and have a vote, not be killed by 11 Senators in the Judiciary Committee, or 10, or whatever the number may be.

So, I accept part of the blame. I acknowledge that Republicans have not always handled judges in the right way. But I ask the question again, what next? We are going to kill them in committee? We are going to kill them by filibuster? This is wrong, my colleagues. We should not do this.

We are starting down a trail that is unfair, and it is going to come back to haunt this institution, haunt both parties, and damage the lives of innocent men and women.

I urge my colleagues, find a way to move this judicial nominee, Miguel Estrada. He deserves better. He should be confirmed.

Some people say: Wait, if we don't stop him now, he may be on the Supreme Court. Well let's test him. Let's confirm him. Let's see how he does. We might be surprised. We might even be disappointed. I have been surprised at times. I voted for a couple of Supreme Court Justices and wished I could take the vote back because when they got there, they were not what I thought they were going to be. Men and women can do surprising things when they become Federal judges for life.

So I just felt a need to come down and recall some of the things that have happened, admit some of the mistakes, try to sober this institution up. This is a great institution that does pay attention to precedents. It does, sometimes, start in the wrong direction, but most of the time we pull ourselves back from the brink; we find a way to get it done. I hope and I certainly feel down deep we are going to find a way to not set this precedent and not defeat this qualified nominee with a filibuster.

I yield the floor.

Mr. KENNEDY. Mr. President, I want to make a brief response to the points made by our colleagues on the floor and in the press during the past week.

It is not true that majority rule is the only rule in our country. The purpose of the great checks and balances under the Constitution is to protect the country from the tyranny of the majority. As far as shutting off debate in the Senate is concerned, majority rule has not been the rule since 1806. Even in our presidential elections, majority rule is not the rule, or we would have a different President today.

There is nothing even arguably unconstitutional about the Senate Rule providing for unlimited debate unless and until 60 Senators vote to cut off debate. The same Constitution which gave the Senate the power of advice and consent gave the Senate the power to adopt its own rules for the exercise of all of its powers, including the rules for exercising our advice and consent power.

The Constitution does not say that judges shall be appointed by the President as he wishes. It says that they shall be appointed by the President with the advice and consent of the Senate. We are not potted plants decorating one end of Pennsylvania Avenue. We play a very special role under the Constitution. The Founders gave us numerous powers to balance and moderate the powers of the President. They gave us longer terms than the President, and staggered our terms, so we would be less subject to the passions of the time. Clearly, we have the power and the responsibility to oppose the President when he refuses to provide us with the only documentation that can tell us what kind of person he has nominated for a lifetime appointment on the Nation's second highest court.

The PRESIDING OFFICER. Under the previous order, the Senate will now proceed to the consideration of Executive Calendar No. 36, which the clerk will report.

NOMINATION OF JAY S. BYBEE, OF NEVADA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

The assistant legislative clerk read the nomination of Jay S. Bybee, of Nevada, to be United States Circuit Judge for the Ninth Circuit.

The PRESIDING OFFICER. Under the previous order, there will now be 6 hours of debate equally divided in the usual form on the nomination.

The Senator from Nevada.

Mr. REID. Mr. President, Senator LEAHY, the manager of this side, requested that I speak now.

Mr. President, I am pleased that we will be moving forward on the nomination of Jay Bybee for U.S. Court of Appeals for the Ninth Circuit. This is an important job which Jay Bybee will have. It is the largest circuit as far as the number of judges that we have.

The chairman of the Judiciary Committee is here. I would be happy to yield to the chairman of the committee.

Mr. President, the Ninth Circuit is the largest circuit, with a full complement of 28 or 29 judges. It is a circuit that certainly is important to my State, the State of Nevada, and the entire western part of the United States. It is a controversial circuit. There have been efforts made in the past to change the makeup of the court and have States divided so we could create another circuit. No one can take away from the importance of this circuit. The State of California alone, with some 35 million people, is under the jurisdiction of the Ninth Circuit Court of Appeals.

The last time I had a conversation with a member of the Bybee family was on an airplane. Mrs. Bybee was on the plane. She is a lovely woman. Certainly Jay Bybee is a proud husband and father, as well he should be. I commented to Mrs. Bybee, Why does he have to write so much? He has written Law Review articles. He has written lots of articles on very controversial subjects. But the good thing about Jay Bybee is that he can explain why he wrote those articles. He is a person—while some may disagree with the conclusions that he reached in his large articles—who has the intellectual capacity to explain his reasoning. He has excellent legal qualifications, not only from an educational perspective but from an experience perspective.

He served as legal adviser during the first Bush administration. He has helped to teach a generation of new lawyers as a former professor at the University of Nevada, Las Vegas Boyd School of Law, and he has taught at other places. He is someone who will bring distinction to the Ninth Circuit.

He was favorably reported by the Senate Judiciary Committee on February 28. The swift pace of this nomination demonstrates how the process can work when both sides of the aisle work together, when the President works with Senators of the other party, and when the advise and consent clause of our Constitution is respected.

Senator JOHN ENSIGN and I work closely on all issues that affect Nevada, and on judges it is certainly no different. JOHN ENSIGN is a class act. The way he handles being in the majority is classic. We know the difference, both having served in the majority. It would be certainly easy for him just to submit a name and not run it past me. But, of course, he didn't. When he came up with the name Bybee, I said of course.

I have a lot of reasons for supporting people named Bybee. One reason is—I don't know the lineage—because there are a lot of Bybees in Utah and Nevada. But when I was in college I fought for a man by the name of ''Spike'' Bybee. He was a police officer in Cedar City, UT. But he devoted long hours of his time training fighters. ''Spike'' moved to Las Vegas where he became a respected probation officer. But my fondest memories of ''Spike'' Bybee were during the time he spent with me taking me in Arizona, Utah, and Nevada as my manager. Anyway, just for no other reason than I traveled around the country with someone who helped me through some difficult times—a fine man. He died at a young age from a very bad disease. I have the name Bybee in my mind from some of the times in my youth.

I indicated Senator ENSIGN and I consulted on Mr. Bybee's nomination when Senator LEAHY chaired the Judiciary Committee for a short time. Mr. Bybee was reported out of the Judiciary Committee in compliance with the committee's rules when Senator HATCH was chairman.

The consultation and respect for the rules is why we are here today, moving forward to fill the Ninth Circuit seat held by Proctor Hug, Jr. since 1977.

I must say a few things about Proctor Hug. He is a fine man and a great athlete. He went to Sparks High School. He was an all-star athlete in football, track, and basketball. He ran track in college, was State debate champion. He was student body president at Sparks High School. He met his

future wife, Barbara Van Meter, at Sparks High School. He became student body president at the University of Nevada.

He served his country honorably in the Navy and then went to one of the most prestigious law schools in the entire country, Stanford Law.

He was appointed by President Carter and became Chief Judge of the Ninth Circuit in 1996. He was a good ''Chief,'' as the other judges called him. He came back here a lot of times lobbying as a judge for issues important to the Ninth Circuit and the Federal judiciary.

Judge Proctor Hug set a fine example of what it means not only to be a judge but to serve your community and your country.

To show what great judgment Proctor Hug has, two of my sons were his law clerks, and one was his administrative assistant when he was chief judge. He signed up with Judge Hug for 2 years. He was a fine administrative assistant.

I expect Jay Bybee will follow in the evenhanded and impartial path set by his predecessor, Judge Proctor Hug.

The point is that where there is consultation, the nominating process works well. When consultation was the rule, where blue slips were issued and made public, the body swiftly confirmed 100 judges, as my friends know.

Talking about the 100 judges, when we were in control of the Senate—even over here in the minority, 11 judges by the end of today will have been approved for the circuit court, the trial court, and the Court of International Trade. In the last 24 hours we will have approved five judges—a circuit court judge, two trial court judges yesterday, and two today. We are moving along quite well.

I am not going to get into we did this and they did that. The fact is whoever did what, we are still filling a lot of judicial vacancies around the country.

I think it is important that we proceed to recognize we have a problem with Mr. Estrada. I know my dear friend, the junior Senator from Mississippi, the majority and minority leader during my time here in the Senate, recognizes that if he is going to get Estrada done, something different has to be done than what we have been doing.

I read in today's New York Times where the junior Senator from Mississippi said—I am paraphrasing, but he basically says: If we—talking about the Republicans—want to get Estrada done, then we are going to have to do something different. And, obviously, what we want done is to have supplied the records when he was in the Solicitor's Office and reconvene the committee and have the hearing.

Now, there are people who may vote for Estrada, if we could get through that process—Democrats. I think there would be a number of them. But until we get that information, and find out if something is being hidden—maybe there has been a perusal of all those documents, and maybe they can't be given to us. Maybe they can't be given to us because he has said things there. Maybe, as Paul Bender said, he is such an ideologue, and maybe he has written about all those things Paul Bender said when he was in the Solicitor General's Office. I don't know. But I would suggest that would be the best way to get over this hump.

The fact is, though, today we should not be dwelling on what we have not been able to do, but we should be talking about what we have done.

Today, we are going to confirm a circuit court judge. We are going to make a man—Uay Bybee—so happy; he was, on more than one occasion during his short tenure at the University of Nevada, Las Vegas—a new law school just accredited—selected as the No. 1 professor, the best professor, at that law school. He was not selected by the other professors. He was selected by the students.

Jay Bybee has a great personality. He has an in-depth knowledge of the law. He comes with a background from a wonderful family. I am so glad we are able today to confirm this man for a lifetime appointment to the Federal judiciary.

We keep talking about the DC Court of Appeals being right under the Supreme Court. So is the Ninth Circuit. It is the highest court you can serve on except for the Supreme Court.

Jay Bybee will serve with distinction and honor, and not only represent the State of Nevada well, and the students he taught at Louisiana and UNLV, but he will also represent the whole country, being a credit to the bar and to the judiciary.

The PRESIDING OFFICER. Who yields time?

Mr. HATCH. Mr. President, I yield such time as he needs to the distinguished junior Senator from Nevada.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. ENSIGN. Mr. President, I thank the senior Senator from Nevada, my colleague, Mr. REID, for all of the work he has done in helping us shepherd the nomination of Jay Bybee through this nomination process for the Ninth Circuit Court of Appeals. Without his help, with the way things are around here, we know this would not be happening today. That would be a shame because Jay Bybee is incredibly qualified. Everybody who has ever been associated with him understands that.

Mr. President, I rise today to speak to my colleagues about a man of the highest legal distinction, Mr. Jay Bybee. Mr. Bybee's experience and background, and his unquestioned dedication to the fair application of the law, make him an ideal nominee for the Ninth Circuit Court of Appeals.

As many of you know, Mr. Bybee appeared before this body in 2001 as a nominee to serve as Assistant Attorney General in the Office of Legal Counsel at the Department of Justice. He was confirmed unanimously by the Senate on October 23, 2001.

As head of the Office of Legal Counsel, Jay assists the Attorney General in his role as legal advisor to the President and all the executive branch agencies. The Office is also responsible for providing legal advice to the executive branch on all constitutional questions and reviewing pending legislation for constitutionality.

Though a native of the chairman's home State of Utah, Nevada is proud to claim Jay as one of its own. Before his confirmation in the Senate in 2001, Mr. Bybee joined the founding faculty and served as a Professor of Law at the William Boyd School of Law at the University of Nevada, Las Vegas. Mr. Bybee's scholarly interests have focused in the areas of constitutional and administrative law. His dedication to ensuring that young law students learn the highest standards of legal practice resulted in his being named the Professor of the Year in 2000.

Mr. Bybee is known throughout the legal community as one of the foremost constitutional law scholars in the United States. He is regarded as extremely fair minded and adheres to the highest ethical and professional standards. He is admired throughout the legal profession as both a leader and a gentleman. Most importantly, Jay understands the rule of law, and will consistently and carefully consider the arguments on both sides of a legal question with an open mind. Because of Jay's combination of his legal skills along with his commitment to fairness, I have no doubts that he will serve in the best traditions of the federal judiciary.

