Two years ago, I announced a bipartisan effort to target the worst-of-the-worst of the foreign rogue websites that profited from piracy, stealing and counterfeiting, while also ensuring that we protect the Internet. I have been working since that time to do just that. In 2010, the bill that Senator HATCH and I introduced was reported unanimously by the Senate Judiciary Committee.

I took seriously the views of all concerned. I reached out to the administration. We incorporated revised definitions suggested by Senator WYDEN. We held additional hearings to which we invited Google and Yahoo!. And we redrafted the legislative measure and reintroduced it as The Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, more commonly known as the PROTECT IP Act. Senator GRASSLEY joined as an original cosponsor. I continued to work with all who showed interest. The measure was reported unanimously from the Judiciary Committee in May 2011, and 40 Senators from both sides of the aisle have cosponsored it. It is rare that editorial boards with divergent viewpoints such as The Wall Street Journal and The Washington Post agree on a problem and legislative approach. As I have already noted, this problem of foreign rogue websites engaging in piracy, theft and counterfeiting is one such time. I ask that copies of the recent editorials from The Washington Post and The Wall Street Journal be included in the RECORD at the conclusion of my remarks.

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

Mr. LEAHY. Few issues unite the United States Chamber of Commerce and the AFL–CIO; the National Association of Manufacturers and the Teamsters; the cable industry and the broadcast industry. By targeting the worst-of-the-worst and protecting the integrity of the Internet, we have been able to create a broad ranging coalition of support of the PROTECT IP Act. Along with law enforcement groups, more than 400 companies, associations, and unions have come together to support this targeted, bipartisan legislation to combat foreign rogue websites.

Protecting American intellectual property and the American jobs that depend on it is important. Last year we were able to reform our patent laws to unleash American innovators and help boost our economic recovery. Now we need to confront the threat to our economic recovery posed by Internet piracy.

As I have demonstrated throughout my service in the Senate and again during the last two years, I have remained flexible in terms of the legislative language in order to best meet our goals of stemming the criminality when protecting legitimate activities and guarding against doing anything to undercut innovation or fetter free discussion. I have urged those with concerns to come forward and to work with us. We adjusted the very definitions in the bill to narrow them as Senator WYDEN had suggested. I announced two weeks ago that I took seriously the concerns about the domain name system provisions and would fix it as part of a manager's amendment when the bill was considered by the Senate.

I regret that the Senate will not be proceeding this week to debate the legislation, and any proposed amendments. I thank the Majority Leader for seeking to schedule that debate on this serious economic threat. I understand that when the Republican leader recently objected and Republican Senators who had cosponsored and long supported this effort jumped ship, he was faced with a difficult decision. My hope is that after a brief delay, we will, together, confront this problem. Everyone says they want to stop the Internet piracy. Everyone says that they recognize that stealing and counterfeiting are criminal and serious matters. This is the opportunity for those who want changes in the bill to come forward, join with us and work with us. This is the time to suggest improvements that will better achieve our goals. The PROTECT IP Act is a measure that has been years in the making, and which has been twice reported unanimously by the Senate Judiciary Committee to better enforce American intellectual property rights and protect American consumers. It has been awaiting Senate action since last May. Today the rogue foreign websites based in Russia that are stealing Americans' property are delighted to continue their operations and counterfeiting sweatshops in China are the beneficiaries of Senate delay. People need to understand that the PROTECT IP Act would only affect websites that have been judged by a federal court to have no significant use other than engaging in theft whether through stolen content or the selling of counterfeits. It is narrowly targeted at the worst-of-the-worst. Websites that have some infringing content on their sites but have uses other than profiting from infringement are not covered by the legislation. Websites like Wikipedia and YouTube that have obvious and significant uses are among those that would not be subject to the provisions of the bill. That Wikipedia and some other websites decided to ''go dark'' on January 18 was their choice, self imposed and was not caused by the legislation and could not be.

It was disappointing that sites linked to descriptions of this legislation that were misleading and one-sided. The Internet should be a place for discussion, for all to be heard and for different points of view to be expressed. That is how truth emerges and democracy is served. Last week, however, many were subjected to false and incendiary charges and sloganeering designed to inflame emotions. I am concerned that while critics of this legislation engage in hyperbole about what the bill plainly does not do, organized crime elements in Russia, in China, and elsewhere who do nothing but peddle in counterfeit products and stolen American content are laughing at their good fortune that congressional action is being delayed.

Nothing in PROTECT IP can be used to cut off access to a blog. Nothing in PROTECT IP can be used to shut off access to sites like YouTube, Twitter, Facebook or eBay. Nothing in PROTECT IP requires anyone to monitor their networks. Nothing in PROTECT IP criminalizes links to other websites. Nothing in PROTECT IP imposes liability on anyone. Nothing in PROTECT IP can be required without a court order, first, and without providing the full due process of our Federal court system to the defendants before a final judgment is rendered. I also note that the guarantees of due process provided in the PROTECT IP Act are those likewise provided every defendant in every Federal court proceeding in the United States, no less. The PROTECT IP Act requires notice to the defendant. If the plaintiff seeks an injunction, the court must apply Federal Rule of Civil Procedure 65, which is the standard for all courts in determining whether to issue an injunction, including whether to issue the injunction as a temporary restraining order for a limited period of time. When stealing of copyrights are involved, such court orders can be made if, upon a factual showing, a court finds that serious harm would otherwise occur and it is in the public interest to do so while the case is more fully considered.

