

the Senator will not be allowed to get access to the floor for the rest of the day; and maybe other penalties. We have not done that, but maybe we need to do it. So that is my purpose for coming to the floor.

I want to make a couple of other comments.

Mr. GRAHAM. Will the Senator yield for another question?

Mr. NICKLES. I am not going to yield. I am going to make one other comment on a different subject.

#### JUDICIAL NOMINATIONS

Mr. NICKLES. Mr. President, earlier today we confirmed a total of eight judges. A lot of people said, boy, didn't we do great? We have done more in the last 12 months than anybody has done in the last 12 months.

I thank Senator DASCHLE, Senator LEAHY, and others because we did confirm a few more circuit court judges, but let me state my disappointment in the fact that we have not done near enough. I want to put out facts. We have now confirmed 13 circuit court judges. President Bush submitted 32. We are in the second year of his Presidency. We are not quite finished, but we have confirmed 40 percent of his circuit court nominees. I looked at the first 2 years of the Clinton administration, and this Senate confirmed 19 of 22. That is 86 percent. I looked at the first 2 years of the first President Bush, the 101st Congress, and we confirmed 22 of 23 circuit court judges. That is 95 percent.

I looked at the first 2 years of President Reagan, 97th Congress, we confirmed 19 of 20 of his circuit court nominees. That is 95 percent.

So for the three previous Presidents we confirmed over 90 percent of their circuit court nominees in their first 2 years.

This Congress—and granted, the first several months, the first 6 or 7 months of this Congress was controlled by Republicans and we did not confirm any judges because the President was just sending his nominees through and they did not have time, and that is not unusual. We usually do not confirm very many in the first 6 months of any administration.

So far this year, we have done 13 out of 32; that is 40 percent. That is less than half the percentage of what we did in three previous Presidencies. Those are just facts. I heard someone said we confirmed 72 judges. Great, 72 is a lot more than we confirmed in the last 2 years of the Clinton administration. Granted, we usually don't confirm very many in the last year of a President's terms, but in the first 2 years we usually do, and we are way behind.

Some of the individuals were nominated 449 days ago—over a year ago. They were nominated last May—a year ago May. Some of these are the most outstanding nominees I have ever seen. John Roberts, nominated for the DC Circuit, has argued 37 cases before the

U.S. Supreme Court. Is this individual qualified? He was nominated a year ago in May, and he has yet to have a hearing. He has argued 37 cases before the Supreme Court. How do you get more qualified? Miguel Estrada argued 15 cases before the Supreme Court and was unanimously rated well qualified by the ABA. He emigrated to the United States as a teenager from Honduras and spoke virtually no English. He graduated magna cum laude from Harvard Law School, editor of the Harvard Law Review, law clerk to Justice Kennedy, a former assistant solicitor general and assistant U.S. attorney. He has not received a hearing.

I guess you can say, we have confirmed 72 this year, how is it fair to have 2 individuals such as John Roberts and Miguel Estrada not even have a hearing, having been nominated over a year ago? Senator LEAHY made a commitment we would do Miguel Estrada. I am waiting.

Priscilla Owen: We had a hearing in July of this year but no vote. The Republicans asked that be postponed because we are not sure where the votes are. Texas Supreme Court justice since 1994; unanimously rated well qualified by ABA; Baylor Law School graduate; member, Baylor law review; highest scorer on the Texas bar exam; eminently qualified.

Maybe some people are now putting a litmus test in the committee. We did not used to do that. People used to rail against having a litmus test, and now people are trying to come up with a litmus test. If she is not confirmed, that is a travesty.

Terrence Boyle was nominated in May, a year ago chief judge of the U.S. District Court, District of North Carolina, since 1997; unanimously rated well qualified. He worked as counsel in the House Subcommittee on Housing; was a legislative assistant in the Senate; prior district judge, 1984 to 1987; very well qualified and still no hearing and certainly has not had a vote.

Michael McConnell, nominated to the Tenth Circuit; presidential professor of law, University of Utah; unanimously rated well qualified by ABA; one of the country's leading constitutional law experts; argued 11 cases before the U.S. Supreme Court; prior assistant solicitor general; law clerk for Justice Brennan and cannot even get a hearing.

Deborah Cook, nominated to the Sixth District; justice to the Supreme Court of Ohio since 1994; unanimously rated well qualified by ABA. The Sixth Circuit is almost half vacant, with 7 out of 16 seats empty in the Sixth Circuit; exceptionally well qualified and no hearing.