If confirmed, Mr. Bybee's service will be an invaluable asset to the Ninth Circuit Court of Appeals. As you are aware, the Ninth Circuit is facing an overwhelming caseload, and the seat that Mr. Bybee has been nominated is designated as a ''judicial emergency'' by the Judiciary Conference of the United States.

Caseloads in the entire federal court system, including in the Ninth Circuit, continue to grow dramatically. Filings in the federal appeals court reached an all time high again last year. The Chief Justice recently warned that the alarming number of vacancies, combined with the rising number of caseloads, threatens the proper functioning of the federal courts. The American Bar Association has called the situation an ''emergency.''

There are currently four vacancies in the 28-judge court of the Ninth Circuit Court of Appeals, with one more vacancy already announced effective in November 2003. The Judicial Conference has asked for two new permanent and three temporary seats on the Ninth Circuit, just to cope with the caseload. That brings the total to 33 judges that are needed just to handle the caseload on the Ninth Circuit. Today there are only 24 judges doing the job of 33. This situation has to change.

That is why it is extremely important that the Senate approve the nomination of Jay Bybee today, and that the Senate continue to consider each one of the President's judicial nominations as quickly as possible.

I would like to thank the chairman and the entire Judiciary Committee and their staff for their hard work in shepherding this nominee through the process. I urge my colleagues in the Senate to vote in support of Jay Bybee's appointment to the Ninth Circuit today.

Mr. President, I first met Jay Bybee a few years ago. I had previously heard some great things from people in the community of southern Nevada about this legal scholar out at the new UNLV Boyd School of Law. I wanted to sit down and meet with him, to talk to him, and just pick his brain about the Constitution.

I am a veterinarian by profession, so I am not a lawyer and did not attend law school as many of our colleagues have. I thought, the more I could learn from scholars such as Jay Bybee, the educated I would be and therefore the better Senator I would be.

We sat down for over an hour. I could have stayed there all day. He has a fascinating mind. He has incredible knowledge of the Constitution, of this nation's history and of case law.

When I first was elected to the Senate, because President Bush had been elected I knew it would come upon me to recommend judges for the State of Nevada. I didn't have many ties in the legal community, so I had to look to Nevadans on whom I could count on for advice. One of the people I went to was Jay Bybee. He helped me tremendously in the interview process.

I actually felt sorry for the people who were coming before us because of the difficulty and depth of the questions Jay Bybee would ask them. It was because of that experience, when this process came forward, that I sent his name to the White House.

When the White House began to consider Jay Bybee, they realized immediately what a talent he is. That is why the Attorney General's Office took him away from the Boyd School of Law, to the position he is now in, in the Attorney General's Office. He advises the Attorney General on constitutional matters. That is how much they think of his constitutional expertise.

At the Boyd School of Law, and in the legal community in Nevada, there is nobody more highly thought of as a constitutional expert than Jay Bybee—both liberals and conservatives. They understand his expertise and the way he looks at law. Literally, I have talked to students from the far left end of the political spectrum to the far right end of the political spectrum, and they all talk about him with glowing remarks. It is truly amazing. I think it tells a lot to his character and a lot to his intellect.

I think he has the right tools intellectually, the right temperament and the right character to serve on the 9th Circuit. He has all the qualifications we want for someone to be on the Ninth Circuit—and especially the Ninth Circuit, the most controversial circuit we have in the United States. As you know, this is the circuit that just ruled that the Pledge of Allegiance is unconstitutional, and this body voted unanimously to condemn that and say we do not agree with that interpretation.

The Ninth Circuit needs help. We need qualified judges to give that help. Jay Bybee is exactly the kind of person we need to the 9th Circuit. There are currently four vacancies on the Ninth Circuit, and soon to be a fifth. The Judicial Conference recently also requested two new permanent judges and three temporary judges. They have a huge crisis on the Ninth Circuit because there are so many backlogged cases. It has been said on this floor: Justice delayed is justice denied. That is what is happening in the Ninth Circuit.

So it is important to approve Jay Bybee's nomination today, and to begin our work to appoint other judges to fill those vacancies I mentioned. It is my hope that we can get the new judgeships approved through this body so the Ninth Circuit can catch up on their caseload.

So enthusiastically, Mr. President, I recommend that we vote to confirm this outstanding nominee, Jay Bybee. He is a great family man. He will make a great judge. And he will be there for a long time, God willing, having a positive influence on the Ninth Circuit.

With that, I once again thank the senior Senator from Nevada. I also thank the chairman of the Judiciary Committee for his work in getting Jay Bybee's nomination to the floor. We appreciate all the indulgences. I know the Chairman has to constantly answer to each individual Senator, and we can be kind of a pain sometimes, but we sure appreciate the work done in getting Jay Bybee's nomination to this day when we can finally get him confirmed.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I thank my two colleagues from Nevada. You very seldom see two colleagues from different parties working so well together. They are both excellent people.

We all respect Senator REID. He is one of the moderate voices around here who tries to get things to work. And I personally appreciate it. And the distinguished junior Senator from Nevada, Mr. ENSIGN—I have not seen a better Senator in years. He is certainly making a difference on our side. And I believe, working with his colleague on the other side, he is getting a lot of things done for Nevada and for the Intermountain West, and it is terrific. So I pay tribute to both of them.

I am pleased we are considering the nomination of Jay S. Bybee who has been nominated by President Bush to serve on the United States Court of Appeals for the Ninth Circuit. Professor Bybee has a sterling resume and a record of distinguished public service. I know him personally. I am a personal friend. I know his quality. I know what a good thinker he is. I know what a great teacher he has been. I know what a great job he has done down at Justice. He is a person everybody ought to support because he is a truly wonderful, upright, good, hard-working, intelligent individual.

Professor Bybee is currently on leave from the University of Nevada at Las Vegas William S. Boyd School of Law, where he has served as a professor since the law school's founding in 1999. Since October 2001, he has served as Assistant Attorney General for the Department of Justice Office of Legal Counsel. Notably, this is a post formerly held by two current Supreme Court Justices. As head of the Office of Legal Counsel, Professor Bybee assists the Attorney General in his function as legal advisor to the President and all executive branch agencies. The office also is responsible for providing legal advice to the executive branch on all constitutional questions and reviewing pending legislation for constitutionality.

Professor Bybee, a California native, attended Brigham Young University, where he earned a bachelor's degree in economics, magna cum laude, and a law degree, cum laude. While in law school, he was a member of the BYU Law Review.

Following graduation, Professor Bybee served as a law clerk to Judge Donald Russell of the Fourth Circuit Court of Appeals before joining the firm of Sidley & Austin—one of the great law firms. In 1984, he accepted a position with the Department of Justice, first joining the Office of Legal Policy, and then working with the Appellate Staff of the Civil Division. In that capacity, Professor Bybee prepared briefs and presented oral arguments in the U.S. Courts of Appeals. From 1989 to 1991, Professor Bybee served as Associate Counsel to President George H.W. Bush.

Profeesor Bybee is a leading scholar in the areas of constitutional and administrative law. Before he joined the law faculty at UNLV, he established his scholarly credentials at the Paul M. Hebert Law Center at Louisiana State University, where he taught from 1991 to 1998. His colleagues have described Professor Bybee as a first-rate teacher, a careful and balanced scholar, and a hardworking and open-minded individual with the type of broad legal experience the Federal bench needs.

Professor Bybee comes highly recommended. One of his supporters is Mr. William Marshall, a professor of law at the University of North Carolina. Mr. Marshall served in a number of high-level posts in the Clinton administration including a stint as Deputy White House Counsel and, notably, as a counsel in the Office of Legal Policy at the

Department of Justice, where he participated in the judicial selection process by screening prospective Clinton administrative nominees. In his letter to the committee supporting Professor Bybee, Mr. Marshall said:

The combination of his analytic skills along with his personal commitment to fairness and dispassion lead me to conclude that he will serve in the best traditions of the Federal judiciary. He understands the rule of law and he will follow it completely.

Stuart Green, a law professor at Louisiana State University who describes himself as a ''liberal Democrat and active member of the ACLU,'' said:

I have always found [Jay Bybee] to be an extremely fair-minded and thoughtful person. Indeed, Jay truly has what can best be described as a 'judicious' temperament, and I would fully expect him to be a force for reasonableness and conciliation on a court that has been known for its fractiousness.

This self-described liberal Democrat states that Professor Bybee will bring some balance to the Ninth Circuit. I remind my colleagues that in this court 14 of the 24 active judges, including 14 of the last 15 confirmed, were appointed by President Clinton.

This court was recently in the news with yet another controversial decision. We are all familiar with the Ninth Circuit's recent ruling which held the Pledge of Allegiance to the Flag as unconstitutional under the Establishment Clause because the Pledge contains the phrase ''under God.''

The Ninth Circuit's high reversal rate by the Supreme Court is well documented, but less well known is the Ninth Circuit's propensity for reversing death sentences, with some judges voting to do so almost as a matter of course. No doubt the Ninth Circuit has some of the nation's most intelligent judges, but some cannot seem to follow the law. Just this term, the U.S. Supreme Court summarily reversed the Ninth Circuit three times in one day and vacated an opinion 9–0.

With two judicial emergencies in the Ninth Circuit, Professor Bybee is the type of judge we need. He is committed to applying and upholding the law. He will be a terrific judge. That circuit represents over 9 million people, the largest in the country. It has the most judges on a circuit court of appeals in the Nation. They need him.

Additional letters in support of Professor Bybee illustrate his professional competence and personal characteristics which will serve him well on the bench. Colleagues at UNLV deserve Professor Bybee as ''widely and properly regarded as a leading constitutional law expert, and his expertise extends to many other areas of law as well. . . . Bybee is highly intelligent, industrious, diligent, and responsible. He has outstanding judgment and is a rock of stability. . . . Perhaps above all, he respects and works effectively with persons of diverse perspectives, temperaments, and ideology.''

Another colleague of Professor Bybee wrote, ''I should note that my personal politics are quite different from Bybee's, but Jay's tremendous intelligence, work ethic and, above all, his integrity and desire to complete each and every task not only to the best of his ability, but also to do the right thing with it, convinces me that I would rather have him be a federal judge than many or most who share more closely my own politics.''

The committee has received similar letters in support of Professor Bybee from law professors and administrators throughout the nation, including the Dean of The George Washington University Law School.

I ask unanimous consent that these supporting Professor Bybee's nomination be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is ordered.

(See exhibit 1).

Mr. HATCH. The legal bar's wide regard for Professor Bybee is reflected in his evaluation by the American Bar Association. Based on his professional qualifications, integrity, professional competence, and judicial temperament, the ABA has bestowed upon Professor Bybee a rating of Well Qualified.

This Senate has previously found Professor Bybee worthy of confirmation for a position of high responsibility in the government, and I am confident it will do so again today.

Professor Bybee is providing the Nation with exceptional service in his current position as Assistant Attorney General in charge of the Office of Legal Counsel. This office assists the Attorney General in his function as legal advisor to the President and all the executive branch agencies.

The office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the executive branch, and offices within the department. Such requests typically deal with legal issues of particular complexity and importance or issues about which two or more agencies are in disagreement.

The office also is responsible for providing legal advice to the executive branch on all constitutional questions and reviewing pending legislation for constitutionality. All executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval.

In addition to serving as, in effect, outside counsel for the other agencies of the executive branch, the Office of Legal Counsel also functions as general counsel for the Department itself. It reviews all proposed orders of the Attorney General and all regulations requiring the Attorney General's approval. It also performs a variety of special assignments referred by the Attorney General or the Deputy Attorney General. In this position, Professor Bybee has performed in an outstanding manner. He has rendered great service to our Nation, he has earned bipartisan respect and support, and is fully prepared to be a Federal circuit court of appeals judge.

(Ms. MURKOWSKI assumed the chair.)

Mr. HATCH. Madam President, I am confident that as the Senate confirms Professor Bybee, Democrats and Republicans can all share in the pride of a job well done. This Senate will have properly exercised its proper constitutional role of advice and consent. I urge my colleagues to support this nomination.

I yield the floor.

EXHIBIT 1

UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW,
Chapel Hill, NC, January 27, 2003.

Re: Jay Bybee.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Russell Senate Office Building, Washington DC.