The PROTECT IP Act is directed at the foreign websites that are the worst-of-the-worst thieves of American intellectual property and operate from outside the United States and the jurisdiction of our courts. These website operators prey on American consumers, steal from our creators and economy, but are currently beyond the jurisdiction of U.S. courts.

The Obama administrative officials were right in a recent post saying ''existing tools are not strong enough to root out the worst online pirates beyond our borders.'' They called on Congress ''to pass sound legislation this year that provides prosecutors and rights-holders new legal tools to combat online piracy originating beyond U.S. borders while staying true to the principles outlined. . . . We should never let criminals hide behind a hollow embrace of legitimate American values.'' That is what we are trying to do with the PROTECT IP Act.

What the PROTECT IP Act does is provide tools to prevent websites operated overseas that do nothing but traffic in infringing material or counterfeits from continuing to profit from piracy with impunity. The Internet needs to be free, but not a lawless marketplace for stolen commerce and not a haven for criminal activities.

In the flash of interest surrounding this bill last week, those who were forgotten were the millions of individual artists, the creators and the companies in Vermont and elsewhere who work hard every day only to find their works available online for free, without their consent. There are factory workers whose wages are cut or jobs are lost when low-quality counterfeit goods are sold in place of the real thing they worked so diligently to produce. There are men and women of our National Guard and military who put their lives on the line for all of us every day, and for whom a counterfeit part can literally be a matter of life and death. There are the seniors who are struggling to be able to afford medications and order from what appears to them to be a reputable site, only to find that a foreign website has sent them an untested counterfeit drug that will not control their blood pressure or diabetes or heart problem.

At the end of the day, this debate boils down to a simple question. Should Americans and American companies profit from what they produce and be able to provide American jobs, or do we want to continue to let thieves operating overseas steal that property and sell it to unsuspecting American consumers? I hope that in the coming days the Senate will focus on stopping that theft that is undercutting our economic recovery. I remain committed to confronting this problem. And I appreciate the efforts of Senator KYL, Senator ALEXANDER and others who want to continue to work in a thoughtful manner with all interested parties to find an effective solution to eliminate online theft by foreign rogue websites. I thank those Senators who called me in Vermont and back here this past week when I got back to Washington to offer their help—Senators on both sides of the aisle. It means a lot.

I know the senior Senator from Nebraska is waiting to speak about the judicial nominee from his State. I will say what I said to him privately because I know this is his last year in the Senate. I have always enjoyed working with him. He has worked hard. He has represented the people of his State well. He has been very honest in his dealings with me. He has been diligent with respect to judicial nominations for vacancies in Nebraska. He has tirelessly pressed to fill vacancies there to ensure cases before the Federal court are not needlessly delayed. He did that to protect everybody in Nebraska, Republicans and Democrats, to make sure the courts are open for them.

I am sorry the confirmation of Justice Gerrard, one he so strongly supported, has been so needlessly delayed for more than 3 months, but I say to the people of Nebraska they are very fortunate to have been represented by the senior Senator from Nebraska, my friend BEN NELSON, who has been there fighting for them. He fought for the people of Nebraska every day from the day he took the oath of office. This may be his last year here, but based on past performance I think it is safe to say he will fight for Nebraska right up until the moment that adjournment bell sounds.

Mr. President, I ask unanimous consent a January 19 article from the Wall Street Journal and a January 22 article from the Washington Post be printed in the RECORD.

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

[From the Wall Street Journal, Jan. 19, 2012]

BRAKE THE INTERNET PIRATES

Wikipedia and many other websites are shutting down today to oppose a proposal in Congress on foreign Internet piracy, and the White House is seconding the protest. The covert lobbying war between Silicon Valley and most other companies in the business of intellectual property is now in the open, and this fight could define—or reinvent—copyright in the digital era.

Everyone agrees, or at least claims to agree, that the illegal sale of copyrighted and trademarked products has become a world-wide, multibillion-dollar industry and a legitimate and growing economic problem. This isn't college kids swapping MP3s, as in the 1990s. Rather, rogue websites set up shop overseas and sell U.S. consumers bootleg movies, TV shows, software, video games, books and music, as well as pharmaceuticals, cosmetics, fashion, jewelry and more.

Often consumers think they're buying copies or streams from legitimate retail enterprises, sometimes not. Either way, the technical term for this is theft.

The tech industry says it wants to stop such crimes, but it also calls any tangible effort to do so censorship that would ''break the Internet.'' Wikipedia has never blacked itself out before on any other political issue, nor have websites like Mozilla or the social news aggregator Reddit. How's that for irony: Companies supposedly devoted to the free flow of information are gagging themselves, and the only practical effect will be to enable fraudsters. They've taken no comparable action against, say, Chinese repression.

Meanwhile, the White House let it be known over the weekend in a blog post—how fitting—that it won't support legislation that ''reduces freedom of expression'' or damages ''the dynamic, innovative global Internet,'' as if this describes the reality of Internet theft. President Obama has finally found a regulation he doesn't like, which must mean that the campaign contributions of Google and the Stanford alumni club are paying dividends.

