Wednesday, December 11, 2013, in room SD–628 of the Dirksen Senate Office Building, at 2:30 p.m., to conduct a nomination hearing to consider the President's nomination of Vincent G. Logan, to be Special Trustee, Office of Special Trustee for American Indians, Department of the Interior, and an Oversight Hearing to receive testimony on Implementation of the Department of the Interior's Land Buy-Back Program.

Those wishing additional information may contact the Indian Affairs Committee at (202) 224–2251.

ORDERS FOR TUESDAY, DECEMBER 10, 2013

Mr. REID. Madam President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 10 a.m. on Tuesday, December 10; that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, the time for the two leaders be reserved for their use later in the day; that following any leader remarks, the Senate proceed to executive session to consider the Millett nomination under the previous order.

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

PROGRAM

Mr. REID. Senators then should expect the first vote tomorrow at 10:15 a.m.

ORDER FOR ADJOURNMENT

Mr. REID. Madam President, if there is no further business to come before the Senate, I ask unanimous consent it adjourn under the previous order, following the remarks of approximately one-half hour of Senator LAMAR ALEXANDER.

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

The Senator from Tennessee.

Mr. ALEXANDER. Madam President, I wonder if I might ask the majority leader a question.

Mr. REID. Of course.

Mr. ALEXANDER. If I may ask it through the Chair, as I understand it, there are a total of 13 district judges on the calendar, and the majority leader is the only one in the Chamber who has the right to bring a judge from the calendar to the floor.

If I heard him correctly, he filed cloture on four district judges. The way I understand the Senate procedure is that means we have an intervening day tomorrow and we can start voting on Wednesday.

Because we changed the rules at the majority leader's request to make it easier to confirm district judges, there is only, in effect, 1 hour of debate on each district judge, 2 hours equally divided. Then, if Democrats decide they don't want to use their hour, we could use our hour if we wanted to—and that there never has been in the history of the Senate a district judge denied his or her seat by a filibuster, not President Obama, not anyone else.

If that is the case, why doesn't the majority leader bring up all the district judges? Let's bring up all 14 of them, bring them to the floor, have 1 hour of debate on each one? Why don't we do that?

Mr. REID. We tried to do that. The distinguished Senator from Tennessee objected.

The truth is that the Senate has gotten out of whack. If there was a controversy with one of these judges, then you could have some reason to stall. In years past, we have done it by unanimous consent. I think it is unfortunate that this Senate has come to this, but that is where we are.

We could approve 14 of these by my friend not objecting to them. He is on the record as saying he doesn't think there should be judges who are objected to; district court judges should be filibustered.

But here is the situation. During the entire time we have been a country, there have been 23 district court judges filibustered, in the entire time we have been a country. Twenty of them have been during the Obama administration.

So this is a game Republicans have played to do everything they can to make Obama a failed President, and they are not doing it. He is a very successful President and has a long list of things he has done in spite of the Republicans.

So I don't know the point my friend is trying to make, but let's approve all these. They are all going to get approved anyway. So what we are going to do is go through this process.

I saw my friend, the Senator from Arkansas, come through here. He helped, along with this Senator whose idea it was, from Tennessee—because Senator Frist was the leader and he backed off that and I understand why—where we had this nuclear option come up before, the Constitutional option, and there was an agreement made by my Republican colleagues that they would not filibuster a judge unless there were extraordinary circumstances. Does anyone understand—does anyone not understand why the whole country is upset about this?

Extraordinary circumstances? Look at these circuit court judges. It is outrageous that they do not like them just because they do not like them. Their qualifications are superb. Their educational backgrounds? They went to the best law schools in America. They all have good work records. But they objected to them.

My friend, for whom I have great admiration, the senior Senator from the State of Tennessee, has a stellar record. He has been Governor of a State, he has been a Cabinet Secretary, and he has been a very fine Senator. But in his heart he knows that what is going on here in the Senate has been wrong. He may criticize the majority leader for working to change the rules here, but they have been changed before, and they are going to be changed again.

It simply is not working. Who can complain about a majority vote? Who can complain about that? Someone talks about this filibuster as if it is something engraven someplace along with the Ten Commandments, but it is not. It is not in the Constitution. It is something we have developed here in the Senate. It originally came about to help get legislation passed. But my friends, the Republicans, the last number of years have used it to defeat legislation.

These nominations should have been approved. We should not have had to go through all this and we will not have to in the future.

The PRESIDING OFFICER. The Senator from Tennessee.

CHANGING SENATE RULES

Mr. ALEXANDER. Madam President, I appreciate the courtesy of the majority leader in allowing me to ask him a question. I have more to say about this whole subject. But let me go back to my point. There are 13 district judges on the calendar. On November 21, when we last met, there were 13 district judges. There is only one person in this Chamber who can bring a judge from the calendar to the floor for confirmation. That is the majority leader. Why did he not bring them all up? Why didn't he move them? Because under our rules all he has to do is make a motion that so-and-so district judge be confirmed. If he files cloture, we have to wait 1 day, and then we have 2 hours of debate.