DEAR CHAIRMAN HATCH: I am writing this on behalf of the nomination of Jay Bybee to the Ninth Circuit Court of Appeals.

First let me introduce myself. I am currently the Kenan Professor of Law at the University of North Carolina School of Law and have taught law for almost 20 years. I also worked in the Clinton Administration as the Deputy Counsel to the President under Beth Nolan and previously as an Associate Counsel to the President under Charles Ruff. In addition, I served under Assistant Attorney General Eldie Acheson in the Justice Department during the spring and summer of 1993 during which my task was to begin the processes of judicial selection for Clinton Administration appointments. I am therefore well familiar with the judicial selection process.

I have come to know Jay Bybee in my work as a law professor both through his writings and through the interactions we have had at numerous legal conferences and academic events. He is an extremely impressive person. To begin with, he is a remarkable scholar. His ideas are creative, insightful, and stimulating and his analysis is careful and precise. I believe him to be one of the most learned and respected constitutional law experts in the country.

He is also an individual with exceptional personal qualities. I have always been struck by the balance that he brings to his legal analysis and the sense of respect and deference that he applies to everybody he encounters—including those who may disagree with him. He is someone who truly hears and considers opposing positions. Most importantly he is a person who adheres to the highest of ethical standards. I respect his integrity and trust his judgement.

Needless to say, I believe that Jay Bybee's professional and personal skills make him an outstanding candidate for a federal judgeship. The combination of his analytic skills along with his personal commitment to fairness and dispassion lead me to conclude that he will serve in the best traditions of the federal judiciary. He understands the rule of law and he will follow it completely. He is an exceptional candidate for the Ninth Circuit and I support his nomination without reservation.

I hope these comments are helpful to you. Please feel free to contact me if you have any further questions.

Sincerely,

WILLIAM P. MARSHALL,
Kenan Professor of Law.

UNIVERSITY OF GLASGOW
SCHOOL OF LAW,
Glasgow, Scotland, January 13, 2003.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN HATCH: I am delighted to have the opportunity to recommend to you my former colleague, Jay Bybee, who has been nominated to a seat on the U.S. Ninth Circuit Court of Appeals. I got to know Jay Bybee during the approximately four years we served together on the Louisiana State University law faculty, where I am a professor of law. (During the 2002–03 academic year, I am on sabbatical, serving as Fulbright Distinguished Scholar to the United Kingdom, in residence at the University of Glasgow.)

Jay is a person of high intelligence, genuine decency, and a strong work ethic. He was an always reliable and generous colleague, a popular and effective teacher, and a creative and insightful scholar. He must surely be regarded as one of the leading constitutional law thinkers in the United States, particularly with respect to questions of separation of powers and the religion clauses of the First Amendment. I have no doubt that he will quickly establish himself as a leading member of the Ninth Circuit Court of Appeals.

Jay and I differ on many issues of politics and law (unlike Jay, I am a liberal Democrat and active member of the ACLU). Yet I have always found him to be an extremely fair-minded and thoughtful person. Indeed, Jay truly has what can best be described as a ''judicious'' temperament, and I would fully expect him to be a force for reasonableness and conciliation on a court that has been known for its fractiousness.

In short, I am pleased to recommend Jay Bybee enthusiastically and without any reservation to be a judge of the U.S. Ninth Circuit Court of Appeals.

Sincerely,

STUART P. GREEN.

UNIVERSITY OF NEVADA LAS VEGAS,
WILLIAM S. BOYD SCHOOL OF LAW,
Las Vegas, NV, January 29, 2003.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN HATCH: I enthusiastically support the nomination of Jay S. Bybee to the United States Court of Appeals for the Ninth Circuit, and I hope that you and your colleagues will confirm his nomination. Professor Bybee is an outstanding teacher, scholar, lawyer, public servant and human being. He will become a splendid judge, exactly the sort who ought to sit on the appellate courts of our country.

I have known Jay Bybee for about five years, since I began to recruit him for a position on the founding faculty of our new law school here at UNLV. We were very fortunate to recruit a faculty member of Jay's quality—he is a superb teacher, a very well-published scholar and a very productive and collegial faculty member—and he, in turn, helped us to hire other members of what has become an excellent faculty. Moreover, in his years on our faculty, Professor Bybee helped us to build an excellent law school, teaching important courses, chairing key committees, producing excellent scholarship, speaking widely in our community, and serving as an example of an excellent public lawyer and scholar. We had hoped that he would return to our faculty at the conclusion of his service as Assistant Attorney General for the Office of Legal Counsel, but those hopes have now been superceded by the needs of our country, which has called him to the United States Court of Appeals.

Professor Bybee will answer that call excellently. He is very smart, very thorough and very knowledgeable about the demanding legal issues that confront our country and our courts. He is a creative thinker, but one whose creativity is appropriately tempered by rigorous legal analysis. More importantly, he is a compassionate and decent person who will approach his work in humane and very reasonable ways.

While those of us on the Boyd Law School faculty come from many backgrounds and hold a variety of views on important societal issues, I think that we all agree on at least three things: that Jay Bybee is a wonderful colleague who has earned our high esteem; that his departure from our faculty weakens our law school; and that his elevation to the federal judiciary will improve our courts and our country. President Bush has chosen well, and I hope that you will confirm his choice.

Please let me know if you would like further information or comment from me. Thank you for your service to our country.

Best regards.

Very truly yours,

RICHARD J. MORGAN,
Dean.

UNIVERSITY OF NEVADA LAS VEGAS,
WILLIAM S. BOYD SCHOOL OF LAW,
Las Vegas, NV, January 30, 2003.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: I write to state my strong support for Jay S. Bybee, who was renominated on January 7 by President George W. Bush to be a judge of the United States Court of Appeals for the Ninth Circuit. I have known Bybee since 2001 when we both were members of the faculty of the William S. Boyd School of Law of the University of Nevada, Las Vegas.

I had the privilege of working directly and substantially with Bybee on Law School committees, in faculty meetings, and in a variety of informal contexts. I also have read much of his published work and have discussed him and his work with numerous other law professors, at the Boyd School of Law and other law schools, and with numerous of his students.

Based on these contacts and associations, I strongly commend Bybee to you. For three reasons, I am confident he would be an outstanding federal appellate judge. First, Bybee clearly has deep and extensive knowledge of the law. He is widely and properly regarded as a leading constitutional law expert, and his expertise extends to many other areas of law as well. By virtue of his private practice, government practice, and academic experience, he is well rounded and superbly knowledgeable in the law.

Second, Bybee's ability to commmunicate and teach are extraordinary. As a teacher, he is held in near legendary status here. His skill as a teacher established a standard that few other law professors can meet. The importance of federal appellate decisions lies not only in correct outcomes but also in the clarity and explanatory force of the opinions that justify the outcomes reached. Bybee's skill as a communicator and teacher will serve the nation well.

Third, Bybee's exemplary personal qualities will enhance his value as a judge. Bybee is highly intelligent, industrious, diligent, and responsible. He has oustanding judgment and is a rock of stability when seas become stormy. Perhaps above all, he respects and works effectively with persons of diverse perspectives, temperaments, and ideology. He is uniformly respected here by faculty, students, and administrators whose views span the political spectrum.

In sum, I have every confidence that Bybee will be an outstanding federal judge. He will contribute positively to the sound application and development of the law and to the wise administration of it. He is exceptionally able and well qualified. I hope that your Committee will act rapidly and positively on his nomination. Please contact me if you have any questions. Thank you.

Sincerely,

STEVE JOHNSON,
E.L. Wiegand Professor of Law.

UNIVERSITY OF NEVADA LAS VEGAS,
WILLIAM S. BOYD SCHOOL OF LAW,
Las Vegas, NV, January 30, 2003.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: I write to offer my strongest recommendation that the Senate confirm the nomination of Jay Bybee to be a judge on the Ninth Circuit Court of Appeals. I clerked for a Ninth Circuit Court of Appeals judge in 1979–1980, so I have a pretty strong idea of what is involved in holding this position. I have also known Mr. Bybee since 1987 and have tremendous confidence that he is a person of great legal knowledge and sound judgment. Without question he has the ability and motivation to give cases the careful attention and thought they deserve. I carefully reviewed Jay's legal scholarship when he taught law at Louisiana State University and recommended his promotion and tenure there. His scholarship is very strong and analytical, and it is clear that he brings a careful and thoughtful mind to bear in addressing legal problems.

Jay is also a person of great integrity, and we can be confident that he will represent the nation well in his professional and personal endeavors. In the years I have known Jay, I have felt great confidence that his word was his bond. This is among the reasons why, when in 1999 I reported to join the faculty here at Boyd School of Law at the University of Nevada, Las Vegas, I invited Jay to co-author with me a book on the Ninth and Tenth Amendments—a work we are still working to complete. Jay's interests in legal scholarship reflect the range of interests he has, and he would bring to this position an awareness of the importance of structural issues relating to government powers as well as the fundamental importance of individual rights. Whether I was a member of the executive branch or the legislative branch of government, I would feel greatly reassured in knowing the important issues relating the scope of governmental powers would be addressed by one with Jay's background, expertise, and judgment.

If I could be of any further assistance to the committee or the Senate in deciding whether to confirm the nomination of Mr. Bybee, I would be happy to do so. I have total confidence that he would be a thoughtful, perhaps even brilliant judge.

Sincerely,

THOMAS B. MCAFFEE,
Professor of Law.

THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL,
Washington, DC, January 30, 2003.

Re Nomination of the Honorable Jay S. Bybee to the U.S. Court of Appeals for the 9th Circuit.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN HATCH: I write in support of the nomination of the Honorable Jay S.

Bybee to the United States Court of Appeals for the 9th Circuit. I have known Jay in both his professional and governmental capacities and I have little doubt he will be a superb judge.

In the first place, Jay is, simply put, very smart, a highly useful attribute for a judge, in my opinion. He graduated with honors from both college and law school. But even more to the point, that legal work with which I am familiar is outstanding. He has a remarkable ability to digest an extraordinary amount of material and then, sorting the wheat from the chaff, produce a succinct, cogent analysis of the problem at hand. His law review articles are of the highest quality, thoroughly researched, impressively documented, carefully analyzed and gracefully written, His briefs exhibit a complete—and honest—explication of the relevant authorities and a thoughtful marshaling of the evidence in support of his position. They are all models of legal craftsmanship. He will undoubtedly apply these hightly honed analytical skills to the inescapably difficult problems federal judges face.

Jay also seems to understand well the amount of energy and efforts necessary to solve complex legal problems. He is a tireless worker producing impressive amounts of work at a very high level of quality. He will bear up well under the extraordinary workload our federal judges face.

I am also impressed with the breadth of Jay's legal experience. He has worked for a year on a court. He has practiced in the private sector. He has worked at both a staff and political level in the government. And he has spent time as an academic, reflecting on the broader purposes of the law. He has been exposed to the operation of the law in almost every imaginable setting. All of this experience will undoubtedly inform his judicial deliberations in highly useful ways.

I have also always found Jay enormously balanced, and fair in both his professional judgments and his personal dealings. He has political views, to be sure, but he is no ideologue. I have even seen him change his mind, something incredibly rare in the academy. I think any petitioner will justifiably have great confidence that his pleas will receive a fair, just and sympathetic hearing.

I also think Jay has a happily well-developed sense of the majesty and dignity of the law. He is well attuned to the importance of the law in protecting our rights, redressing our grievances, and protecting us from the pressure of both our neighbors and, on occasions, the government. At the same time, I think he understands—and understands well—the limits of legal redress. The courts are not legislators and I do not think Jay would ever confuse the two. In short, I think he has a sophisticated and appropriate appreciation of the role of the judge and the courts in our political and legal system. Jay will prove a very good judge, someone we will all be proud to claim, whatever our personal view of the appropriate line between courts and legislators.

Finally, I would be remiss if I did not stress just how extraordinarily decent Jay is. Even on first meeting, it is clear he is a thoughtful, considerate, indeed, kind person. But much more importantly, my every contact has also convinced me he is a person of unshakable integrity. He is clear and entirely transparent about his core values. And they are absolutely the right ones. They revolve around family, community and country. They bespeak a fidelity to law as both a device to ensure that all have the opportunity to reach their fullest capacity, as well as a shield against man's least worthy impulses. He is honest, forthright and entirely respectful of the dignity of everyone he meets.

