nominee in American history; Justice Kavanaugh got an astonishing and disgraceful spectacle; and Justice Barrett received baseless, delegitimizing attacks on her integrity.

Now, this history is not the reason why I oppose Judge Jackson. This is not about finger-pointing or partisan spite. I voted for a number of President Biden's nominees when I could support them, and just yesterday, moments after the Judiciary Committee deadlocked on Judge Jackson, they approved another judicial nominee by a unanimous vote.

My point is simply this: Senate Democrats could not have less standing to pretend—pretend—that a vigorous examination of a nominee's judicial philosophy is somehow off limits.

My Democratic friends across the aisle have no standing whatsoever to argue that Senators should simply glance—just glance—at Judge Jackson's resume and wave her on through.

Our colleagues intentionally brought the Senate to a more assertive place. They intentionally began a vigorous debate about what sort of jurisprudence actually honors the rule of law. This is the debate Democrats wanted. Now it is the debate Democrats have. And that is what I will discuss tomorrow—why Judge Jackson's apparent judicial philosophy is not well suited to our highest Court.

VOTE ON MOTION

The PRESIDING OFFICER. Under the previous order, the question is on agreeing to the motion to discharge.

The yeas and nays have been previously ordered.

The clerk will call the roll.

The senior assistant legislative clerk called the roll.

The result was announced—yeas 50, nays 50, as follows:

[Rollcall Vote No. 127 Ex.]

YEAS—50

Baldwin	Hickenlooper	Reed
Bennet	Hirono	Rosen
Blumenthal	Kaine	Sanders
Booker	Kelly	Schatz
Brown	King	Schumer
Cantwell	Klobuchar	Shaheen
Cardin	Leahy	Sinema
Carper	Luján	Smith
Casey	Manchin	Stabenow
Coons	Markey	Tester
Cortez Masto	Menendez	Van Hollen
Duckworth	Merkley	Warner
Durbin	Murphy	Warnock
Feinstein	Murray	Warren
Gillibrand	Ossoff	Whitehouse
Hassan	Padilla	Wyden
Heinrich	Peters	

NAYS—50

Barrasso	Ernst	McConnell
Blackburn	Fischer	Moran
Blunt	Graham	Murkowski
Boozman	Grassley	Paul
Braun	Hagerty	Portman
Burr	Hawley	Risch
Capito	Hoeven	Romney
Cassidy	Hyde-Smith	Rounds
Collins	Inhofe	Rubio
Cornyn	Johnson	Sasse
Cotton	Kennedy	Scott (FL)
Cramer	Lankford	Scott (SC)
Crapo	Lee	Shelby
Cruz	Lummis	Sullivan
Daines	Marshall	Thune
Tillis	Toomey	Wicker
	Tuberville	Young

(Mr. PADILLA assumed the Chair.)

The VICE PRESIDENT. On this vote, the yeas are 50, the nays are 50.

The Senate being equally divided, the Vice President votes in the affirmative, and the motion is agreed to.

The nomination is discharged and will be placed on the calendar.

LEGISLATIVE SESSION

The PRESIDING OFFICER (Mr. PADILLA). Under the previous order, the Senate will resume legislative session.

The majority leader.

EXECUTIVE SESSION

EXECUTIVE CALENDAR—Motion to Proceed

Mr. SCHUMER. Mr. President, I move to proceed to executive session to consider Calendar No. 860.

The PRESIDING OFFICER. The question is on agreeing to the motion.

Mr. SCHUMER. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

The result was announced—yeas 53, nays 47, as follows:

[Rollcall Vote No. 128 Leg.]