Never in the history of the country, according to the Congressional Research Service, has a district judge been denied his or her seat because of a failed cloture vote, because of a filibuster. I know this from personal experience because a judge named McConnell from Rhode Island was nominated by President Obama at the recommendation of the Rhode Island Senators, and there were a number on this side who said we should filibuster the judge.

I thought not. I argued to all of the Republicans that we never had done that in history and we ought not to do it, we ought not to start it. So what has happened? I believe, with all due respect, the majority leader is manufacturing a crisis. There is no crisis with those 13 district judges. He is the one who could bring them up. He could have done it on Thursday, November 21st, the day he changed the rules. Friday would be the intervening day. The maximum amount of debate the Democrats could require on each judge would be 1 hour, if they yield back their hour. So in 13 hours, before midnight tonight, they could all be district judges. They were sitting on the calendar waiting for the majority leader to move.

The same is true with the sub-Cabinet members. But let's just stay with the district judges for a minute. I know I am right about this because I have sat down with the Senate historian. I sat down with the Congressional Research Service. I said, has there ever been a President's nominee for a Federal district judge who has not been confirmed because of a failed cloture vote? The answer is zero—not for President Obama, not for President Bush, not for President Clinton, not for any President.

Because Senator REID, the distinguished majority leader, believed that the district judges were moving too slowly through the Senate, we changed the rules this past year. We said that with district judges, once there is a cloture vote—and remember, no judge has ever been denied his seat because of a cloture vote. Once there is a cloture vote, there can only be 2 hours of debate, one for the minority and one for the majority. So this is a manufactured crisis. That is what was done in order to do what the Democratic majority did on November 21, which is the most stunning development in the history of the Senate in terms of a rules change, and I intend to talk about that tonight. I want to go through some very specific facts—not speeches, not something made up, but facts.

I am glad that the majority leader moved four district judges but every one of the other nine might ask, Mr. Majority Leader, why did you not move my name? Why are you leaving me out? Because you could move it on Monday, wait a day, and on Wednesday you could confirm every single one of the judges there?

The reason was because the majority leader wanted to make it look like there was a problem here so he could do as Senator LEVIN said we did on November 21—in effect create a Senate without rules—over the objection of 48 Senators the Democratic majority established a precedent that the Senate can change the rules any time it wants to for any reason it wants to. So I want to speak a little bit tonight about how I and other Senators are expected to serve in a Senate with no rules.

Yesterday was a pretty exciting day in the National Football League. There were a lot of close games. The Ravens and the Vikings scored 5 touchdowns in 2 minutes and 1 second. In Pittsburgh, Miami was ahead when the Steelers Anthony Brown raced into the end zone after a series of lateral passes. It was one of those things where it is the last play of the game and they start playing, passing to each other. It rarely works. Every now and then it does, and it appeared to in this case because Brown was the last one with the ball. He got into the end zone before time expired, but the officials ruled he had stepped out of bounds before scoring.

What if Pittsburgh had said yesterday: Wait a minute, we are the home team. We will change the rules and say if you go step out of bounds only once as you are running toward the end zone with lateral passes on the last play of the game then you score, so Pittsburgh wins the game?

Or what if they had said: We are the home team. We will just add 5 minutes and see if we can win the game in that 5 minutes? They would have been happy in Pittsburgh yesterday but maybe not for long.

But what happens when Miami becomes the home team and Pittsburgh goes to Miami to play and Miami changes the rules in the middle of the game so Miami can win? What would happen to the game of professional football if the home team could change the rules in the middle of the game to get the result it wanted? The National Football League knows. They spend a lot of time on rules. They know if there is no integrity for the rules there is no integrity for the game, and pretty soon the fans do not watch the game because the game has no integrity.

That is why the NFL goes to such great lengths about its rules. There are officials all over the field. They are standing, you know, right in the middle of the play. There is an instant review of every call they make. When they make a call they huddle to see if they interpreted the rule right. If a coach doesn't like it, he has an opportunity to challenge the ruling. There is someone up in a box who looks at that and reviews it. Today, Monday morning in New York, in the National Football League office, senior retired officials get together and they review every single call and every single no-call that was made yesterday in every league game. They grade every single official based on those calls, and rarely does anyone get 100 percent. The NFL is in a constant review of the rules because if there is no integrity to the rules, they know there is no integrity to the game, and there will be no fans.