I have gone on at perhaps too much length, but I strongly support this nomination. Jay has all the professional and, more importantly, in my judgment, personal attributes of a great judge. I sincerely hope he will become one.

Thank you for allowing me to submit this letter in support of Jay.

With best regards.

Sincerely yours,

MICHAEL K. YOUNG,
Dean.

BOSTON COLLEGE
LAW SCHOOL,
Newton, MA, January 22, 2003.

Hon. PATRICK J. LEAHY,
Ranking Member, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR LEAHY: I am delighted that Jay Bybee has been nominated for the 9th Circuit. I have known Mr. Bybee for almost two decades. We both served in Washington in the 1980s, overlapping at the Justice Department in 1984. I have had frequent contact with Mr. Bybee since then, because we both have taught constitutional law, and written articles in many of the same areas. Mr. Bybee is, among legal academics, one of the best known and best respected writers on the subjects of federalism and separation of powers. I have been impressed with his calm and approachable demeanor, his ability to explain difficult legal concepts in understandable terms, and his fairness and open-mindedness in dealing with those who have intellectual disagreements with him.

Mr. Bybee has also had a wealth of significant legal experience since his graduation from law school twenty-three years ago. As a private lawyer he has acquired expertise in issues concerning transportation and communication. In the Civil Division of the Justice Department for five years he acquired a wealth of knowledge about the standard business of the agencies of government. He has handled with considerable skill more than three dozen appellate cases for the United States. He served on the White House staff for two years as associated counsel to the first President Bush. And I think he has done a terrific job of running the Office of Legal Counsel for the past few months. I think that he will be a splendid addition to the 9th Circuit.

Sincerely,

JOHN H. GARVEY,
Dean.

Mr. LEAHY. Mr. President, in spite of the intransigence of the White House and the overreaching of the Republican majority here in the Senate, I believe the Senate will, by the end of this week, have moved forward to confirm 111 of President Bush's judicial nominations since July 2001. That total would include 11 judges confirmed so far this year and of those 7 would be confirmed this week. Consideration of this controversial nomination of Jay S. Bybee to the United States Court of Appeals for the Ninth Circuit is the 18th circuit nomination considered for this President since July 2001. The 17 others were each confirmed, some like Judge Shedd and Judge D. Brooks Smith with significant opposition. Nonetheless, Democrats have moved forward almost twice as promptly on this President's circuit nominees as the Republican majority did on President Clinton's circuit nominees. The Republican majority averaged 7 circuit judge confirmations a year over the 6½ years it previously controlled this process. By contrast, the Democratic majority confirmed 17 circuit judges in 17 months for President Bush, in addition to 83 district court judges.

In terms of percentages, which is what Republicans love to cite, the percentage of circuit nominees of President Clinton confirmed under the Republican majority in the 107th Congress was 0; the percentage confirmed in the 106th Congress was 44 percent; the percentage confirmed in the 105th Congress was 66 percent; and the percentage confirmed in the 104th Congress was 55 percent. In fact, despite the percentage for a full Congress, in four of their six full years, they confirmed 33 percent or less of President Clinton's circuit court nominees. In less than a full Congress, after assuming the majority in the summer of 2001 and in spite of the 9/11 attacks and the anthrax attacks and all the disruptions and priorities in those 17 months, the Democratically-led Senate not only held hearings on 20 circuit nominees, the Judiciary Committee voted on 19 and the Senate confirmed 17 for a 53 percent confirmation rate of the President's controversial slate of circuit nominees.

Those considering these matters might contrast the progress in which Democrats are assisting with the start of the last Congress in which the Republican majority in the Senate was delaying consideration of President Clinton's judicial nominees. In 1999, the first hearing on a judicial nominee was not until mid-June. The Senate did not reach 11 confirmations until the end of July of that year whereas we will reach that benchmark this year before St. Patrick's Day. Accordingly, the facts show that Democratic Senators are being extraordinarily cooperative with a Senate majority and a White House that refuses to cooperate with us. We have made progress in spite of them.

Indeed, by close of business today, we will have reduced vacancies on the Federal courts to under 55, which includes the 20 judgeships Democrats newly authorized in the 21st Century Department of Justice Appropriations Authorization Act last year. That is an extremely low vacancy number based on recent history and well below the 67 vacancies that Senator HATCH termed ''full employment'' on the federal bench during the Clinton Administration.

Turning to the nomination now before the Senate, the nomination of Jay S. Bybee for a lifetime appointment to the Ninth Circuit Court of Appeals is a difficult one for me. It is made all the more difficult by the respect I have for the senior Senator from Nevada, who has supported this nomination.

I think that Senator BIDEN made a compelling case against this nomination in his statement to the Judiciary Committee. I know that we intended to and did establish a separate Violence Against Women Office at the Department of Justice and a Director subject

to Senate confirmation when we wrote the Department of Justice authorization legislation and enacted it last year. How Mr. Bybee could misinterpret that measure is beyond me.

Mr. Bybee appeared before the Judiciary Committee in 2001 when he was nominated to serve at the Department of Justice. During that confirmation hearing, Mr. Bybee promised the Judiciary Committee that as Assistant Attorney General, he would ''not trample civil rights in the pursuit of terrorism'' and that he would ''bring additional sensitivity to the rights of all Americans'' to his work at the Justice Department. Given the veil of secrecy imposed by the Administration, I have serious concerns about how the Department of Justice has been operating.

Unfortunately, Mr. Bybee's hearing for judicial office took place on a particularly busy morning when many Senators had other committee obligations and during the Secretary of State's address to the United Nations regarding Iraq. Many of us were unable to attend Mr. Bybee's hearing in person that day. At least five of us submitted detailed sets of written questions to ask about the Justice Department and some controversial views he has taken in his academic writings and speeches before the Federalist Society.

I have given a lot of thought to this nomination. I have concerns that Mr. Bybee was chosen to be another in a long line of circuit court nominees from this President who will prove to be an ideologically driven conservative activist if accorded lifetime tenure on the Court of Appeals.

However, Senator REID knows Mr. Bybee and supports his confirmation. Mr. Bybee is obviously conservative, but we've had a chance to review his articles and speeches and no one has called into question his ability and commitment to setting aside his views as a judge.

On the very day that Democrats cooperated in debating and voting on the Bybee nomination in Committee, our cooperation was rewarded by the Republican majority violating our rights. Republicans violated our longstanding Judiciary Committee rules and unilaterally declared the termination of debate on two other controversial circuit court nominations, John Roberts and Justice Deborah Cook that very morning.

Senator DASCHLE termed this unilateral action deeply troubling and a ''reckless exercise of raw power by a Chairman,'' and he is right. He observed that the work of this Senate has for over 200 years operated on the principle of civil debate, which includes protection of the minority. When a chairman can on his own whim choose to ignore our rules that protect the minority, not only is that protection lost, but so is an irreplaceable piece of our integrity and credibility.

The Democratic leader noted that faithful adherence to longstanding rules is especially important for the Senate and for its Judiciary Committee. He noted ''how ironic that in the Judiciary Committee, a Committee which passes judgment on those who will interpret the rule of law,'' that it acted in conscious disregard of the rules that were established to govern its proceedings. If this is what those who pontificate about ''strict construction'' mean by that term, it translates to winning by any means necessary. If this is how the judges of the judicial nominees act, how can we expect the nominees they support as ''strict constructionists'' to behave any better? Given this action in disrespect of the rights of the minority, how can we expect the Judiciary Committee to place individuals on the bench that respect the rule of law?

In my 29 years in the Senate and in my reading of Senate history, I cannot think of so clear a violation of Senators' rights.

As Chairman of the Agriculture Committee, as Chairman of the Subcommittee on Foreign Operations of the Appropriations Committee and as Chairman of the Judiciary Committee, I strove always to protect the rights of the minority. I did not always agree with what they were saying or doing, I did not always find it convenient, but I protected their rights. It was not always as efficient as I might have liked, but I protected their rights. That is basic to this democracy and fundamental to the Senate of the United States. Senators respect other Senators' rights and hear them out.

There is no question that the Senate majority is in charge and responsible for how we proceed. I understand that and always have—I wish Republicans had shared that view when I chaired the Judiciary Committee last year. But in the Senate, the majority's power is circumscribed by our rules and traditional practices. We protect and respect the rights of the minority in this democratic institution for the same reason we steadfastly adhere to the Bill of Rights.

I, too, am gravely concerned about this abuse of power and breach of our committee rules. When the Judiciary Committee cannot be counted upon to follow its own rules for handling important lifetime appointments to the Federal judiciary, everyone should be concerned. In violation of the rules that have governed that committee's proceedings since 1979, the chairman chose to ignore our longstanding committee rules and short-circuit committee consideration of the nominations of John Roberts and Justice Deborah Cook. Senator DASCHLE spoke to that matter that day. Judiciary Committee members, Senator FEINSTEIN, Senator SCHUMER, Senator DURBIN and Senator FEINGOLD have also spoken to the Senate about this breach of our rules, as well as a number of other liberties that Republicans have been taking with the rules.

Since 1979, the Judiciary Committee has had this particular committee rule to bring debate on a matter to a close while protecting the rights of the minority. It may have been my first meeting as a Senator on the Judiciary Committee in 1979 that Chairman KENNEDY, Senator THURMOND, Senator Dole, Senator COCHRAN and others discussed adding this rule to those of the Judiciary Committee. Senator Thurmond, Senator HATCH and the Republican minority at that time took a position against adding the rule and argued in favor of any individual Senator having a right to unlimited debate—so that even one Senator could filibuster a matter. Senator HATCH said that he would be ''personally upset'' if unlimited debate were not allowed.

Senator HATCH explained:

> There are not a lot of rights that each individual Senator has, but at least two of them are that he can present any amendments which he wants and receive a vote on it and number two, he can talk as long as he wants to as long as he can stand, as long as he feels strongly about an issue. I think those rights are far superior to the right of this Committee to rubber stamp legislation out on the floor.

It was Senator Dole who drew upon his Finance Committee experience to suggest in 1979 that the Committee rule be that ''at least you could require the vote of one minority member to terminate debate.'' Senator COCHRAN likewise supported having a ''requirement that there be an extraordinary majority to shut off debate in our Committee.''

The Judiciary Committee proceeded to refine its consideration of what became Rule IV, which was adopted in 1979 and has been maintained ever since. It struck the balance that Republicans had suggested of at least having the agreement of one member of the minority before allowing the Chairman to cut off debate.

That protection for the minority has been maintained by the Judiciary Committee for the last 24 years under five different chairmen—Chairman KENNEDY, Chairman Thurmond, Chairman BIDEN, under Chairman HATCH previously and during my tenure as chairman.

Rule IV of the Judiciary Committee provides the minority with a right not to have debate terminated and not to be forced to a vote without at least one member of the minority agreeing. That rule and practice had until last month always been observed by the committee, even as we have dealt with the most contentious social issues and nominations that come before the Senate.

Until last month, Democratic and Republican chairmen had always acted to protect the rights of the Senate minority. The rule has been the committee's equivalent to the Senate's cloture rule in Rule 22. It had been honored by all five Democratic and Republican chairman, including Senator HATCH—until last month.

It was rarely utilized but Rule IV set the ground rules and the backdrop against which rank partisanship was

required to give way, in the best tradition of the Senate, to a measure of bipartisanship in order to make progress. That is the other important function of the rule.

Besides protecting minority rights, it enforced a certain level of cooperation between the majority and minority in order to get anything accomplished. That, too, has been lost as the level of partisanship on the Judiciary Committee and within the Senate reached a new level when Republicans chose to override our governing rules of conduct and proceed as if the Senate Judiciary Committee were a minor committee of the House of Representatives.