The House bill known as the Stop Online Piracy Act, or SOPA, and its Senate counterpart are far more modest than this cyber tantrum suggests. By our reading they would create new tools to target the worst-of-the-worst black markets. The notion that a SOPA dragnet will catch a stray Facebook post or Twitter link is false.

Under the Digital Millenium Copyright Act of 1998, U.S. prosecutors and rights-holders can and do obtain warrants to shut down rogue websites and confiscate their domain names under asset-seizure laws. Such powers stop at the water's edge, however. SOPA is meant to target the international pirates that are currently beyond the reach of U.S. law.

The bill would allow the Attorney General to sue infringers and requires the Justice Department to prove in court that a foreign site is dedicated to the wholesale violation of copyright under the same standards that apply to domestic sites. In rare circumstances private plaintiffs can also sue for remedies, not for damages, and their legal tools are far more limited than the AG's.

If any such case succeeds after due process under federal civil procedure, SOPA requires third parties to make it harder to traffic in stolen online content. Search engines would be required to screen out links, just as they remove domestic piracy or child pornography sites from their indexes. Credit card and other online financial service companies couldn't complete transactions.

(Obligatory housekeeping: We at the Journal are in the intellectual property business, and our parent company, News Corp., supports the bills as do most other media content companies.)

Moreover, SOPA is already in its 3.0 version to address the major objections. Compromises have narrowed several vague and overly broad provisions. The bill's drafters also removed a feature requiring Internet service providers to filter the domain name system for thieves—which would have meant basically removing them from the Internet's phone book to deny consumer access. But the anti-SOPA activists don't care about these crucial details.

The e-vangelists seem to believe that anybody is entitled to access to any content at any time at no cost—open source. Their real ideological objection is to the concept of copyright itself, and they oppose any legal regime that values original creative work. The offline analogue is Occupy Wall Street.

Information and content may want to be free, or not, but that's for their owners to decide, not Movie2k.to or LibraryPirate.me or MusicMP3.ru. The Founders recognized the economic benefits of intellectual property, which is why the Constitution tells Congress to ''promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'' (Article I, Section 8).

The Internet has been a tremendous engine for commercial and democratic exchange, but that makes it all the more important to police the abusers who hijack its architecture. SOPA merely adapts the current avenues of legal recourse for infringement and counterfeiting to new realities. Without rights that protect the creativity and innovation that bring fresh ideas and products to market, there will be far fewer ideas and products to steal.

[From the Washington Post, Jan. 22, 2012]

MEGAUPLOAD SHOWS ONLINE COPYRIGHT PROTECTION IS NEEDED

(By Editorial Board)

By most measures, the Web site Megaupload was a 21st-century success story, with 50 million daily visitors and $175 million in profits. According to the Obama administration, it was also an ''international organized crime enterprise.''

In an indictment last week, the Justice Department accused the company and several of its principals of conspiracy, racketeering and vast violations of copyright law. The loss to copyright owners of movies, television programs, entertainment software and other content: some $500 million. The government calls this the largest criminal copyright case in the nation's history.

Megaupload maintained servers in the United States and relied on U.S.-registered domain names, allowing U.S. prosecutors to tap domestic laws to shutter the business. But what if the Web site had been run using only foreign-based servers and foreign-registered domain names? U.S. law enforcers would have had a difficult if not impossible time stopping the alleged wrongdoing.

That reality, of course, is what gave rise to the Protect IP Act (PIPA) and its House counterpart, the Stop Online Piracy Act (SOPA), which proposed to give the Justice Department and copyright owners the legal reach and muscle to thwart overseas theft of American intellectual property. SOPA was fatally flawed, with vague provisions that could have made legitimate Web sites vulnerable to sanctions. PIPA was more measured, allowing action against a site only if a federal judge concluded it was ''dedicated to'' profiting from the unauthorized peddling of others' work.

Still, Internet giants such as Google railed against the bills, arguing they sanctioned government censorship and threatened the viability and security of the Internet. The protests culminated last week in a remarkable, largely unprecedented protest during which sites such as Wikipedia temporarily went dark. Millions of individuals—many of them armed with distorted descriptions of the bills—phoned, e-mailed and used social networks to demand that they be quashed.

Whether it was democracy in action or spinelessness by cowed lawmakers, the campaign worked. House and Senate leaders said they would pull back the bills for further consideration. While a temporary breather may be helpful, lawmakers should not abandon the quest to curb the multibillion-dollar problem that is overseas online piracy.

Some opponents will fight any regulation of the Internet. This should not be acceptable. A free and viable Internet is essential to nurturing and sustaining the kinds of revolutionary innovations that have touched every aspect of modern life. But freedom and lawlessness are not synonymous. The Constitution does not protect the right to steal, and that is true whether it is in a bricks-and-mortar store or online.

The PRESIDING OFFICER (Mr. COONS). The Senator from Nebraska.

Mr. NELSON of Nebraska. I thank my colleague, the esteemed chair, for such kind remarks. I wish they were universally believed by all. This is the kind of introduction my father would have enjoyed but my mother would have believed. I appreciate so very much his kind comments.