I say this because on Thursday, the last day we were here, November 21, before Senators went home for Thanksgiving, the Democratic majority destroyed the rules of the Senate. With all of the Republican Members opposed and 3 Democratic Members opposed, the Senate voted 52 to 48 to invoke the so-called nuclear option, allowing a majority of Senators present and voting—so not necessarily 51—to approve Presidential nominees except for Supreme Court Justices. For those positions they eliminated the filibuster, which required 60 votes to proceed to an up or down majority vote.

That is what Senator REID went through a few minutes ago. He was saying that we will move for cloture, we will have an intervening day, and then we will have a cloture vote. Before Thursday, before November 21, that took 60 votes. Although, as I said, in the case of Federal district judges it had never been used to deny a seat. But now it only takes a majority of those present and voting. This was the most dangerous restructuring of Senate rules since Thomas Jefferson wrote the rules because it creates a perpetual opportunity for what Alexis de Tocqueville called, when he traveled our country in the 1830s, one of the greatest threats to our democracy, and that is the tyranny of the majority.

This stunning rules change by the Senate majority can best be described as ObamaCare 2. One of the things that Americans really didn't like about the new health care law, ObamaCare, was that it was passed in the dead of night by a purely partisan vote during a snowstorm. It showed that those who had the votes could do whatever they wanted no matter what the minority thought, and we can see the results: millions of Americans having their policies canceled. Next year, tens of millions will—those who get their insurance through employers. This is another example of that kind of power play. This time the goal was to help the administration and the Democratic majority advance its radical agenda, unchecked through the courts and the executive agencies.

As the Senator from Michigan, Senator LEVIN said—quoting a former Republican Senator, Senator Vandenberg—Senator LEVIN is a Democrat—said on that Thursday, ''If a majority of the Senate can change its rules at any time, there are no rules.''

''If a majority of the Senate can change its rules at any time, there are no rules.''

Similar to the Pittsburgh game, if the home team can change its rules at any time there are no rules to the game. Every child knows that there have to be rules to the game. So I have this question: How am I and how are other Senators supposed to serve in a Senate with no rules? How is this different from what could have happened in Pittsburgh if they changed the rules in the middle of the game? Or if the Red Sox, finding themselves behind in the ninth inning, added a few innings just to make sure they beat the Cardinals in the World Series. In the Senate, future majorities could do whatever they want, end the filibuster for legislation, removing any obstacle to the tyranny of the majority. Just as if there were no integrity of the rules of football and there would be no integrity of the game and there would be no fans, if there were no integrity to the rules of the Senate, there is no integrity for the Senate and no respect for this part of our system of government.

I think I was not overstating it when I said this is the most dangerous change to the rules since Thomas Jefferson wrote them. When he did write the rules, he had this to say about why we have rules. His words are in the Senate rules book that every single one of us has and hopefully have read at least the beginning parts of. This is worth reading. It is entitled ''The Importance of Adhering to Rules.''

Remember the argument here is not about the filibuster, it is about how the rules were changed. The Importance of Adhering to Rules. I am going to read

a little bit of this. According to Thomas Jefferson, when he wrote the Senate rules:

Mr. Onslow, the ablest among the Speakers of the House of Commons, used to say, ''it was a maxim he had often heard, when he was a young man, from old and experienced members, that nothing tended to throw power more into the hand of administration and those who acted with the majority of the House of Commons, than a neglect of, or departure from, the rules of proceeding: that these forms, as instituted by our ancestors, operated as a check and control on the actions of the majority; and that they were in many instances a shelter, and a protection to the minority, against the attempts of power.

This is Thomas Jefferson writing about the importance of rules when he wrote the Senate rules.

Continuing:

So far the maxim is certainly true, and is founded in good sense, that as it is always in the power of the majority, by their numbers, to stop any improper measures proposed on the part of their opponents, the only weapons by which the minority can defend themselves against similar attempts from those in power, are the forms and rules of proceeding which have been adopted as they were found necessary from time to time, and are become the law of the House; by a strict adherence to which, the weaker party can only be protected from those irregularities and abuses which these forms were intended to check, and which the wantonness of power is but too often apt to suggest to large and successful majorities.

I would think a majority that claims to protect the rights of minorities would be interested in these words of Jefferson and especially in the following words:

And whether these forms be in all cases the most rational or not, is really not of so great importance. It is much more material that there should be a rule to go by, than what that rule is; that there may be a uniformity of proceeding in business, not subject to the caprice of the Speaker, or captiousness of the members. It is very material that order, decency and regularity be preserved in a dignified public body.

That was Thomas Jefferson on the importance of Senate rules when he wrote them at the beginning of our country. The majority has set a precedent that destroys those rules—that destroys the integrity of the rules because a Senate in which a majority can change the rules at any time for any reason is a Senate with no rules. That is why it is not too much to say that the Democratic majority has created a perpetual opportunity for the tyranny of the majority. The majority can do anything it wants any time it wants.