YEAS—53

Baldwin	Hickenlooper	Reed
Bennet	Hirono	Romney
Blumenthal	Kaine	Rosen
Booker	Kelly	Sanders
Brown	King	Schatz
Cantwell	Klobuchar	Schumer
Cardin	Leahy	Shaheen
Carper	Luján	Sinema
Casey	Manchin	Smith
Collins	Markey	Stabenow
Coons	Menendez	Tester
Cortez Masto	Merkley	Van Hollen
Duckworth	Murkowski	Warner
Durbin	Murphy	Warnock
Feinstein	Murray	Warren
Gillibrand	Ossoff	Whitehouse
Hassan	Padilla	Wyden
Heinrich	Peters	

NAYS—47

Barrasso	Graham	Portman
Blackburn	Grassley	Risch
Blunt	Hagerty	Rounds
Boozman	Hawley	Rubio
Braun	Hoeven	Sasse
Burr	Hyde-Smith	Scott (FL)
Capito	Inhofe	Scott (SC)
Cassidy	Johnson	Shelby
Cornyn	Kennedy	Sullivan
Cotton	Lankford	Thune
Cramer	Lee	Tillis
Crapo	Lummis	Toomey
Cruz	Marshall	Tuberville
Daines	McConnell	Wicker
Ernst	Moran	Young
Fischer	Paul	

The motion was agreed to.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

The PRESIDING OFFICER (Mr. LUJÁN). The clerk will report the nomination.

The bill clerk read the nomination of Ketanji Brown Jackson, of the District of Columbia, to be an Associate Justice of the Supreme Court of the United States.

CLOTURE MOTION

Mr. SCHUMER. Mr. President, I proudly and happily send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The bill clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the nomination of Executive Calendar No. 860, Ketanji Brown Jackson, of the District of Columbia, to be an Associate Justice of the Supreme Court of the United States.

Charles E. Schumer, Richard J. Durbin, Patrick J. Leahy, Dianne Feinstein, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Richard Blumenthal, Mazie K. Hirono, Cory A. Booker, Alex Padilla, Jon Ossoff, Patty Murray, Raphael G. Warnock, Sherrod Brown, Elizabeth Warren, Margaret Wood Hassan, Tina Smith, Ben Ray Luján, Jacky Rosen.

The PRESIDING OFFICER. The Senator from Texas.

NOMINATION OF KETANJI BROWN JACKSON

Mr. CORNYN. Mr. President, later this week, perhaps in a day or two, the Senate will vote on the nomination of Judge Ketanji Brown Jackson to serve as a member of the U.S. Supreme Court.

Last week, I laid out my reasons for my opposition to this nomination, and yesterday, I voted against her nomination in the Judiciary Committee. But I want to make clear that my vote against Judge Jackson is not a rebuke of her legal knowledge, her experience, or her character. Judge Jackson is obviously very smart. She has vast practical experience, which I think is very useful. She is likeable. And she is very clearly passionate about her work.

The Senate's constitutional duty to provide advice and consent, though, requires us to look beyond Judge Jackson's resume and personality to understand her judicial philosophy and the lens through which she views her role as a judge.

Certainly, the Senate must evaluate whether Judge Jackson will act fairly and impartially. We have also got to make a judgment whether she will leave her personal beliefs and her policy preferences at the door and whether she will respect the bounds of her role as a judge or attempt to establish new judge-made law.

This last point is absolutely critical, in my view. The Founders wisely established a system of checks and balances to ensure that no person or institution wields absolute power. The legislative branch, of course, makes law; the executive branch enforces the law; and the judicial branch interprets the law. We have each got our responsibilities under the Constitution.

And while that is certainly a simplification of the duties of each of the three branches, it does illustrate that there are separate lanes or roles for each branch in our constitutional Republic. And we talked about that during Judge Jackson's confirmation hearing.

The judge said she understands the importance of staying in her lane. She used that phrase many times during the confirmation hearing. She said she would not try to do Congress's job making laws.

But over the years—and I think this is a blind spot for Judge Jackson and, frankly, many on the bench, particularly at the highest levels. Over the years, we have come to see a pattern of judges who embrace the concept of judge-made law.