The Nebraska Supreme Court temporarily stayed the execution of one prisoner, a Carey Dean Moore, because a full evidentiary record was before it in another immediately pending case, State v. Mata, which was referred to by my friend and colleague from Alabama, Senator SESSIONS. That case challenged the constitutionality of electrocution as a method of execution. It did not challenge, it did not deal with, and was not associated with whether or not to have a death penalty. It was not challenging the death penalty but the methodology of a death penalty.

The court had to determine whether a prisoner should be executed depending on whether that question was soon answered. The temporary stay was issued and the other case decided as a matter of State constitutional law. The court, by a vote of 6 to 1, determined that execution as a method—and I emphasize ''a method'' of electrocution—violated prohibitions against cruel and unusual punishment, which is the purview of the court to make that determination where there is a question of dealing with the Constitution.

The court was clear that the death penalty remained valid in Nebraska. No writ of certiorari had been taken. The Nebraska Legislature changed the method of execution to lethal injection, and the execution of Moore, Mata, and others will be carried out accordingly.

As a matter of fact, the court has set a date of execution for a prisoner to be executed on March 6. This same court set dates of execution while I was Governor on three occasions, and they were carried out. Judge Gerrard was a

member of the court at that time and had no objections to the executions. It is the methodology that the court dealt with.

It is important to recognize that in the Moore case the issue was not whether the death penalty itself was constitutional; it was whether a particular means of execution was constitutional. Those are completely different questions.

Senator SESSIONS claims that Judge Gerrard stayed the defendant's execution in the light of ''a changing legal landscape.'' However, it is not uncommon for a court, when presented with different cases involving related issues, to withhold ruling on any one case until all of the related issues are resolved. Therefore, the Moore order reflects a pragmatic decision to wait until both cases could be resolved.

I agree with Senator SESSIONS that this is about the duty of a judge to be faithful to the law and to serve under the law. However, I strongly disagree with Senator SESSIONS' characterization of Judge Gerrard as an activist judge. Judge Gerrard has written 450 opinions in his 15-plus years on the Nebraska Supreme Court. The U.S. Supreme Court concluded in a previous case that the U.S. Supreme Court and the Nebraska Supreme Court have held in a related matter that the death penalty is not cruel and unusual. Judge Gerrard would have no difficulty following that binding precedent. As a matter of fact, he has. He has no personal beliefs that would prevent him from enforcing the death penalty. In fact, he has authored several opinions and voted to affirm the convictions and sentences of defendants who have actually been sentenced to death.

Judge Gerrard believes the death penalty is an acceptable form of punishment. He understands the significant difference between a judge on a court of last resort interpreting State court constitutional law and a Federal district judge who follows U.S. Supreme Court precedent.

I reiterate for the record, Judge Gerrard is held in the highest regard by both the bench and the bar in Nebraska. He has earned an ''AV'' Martindale-Hubbell rating from his colleagues, and the American Bar Association has deemed him ''unanimously well-qualified'' to serve on the U.S. district court.

I thank my colleague, Senator JOHANNS from Nebraska, for his support and his comments which I think were also very supportive, clearly supportive, of Judge Gerrard and the decisions. Clearly, he is not an activist judge.

I yield the floor.

RECESS APPOINTMENTS

Mr. GRASSLEY. Mr. President, just over a month ago, on December 17, the Senate entered into a unanimous consent agreement to consider the nomination of John M. Gerrard, of Nebraska, to be United States District Judge for the District of Nebraska. We are proceeding with this nomination, which I will support, despite the President's actions on recess appointments. During the last session we acted responsibly in considering the President's nominees. Even the Majority Leader acknowledged this. He stated, ''We have done a good job on nominations the last couple of months. Actually, in the last 3 months, we have accomplished quite a bit.''

I will have more to say about the recess appointments. But with regard to this nomination I hope my colleagues understand that even though we are proceeding under regular order today, it is only because this unanimous consent agreement was locked in before the President demonstrated his monarchy mentality by making those appointments. I am not going to hold this nominee accountable for the outrageous actions of the President.

However, as this is a matter of concern to my Republican colleagues, as it should be for all Senators, we must consider how we will respond to the President and restore a Constitutional balance. Since the adoption of the unanimous consent agreement governing the nomination before us, President Obama has upset the nominations process. Article II, Section 2 of the Constitution provides for only two ways in which Presidents may appoint certain officers.

First, it provides that the President nominates, and by and with the advice and consent of the Senate, appoints various officers. Second, it permits the President to make temporary appointments when a vacancy in one of those offices happens when the Senate is in recess. On January 4, the President made four appointments. They were purportedly based on the Recess Appointments Clause. He took this action even though the Senate was not in recess. This action is of the utmost seriousness to all Americans.

These appointments were blatantly unconstitutional. They were not made with the advice and consent of the Senate. And they were not made ''during the recess of the Senate.''

Between the end of December and today, the Senate has been holding sessions every 3 days. It did so precisely to prevent the President from making recess appointments. It followed the same procedure as it had during the term of President Bush. Honoring the Constitution and the desire of the Senate President Bush declined to make recess appointments during these periods. But President Obama chose to make recess appointments despite the existence of these Senate sessions.