The premature and unilateral termination of debate in committee last month was apparently a premeditated act. Senator HATCH indicated that he had checked with the parliamentarians in advance, and he apparently concluded that he had the raw power to ignore our committee rule and so long as all Republicans on the committee stuck with him, he would do so. I understand that the parliamentarians advised Senator HATCH that there is no enforcement mechanism for a violation of committee rules and that the parliamentarians view Senate Committees as ''autonomous''. I do not believe that they advised Senator HATCH that he should violate our Committee rules or that they interpreted our Committee rules.

I cannot remember a time when then-Chairman KENNEDY or Chairman THURMOND or Chairman BIDEN would have even considered violating their responsibility to the Senate and to the committee and to our rules. Accordingly, we have never been faced with a need for an ''enforcement mechanism'' or penalty for violation of a fundamental committee rule.

In fact, on the only occasion I can recall when Senator HATCH was faced with implementing Committee Rule IV, he did so. In 1997, Democrats on the committee were seeking a Senate floor vote on President Clinton's nomination of Bill Lann Lee to be the Assistant Attorney General for Civil Rights at the Department of Justice.

Republicans were intent on killing the nomination in committee. The committee rule came into play when in response to an alternative proposal by Chairman HATCH, I outlined the tradition of our Committee. I said:

> This committee has rules, which we have followed assiduously in the past and I do not think we should change them now. The rules also say that 10 Senators, provided one of those 10 is from the minority, can vote to cut off debate. We are also required to have a quorum for a vote.
>
> I intend to insist that the rules be followed. A vote that is done contrary to the rules is not a valid one.

Immediately after my comment, Chairman HATCH abandoned his earlier plan and said:

> I think that is a fair statement. Rule IV of the Judiciary Committee rules effectively establishes a committee filibuster right, as the distinguished Senator said.

With respect to the nomination in 1997, Chairman HATCH acknowledged:

> Absent the consent of a minority member of the Committee, a matter may not be brought to a vote. However, Rule IV also permits the chairman of the Committee to entertain a non-debatable motion to bring any matter to a vote.
>
> The rule also provides as follows: ''The Chairman shall entertain a non-debatable motion to bring a matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a rollcall vote of the Committee shall be taken, and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with ten votes in the affirmative, one of which must be cast by the Minority.''

Thereafter, given the objection, the committee proceeded to a roll call vote whether to end the debate. That was consistent with our longstanding rule. In that case, Chairman HATCH followed the rules of the committee.

At the beginning of our executive business meeting on February 27, I referenced the Committee's rules and during the course of the debate on nominations both Senator KENNEDY and I sought to have the committee follow them. We were overridden.

Last month, the bipartisan tradition and respect for the rights of the minority ended when Chairman HATCH decided to override Rule IV rather than follow it. He did so expressly and intentionally, declaring: ''[Y]ou have no right to continue a filibuster in this committee.''

Chairman HATCH decided, unilaterally, to declare the debate over even though all members of the minority were prepared to continue the debate and it was, in fact, terminated prematurely. I had yet to speak to any of the circuit nominees on the agenda and other Democratic Senators had more to say.

Senator HATCH completely reversed his own position from the Bill Lann Lee nomination and took a step unprecedented in the history of the committee. Contrast the statements of Senator HATCH in 1979 when he supported unlimited debate for a single Senator—with Republicans in the minority—with his action overriding the rights of the Democratic minority and his recent letter to Senator DASCHLE in which, now that Republicans hold the Senate majority, he says that he ''does not believe the Committee filibuster should be allowed and [he] thinks it is a good and healthy thing for the Committee to have a rule that forces a vote.''

But our committee rule, while providing a mechanism for terminating debate and reaching a vote on a matter, does so while providing a minimum of protection for the minority. Even this minimum protection will no longer be respected by Chairman HATCH.

Contrast Senator HATCH's recognition in 1997 that Rule IV establishes a Judiciary Committee ''filibuster right'' and that a ''[a]bsent the consent of a minority member of the Committee, a matter may not be brought to a vote,'' with his declaration last month that there is no right to filibuster in committee.

In his recent letter to Senator DASCHLE, Senator HATCH declares that he ''does not believe that Committee filibusters should be allowed.'' It is Senator HATCH who has ''turned Rule 4 on its head'' last month, after 24 years of consistent interpretation and implementation by five chairmen. Never before his letter to Senator DASCHLE has anyone since the adoption of the rule in 1979 ever suggested that its purpose was to be narrowed and redirected to thwart ''an obstreperous Chairman who refuses to allow a vote on an item on the Agenda.'' After all, as Senator HATCH recognizes in his letter, it is the chairman's prerogative to set the agenda for the mark-up.

This revisionist reading of the rule is not justified by its adoption or its prior use and appears to be nothing other than an after-the-fact attempt to justify the obvious breaches of the longstanding Committee rule and practice that occurred last month. It was not even articulated contemporaneously at the business meeting.

I appreciate the frustrations that accompany chairing the Judiciary Committee. I know the record we achieved during my 17 months of chairing that committee, when we proceeded with hearings on more than 100 of President Bush's judicial nominees and scores of his executive nominees, including extremely controversial nominations, when we proceeded fairly and in accordance with our rules and committee traditions and practices to achieve almost twice as many confirmation for President Bush as the Republicans had allowed for President Clinton, and know how that record was mischaracterized by partisans. Those 100 favorably reported nominations included Michael McConnell, Dennis Shedd, D. Brooks Smith, John Rogers, Michael Melloy and many others.

I know that sometimes a chairman must make difficult decisions about what to include on an agenda and what not to include, what hearings to hold and when. In my time as chairman I tried to maintain the integrity of the committee process and to be bipartisan. I noticed hearings at the request of Republican Senators and allowed Republican Senators to chair hearings. I made sure the committee moved forward fairly on the President's nominees in spite of the Administration's unwillingness to work with us to fill judicial vacancies with consensus nominees and thereby fill those vacancies more quickly.

But I cannot remember a time when Chairman KENNEDY, Chairman THURMOND, Chairman BIDEN, Chairman HATCH previously, or I, ever overrode by fiat the right of the minority to debate a matter in accordance with our longstanding committee rules and practices.

The committee and the Senate have crossed a threshold of partisan overreaching that should never have been crossed. I urge the Republican leadership to recommit the nominations of Justice Deborah Cook and John Roberts to the Judiciary Committee so that they can be considered in accordance with the committee's rules. The action taken last month should be vitiated and order restored to the Senate and to the Judiciary Committee.

I urge the Republican leadership to rethink its missteps and urge the chairman and the committee to disavow the misinterpretation and violations of Rule IV that occurred last month.

We have also worked hard to report a number of important executive and judicial nominees in spite of the continued partisanship by the White House and Senate Republicans. As Senator FEINSTEIN recently noted, we have cooperated by not insisting on our rights to seven days notice or seven days holdover on various matters and we have not insisted on three days' notice of items on the agenda. We have proceeded to debate with less than a quorum present and Democrats have been responsible for making quorum after quorum so that this committee could conduct business. Ironically, we did so even last month while our rights were being violated. Order and comity need to be restored to the Judiciary Committee and to the Senate. An essential step in that process is the restoration of our rights under Rule IV and recognition of our rights thereunder.

There are continuing problems caused by the administration's refusal to work with Democratic Senators to select consensus judicial nominees who could be confirmed relatively quickly by the Senate. Despite the President's lack of cooperation, the Senate in the 17 months I chaired the Judiciary Committee was able to confirm 100 judges and vastly reduce the judicial vacancies that had built up and were prevented by the Republican Senate majority from being filled by President Clinton.

Last year alone the Democratic-led Senate confirmed 72 judicial nominees, more than in any of the prior six years of Republican control. Not once did the Republican-controlled committee consider that many of President Clinton's district and circuit court nominees, even though there were often more judicial nominees than that waiting for a hearing. In our efforts to turn the other cheek and treat this President's nominees better than his predecessor's had fared, we confirmed 100 judges in 17 months. Yet, not a single elected Republican has acknowledged this tremendous bipartisanship and fairness. When Chief Justice Rehnquist thanked the committee for confirming 100 judicial nominees, this was the first time our remarkable record had been acknowledged by anyone from a Republican background.

Almost all of the 100 judges we confirmed last Congress are conservative, quite conservative. And with some, the Senate has taken a significant risk that they will be activist judges with lifetime tenure. We nonetheless moved fairly and expeditiously on as many as we could. We cut the number of vacancies on the courts from 110 to 59, despite an additional 50 new vacancies that arose during my tenure. I recall that Senator HATCH took the position in September of 1997 that 103 vacancies, during the Clinton Administration, did not constitute a ''vacancy crisis.'' He also stated repeatedly that 67 vacancies meant ''full employment'' on the federal courts.

Even with the vacancies that have arisen since we adjourned last year, we remain below the ''full employment'' level that Senator HATCH used to draw for the federal courts with only 60 current vacancies on the District Courts and Courts of Appeals. Unfortunately, the President has not made nominations to almost two dozen of those seats, and on more than one-half of the current vacancies he has missed his self-imposed deadline of a nomination within 180 days. Of course, several of the nominations he has made are controversial.

Last Congress, we worked hard to keep a steady pace of hearings, even though so many of this President's judicial picks proved to be quite divisive and raised serious questions about their willingness to be fair to all parties. We held hearings for 90 percent of his nominees eligible for hearings, a total of 103 nominees, including 20 circuit court nominees. We voted on 102 of them, two of whom were defeated after fair hearings and lengthy debate. The President has taken this unprecedented action of re-nominating candidates voted down in committee in spite of the serious concerns expressed by fair-minded members of this committee.

This year the committee has had a rocky beginning with a hearing that has caused a great many problems that could have been avoided. The committee proceeded to a vote on the Estrada nomination and to a vote on the Sutton nomination and to votes on the Bybee and Tymkovich nominations—all controversial nominations to circuit courts.

The rushed processing of nominees in these past few weeks has led to editorial cartoons showing conveyor belts and assembly lines with Senators just rubber-stamping these important, lifetime appointments without sufficient inquiry or understanding. What we are ending up with is a pile-up of nominees at the end of this rapidly-moving conveyer belt. There is no way that we can meaningfully keep up with our constitutional duty to determine the fitness of these nominees at this pace. The quality of our work must suffer, and slippage in the quality of justice will necessarily follow. I hope we will do all we can to prevent more of these ''I Love Lucy'' moments.

All of the Democratic Senators who serve on the Judiciary Committee have asked the Chairman to reconvene the hearing with Justice Cook and Mr. Roberts because of the circumstances under which it was held and not satisfactorily completed. We have also taken the White House up on its offer to make the nominees available with a joint letter seeking an opportunity to make further inquiries of them. Regrettably, last Wednesday the White House withdrew its offer and now refuses to proceed. That change of position by the White House, on top of the inadequate hearing on these important nominations, has created another impasse and unnecessary complication.

That is why the minority, while prepared to debate and vote on the Bybee nomination to the 9th Circuit and nine other presidential nominations on February 27, wished to continue the debate on the Cook and Roberts nominations.

Let me be specific: On January 29, the Judiciary Committee met in an extraordinary session to consider six important nominees for lifetime appointments to the federal bench, including three controversial nominees to circuit courts: Jeffrey Sutton, Justice Deborah Cook and John Roberts. Several Senators only officially learned the names of the nominees on the agenda for that hearing at 4:45 p.m. on January 28, the day before.

On learning that the chairman intended to include three controversial circuit court nominees on one hearing, something virtually unprecedented in the history of the committee, and absolutely unprecedented in this chairman's tenure, Democrats on the committee wrote to the Chairman to protest. We explained that since 1985, when Chairman Thurmond and Ranking Member BIDEN signed an agreement about the pace of hearings and the number of controversial nominees per hearing, there has been a consensus on the committee that members ought to be given ample time to question nominees, and that controversial nominees in particular deserve more time.

We explained that we were surprised by the chairman's rush to consider these three nominees at the same time, considering the pace at which President Clinton's nominees were scheduled for hearings. During the time Republicans controlled the Senate and Bill Clinton was president, there was never a hearing held to consider three circuit court nominees at once. Never.

Finally, we explained the importance of giving Senators sufficient time to consider each nominee and properly exercise their constitutional duty to give advice and consent to the President's lifetime appointments to the federal bench.