In this case, what it wanted to do was stack the Federal court that hears most of the challenges to its radical regulatory agenda with judges who believe in that agenda. Who knows what the next power play will be. First it was ObamaCare, then ObamaCare 2, the change of the rules. What we do know is that this majority has set an unprecedented precedent. They have set the precedent to do whatever they want to do anytime they want to do it. They have created a Senate without rules.

Now let's talk a little bit about what the justification might be for such a stunning action because there are so many words thrown around that don't represent facts at all that—somehow—I wonder about this. For example, the Democrats complain that their radical action was warranted because the Senate is broken. I agree with that. I will explain in a few moments why I think so. Their reason is that President Obama's appointees have been unfairly denied seats by failed cloture votes or filibusters. The charge was—and you heard the majority leader a few minutes ago—things have gotten so bad that this Republican majority has treated President Obama unfairly by denying his nominees their seats by failed cloture votes or filibusters. The Democrats have gotten themselves in a room and convinced each other that this is true, but it is flat out not true.

According to the Congressional Research Service—and I have researched this for several months and asked them this question: Has there ever been any Supreme Court nominee, by any President, who has been denied his or her seat by a filibuster? The answer is no. It is zero. Now, there is one possible exception. Abe Fortas was nominated by President Lyndon Johnson as Chief Justice. The nomination was in trouble on both sides of the aisle, and to help his friend Abe Fortas save face, President Johnson engineered a cloture vote in 1968. I think the vote was 45 to 43. They called that a win to help ''Abe save face.'' But certainly President Obama's nominees have not been denied their seats by a failed cloture vote, and neither have any other Presidents.

Have there ever been any Cabinet members of President Obama or any other President who have been denied their seats by a failed cloture vote or by a filibuster? According to the Congressional Research Service, the answer is no. The number is zero. There have been no Cabinet members who have been denied their seats in the Obama administration by a failed cloture vote.

Have there ever been any Federal district judges denied their seats by a failed cloture vote for President Obama or any other President? The answer is zero. Except for perhaps Fortas, there has never been a Supreme Court Justice, Cabinet member, or Federal district judge nomination in the history of President Obama—and never in the history of this country has a President's nomination been denied by a filibuster. Interesting.

Then why did we go to this stunning radical move on November 21? Well, maybe it was because of sub-Cabinet members. How many of those have been denied their seats by a filibuster, according to the Congressional Research Service? Two of President Obama's, three of President George W. Bush's, and two of President Clinton's. That is a total of seven in the history of the Senate when a filibuster has said to a sub-Cabinet member that we are going to deny them their seat because of a filibuster or a failed cloture vote. So President Obama has been treated about exactly the same as his last two predecessors.

In all of those I just mentioned, among Cabinet members, district judges, Supreme Court Justices, and sub-Cabinet members, we only found two Obama nominees who have been denied their seats by a failed cloture vote. Now, that is a fact. That is not a piece of Republican propaganda. That comes from the Congressional Research Service.

Why is there a fuss about this? Well, maybe it is because of the Federal circuit judges. Well, let's talk about that. As for appeals court judges, Republican filibusters have blocked five. Why did that happen? That happened as a result of what happened in 2003, the year I came to the Senate. Then, Democrats got together and said: We think President Bush's nominees are too conservative, so for the first time in the history of the Senate we are going to block 10 of President Bush's nominees basically because they are too conservative. I knew some of those judges. I used to clerk on the Fifth Circuit Court of Appeals for Judge John Minor Wisdom. I knew the respect he had for Judge Pryor. I knew Mr. Pickering, who had really been a pioneer for civil rights in the State of Mississippi in the 1960s and 1970s when it was hard to do that.

The truth is that the majority of Democrats said: We are going to block 10 of the Bush judges. It has never been done before, but we are going to do it with a cloture vote.

Well, as you can guess, everyone on the Republican side—and the majority then—got very excited. The majority leader, Senator Frist, said: We are going to change the rules and do something that Senator Lott—a majority leader at one time—said was the nuclear option.

There was great consternation. In 2006 Senator REID said—and he recounts this very well in his book—''to do so would be the end of the Senate.''

I made two speeches. I suggested that, well, this is a terrible thing to do. A President ought to have an up-or-down vote on his circuit judges. So why don't we see if we can't get a few Republicans and a few Democrats and just take it out of the hands of the leaders and agree we will only use the filibuster on circuit judges in extraordinary circumstances, which was the result. I said at the time that I would never vote for a filibuster on a circuit judge. I adjusted my view to be the same as the Senate precedent that came out of the Gang of 14. Of the 10 Bush judges, 5 were not confirmed and 5 were confirmed. In 2003 the Democratic Senators for the first time in history refused to confirm five Presidential nominees for the Federal court

of appeals by a cloture vote—by a filibuster—and the expected happened. Over time, the Republicans now have blocked five nominations. So Republicans and Democrats are even.