In other words, it is not derived from a statute passed by the Congress, it is not derived from the text of the Constitution itself, but rather, it is made as a policy judgment without any explicit reference in the Constitution itself. Now, that, I believe, is judicial policymaking or legislating from the bench.

The Supreme Court over the years has developed various legal doctrines like substantive due process. That is a little more opaque, I would think, to most people than judge-made law, but basically, it is the same thing. It is a doctrine under which judges create new rights that are not laid out in the Constitution.

It shouldn't matter if a person ultimately agrees or disagrees with this new right. If you like the result, well, you are liable to overlook the process by which the judges reached a decision. But if you disagree with it, then, clearly, it is a problem to have judges—unelected, unaccountable to the voters—making policy from the bench, no matter what it is called.

It is deeply concerning, I think—and it should be—to all Americans, to have nine unelected and ultimately unaccountable judges make policies that affect 330-or-so million people and they can have no say-so about it at all. They can't vote for them; they can't vote them out of office; they can't hold them accountable. In fact, the whole purpose of judicial independence is so judges can make hard decisions, but they have to be tethered to the Constitution and the law, not made up out of whole cloth.

No judge is authorized under our form of government to rewrite the Constitution to their liking or impose a policy for the entire country simply because it aligns with their personal belief or their policy preferences.

As our Founders wrote in the Declaration of Independence:

> Governments are instituted among Men, deriving their just powers from the consent of the governed.

When judges find unenumerated and invisible rights in the Constitution and issue a judgment holding that, in essence, all State and Federal laws that contradict with their new judge-made law is invalid and unconstitutional, there is no opportunity for anybody to consent to that outcome like you would if you were a Member of the Senate or a Member of the House. People could lobby us. They could call us on the phone. They could send us emails, use social media to try to influence our decision. They could recruit somebody to run against us in the next election. They could vote us out of office if they didn't like the outcome.

But none of that would apply to lifetenured, unaccountable Federal judges making judge-made law at the highest levels—no consent of the governed, no legitimacy which comes from consent.

Abraham Lincoln made clear that it is the concept of consent that is the foundation for our form of government. He said famously: No man is good enough to govern another man without that man's consent.

Of course, he used that in the context of slavery, and he was right; but it has broader application as well.

As I said, when it comes to the executive and legislative branches, it is easy to see how consent and the legitimacy that flows from that comes into play. Voters cast their ballot for Senators, for Members of the House, for the President.

Once a person is in office, voters conduct what you could describe as a performance evaluation. The next time that person is on the ballot, voters determine whether that person should remain in office or be replaced by someone new.

But, again, that is not true of the judicial branch, which highlights and demonstrates why the judicial branch is different, why it shouldn't be a policy maker, why judges shouldn't be pronouncing judge-made law that is not contained in the Constitution itself.

It is important that our courts remain independent and be able to make those hard calls, but even people like Justice Breyer, who Judge Jackson will succeed on the Supreme Court, has written books worried about the politicization of the judiciary, and I think that is one reason why our judicial confirmation hearings can get so contentious—witness Brett Kavanaugh's confirmation hearing, which was a low point, I believe, for the Senate Judiciary Committee and for the Senate as a whole.

But people wouldn't get so exercised over these nominations if people were simply calling balls and strikes like the umpire at a baseball game. Judges should be umpires; judges should not be players.

So Justices on the Supreme Court are not held accountable at the ballot box, and they aren't evaluated every few years for their job performance. They are nominated by the President and confirmed for a lifetime appointment.

When Justices engage in blatant policymaking, it takes away the power of ''we the people'' to decide for ourselves and hold our government accountable. It speaks to that statement in the Declaration of Independence that says government derives its just powers from the consent of the governed. But that is totally missing when it comes to judge-made law and identifying new rights that are nowhere mentioned in the Constitution.