In addition to being unconstitutional, these so-called recess appointments break a longstanding tradition. They represent an attempted presidential power grab against this body.

A President has not attempted to make a recess appointment when Congress has not been in recess for more than 3 days in many decades. In fact, for decades, the Senate has been in recess at least 10 days before the President has invoked this power.

Other parts of the Constitution beyond Article II, Section 2 show that these purported appointments are invalid. Article I, Section 5 provides, ''Each House may determine the Rules of its Proceedings. . . .''

In December and January, we provided that we would be in session every 3 days. The Senate was open and provided the opportunity to conduct business. That business included passing legislation and confirming nominations. In fact, the Senate did pass legislation, which the President signed. According to the Constitution—each House—not the President determines whether that House is in session. The Senate said we were in session. The President recognized that fact by signing legislation passed during the session.

Article I, Section 5 also states, ''Neither House, shall, during the session of Congress, without the consent of the other, adjourn for more than 3 days. . . .'' The other body did not consent to our recess for more than 3 days. No concurrent resolution authorizing an adjournment was passed by both chambers. Under the Constitution, we could not recess for more than 3 days. We did not do so. The President's erroneous belief that he can determine whether the Senate was in session would place us in the position of acting unconstitutionally. If he is right, we recessed for more than 3 days without the consent of the other body. By claiming we were in recess, the President effectively dares us to say that we failed to comply with our oath to adhere to the Constitution. Yet, it is the President who made appointments without the advice and consent of the Senate while the Senate was in session. It is the President who has violated the Constitution.

Of course, the President does not admit that he violated the Constitution. He has obtained a legal opinion from the Office of Legal Counsel at his own Department of Justice.

That opinion reached the incredible conclusion that the President could make these appointments, notwithstanding our December and January sessions. That opinion is entirely unconvincing. For instance, to reach its conclusion that the Senate was not available as a practical matter to give advice and consent, it relies on such unpersuasive material as statements from individual Senators.

The text of the Constitution is clear. It allows no room for the Department to interpret it in any so-called ''practical'' way that departs from its terms.

The Justice Department also misapplied a Judiciary Committee report from 1905 on the subject of recess appointments. That report said that a Senate ''recess'' occurs when ''the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions;

when its Members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.''

Obviously, that report does not support the Department of Justice. During these days, the Senate was sitting in session. It could discharge executive functions. The Chamber was not empty. It could receive communications. It could participate as a body in making appointments. In fact, it sat in regular session and passed legislation.

There is nothing in the 1905 report that justifies the President substituting his judgment for the Senate's regarding whether the Senate is in session. In any event, a Senate Judiciary Committee report from 1905 does not govern the United States Senate; in 2012. The Senate; as constituted today; decides its rules and proceedings.

The Department is on shaky legal ground when it claims that ''whether the House has consented to the Senate's adjournment of more than 3 days does not determine the Senate's practical availability during a period of pro forma sessions and thus does not determine the existence of a 'Recess' under the Recess Appointments Clause.''

There is no basis—none—for treating the same pro forma sessions differently for the purposes of the 2 clauses. The Department simply cannot have it both ways.

The Justice Department's opinion contains other equally preposterous arguments. For instance, the opinion claims that the Administration's prior statements to the Supreme Court—through former Solicitor General Elena Kagan—that recess appointments can be made only if the Senate is in recess for more than 3 days are somehow distinguishable from its current opinion, or that the pocket veto cases do not apply.

Or even if they did, the ''fundamental rights'' of individuals that the courts described in those cases include the right of the President to make recess appointments.

There was a time when Presidents believed that they could take action only when the law gave them the power to do so. They obtained advice from the Justice Department on the question whether there was legal authority to justify the action they wished to take. But Theodore Roosevelt started to change the way Presidents viewed power. He believed that the President could do anything so long as the Constitution did not explicitly preclude him from acting. When he used that theory to create wildlife refuges against a rapidly expanding industrial base, there was no objection. But a dangerous precedent was set. When he claimed that he could make recess appointments during a ''constructive recess'' of the Senate, the Senate rejected this view in that 1905 report.

When a President thinks he can do anything the Constitution does not expressly prohibit, the danger arises that his advisers will feel pressure to say that the Constitution does not stand in the way. At that point, a President is no longer a constitutional figure with limited powers as the founders intended. Quite the contrary, the President looks more and more like a king that the Constitution was designed to replace.

This OLC opinion reflects the changes that have occurred in the relationship between the Justice Department and the President on the question of presidential power. Formerly, the Justice Department gave legal advice to the President based on an objective reading of texts and judicial opinions. It was not an offshoot of the White House Counsel's office.

This more objective view of the limits of Presidential power also provided a level of protection for individual liberty, the principle at the core of our constitutional separation of powers. The President might refuse to accept the advice. He might choose to fire the officer who gave him advice with which he disagreed. He could seek to appoint a new officer who would provide the advice he preferred. But he risked paying a political price for doing so. An official who thought that loyalty to the Constitution exceeded his loyalty to the President could refuse to comply, at great personal risk. That is what Elliot Richardson did during the Saturday Night Massacre of the Watergate era.

During the Reagan Administration, OLC issued opinions that concluded that the President lacked the power to undertake certain acts to implement some of his preferred policies. The President did not undertake those unilateral actions.