When you start something, things have a way of coming back around. What the Democrats said was fair to do in 2003 and 2004 the Republicans now say is fair to do. If the Democrats think the Republican nominees are too conservative, they will block five of them. If we think President Obama's nominees are too liberal, then we will block five of them. We put in the trash heap the tradition that we will never use the filibuster on Federal courts of appeals judges.

The majority leader and others have said: Well, that is not the only problem. The problem is that President Obama has had to wait too long to get his judges confirmed.

Again, that is not true either. This is another case where the Democrats apparently have gotten themselves in a room and convinced themselves that something that isn't true is true. According to the Congressional Research Service, President Obama's second-term Cabinet nominees have been confirmed at about the same pace as President Bush's Cabinet nominees and President Clinton's Cabinet nominees.

The other day I heard the majority leader use the example of the distinguished Secretary of Defense and a former Member of this body, Senator Hagel, as an example of delay. Well, let me comment on that, if I may. Senator Hagel's nomination was reported to the Senate floor. The day after it was reported by the Armed Services Committee, the majority leader filed cloture and called that a filibuster.

Now, many Republican Senators—I watched the Senator from Arizona and the Senator from South Carolina and others say on the floor to the majority leader: That is premature. You are cutting off debate before we have had a chance to consider the Secretary of Defense of this country. If you will allow us more time—at that time we were going into the Presidents Day recess for a week—we will cut off debate the day we come back and then we will have an up-or-down vote.

But, no, the majority leader and the White House said: Ram it through.

They insisted on a vote, the vote was turned down, and he called that a filibuster. I call it cutting off debate—cutting off debate prematurely. Why in the world wouldn't you allow a Secretary of Defense to be on the floor for more than 1 day before you cut off the debate prematurely and call it a filibuster?

The majority leader said: Well, we could be attacked.

I think he must have forgotten we had a perfectly adequate Secretary of Defense in place—Leon Panetta—until the next one was confirmed, and he was going to be confirmed because the majority had the majority of votes to do that and a Cabinet member has never been denied his or her seat because of a cloture vote.

I want to keep coming back to that. A Cabinet member has never been denied confirmation because of a failed cloture vote. A Cabinet member will be confirmed after a while—after you have questions. But in that case, they filed cloture after 1 day.

Now, in my case, 20 years ago when President Bush nominated me as the Education Secretary, there was a Democratic Senate. I was announced in December, nominated in January, and it was March before some of the Democratic Senators saw fit to give me a vote, and I was confirmed by unanimous consent. During that time I tried to get ready for our education program. It gave me some time to work. When President Reagan nominated Ed Meese to be the Attorney General, it took a year before the Senate confirmed Ed Meese, but he was confirmed. There have been some Cabinet members who have withdrawn their names because they have become embarrassed or for some other reason.

If the question is whether a failed cloture vote has ever been used to deny a Cabinet member his or her seat, the answer is no. In the case of Secretary Hagel, I would think 1 day is not quite long enough to file a motion to cut off debate and claim it is a filibuster.

What about judges? Has the Senate been slow on judges? This year the Senate has confirmed 36 of the President's second-term nominees to circuit and district courts compared with 14 for President Bush as of November 21st in his second term in 2005. These things are never exact because there are vacancies for a variety of reasons. That is a pretty big difference. It is very hard to argue that it is unfair. But the majority leader did argue successfully that the minority was holding up district judges in order to negotiate for other points. He did that the second time a bipartisan group of us sat down to talk about how to change the Senate rules so we could move along better. So what the Senate agreed to do earlier this year was to change the rules to make it easier to confirm district judges.

Here is the procedure: Remember, first they have to be on the calendar. How do they get on the calendar? A committee majority puts them on the calendar. What party has the majority in the Judiciary Committee? The Judiciary Committee majority is Democratic. That puts them on the calendar. So Democrats put them on the calendar. Only the majority leader can take them off the calendar, and when he does that, he has no motion to proceed; he just takes them right off just like he did tonight. If he wants to, he can just bring them up and ask unanimous consent that they be approved, which they often are.

I am told by the Republican leader's office that when the majority leader rammed the rules change through on November 21, there were about 40 or so noncontroversial—so-called—nominees who were about to be confirmed, including many district judges. But tonight the majority leader has selected 4 of the 13 district judges who are on the calendar and made a big show out of the fact that we are going to take an intervening day tomorrow and then we are going to vote on them, I guess, beginning on Wednesday. Under the rules change he asked for, the debate on each one of those can only be 2 hours, and it is divided evenly, which means the Democrats have an hour and the Republicans have an hour. If the Democrats want to speed things up, they can give their hour back. On a noncontroversial judge, Republicans normally wouldn't say anything, except a word or two of praise. But let's say the Republicans are upset by the rules changes and we are going to say we will take that whole hour. The Democrats could say 2 or 3 minutes of praise for the district judge and we could confirm those four in 4 hours. That is half a day's work.