Jeffrey Sutton, nominated to the Sixth Circuit as well; rated well qualified by ABA and qualified by ABA; graduated first in his class, Ohio University College of Law; law clerk to Supreme Court Justices Powell and Scalia, and argued 9 cases and over 50 merits and amicus briefs before the Su-

preme Court; and prior State Solicitor of the State of Ohio. He has yet to have a hearing in the Judiciary Committee.

Dennis Shedd, nominated to the Fourth Circuit; a judge in the U.S. District Court of South Carolina since 1991; rated well qualified by ABA; 20 years of private practice and public service prior to becoming a district judge; law degree from the University of South Carolina; master of law degree from Georgetown. He received a hearing on June 27—still not reported out of committee.

I thank my colleagues for the fact we have confirmed 72 judges, but I mentioned 8 nominees who were nominated in May of last year; a couple have had a hearing, and the rest have not had hearings and have not been voted on in committee, and we have not had a chance to have a vote on the floor. A year and a half, how much is enough? This is an outrage. I don't think this should be done, Democrat or Republican.

I plan on being back in the majority, and I tell my friends and colleagues on the other side of the aisle, I plan on treating judicial nominees fairly. Regardless of who is in the White House, we should treat them fairly. If there is a judge really out of the mainstream, let's debate it. But to hold up these individuals who have argued 30, and 15, and 9, and 10 cases before the Supreme Court and we do not even give them a hearing in committee, that is not fair. That is an injustice. That is an abuse of power.

Maybe we are confirming district judges, and that is great, and district judges have sponsors of Senators. These are appellate court judges, circuit court judges, next to the highest court in the land, next to the Supreme Court, and they cannot get a hearing. I don't think that is right. I don't think it is fair. I am not saying there have not been injustices before by Republicans. Enough of this nonsense: You did not treat us right, we are not going to treat you right.

Again, the tradition of the Senate: We do not usually confirm a lot of nominees in a President's last year or so. We certainly do his first year or so, as evidenced by the fact—and I will put this in the Record—that 95 and 96 percent of the three previous Presidents' circuit court nominees were confirmed in the first 2 years—almost all of them—and this year we are at 40 percent on circuit court nominees.

That is totally unsatisfactory. That is not fair to those individuals. It is not fair to the judicial system. It is certainly not fair to the Sixth Circuit Court, which is almost half vacant.

I tell my colleagues, we have made some progress, and my compliments. But we have a lot more to do, especially on circuit court nominees and on individuals such as John Roberts and Miguel Estrada. Let's lower the rhetoric and get some people confirmed. Let's treat them like individuals, with dignity. They have been nominated to

the highest courts in the land. They have been nominated for lifetime appointments. Let's do our work. The Senate traditionally, over the years, would move judicial nominees expeditiously. And they are getting more difficult.

Now people are saying: We want to review every case that the judge has ever written; we want to review every case on which he made a recommendation. That is ridiculous. It is an excuse for delay. That is not right. It is not for the majority or the minority. I urge my colleagues to be fair to the nominees and get as many confirmed and move the Senate along as we should and restore the Senate through the great traditions that the Senate has long held so we can be worthy of the title of Senator, and not have a reputation of: I am sorry, judge, we are sorry about your political career or, Mr. Attorney, you were nominated by the President of the United States, but we are sorry you have waited a year and a half and you cannot get a hearing before the Senate; they are too busy. That embarrasses me.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GRAHAM. I ask unanimous consent the order for the quorum call be rescinded.

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

#### HEALTH CARE

Mr. GRAHAM. Mr. President, this is the last day of a long legislative session. We are about to take the month of August to go back to our home States, be with our constituents, and maybe have a little opportunity to get some personal relaxation and rejuvenation, and come back after Labor Day and complete this 107th session of Congress.

It is exactly this time in the legislative calendar where maybe tempers and tolerance are beginning to wear thin and short.

I share with my friend from Oklahoma high feelings for the persons who debated vigorously over the last 2 weeks on an issue whose importance we all understand and feel deeply about, which is the issue of providing a health care program to 40 million senior Americans by adding to that 37-year-old program, at long last, a prescription drug benefit. I think the goal is one we all share. We have somewhat different ideas as to how to get to that goal.