But our request went unanswered, and we were expected to question three nominees in the space of a single day. That proved impossible, as was evident throughout that long day. My colleagues and I asked several rounds of questions of Mr. Sutton, and were only

able to ask very few questions of the other two nominees. We asked, during the hearing itself, that the chairman reconsider and ask the other two nominees to return the next day or the next week, and to give them the time they deserved in front of the committee, but he refused.

We asked the same thing after the hearing, and were told that indeed the nominees would make themselves available to meet with each of us, so we wrote to accept those offers, although as we explained, we would have preferred to meet with them altogether, and in a public session. But again, we were rebuffed. I wonder, though, if they were available for one sort of meeting, why were they not available for another. I regret that the White House refused our request to bring closure to those matters.

During the last 4 years of the Clinton administration, his entire second term in office after being reelected by the American people, the Judiciary Committee refused to hold hearings and committee votes on his qualified nominees to the D.C. Circuit and the Sixth Circuit. Last month, in sharp contrast, this committee was required to proceed on two controversial nominations to those circuit courts in contravention of the rules and practices of the committee. This can only be seen as part of a concerted and partisan effort to pack the courts and tilt them sharply out of balance.

I ask unanimous consent to print a letter in the RECORD.

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

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, February 24, 2002.

Hon. ALBERTO R. GONZALES,
Counsel to the President, The White House, Washington, DC.

DEAR JUDGE GONZALES: As you may know, Democratic Senators on the Judiciary Committee have been offered the opportunity to meet with Justice Deborah Cook and Mr. John Roberts in order to ask questions and discuss issues relevant to their nominations to lifetime appointments to United States Courts of Appeals. We are writing to let you know that some of us would like to accept those offers and meet with both of the nominees together before voting on their nominations.

We are available to meet as early as Wednesday, February 26, 2003, but are amenable to another mutually convenient time. For the purposes of review after the meeting, we will arrange for a stenographer to attend the meeting and record the exchanges with the nominees. We also anticipate that the meeting will be open to the public.

We hope that you and the Department of Justice will work with us to schedule this important meeting. Some of us believe the January 29, 2003, Committee hearing did not provide an adequate opportunity to ask the questions necessary for Senators to effectively carry out their Constitutional duty to advise and consent to judicial nominees. Written questions are not a satisfactory substitute for direct exchanges between Senators and the nominees.

Thank you for your assistance, and we look forward to the meeting we have requested.

Sincerely,

Patrick J. Leahy; Edward M. Kennedy; Joseph R. Biden, Jr.; Dianne Feinstein; Charles E. Schumer; John Edwards; Herbert Kohl; Russell D. Feingold; Richard J. Durbin.

The PRESIDING OFFICER. The Senator from New Mexico is recognized.

(The remarks of Mr. BINGAMAN are printed in today's RECORD under ''Morning Business.'')

The PRESIDING OFFICER. The Senator from Idaho is recognized.

Mr. CRAIG. Madam President, I am here in the Chamber this afternoon to speak to the nomination of Jay Bybee of Nevada to the Ninth Circuit Court.

I call it the Ninth Circuit Court of Western States. I know the State of the Presiding Officer is part of the Ninth Circuit, as is my State of Idaho. It is a circuit that has caused us great frustration over the last good number of years as many of its cases have been overturned. In fact, just this term, the Supreme Court in one day overturned three cases or reversed three cases of the Ninth Circuit.

Some call it the most dysfunctional court of the land. I believe it to be that. Idahoans are extremely frustrated when a San Francisco-oriented judge makes a decision on an Idaho resource matter that is so totally out of context with our State and the character of our State and her people that Idahoans grow angry. That is why it is not unusual that I and others over the years have offered legislation to divide the Ninth Circuit. That has been spoken to on more than one occasion in this Chamber, and it will be again this year.

I and my colleagues from Idaho are supportive of that kind of legislation, and it is that kind of legislation the Presiding Officer has just introduced: to change the character of this court to be more reflective of the broad scope of its authority than just to have, if you will, California judges making decisions for Idaho, Washington, Oregon, Alaska, and other States.

It is the largest court in the land, and it is a court that clearly needs our attention. It begs for our attention. The outcry in my State and in other States, such as Alaska, demands it. But today we have an opportunity to improve it, and that is to confirm Jay S. Bybee to the U.S. Court of Appeals for the Ninth Circuit.

I am confident the Senate will consent to the appointment of Professor Bybee, who enjoys bipartisan support and, in these current times as we debate judges in this Chamber, bipartisan support is in itself unique. That must speak to the uniqueness of this individual.

A review of Professor Bybee's credentials demonstrates he is, as the American Bar Association has concluded, a highly qualified person for this position. Professor Bybee's education, his private legal career, his work as a law professor, and his extensive Government service, have prepared him well to serve as a circuit judge. Let me briefly review his background.

Professor Bybee received a BA magna cum laude and with highest honors in economics from Brigham Young University. He also attended the J. Reuben Clark Law School at BYU, graduating cum laude. I also note he was an editor of the BYU Law Review. Those are high credentials from a very well-qualified, recognized law school.

Following his graduation from law school, Professor Bybee clerked for Judge Donald Russell of the U.S. Court of Appeals for the Fourth Circuit and then was engaged in private practice of law at the distinguished firm of Sidley & Austin. There he handled regulatory and antitrust matters, including civil litigation in Federal courts and administrative law matters before the Interstate Commerce Commission.

Professor Bybee began his career in public service first as an attorney in the U.S. Department of Justice, Office of Legal Policy, then as an attorney on the appellate staff at the Civil Division. During this period, he worked on a variety of departmental issues and judicial selections, was the principal author of the Government's briefs in more than 25 cases, and argued cases before a number of Federal circuits. Professor Bybee also served as an associate counsel, as the chairman of the Judiciary Committee, Senator HATCH, mentioned, to George H. W. Bush.

Professor Bybee has had an excellent career as a law professor, beginning at the Paul M. Hebert Law Center at Louisiana State University. He is a founding faculty member at the University of Nevada, Las Vegas William S. Boyd School of Law. As an accomplished scholar in the areas of administrative and constitutional law, Professor Bybee has taught courses in civil procedure, constitutional law, administrative law, and seminars on religious liberty and the separation of powers.

My colleague from Nevada was talking about his phenomenal knowledge of the Constitution and its authority and responsibility and our responsibility to it as we craft law.

He has a distinguished record in publications in a phenomenal variety of legal areas.

Professor Bybee presently serves as an Assistant Attorney General, heading the Office of Legal Counsel at the U.S. Department of Justice. Supervising a staff of attorneys, Professor Bybee has the principal responsibility for providing legal advice to the Attorney General on constitutional, statutory, and regulatory questions. In addition, the office reviews orders to be issued by the President or the Attorney General for form and legality. The Office of Legal Counsel also advises the President and the executive branch

agencies on constitutional and statutory matters.

It is clear from his educational record, his private practice, his outstanding credentials as a law professor, and his distinguished career in public service that Professor Bybee is well qualified to serve on the Ninth Circuit and will be an outstanding judge. In fact, I am quite confident he will lift the quality of that court in its decisions substantially.

Professor Bybee comes highly recommended. As a result of that, clearly he brings distinguished service to an area that cries out for the need of astute minds.

As Senator HATCH mentioned, one of his supporters is William Marshall, Professor of Law at the University of North Carolina. I note that Professor Marshall worked in the Clinton administration as Deputy Counsel to the President and in the Justice Department reviewing judicial nominees.

In Professor Marshall's letter in support of Professor Bybee, he writes:

He—

meaning Professor Bybee—

is an extremely impressive person. To begin with, he is a remarkable scholar. . . .

I think what I have said and the record I have spoken to clearly exemplifies that.

I believe him to be one of the most learned and respected constitutional law experts in the country. He is also an individual with exceptional personal qualities. I have always been struck by the balance that he brings to his legal analysis and the sense of respect and deference that he applies to everybody he encounters—including those who may disagree with him. He is someone who truly hears and considers opposing positions. Most importantly, he is a person who adheres to the highest of ethical standards. I respect his integrity and trust his judgment.

That is a quote from the letter of William Marshall, Professor of Law, University of North Carolina.

That endorsement rings loud in these Halls as it speaks well to the person who is before us today. Other letters of support from law professors with whom he worked and associates throughout the Nation speak highly of Professor Bybee. They note his personal integrity, his professional ability, his clear and thoughtful scholarship, and his exemplary personal qualities. Even those who disagree with him politically are impressed with Professor Bybee and strongly support his nomination.

That is the record. The record is clear. I am pleased that we see the kind of bipartisan support that most judicial nominees who come to this floor deserve. I support his nomination. He brings integrity and quality of mind to decisionmaking and judgment to the Ninth Circuit Court, a court of which my State of Idaho is a part. I strongly endorse Professor Bybee.

I yield the floor.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. Madam President, I thank the distinguished Senator for his statement. I, too, will support Professor Bybee. I have no problem with doing that at all.

May I say that Professor Bybee can be proud that Senator LARRY CRAIG has spoken on his behalf. Senator CRAIG is one of the most articulate Senators not only at this time in this body, but having been in this body for more than 44 years now, I can say that I have seen a lot of articulate speakers but Senator CRAIG is one among the foremost of those. I would treasure his support of my nomination if I were indeed a nominee for any position.

Madam President, has the Pastore rule run its course for today?

The PRESIDING OFFICER. Yes, it has.

Mr. BYRD. Madam President, I believe the Senate is in executive session.

The PRESIDING OFFICER. The Senator is correct.

Mr. BYRD. I ask unanimous consent that I may speak as if in legislative session.

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

Mr. BYRD. Is there any limitation on time?

The PRESIDING OFFICER. No, there is not.

RECONSTRUCTION OF IRAQ

Mr. BYRD. I thank the Chair. I will speak perhaps, as I see it, 40 minutes or less, which is something worthy of commenting on in itself.

There is an axiom in military planning that countries tend to prepare to fight the last war, not the next one. Some historians blamed the incredible death toll of World War I on military commanders who failed to realize that the days of set-piece battles, as in the days of the American Revolution or the Napoleonic Wars, were over. Some have also pointed out that the countries that were overrun in the opening months of World War II were those that were best prepared to engage in trench warfare.

As our own Republic continues to ready for war in Iraq, there has been the alarming tendency to see this next war as a replay of our 1991 campaign to liberate Kuwait. Some have taken to calling the impending conflict ''gulf war II,'' as if we could win this conflict in 2003 by rewinding the tapes of smart bombs dropping on their targets in 1991. I fear that many have succumbed to an intellectual and moral laziness that views the coming war through the lens of our victory in 1991.

This next war in Iraq will not be like the last. Twelve years ago, there was a war in one act with an extensive list of players opposing an aggressive antagonist. Now, the curtain is about to rise on a war with the same lead character, Saddam Hussein, but only one great power opposing him, that great power being the one superpower in the world today, the United States. Many countries that played supporting roles in the last war look as though they will, this time, serve more as extras, seen only in the crowd scenes without supporting roles. Most ominously, we do not know how long this costly drama might last. It may last a month. It may last 2 months. It may last a week. It may last 2 days. Who knows? I do not know. But this conflict will be played out in many acts.

As in the last war, the coming battles will draw heavily on U.S. air power, followed by the use of our ground troops to destroy the Iraqi army. That is where the similarities between 1991 and 2003 begin and end. The ultimate goal in the coming war is not to roll back an invasion of a small, oil-rich corner of desert that borders the Persian Gulf. This time, the goal is to conquer the despotic government of Saddam Hussein.

In the 1991 gulf war, our victory was followed by an orderly withdrawal of our troops, so that they may return to their hometowns to march in ticker-tape parades and be honored with twenty-one gun salutes to acknowledge a resounding American victory on the battlefield.

It may not be the same in 2003. Our forces do not have the straightforward task of pushing the Iraqi military out of Kuwait. The aim is to push Saddam and his associates from power. This could involve house-to-house fighting or laying siege to Baghdad and other urban centers, where seven out of ten Iraqis live. The United States will have to manage religious, ethnic, and tribal rifts that may seek to tear the country apart. According to a declassified CIA estimate, we must contend with the increasing chance that Saddam Hussein will use weapons of mass destruction against our troops as they march toward Baghdad.