Again, I understand, when you like the outcome as a policy matter, you are not liable to complain too much. But we should recognize this over the course of our history as a source of abuse by judges at different times in our history, and we have seen the horrible outcomes of things like Plessy vs. Ferguson, where the Supreme Court, without reference to the Constitution itself, using this doctrine of substantive due process, said that ''separate but equal'' was the answer for the conflict between the rights of African-American schoolchildren and the rest of the population. They said it is OK. You can satisfy the Constitution if you give them separate but equal educations.

Well, of course, that is a shameful outcome, and we would all join together in repudiating that kind of outcome. And, thankfully, years later—too many years later—Brown v. Board of Education established that the ''separate but equal'' doctrine was overruled, and that is as it should be.

But the point I am trying to make here is whether it is the Court's decisions on abortion or the right to marry a same-sex partner or separate but equal, or even things like the Dred Scott decision, which held that African-American fugitive slaves were chattel property, or in the famous Lochner case, where the New Deal Justices struck down an attempt by the government to regulate the working hours of bakers in New York.

All of these involved the use of this substantive due process doctrine as a way to cover up and hide the fact that it was judges making the law and not the policymakers who run for office.

I am also afraid that Judge Jackson did not always adhere to her own admonition that judges should stay in their lane. In the case Make the Road New York v. McAleenan, the American Civil Liberties Union challenged a regulation involving expedited removal of individuals who illegally cross our borders and enter into the country.

The Immigration and Nationality Act gives the Department of Homeland Security Secretary ''sole and unreviewable discretion'' to apply expedited removal proceedings. Judge Jackson, who presided over the case challenging that rule, ignored the law. She went beyond the unambiguous text to deliver a political win to the people who brought the lawsuit.

She barred the Department of Homeland Security from using expedited removal proceedings to deter illegal immigration. She stopped the administration from enacting immigration policies it had clear authority to implement according to the black-letter law. Unsurprisingly, that decision was appealed and ultimately overturned by the DC Court of Appeals. But this is an example of not staying in your lane and not deferring to Congress the authority to make the laws of the land when the Congress has been unambiguously clear.

So, ultimately, I believe that demonstrates a willingness to engage in judicial activism and achieve a result, notwithstanding the facts and the black-letter law in the case, and to disregard the law in favor of a political win for one of the parties.

But this is just exactly what I started off talking about. This is the opposite of consent of the governed, when judges ignore the laws passed by Congress, even when congressional intent is clear.

Unfortunately, that wasn't the only example of activism in Judge Jackson's decisions. We have heard a lot about this, and I think it was an entirely appropriate subject for questions and answers. Judge Jackson is an accomplished and seasoned lawyer and judge, and she knows how to answer hard questions.

During sentencing hearings, Judge Jackson has said she disagreed with certain sentencing enhancements for policy reasons. That is the word she used—for policy reasons—and she chose to disregard its application. That is not staying in your lane.

She also used a compassionate release motion to retroactively slash a dangerous drug dealer's criminal sentence because she didn't like that the government brought a mandatory minimum drug charge, even though the government had every right to do so under the applicable law.

The promise of equal justice under the law requires judges to follow the law regardless of their own personal feelings about the policy. Justice Scalia famously said that if a judge hasn't at one time or another in his or her career rendered a judgment that conflicts with their own personal preferences, then they are probably not doing their job right.

It is absolutely critical for our Supreme Court Justice to not only acknowledge but to respect the limited but important role that our judges play in our constitutional Republic. They shouldn't allow politics or policy preferences to impact their decisions from the Bench, and they can't use their power to invalidate the will of the American people based on invisible rights that aren't actually included in the Constitution itself.

In 1953, Judge Robert Jackson observed that the Supreme Court is ''not final because [it is] infallible, but [it is] infallible only because [it is] final.''

In other words, the recourse that we the people have when judges overstep their bounds when it comes to constitutional interpretation is to amend the Constitution itself—something that has only happened 27 times in our Nation's history—and it is a steep hill to climb, to be sure.

But it is important for the legitimacy of the Supreme Court itself for the judges to be seen as staying in their lane and interpreting the law, not making it up as they go along. I am reminded of another quote about the scope of the Judiciary's duties and powers. In 1820, Thomas Jefferson wrote, ''To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.''