The question I asked the majority leader was, What about the other nine? What about the other nine district judges who are sitting on this calendar, put there by the Democratic majority of the Judiciary Committee, and only one person in the Senate can bring them up for a vote, and he didn't bring them up. Why doesn't he bring them up? He could bring them up today. Tomorrow would be the intervening day and we could vote on Wednesday and vote on them all. He could have brought every single district judge up Thursday before recess, when he turned the Senate into a place that has no rules; Friday would have been the intervening day, and we could have been voting all day today, and by the time we went home for supper, every district judge would be confirmed because of the earlier rules change that limited post-cloture debate on district judges to 2 hours. The only reason I can see to go through all of this is to manufacture a crisis to make the American people think that somehow the minority is abusing its privileges.

I read the Executive Calendar on November 21 very carefully. Remember, this is the document that is on every Senator's desk. A nominee has to be on here in order to be confirmed. If a person is an executive nominee, the only person who can bring it up is the majority leader. It is the same with legislation. So legislative matters require a motion of consent. There were only 16 on the calendar who had been there 3 weeks and only 8 more who had been there more than 9 weeks, and 2 of the 8 were being held up by Democratic Senators. That is hardly a crisis.

Finally, let me address the claim the majority leader didn't take seriously; that is, Republicans have unfairly blocked the President from filling vacancies on the U.S. Court of Appeals for the DC Circuit. Remember, I pointed out the Democrats started this by saying that if President Bush nominates judges that are too conservative,

we will block them, so the Republicans now have blocked an equal number of President Obama's judges. But that is not the primary reason for blocking them. The primary reason is stated in a letter written on July 27, 2006, to the chairman of the Judiciary Committee, a Republican, Senator Specter, from all of the Democratic members of the Judiciary Committee. President Bush had nominated someone for this same court, the District of Columbia Federal Circuit Court, and this is what the Democratic Senators said in 2006:

> We believe that Mr. Keisler should under no circumstances be considered—much less confirmed—by this Committee before we first address the very need for that judgeship, receive and review necessary information about the nominee, and deal with the genuine judicial emergencies identified by the Judicial Conference.

In other words, what the Democrats were saying—and it included a number of the most distinguished Members of this body—the chairman Senator LEAHY, Senator SCHUMER, Senator Feingold, Senator FEINSTEIN, Senator Kohl, Senator Kennedy, Senator DURBIN, Senator BIDEN—they were saying that this court, the DC court, is an important court, but it doesn't need any more judges. Before we add any more judges to a court that is underworked, we ought to consider transferring those judgeships to courts that are overworked.

That argument had been made since at least 2001 by Senator GRASSLEY from Iowa, and finally, with some bipartisan cooperation in 2007, he achieved some success. With President Bush's agreement, the Republican President, he agreed with the Democratic Senators that the DC Circuit should under no circumstances—those are their words in their letter—have more judges. They reduced by one the number of judges, and they transferred a judge to the Ninth Circuit, which was overworked.

So what Republicans have said about the three judges whom the President has nominated to the DC Circuit is, before we consider any of them, consider Senator GRASSLEY's bill. Do in 2013 what you said we should do in 2006 and 2007 and which we did in a bipartisan way.

So how can this be dismissed when Republicans are asking to do in 2013 exactly what the Democrats successfully insisted on in 2006, which is to transfer judges from the courts where they are not needed to the courts where they are needed. In fact, the DC Circuit has a lower caseload by comparison today than it did in 2007 when, by a bipartisan agreement, it was considered underworked. The Democrats didn't think it was unfair then to insist that we not appoint more judges to a court that was underworked. It must be they are trying to manufacture a crisis now.

So if there is no good reason to change the rules in such a dramatic way as the majority did on November 21, why would the majority leader insist on cramming through in a power play a rules change that in 2006 he said would be the end of the Senate? Because the vote was not about the filibuster. All of that is pretext. The vote was about allowing the majority to do whatever it wants to do any time it wants to do it.

One of the things the American people detest about ObamaCare, as I said earlier, is that it was crammed through in the middle of the night in a partisan power play and we can see the results. Unlike the civil rights bill which had broad bipartisan support—I can remember Senator Dirksen and President Johnson working together on it when it required 67 votes in the Senate, and because it achieved that consensus, Senator Russell, the great opponent of the bill, went home to Georgia and said: It is the law of the land and we should now support it.

When we cram a big social change—or any big change—through the Congress, we are going to get the kind of result we get with ObamaCare today: millions of people losing their policies, tens of millions will next year, great concern, Web site not working. That is what we get when we cram things through in a partisan way, and the Democrats have done it again.