President Obama originally submitted a nominee for OLC that was wholly objectionable. The Senate had good reason to believe that she would not interpret the law without regard to ideology. We refused to confirm her.

The President ultimately withdrew her nomination and nominated instead Virginia Seitz. We asked important questions at her confirmation hearing and thorough questions for the record.

Ms. Seitz responded that OLC should adhere to its prior decisions in accordance with the doctrine of stare decisis. And she stated that if the administration contemplated taking action that she believed was unconstitutional, she would not stand idly by. Relying on those assurances, the Senate confirmed Ms. Seitz.

Ms. Seitz is the author of this wholly erroneous opinion that takes an unprecedented view of the Recess Appointments Clause. And I suppose it is literally true that Ms. Seitz did not stand idly by when the administration took unconstitutional action: rather, she actively became a lackey for the administration. She wrote a poorly reasoned opinion that placed loyalty to the President over loyalty to the rule of law.

That opinion, and her total deviation from the statements she made during her confirmation process, show extreme disrespect for the institution of the Senate and the constitutional separation of powers. I gave the President and Ms. Seitz the benefit of the doubt in voting to confirm her nomination. However, after reading this misguided and dangerous legal opinion, I am sorry the Senate confirmed her. It's likely to be the last confirmation she ever experiences.

The Constitution outlines various powers that are divided among the different branches of our Federal government. Some of these powers are vested in only one branch, such as granting pardons or conducting impeachment proceedings. Other powers are shared, such as passing and signing or vetoing bills. The appointment power is a shared power between the President and the Congress. When one party turns a shared power into a unilateral power, the fabric of the Constitution is itself violated, and a response is called for.

In Federalist 51, Madison wrote that the separation of powers is more than a philosophical construct. He wrote that the ''separate and distinct exercise of the different powers of government'' is ''essential to the preservation of liberty.''

The Framers of the Constitution wrote a document that originally contained no Bill of Rights. They believed that liberty would best be protected by preventing government from harming liberty in the first place. That was the reason for the separation of powers. They designed a working separation of powers through checks and balances to ensure a limited government that protected individual rights. Madison wrote, ''Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.''

That is what the Framers intended in a case such as this. When the President unconstitutionally usurped the power of the Senate, the Senate's ambition would check the President's. In this way, the Constitution is preserved. The power of the government is limited. And the liberties of the people are protected. But the Framers did not anticipate the modern Presidency. It took Justice Jackson's famous concurrence in the Youngstown case to address presidential powers in today's world. When the Judiciary Committee held its confirmation hearings on President Bush's Supreme Court nominations, my friends on the other side of the aisle posed many questions about the Jackson concurrence. That opinion sheds light on these so-called recess appointments.

For instance, President Obama argued in a nationally televised rally that his actions were justified because ''[e]very day that Richard [Cordray] waited to be confirmed . . . was another day when millions of Americans were left unprotected. . . . And I refuse to take 'no' for an answer.''

Justice Jackson anticipated these hyperbolic statements. He wrote: ''The tendency is strong to emphasize the transient results upon policies. . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.'' President Obama has definitely let transient policy goals overtake the Constitution. His argument is that the end justifies the means.

His argument is that he can say no to the Constitution. Or, in essence, that the Constitution does not apply to him. But the Constitution demands that the means justify the ends, and that adherence to established procedure is the best protection for liberty. A monarch or a king could say no to the Constitution. But under our Constitution, the President may not. It is the Constitution, and not the President, that refuses to take no for an answer.

Justice Jackson was also aware that the modern President's actions ''overshadow any others [and] that, almost alone, he fills the public eye and ear.'' By virtue of his influence on public opinion, he wrote, the President ''exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.''

Some people believe that President Obama challenged the Senate for partisan purposes. But Justice Jackson understood the true partisan dynamic that is now playing out. He recognized that the President's powers are political as well as legal. Many presidential powers derive from his position as head of a political party. Jackson wrote: ''Party loyalties and interests sometimes more binding than law, extend his effective control into branches of government other than his own, and he often may win, as a political leader, what he cannot command under the Constitution.'' Finally, he concluded, ''[O]nly Congress itself can prevent power from slipping through its fingers.''

Outside these walls, in the reception room, are portraits of great Senators of the past. The original portraits were selected by a committee that was headed by then Senator John F. Kennedy. They included such figures as Webster, Clay, Calhoun, LaFollette, and Taft. Yes, these Senators were partisans. But they were selected because of the role they played in maintaining the unique institution that is the Senate in our constitutional system. In particular, they protected the Senate and the country from the excessive claims of presidential power that were made by the chief executives of their time. Where are such Members today?

Where is a member of the President's party today who is like a more recent Senate institutionalist—Robert C. Byrd? He defended the powers of the Senate when Presidents overreached—even Presidents of his own party. Where are the Members who recognized that our sessions every 3 days rightly prevented President Bush from making recess appointments but who stand idly by as President Obama makes recess appointments without a recess?

I remind my colleagues of my experiences as chairman or ranking member of the Finance Committee. I refused to process nominees to positions that passed through that committee to whom President Bush gave recess appointments. That is how I used the authority that I had to protect the rights of the Senate.