Once again, our Founders, our Founding Fathers, had the wisdom to establish three branches of government to share power to avoid any single person or institution from wielding absolute power, and to ensure that we maintain the proper balance of power, Justices need to stay in their lane and interpret the law, not make the law, particularly when the voters have denied consent from them for doing so.

So to summarize, to ensure that we maintain the proper balance of power under our Constitution, judges must only interpret the law and they can't allow activism to bleed into their decisions and they can't ignore black-letter law and they can't use doctrines like substantive due process to hide the fact that they are making up new rights that aren't contained anywhere in the written Constitution itself.

As I said before, I fear that, if confirmed, Judge Jackson will attempt to use her vast legal skills to deliver specific results and get outside of her lane by making judge-made laws that are not supported by the text of the Constitution itself. As I said in the Judiciary Committee, and I will say again, when the time comes to vote on Judge Jackson's nomination here on the Senate floor, I will once again vote no for the reasons I just stated.

The PRESIDING OFFICER. The Senator from Missouri.

UNANIMOUS CONSENT REQUEST—S. 3951

Mr. HAWLEY. Mr. President, I rise today to urge the Senate to take action to crack down on child pornography offenders and to protect our children. This is a growing crisis, and it is one that is near to the heart of every parent in America. I can attest to that as a father of three small children myself. I have got a 9-year-old, a 7-year-old, and a 16-month-old baby at home.

But I can also attest to it as a former prosecutor. As the attorney general for the State of Missouri, one of the first things I did was establish a statewide anti-human trafficking initiative and task force because what I saw as attorney general of my State was that human trafficking, including, unfortunately, child sex trafficking, is an exploding epidemic.

In my State and around our country, children are exploited, children are trafficked. And those who work in this area and those who prosecute in this area—law enforcement who work day in and day out—will tell you that the explosion of child pornography is helping to drive this exploding epidemic of child sexual exploitation and child sex trafficking.

The problem is that child porn itself is exploding. A New York Times investigative reporter found that in 2018, there were 45 million images of children being sexually exploited available on the internet—45 million. Just a few years before, it had been 3 million and in 2018, 45. Then, last year, the National Center for Missing and Exploited Children found that that number had grown to 85 million—85 million images on the internet of children being brutally sexually exploited.

And as every prosecutor and every law enforcement advocate and every law enforcement agent who works in this area will tell you, that explosion of this material—which, by the way, is harmful in and of itself, is exploitative in and of itself—is driving a crisis of child exploitation and child sex trafficking in this country.

Now the nomination of Judge Ketanji Brown Jackson to the Supreme Court has helped bring this issue front and center. Her record of leniency to child sex offenders has been much at the center of her hearings, and it has startled the public. A recent Rasmussen survey found that following her hearings, 56 percent of all respondents said that they were troubled by her record on child sex offenders. That included 64 percent of Independents.

And they are right to be troubled. Her record is indeed startling. In every case involving child pornography where she had discretion, she sentenced below the Federal sentencing guidelines, below the prosecutor's recommendations, and below the national averages.

We now know that the national average for possession of child pornography—the national sentence imposed, on average, is 68 months. Judge Jackson's average is 29.3 months. The national average sentence for distribution of child pornography: 135 months; Judge Jackson's average, 71.9 months.

In fact, it is true for criminal sentencing across the board. The national average of all criminal sentences imposed in the United States, 45 months; Judge Jackson's average, 29.9 months.

This is a record of leniency. In the words of the Republican leader, leniency to the ''extreme'' to child sex offenders and on criminal matters in general.

But—but, but, but—we are told, and have been told for weeks on end now, it is not really her fault. We were told by the White House and Senate Democrats that it is not her fault because those Federal sentencing guidelines that she, in every case where she could went below—those guidelines aren't binding. Thanks to the decision by the Supreme