So if the filibuster was not the problem, then why is the Senate not functioning better? Why are we so low in public opinion polls? Frankly, it is because of the Senate leadership. I have had the privilege over the years of watching the Senate. I came here for the first time in 1967 as an aide to Senator Howard Baker, the future majority leader of the Senate. I watched Senator Mansfield and Senator Dirksen. I watched Senator Byrd and Senator Baker. I watched Senator Daschle, Senator Lott, Senator Frist. I wasn't in the Senate all of that time—I have only been here since 2003—but I have seen it over that time up close. All of them could operate this body very well under the rules we had until Thursday of 2 weeks ago, until November 21.

I was at the Rules Committee meeting when Senator Byrd, former majority leader and acknowledged as the great historian of the Senate, came. He could barely speak, but he had one last message for the Senate and it was: Don't change the filibuster. He called it the necessary fence against the excesses of the executive and the popular will. That was what Senator Byrd said. He also said that under the rules we had until November 21, a majority leader could operate the Senate if he wanted to.

The current majority leader seems to be unable to do that, and we saw an example of it here tonight. He brings up 4 district judges, while there are 13 on the calendar. He could have brought them up on November 21 and we could have been voting on all of them today. He could bring them all up today and we could vote on all of them Wednesday, but he is parceling them out as if there were a crisis somewhere. Why is he doing that? I don't see why he is doing that. It is not the way to make the Senate function. It is not what Senator Byrd would do. It is not what Senator Baker would do. I saw them come in and open the Senate to amendments, put a bill on the floor, ask for amendments. Here came 300 amendments. Ask for unanimous consent to cut off amendments. They got unanimous consent because nobody could think of any other amendments, and then Senator Byrd would say—and Senator Baker did as well—all right, let's start voting, and vote, vote, vote, vote. Then we could get to about Wednesday or Thursday and Senators would think, well, maybe my amendment is not so important, and by Friday, when it was clear the majority leader was going to finish the bill that week, they would drop the amendments, and we got it done.

So the Senate wasn't a perfect place—things were still bumpy. There was Senator Metzenbaum sitting in the front row objecting. There was Senator Williams before him, Senator Allen before him, exercising their rights, but the majority leaders were able to work with that. The Senate worked on Mondays and Fridays, it worked at night, and the threat of that usually caused people who were trying to not show a proper amount of restraint and use of their privileges to back down.

Instead, what the current majority leader does—and we heard him tonight—is complain about obstructionism when there isn't any, certainly not on nominations. I am not going to say Senators on both sides of the aisle haven't abused their privileges and slowed down the Senate. But he complains about obstructionism when, in fact, he has become the obstructionist in chief by making it more difficult for those of us who are elected from our States to represent the people who have a right to be heard. Seventy-seven times this majority leader has cut off amendments in a body whose whole purpose is to amend, debate, and vote. I call it a gag rule, with the majority cutting off the right of American voices to be heard on the Senate floor. There have been 114 times when he has filed a motion to cut off debate on the same day he has introduced a bill, and he calls that a filibuster. I call it a gag rule. He has bypassed Senate committees in an unprecedented way: 76 times in the last 7 years.

He set himself up as the king of the Senate: May I offer an amendment on Iran, a Senator might ask. No. May I offer an amendment on Egypt? No. How about an amendment on ObamaCare? No. What about a bill on the National Labor Relations Board? No. Can we work on appropriations bills? No. Only one person is deciding what happens here when, in fact, the history of the Senate has been a place of virtually unlimited debate on virtually any amendment. That has been the history of the Senate. It is different than the House of Representatives. It has been different than any other body in the

world. It operates by unanimous consent, and it requires restraint which hasn't always been exercised, but majority leaders who have been effective have found their way to deal with that.

I have spent the last 3 years doing my best to help make this place function. I cannot say where this rules change on November 21 will lead, but it is heading in a dangerous direction—a direction that is dangerous for the Senate and dangerous for our country.

This is a country that prizes the rule of law. Other countries around the world that do not have it wish they did, they wish they had a country with the rule of law. So in a country that prizes the rule of law, we now have a Senate without any rules because the Senate majority has decided, for the first time, that a majority can change the rules at any time, for any reason it wants, which makes this a body without rules.

In a country that yearns for solutions on Iran, on health care, on our debt crisis, we have a king of the Senate saying: No amendments, no debate. I will make all the decisions.

I know of only one cure for this dangerous trend, and that is one word, an election—the election of six new Republican Senators so power plays such as ObamaCare and the November 21 rules change will be ended and the Senate will again be alive with bills, amendments, and debates, reflecting the will of the American people on the important issues of our time.

I ask unanimous consent to have printed in the RECORD the letter from the year 2006 from the Democratic Senators on the Judiciary Committee saying there should be no new judges added to the DC Court of Appeals because it is underworked.

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

U.S. SENATE,
Washington, DC, July 27, 2006.