The reason I came to the floor earlier today was out of, yes, a sense of personal attack but also a sense of the need to set a very obvious erroneous record somewhat straighter. My concern was piqued by a statement that was made which implied that I, Senator SMITH, and others, tried to slip something by the Senate. And that

"something" was not a small amount, but a very substantial, maybe as much as a \$70 billion additional cost on the States according to my Republican colleagues.

I knew that was not accurate because I had received from the Congressional Budget Office, which had scored our legislation, the fact that they had determined that, in fact, there was no additional cost to the States and I had made that representation to my colleagues. I felt my personal credibility was at stake. So I went back to the Congressional Budget Office today to recheck what they had said and they reaffirmed the statement that there was no additional cost to the States.

I showed them this—

Mr. NICKLES. Will the Senator yield?

Mr. GRAHAM. Let me just finish, get the facts out, and then we will talk about the policy.

So I showed them this chart. They pointed out what was obvious which was that this chart only shows half, in fact less than half of the equation. It shows the additional costs to the States that will come incident to their picking up some of the prescription drug costs. What it does not show is that the States are going to be relieved of a substantial amount of their current costs.

The Senator from Oklahoma mentioned one of these costs. But, in addition to that, there are other costs from which the States will receive relief. For example, there are 31 States that provide State pharmacy assistance for low-income senior citizens, the States which have received Medicaid waivers in order to allow them to cover additional groups of seniors. As the Federal Government has dawdled on the subject of providing prescription drugs for senior Americans, many States have stepped forward and have done so.

So within the Medicaid Program as well as in areas where the States have tried to fill the void that the Federal Government has left behind, there are substantial savings to the States—thus the report of the Congressional Budget Office that there is no increased cost to the States. But there is no column or figures on this chart which reflect the fact that there are these offsetting savings to the States.

Mr. NICKLES. Will the Senator yield?

Mr. GRAHAM. What got Enron in trouble was it set up a whole constellation of off-budget partnerships in order to hide their expenses.

Mr. NICKLES. Will the Senator yield for a question?

Mr. GRAHAM. And therefore it overstated their profitability.

We have a chart here which does the opposite. We have a chart here which hides the benefits the States are going to get and only highlights those additional costs.

Mr. NICKLES. Will the Senator yield for a question?

Mr. GRAHAM. I am almost there.

Therefore, presenting the impression that the passage of this amendment would result in substantial additional cost to the States—touted to be \$70 billion—is a patently untrue statement.

I wanted to set the record straight before we went home so none of our colleagues spend August worrying that they might have been deceived into believing there was going to be a very major additional cost to the States and that might have influenced their vote on this matter.

So my only purpose was to make those corrective comments and express my hope that in the future we would follow the spirit and custom of the Senate, which is when you distribute a document such as this, you put your name on it so someone is held accountable. And I suggest it would also be helpful if we adopted the custom that there be some source given for documents such as this, so those who are interested in pursuing the basis upon which the calculation was made would at least know whose telephone number to call.

Mr. NICKLES. Will the Senator yield?

Mr. GRAHAM. I would be pleased to yield.

Mr. NICKLES. I am wondering about all these savings. I am looking at my State. You said if the State had a prescription drug program, the Federal Government might be picking up a lot of that State program so therefore it is saving. My State doesn't have that, other than the fact we provide Medicaid prescription drugs up to 74 percent, and that is limited to three prescriptions per month.

So where is the savings for my State? HHS said this is going to cost my State something like \$62 million. My director of Medicaid said it is going to cost our State, and we can't afford it.

There, obviously, under your proposal are some States, maybe a lot of States, that would be losers; isn't that correct? It would increase their Medicaid costs dramatically?

Mr. GRAHAM. What CBO has said is that for the States as a collective, that there would be no additional cost as a result of this. I have asked CBO to prepare a State-by-State analysis of what those offsetting savings would be. I do not have those numbers today.

Mr. NICKLES. Isn't it likely that some States would be losers?

Mr. GRAHAM. But I think it is a given that no State is going to have zero savings. So that every one of these State-by-State numbers is overstated.

Mr. NICKLES. I don't know. I will just state to my friend that these are additional new costs. There may be some offsets. I mentioned one possibility. You mentioned: Well, if they have the State drug program, that might be a savings. I didn't have that program.

The only offsets I could see is if the Federal Government is taking over some of the catastrophic, and I don't see that hardly ever happening. So I