After all of this, more work awaits. A U.S. invasion of Iraq with only token support from other countries will leave us with the burden of occupying and rebuilding Iraq. The United States will find itself thrust into the position of undertaking the most radical and ambitious reconstruction of a country since the occupation of Germany and Japan after World War II.

The likely first step in a post-war occupation would be to establish security. No rebuilding mission could possibly occur if the Iraqi army still has fight left in it or if Iraq's cities are in chaos. Establishing security could well prove to be more difficult than defeating Iraq's military. Saddam Hussein could go on the lam, forcing our military into a wild goose chase. Surely Iraq could not be considered secure if its evil dictator were to be on the loose.

Creating a secure environment in Iraq also means dealing with difficult situations. How will our military deal with hungry Iraqis taking to the street in mobs? What are we going to do about civilians exacting revenge on those who had oppressed them for so long? How will we prevent violence within and among Iraq's multitude of tribes, ethnic groups, and religions?

I am not convinced that, right now, the Administration has any idea of how

to deal with these scenarios, or the dozens of other contingencies that might arise while the United States serves as caretaker to a Middle Eastern country.

The United States will then be faced with the task of providing for the humanitarian needs of 23 million Iraqis, 60 percent of whom are fully dependent on international food aid. The United State will have to make sure that roads and bridges are rebuilt so that humanitarian assistance can get through to where it will be needed. That would be largely our responsibility. That would not be the case if we were being attacked, if the United States were being attacked by Iraq, if the United States were confronted with an imminent and direct threat from Iraq. If that were the case, then we would not be so morally responsible for cleaning up the mess, for reconstructing, for rebuilding that which we will have destroyed.

That is not the case. We will have to make sure that roads and bridges are rebuilt so humanitarian assistance can get through to where it will be needed. Electrical systems will have to be repaired. Who knows, some in this country may have to be repaired when that attack is launched. But we are talking about the morning after now, the postwar Iraq.

Electrical systems will have to be repaired so that doctors can operate in their hospitals. Water systems must be maintained to provide drinking water to the country as it enters the scorching summer months and to provide sanitation to prevent the spread of disease. Telephone systems will also be needed to communicate with the distant parts of a country that is the size of France, or a country that is seven times the size of West Virginia.

Protecting or rebuilding this critical infrastructure may become a huge task in itself, as Saddam Hussein is apparently planning a scorched earth defense of his regime. Such a scorched earth defense could involve setting oil fields ablaze. It could involve blowing up dams. It could involve the destruction of bridges over rivers, two of the oldest rivers in the world, the Euphrates and the Tigris, in a country that when I was in school many years ago was referred to as Mesopotamia, the land between the two great rivers. Such a strategy on the part of Saddam Hussein could involve sabotaging water supplies or destroying food sources. U.S. military officers are now reporting that Iraqi troops dressed as U.S. soldiers may seek to attack innocent Iraqi civilians in an effort to blame the West as being responsible for war atrocities.

If we are successful in deposing Saddam Hussein—and I don't have any doubt we will be successful in doing that; there is any number of scenarios by which Saddam may be deposed. He may be assassinated. Assassinations do occur, as we read today in the newspapers about an assassination. Saddam Hussein may turn tail and run. He may want to live and fight another day. He may decide to fight to the death. He may be willing to die himself while others die around him. Who knows. But there is no doubt in my mind that he will be deposed, one way or another.

But in any event if we are successful in deposing Saddam Hussein and limiting the loss of life among our troops and those of Iraqi civilians, the United States will have to reform the government of Iraq. According to an article that appeared in the Washington Post on February 21, the post-Saddam plan crafted by the administration calls for the U.S. military to take complete, unilateral control of Iraq after a war, followed by a transition to an interim administration by an American civilian. This interim administration would purge Iraq of Saddam Hussein's cronies and lay the groundwork for a representative government. General Barry McCaffrey, who commanded ground troops during the 1991 war, estimated in the article that the occupation would take 5 years.

Let us remember that Iraq once had a colonial government under the flag of Great Britain from 1920 to 1932. Iraqis revolted against British troops, leading one of the great men of the 20th century, one of the great men of all time, Winston Churchill to refer to the country as ''these thankless deserts.''

Have you ever been in a sandstorm in the deserts of the Middle East? It is quite an experience.

If the United States is to administer Iraq for a period of years, we will run the risk of being viewed as a new colonial power, no matter how pure our intentions. Those who may greet us as liberators in 2003 may increasingly view us as interlopers in 2004, 2005, 2006, and beyond.

The United States will also face the task of reforming Iraq's military. Fearful that a weak Iraq could fuel the ambitions of other regional powers, the Department of Defense is now considering how to take apart Iraq's million-man army and rebuild it into a smaller, more professional force. While details are still wrapped in secrecy, it appears that the United States will have a major hand in retraining and reequipping the post-Saddam Iraqi army. We are already trying to build an Afghan national army of perhaps 70,000 troops, but a new military for Iraq would have be several times that size. One thing is for sure, the arms industries must be salivating at the profits that could be made from building a new, modern Iraqi army from scratch.

These occupation and reconstruction missions are all difficult risks and difficult tasks. No wonder the ranking general in the British military, Gen. Sir Mike Jackson, said in an interview published in a London newspaper on February 23:

> In my view, the post-conflict situation will be more demanding and challenging than the conflict itself.

We had better hear that. We had better take note of that. Let's hear again what the British military general says. The British general, Sir Mike Jackson—here is what he said in an interview published in a London newspaper on February 23 of this year:

> In my view, the post-conflict situation will be more demanding and challenging than the conflict itself.

In other words, the war we may soon face in the Persian Gulf will be an entirely different campaign than was the war in 1991.

Congress and the American people, the people in the galleries that extend from sea to shining sea, from the Gulf of Mexico to the Canadian border, the people, the American people, those out there who are looking upon this Chamber through that electronic lens, those people, the people need to know how long we can expect to occupy postwar Iraq.

Last month, Under Secretary of State Marc Grossman estimated that a military occupation of Iraq would take 2 years. That estimate is hard to believe. Gen. Douglas MacArthur believed that the occupation of Japan after World War II would take no more than 3 years. It lasted 6 years and 8 months. The first U.S. military governor in Germany, Gen. Dwight Eisenhower, anticipated that the United States military would ''provide a garrison, not a government, except for a few weeks.'' Instead, the first phase of the occupation of Germany lasted 4 years.

These types of missions have their own momentum. We have had United States troops in Bosnia for 7 years and United States soldiers in Kosovo for 3½ years. Let us not forget that Gov. George Bush, as a Presidential candidate in 2000, said he would work to find an end to those peacekeeping missions. But the United States is now looking at a peacekeeping mission in Iraq that dwarfs our deployment to the Balkans in every respect.

I find it utterly confounding that a President so opposed to nation building would then launch into military scenarios that so clearly culminate in that very outcome. I have to wonder—I have to wonder if this President is simply so driven to act that he cannot see that action itself is not the goal. How far along was this administration in planning military action in Afghanistan before the question of what postwar Afghanistan would look like even came up? There seems to be at least some forethought about postwar Iraq, but how thoroughly has it been forethought? How thoroughly has it been thought about? How thoroughly has it been scrutinized?

The information given to Congress—that's that legislative branch up there, the people's representatives. Why, those people down in the White House view the legislative branch with contempt, with disdain. Why should they let those people up there know what they, the people on Mt. Olympus, are thinking? The information given to Congress and to the American people, who pay all of us in public office—we

are the hired hands. I am one of the hired hands. So is the President of the United States. He is just one of the hired hands. Then why should we view those people, who pay us, with such contempt that we don't think we ought to let them in on these secrets?

Oh, we don't have to tell them. We don't have to tell the people's elected representatives in Congress. We don't have to tell them. We'll let them know what we estimate the cost to be when we send up our bill, when we send up a supplemental appropriations bill.

Congress and the American people should also know how much it will cost to occupy Iraq. At least there must be some estimates that have been carefully wrought. The Army Chief of Staff, General Shinseki, is standing by his estimates, given to the Armed Services Committee, that ''several hundred thousand'' troops would be required to occupy Iraq. There is an Army Chief of Staff who doesn't back down. There is an Army Chief of Staff who doesn't break and run. He said this a few days ago. His estimate was disputed by the Defense Department. But General Shinseki didn't cower. He is standing by his estimate, given to the Armed Services Committee, that several hundred thousand troops would be required to occupy Iraq.

The Congressional Budget Office has provided estimates, based on an occupation force of 75,000 to 200,000 American troops, it would cost $1 billion to $4 billion—from $1 billion to $4 billion—per month.

I said that right. The cost of occupying Iraq has been estimated to be $1 billion to $4 billion per month. How much is that money to us peons? Under $4 billion. That is $1 to $4 for every minute since Jesus Christ was born. Perhaps that can give us hillbillies a little better feel of what we are talking about; $1 billion to $4 billion per month. That is $12 billion to $48 billion per year; $33 million to $130 million per day; $23,000 to $93,000 per minute. And these enormous amounts do not include the cost of rebuilding Iraq.

One estimate by the United Nations Development Program says that at least $30 billion will be needed for reconstruction in the first 3 years after a war. The actual cost, of course, could be much higher.

If the United States initiates war against Iraq in the coming days, maybe a week—I find it a little hard to think it will be 2 weeks, but it could be. If the United States initiates war against Iraq in the coming days, we will be hard pressed to share these staggering costs with our allies. We have foolishly engaged in a war of words with some of our most powerful European allies, countries which could have been valuable partners in rebuilding Iraq if war were proven to be inevitable.

Instead, it looks like the American taxpayer—you out there looking in this Chamber—the American taxpayer will be alone, all by himself, in shelling out billions of dollars for new foreign aid spending.

Some have suggested that Iraqi oil might take care of the post-war costs. According to the United Nations, if Iraq's oil production reached all-time highs, about $16 billion in revenue could be generated each year. Right now, Iraq's legitimate oil sales are supposed to buy food and medicine for the starving and ill. After a war, however, those funds could be subject to claims by Iraq's creditors, who are owed at least $60 billion in commercial and official debt. There is also the issue of $170 billion in unpaid reparations to Kuwait.

Mr. President, the big, black, endless pit we will find in Iraq after a war will not be filled with cheap oil for our gas-guzzling cars. The pit—that bottomless pit—that we will find in Iraq will have to be fed with enormous amounts of American dollars.—Courtesy of whom? Courtesy of Uncle Sam.

The irony of investing huge amounts of money to rebuild Iraq when we have urgent needs here at home has not been lost on late-night comedians. One talk-show host commented that if President Bush's plan to provide Iraqis with food, medicine, supplies, housing, and education proves to be a success, it could eventually be tried in the United States, too.

The comedians are on their toes. They are not overlooking any bets.

If the United States leads the charge to war in the Persian Gulf, we may be lucky and achieve a rapid victory. I hope we will be lucky. Perhaps the odds for being lucky are, I guess, 90 to 1. But we may not be lucky. But even if we are lucky, we will then have to face a second war—a war to win the peace in Iraq. That war will not be over in a day, or a week, or a month, or a year. That war will last several years, perhaps many years, and will surely cost hundreds of billions of dollars.

In the light of this enormous task, it would be a great mistake to expect that this will be a replay of the 1991 war. The stakes are much higher in this conflict.

Despite all of these risks and costs, it seems the administration continues to move our country closer and closer and closer to war. It seems we have already lost patience. We have already lost patience. We have stopped listening. This administration, this President, has stopped listening. The superhawks that surround him have stopped listening, if they ever were listening. It seems we have already lost patience for a regime of arms inspections that might take months to play out. But going to war will require our commitment to Iraq to last years—years.

The problems with Iraq are not going to be solved when 700 cruise missiles and 3,000 bombs land on that country in the opening days and the opening nights of war. Assuming victory—and I assume victory—we will be on the hook. You know what that means. We will be on the hook to rehabilitate Iraq. And I fear that the rebuilding of that ancient country with its ancient artifacts—a country that goes back to the mists of biblical years, of Abraham, and Issac, and Jacob, and Joseph—a country, a land of Ur, and a land between the two great rivers—after the rebuilding of that ancient country, there will have to be another act of U.S. unilateralism. There you are—another act of U.S. unilateralism for which the American people are ill prepared.