I do not believe we should let the powers vested in the elected representatives of the American people slip through our fingers because we place partisan interests above the Constitution. I have shown how the Framers understood that supposedly expedient departures from the Constitution risked individual liberty. The constitutional text in this situation is clear. It must be upheld. We must take appropriate action to see that it is done.

Nor should we wait for the courts.

Although the NLRB appointments are already the subject of litigation, we should take action ourselves rather than rely on others. The stakes are too high. On the other hand, even the OLC opinion recognizes, as it must, the litigation risk to the President.

For more than 200 years, Presidents have made very expansive claims of power under the Recess Appointments Clause. The President and the Senate have worked out differences to form a working government.

Now, the Obama administration seeks to upend these precedents and that working relationship. It may well find, as did the Bush administration, that when overbroad claims of presidential power find their way to court, that not only does the President lose, but that expansive arguments of presidential power that had long been a part of the public discourse can no longer be made.

Although I believe that this ironic result will ultimately occur here as well, the Senate must defend its constitutional role on its own, as intended by the framers of the Constitution that we all swore an oath to uphold.

Mr. KYL. Mr. President, important questions have been raised about Judge Gerrard's willingness to follow established precedent in a reasoned way in death-penalty cases. Too often, the Senate has confirmed nominees who are hostile to the death penalty, and who then abuse their authority and twist the law to block the execution of legally sound capital sentences that have been entered by State courts. In his December 15, 2011, written response to questions posed to him by Senator SESSIONS, however, Judge Gerrard assured the Senate that he ''would have no difficulty'' in following ''binding precedent'' in capital cases, and that he has ''no personal beliefs that would prevent [him] from enforcing the death penalty.'' I take Judge Gerrard at his word and thus will vote in favor of confirming his nomination to be a United States district judge.

Mr. GRASSLEY. Mr. President, John M. Gerrard is nominated to be United States District Judge for the District of Nebraska. Judge Gerrard received his B.S. degree from Nebraska Wesleyan University in 1975 and his J.D. from Pacific McGeorge School of Law in 1981.

He began his legal career in private practice as an associate for the Nebraska law firm of Jewell, Otte, Gatz, Collins & Domina. A year later, Judge Gerrard joined in a new law firm where he conducted primarily a general litigation practice. In 1990, Judge Gerrard and two partners formed a new law office. For the next 5 years, before being appointed to the bench, he engaged in an active trial practice and administrative law/school law practice.

In 1995, then-Governor Nelson appointed Judge Gerrard to the Nebraska Supreme Court. He has been retained (by election) in 1998, 2004, and 2010. He has written roughly 480 opinions, 450 of which are published. The opinions cover a variety of legal issues, including homicide appeals, tort issues, and evidentiary disputes. While serving on the State's highest court, Judge Gerrard has served on a number of committees, including those focusing on issues pertaining to gender, race and the judicial system.

The American Bar Association Standing Committee on the Federal Judiciary has rated Judge Gerrard with a unanimous ''Well Qualified'' rating.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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.

Mr. GRASSLEY. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

Mr. CONRAD. Mr. President, I yield back all time on our side.

The PRESIDING OFFICER. All time has expired.

The question is, Will the Senate advise and consent to the nomination of John M. Gerrard, of Nebraska, to be United States District Judge for the District of Nebraska?

The yeas and nays have been ordered.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from North Carolina (Mrs. HAGAN), the Senator from New Jersey (Mr. LAUTENBERG), the Senator from Connecticut (Mr. LIEBERMAN), the Senator from Maryland (Ms. MIKULSKI), and the Senator from Vermont (Mr. SANDERS) are necessarily absent.

Mr. KYL. The following Senators are necessarily absent: the Senator from

Georgia (Mr. CHAMBLISS), the Senator from South Carolina (Mr. GRAHAM), the Senator from Utah (Mr. HATCH), the Senator from North Dakota (Mr. HOEVEN), and the Senator from Illinois (Mr. KIRK).

Further, if present and voting, the Senator from Utah (Mr. HATCH) would have voted ''yea.''

The PRESIDING OFFICER (Mr. MANCHIN). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 74, nays 16, as follows:

[Rollcall Vote No. 1 Ex.]

YEAS—74

Akaka	Durbin	Merkley
Alexander	Enzi	Moran
Ayotte	Feinstein	Murkowski
Barrasso	Franken	Murray
Baucus	Gillibrand	Nelson (NE)
Begich	Grassley	Nelson (FL)
Bennet	Harkin	Portman
Bingaman	Heller	Pryor
Blumenthal	Hutchison	Reed (RI)
Blunt	Inouye	Reid (NV)
Boxer	Johanns	Roberts
Brown (MA)	Johnson (SD)	Rockefeller
Brown (OH)	Kerry	Schumer
Burr	Klobuchar	Shaheen
Cantwell	Kohl	Snowe
Cardin	Kyl	Stabenow
Carper	Landrieu	Tester
Casey	Leahy	Thune
Coats	Levin	Udall (CO)
Cochran	Lugar	Udall (NM)
Collins	Manchin	Warner
Conrad	McCain	Webb
Coons	McCaskill	Whitehouse
Corker	McConnell	Wyden
Crapo	Menendez	

NAYS—16

Boozman	Johnson (WI)	Shelby
Coburn	Lee	Toomey
Cornyn	Paul	Vitter
DeMint	Risch	Wicker
Inhofe	Rubio	
Isakson	Sessions	

NOT VOTING—10

Chambliss	Hoeven	Mikulski
Graham	Kirk	Sanders
Hagan	Lautenberg	
Hatch	Lieberman	

The nomination was confirmed.