Hon. ARLEN SPECTER,
Chairman, Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN SPECTER: We write to request that you postpone next week's proposed confirmation hearing for Peter Keisler, only recently nominated to the DC Circuit. Court of Appeals. For the reasons set forth below, we believe that Mr. Keisler should under no circumstances be considered—much less confirmed—by this Committee before we first address the very need for that judgeship, receive and review necessary information about the nominee, and—deal with the genuine judicial emergencies identified by the Judicial Conference.

First, the Committee should, before turning to the nomination itself, hold a hearing on the necessity of filling the 11th seat on the DC Circuit, to which Mr. Keisler has been nominated. There has long been concern—much of it expressed by Republican Members—that the DC Circuit's workload does not warrant more than 10 active judges. As you may recall, in years past, a number of Senators, including several who still sit on this Committee, have vehemently opposed the filling of the 11th and 12th seats on that court:

Senator Sessions: ''[The eleventh] judgeship, more than any other judgeship in America, is not needed.'' (1997)

Senator Grassley: ''I can confidently conclude that the DC Circuit does not need 12 judges or even 11 judges.'' (1997)

Senator Kyl: ''If . . . another vacancy occurs, thereby opening up the 11th seat again, I plan to vote against filling the seat—and, of course, the 12th seat—unless there is a significant increase in the caseload or some other extraordinary circumstance.'' (1997)

More recently, at a hearing on the DC Circuit, Senator Sessions, citing the Chief Judge of the DC Circuit, reaffirmed his view that there was no need to fill the 11th seat: ''I thought ten was too many. . . I will oppose going above ten unless the caseload is up.'' (2002)

In addition, these and other Senators expressed great reluctance to spend the estimated $1 million per year in taxpayer funds to finance a judgeship that could not be justified based on the workload. Indeed, Senator Sessions even suggested that filling the 11th seat would be ''an unjust burden on the taxpayers of America.''

Since these emphatic objections were raised in 1997, by every relevant benchmark, the caseload for that circuit has only dropped further. According to the Administrative Office of the United States Courts, the Circuit's caseload, as measured by written decisions per active judge, has declined 17 percent since 1997; as measured by number of appeals resolved on the merits per active judge, it declined by 21 percent; and as measured by total number of appeals filed, it declined by 10 percent. Accordingly, before we rush to consider Mr. Keisler's nomination, we should look closely—as we did in 2002—at whether there is even a need for this seat to be filled and at what expense to the taxpayer.

Second, given how quickly the Keisler hearing was scheduled (he was nominated only 28 days ago), the American Bar Association has not yet even completed its evaluation of this nominee. We should not be scheduling hearings for nominees before the Committee has received. their ABA ratings. Moreover, in connection with the most recent judicial nominees who, like Mr. Keisler, served in past administrations, Senators appropriately sought and received publicly available documents relevant to their government service. Everyone, we believe, benefited from the review of that material, which assisted Senators in fulfilling their responsibilities of advice and consent. Similarly, the Committee should have the benefit of publicly available information relevant to Mr. Keisler's tenure in the Reagan Administration, some of which may take some time. to procure from, among other places, the Reagan Library. As Senator Frist said in an interview on Tuesday, ''[T]he DC Circuit . . . after the Supreme Court is the next court in terms of hierarchy, in terms of responsibility, interpretation, and in terms of prioritization.'' We should therefore perform our due diligence before awarding a lifetime appointment to this uniquely important court.

Finally, given the questionable need to fill the 11th seat, we believe that Mr. Keisler should not jump ahead of those who have been nominated for vacant seats identified as judicial emergencies by the non-partisan Judicial Conference. Indeed, every other Circuit Court nominee awaiting a hearing in the Committee, save one, has been selected for a vacancy that has been deemed a ''judicial emergency.'' We should turn to those nominees first; emergency vacancies should clearly take priority over a possibly superfluous one.

Given the singular importance of the DC Circuit, we should not proceed hastily and without full information. Only after we reassess the need to fill this seat, perform reasonable due diligence on the nominee, and tend to actual judicial emergencies, should we hold a hearing on Mr. Keisler's nomination.

We thank you for your consideration of this unanimous request of Democratic Senators.

Sincerely,

PATRICK LEAHY.
RUSSELL D. FEINGOLD.
DIANNE FEINSTEIN.
HERB KOHL.
CHARLES SCHUMER.
EDWARD M. KENNEDY.
RICHARD DURBIN.
JOSEPH R. BIDEN, Jr.

Mr. ALEXANDER. I yield the floor.

ADJOURNMENT UNTIL 10 A.M. TOMORROW

The PRESIDING OFFICER. The Senate stands adjourned until 10 a.m. tomorrow.

Thereupon, the Senate, at 7:46 p.m., adjourned until Tuesday, December 10, 2013, at 10 a.m.