The PRESIDING OFFICER. Under the previous order, the motion to reconsider is considered made and laid upon the table, and the President will be immediately notified of the Senate's action.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will resume legislative session.

The Senator from Illinois is recognized.

MORNING BUSINESS

Mr. DURBIN. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak therein for up to 10 minutes each.

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

ORDER OF PROCEDURE

Mr. CORNYN. Mr. President, reserving the right to object, can I kindly ask the assistant leader something, and this is a matter of accommodation. We have two speakers on the Republican side and two on the Democratic side. Would he be amenable to entering into an order to lock in the order and go back and forth?

Mr. DURBIN. I have no objection. May I have some suggestion about the time for each? Senators WYDEN and MORAN want to speak.

Mr. WYDEN. Mr. President, I think that is a reasonable request. Senator MORAN and I, who have teamed up on Internet policy, wish to speak for a few minutes, if we could follow each other. We plan to be brief. The Senator from Illinois will be brief. Is that acceptable?

Mr. CORNYN. I ask whether the Senator from Illinois would agree that following his comments I be recognized for 10 minutes, and then go back and forth.

Mr. DURBIN. Mr. President, here is what I suggest to the Senator from Texas. Senator WYDEN and Senator MORAN already asked for time. I only ask for 3 minutes to speak about Senator KIRK, and then I will turn it over to them. I will not speak at length. After they have spoken—can the Senator suggest a time?

Mr. WYDEN. Five or 10 minutes each. We will be brief.

Mr. DURBIN. And then we will go back to the Senator's side. Is that fair?

Mr. CORNYN. Yes.

Mr. DURBIN. I ask unanimous consent that that be the order.

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

SENATOR MARK KIRK

Mr. DURBIN. Mr. President, we have been gone for 6 weeks or so. It is great to see our colleagues back here. A lot of things have been exchanged about what we did back home during the break, but the focal point of most conversations on the floor this evening has been, rightfully, about my colleague, Senator MARK KIRK. Most everybody knows now he suffered a stroke over the weekend, and he underwent surgery in Chicago at Northeastern Hospital last night.

All that I know about this comes from a press conference his surgeon gave in Chicago today. We want to make it clear to MARK that he is in our thoughts and prayers, as is his family. We all feel, to a person, that he will make a strong recovery. He is young and in good condition. He prides himself on his service in the Naval Reserve and stays fit to serve our country in that capacity, as well as in the Senate. He has a tough, steep hill ahead of him, but he is up to the task.

If encouragement from a Democrat, as well as many Republicans, is what is needed, he has that. I want to let him know, if the word is passed along to him in his recovery, that his colleagues in the Senate are focusing on his quick recovery and are anxious for him to return.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oregon is recognized.

Mr. WYDEN. Mr. President, Senator DURBIN speaks for every Member of the Senate. Senator KIRK is such a decent, caring, and thoughtful man, and all of us enjoy working with him in the Senate on various kinds of bills. Godspeed, Senator KIRK, for a healthy recovery. We are thinking of you tonight and you are in our prayers. I am very glad the senior Senator from Illinois has reflected the concerns of everybody from his home State tonight.

THE INTERNET

Mr. WYDEN. Mr. President, I want to take a few minutes with Senator MORAN tonight to reflect on the events of the last few days with respect to the Internet legislation. I want to begin by thanking Majority Leader HARRY REID for reopening the debate on anticounterfeiting and copyright protection legislation. In pulling the Protect IP Act from the floor, Leader REID has given the Senate an opportunity to get this policy right. The Senate now has the opportunity to consult all of the stakeholders, including the millions of Internet users who were heard last week. The Senate has the opportunity to ensure that those exercising their first amendment rights through the Internet, those offering innovative products and services, and those looking for new mediums for sharing and expression, have their voices heard.

I also express my appreciation to Senator MORAN. He is an impassioned advocate for job creation and innovation on the Net—the first on the other side of the aisle to join me in this cause. My colleague, Senator CANTWELL from Washington State, who is as knowledgeable as anybody in public service about technology, and Senator RAND PAUL, who is a champion of the Internet as a place where those who look at the Net as a marketplace of ideas, stand together and approach policy in an innovative way.

Last week, tens of millions of Americans empowered by the Internet effected political change here in Washington. The Congress was on a trajectory to pass legislation that would change the Internet as we know it. It would reshape the Internet in a way, in my view, that would have been harmful to our economy, our democracy, and our national security interests.

When Americans learned about all this, they said no. The Internet enables people from all walks of life to learn about the legislation and then take collective action to urge their representatives in Washington to stop it.

So everybody asked, come Wednesday, what would happen? In fact, the American people stopped this legislation. Their voices counted more than all the political lobbying, more than all of the advertising, more than all of the phone calls that were made by the heads and the executives of the movie