I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. DAYTON. Madam President, I first pay tribute to my very distinguished colleague and senior Senator from West Virginia, whose eloquence on this subject has been magnificent in the last months and whose leadership in behalf of the wisdom of the Senate and the tradition of the Senate has been recognized by—I believe the Senator said over 20,000 telephone calls from fellow citizens came into his office in response to his outspoken courage.

The Senator said he noticed in last Sunday's New York Times a reprint of one of his famous speeches which he gave here just a short while ago.

I thank the Senator for his gracious leadership on behalf of our country and on behalf of the institution of this Senate. This Senator has learned more about the Constitution and the traditions of this great institution from the Senator from West Virginia than from any other source. I am grateful for that education, which is actually the subject I want to bring up today because in a few moments we will begin voting once again on proceeding to a nomination to the second highest court.

Mr. BYRD. Madam President, if the distinguished Senator will yield briefly—

Mr. DAYTON. I yield to the distinguished Senator from West Virginia.

Mr. BYRD. Madam President, may I thank the distinguished Senator for his overly charitable comments concerning this Senator. And I am indeed grateful. I am grateful for the fact that he on several occasions here during his short career thus far in the Senate—I predict that it will be a long career, if he wishes to make it a long one—has stood with me with regard to several important subjects—subjects that deal with the Constitution, deal with this institution, and that deal with war and peace.

I thank him for standing shoulder to shoulder and toe to toe. I thank him likewise for what he brings to the Senate—vigor and fresh insights, vision that is beyond today's 24 hours, a man whose kinsman served in the Constitutional Convention from the State of New Jersey, and whose signature on that Constitution will be there until kingdom come.

I thank the Senator.

The PRESIDING OFFICER (Mr. CHAMBLISS). The Senator from Minnesota.

Mr. DAYTON. Mr. President, I thank the Senator from West Virginia. I

would stand proudly with the Senator on any matter shoulder to shoulder. I believe I am 30-some years younger than the Senator. I wish I had the Senator's vigor and eloquence to carry forward. I thank the Senator for those kind words.

Taking what I have learned from the distinguished senior Senator from West Virginia, I note, with dismay, that while this body has spent over 100 hours on the Senate floor debating this judicial nomination, I compare that 100 hours on one judicial appointment with the number of hours this year this body has spent discussing and debating a declaration of war before commencing a war against Iraq.

And the answer is: Zero, not 1 hour, not 1 minute of formal debate in the 108th session of the Senate on this profound matter of war and peace, life and death—even now, with this Nation poised on the brink of war, a war which the United States is instigating, without direct provocation, without an immediate threat to our national security; the first war under the new doctrine of preemption, a claimed right to attack another country because they might become a future threat; the first war in which the United States is perceived in the eyes of much of the rest of the world as the provocateur, as a threat to world peace.

The Times of London recently surveyed the English people and asked: Who is the greatest threat to world peace today? Forty-five percent named Saddam Hussein, 45 percent named President Bush. In Dublin, Ireland, the poll was 31 percent Saddam Hussein, 68 percent President Bush. In the Arab world, the populations are overwhelmingly against a U.S. invasion of Iraq.

Osama bin Laden, with his most recent tape, is attempting to exploit those emotions, exhorting the members of his al-Qaida terrorist organization and followers to rise up against the invader, the crusader, the United States.

Those sentiments come as a great shock to us, as unwarranted and undeserved as they are. A few, unfortunately, in high levels in this administration believe they don't matter, that they are irrelevant.

Eighteen months ago, we had the sympathy and support of the entire world after the dastardly attacks of 9/11, support and sympathy which has been needlessly squandered and which will not easily be regained.

Here at home our citizens receive color-coded warnings of greater or lesser unspecified threats. They are told to stockpile water, food, plastic sheets, and duct tape, or else they are told nothing at all.

The Secretary of Defense, testifying before the Senate Armed Services Committee, on which I serve, said recently: We are entering what may prove to be the most dangerous security environment the world has known.

In the midst of this ominous, dangerous, fateful time, the 108th session of the Senate has devoted no time for debate or discussion. The last 3 days the debate has been on a bill that purports to ban partial-birth abortions, a matter of importance, a matter of great concern to some, but not one that required the attention of the Senate at this moment in time.

Now we move on to consider, once again, a judicial nomination, then another judge; and before that there was another judge. Does it appear we are avoiding something? Well, we are. We are avoiding our constitutional responsibility, perhaps the most important responsibility placed upon us by the U.S. Constitution: whether to declare war.

As I have learned from the distinguished Senator from West Virginia, the Constitution says—simply, clearly, emphatically—Congress shall declare war, only Congress, no one else—not the President, not the judiciary, not the military—only Congress, only the 435 Representatives and 100 Senators elected by and acting for the people of the United States.

Last October, a majority of the Members of the 107th Congress—a majority of the Members in the House and a majority of the Senate—voted to transfer that authority to the President. Five months before he even made his own final decision regarding war or peace, Congress was asked to give him that authority that the Constitution assigns only to us. And Congress did so. It passed a resolution that said the President may use whatever means necessary, including the use of force, against Iraq.

Oh, we use such clever euphemisms in the Senate, words which disguise the meaning of our intentions. Use ''whatever means necessary.'' And, oh, by the way, lest you forget, it is OK with us if you use force—not the lives of American men and women, not their bodies, their blood, their patriotism—use force—not the deadly, ear-splitting, Earth-shaking, people-maiming, death-dealing bombs, and other weapons of destruction, the most devastating, overwhelming, terrifying, death-dealing force the world has ever known coming from us, the good guys, the protectors, the preservers of world peace, the United States of America.

What incredible foresight the Founders of this great Nation had in not wanting a decision that enormous, that Earth-shaking or ear-shattering to be made by one person—not by this President, not by any President.

Instead, this President asked for—and the 107th Congress acquiesced and gave—complete, unrestricted, unrestrained authority, with no conditions, no restraints to make that decision. Don't tie my hands, the President said.

Don't tie the President's hands? What did the Founders of the country think of that? Thomas Jefferson wrote, in 1798:

> In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.

''Bind him down from mischief by the chains of the Constitution.''

Tie his hands? That was not enough. ''Chain him to the Constitution.''

We, in Congress, are supposed to be chained to the Constitution. We took an oath. When we were sworn in, we promised to support and defend the Constitution of the United States against all enemies, foreign and domestic, bear true faith and allegiance to the same Constitution.

That was our oath and our allegiance written—not to the country, not to our State, not to our Government but to the Constitution of the United States of America.

The Founders of this Nation had other admonitions for the United States regarding the Constitution: Follow it or change it, but don't ignore it or evade it.

George Washington, in his Farewell Address, in 1796, said:

> If, in the opinion of the people, the distribution of constitutional powers be wrong, let it be corrected by amendment in the way which the Constitution designates. But let there be no change by usurpation, for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

Finally, an admonition from another perspective, that of Edward Gibbon, the author of the ''History of the Decline and Fall of the Roman Empire.'' He said:

> The principles of a free constitution are irrevocably lost when the legislative power is taken over by the executive.

In this sense, the legislative power was not taken over by the Executive. We gave it away. Here, Mr. President, you decide. If you are right, we will try to share the credit. If you are wrong, you take the blame.

Mr. BYRD. Mr. President, will the Senator yield?

Mr. DAYTON. The Senator yields.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. Will the Senator from Minnesota yield without losing his right to the floor?

Mr. DAYTON. The Senator yields without losing his right to the floor.

Mr. BYRD. Mr. President, the Senator from Minnesota is making a great speech. It is great because of the quotations the Senator from Minnesota has given to us today about that Constitution.

The Senator was one of the lonely 23 who voted not to give to this President, or any other President—not to attempt to hand over to this President or to any other President—the power to declare war, which is found in the eighth section of article I of the Constitution of the United States.

A nominee for a Federal judgeship came to me the other day. I said: Where in the Constitution is the power to declare war lodged? He didn't remember. I said: Where in the Constitution is the vestment of the power to appropriate moneys? He knew it was there, but he didn't know in what section that was to be found. Of course, I

didn't have any problem in reminding him where both were to be found.

But the Senator from Minnesota today is referring to the Constitution of the United States, written in 1787, signed by 39 individuals, among whom was one kinsman of the distinguished Senator from Minnesota, MARK DAYTON, and his name is found in that illustrious roll of signers from the State of New Jersey, William Livingston, David Brearley, William Paterson, Jonathan Dayton. The Senator from Minnesota, Mr. MARK DAYTON, voted to uphold the Constitution, concerning which he has stood before that desk of the Presiding Officer with his hand on the Bible and swore to support and defend that Constitution.

This Senator who sits in front of me, I now put my hand on his shoulder, Senator KENT CONRAD, he was among the 23, yes. He was on that illustrious roll to which someone in ages hence will point. The Senator from Illinois, Mr. DURBIN, sits here on the floor today. He, too, was one of the 23 who stood for the Constitution on that day, when a majority of the Senate voted to shift the power to declare war to the President of the United States. But 23 Senators voted to leave that authority where the Constitution puts it: namely, in Congress.

What would Jonathan Dayton have said could he have spoken on the day that those 23 Members stood up for the Constitution—21 Democrats, one Independent and one Republican—what would Jonathan Dayton of New Jersey have said if he could have spoken to the Senate that day? What would his advice to us have been?

Mr. DAYTON. I think he would have said it was a good thing we added West Virginia to the United States of America so we could have the distinguished Senator from West Virginia to give us the guidance he did that day.

Since the hour is approaching for the vote under the rules, I will conclude my remarks.

Mr. BYRD. I thank the distinguished Senator for yielding.

Mr. DAYTON. I thank the Senator for his kind words.

I respectfully urge the majority leader and all of my colleagues to turn their attention to this fateful decision when we return next week. A decision whether or not to vote a declaration of war is one that would be a very difficult vote, one that would be a career-shaping or career-shattering vote, but it would be one the Constitution requires of us, as do our fellow citizens who elected us. And it is one that only we can and must do, to vote on whether or not to declare war.

I urge the Senate to turn its attention to that matter when it resumes next week.

I yield the floor.

Mr. FEINGOLD. Mr. President, I will oppose the nomination of Jay Bybee to the Ninth Circuit Court of Appeals. I was not able to attend the hearing that was held on Mr. Bybee because of Secretary Powell's presentation that morning to the United Nations. So I submitted written questions, as did a number of my colleagues. Unfortunately, I have to say after reviewing Mr. Bybee's response to those questions that his unwillingness to provide information in response to our inquiries is striking. On more than 20 occasions, Mr. Bybee refused to answer a question, claiming over and over again that as an attorney in the Department of Justice he could not comment on any advice that he gave at any time. This is unfortunately becoming a very familiar refrain of nominees before the Judiciary Committee.

I say unfortunate because it puts many of us in the position of having to oppose nominees because they have not been forthcoming. This was not the approach taken by at least some Bush nominees in the last Congress. Michael McConnell, for example, was forthcoming in his testimony and answers to written questions. He convinced me that he would put aside his personal views if he were confirmed to the bench.

There is an extensive body of legal work both written by or at least signed off on by this nominee, in this case unpublished Office of Legal Counsel opinions. The administration and the nominee are acting as if they are irrelevant to the confirmation process. A nominee cannot simply claim that he or she will follow Supreme Court precedent and ask us to take that assurance on faith, when there are written records that may help us evaluate that pledge, but the nominee refuses to make those records available.

Only three OLC opinions had been made publicly available since Mr. Bybee's confirmation to head that office. That is extraordinary, given that 1,187 OLC opinions dating back to 1996 are publicly available. This is a dramatic change in the Department's practice, a change that did not occur until this nominee was confirmed to be Assistant Attorney General for the office. While there may be some justification for releasing fewer opinions since 9/11, the wholesale refusal to share with the public and Congress important OLC decisions affecting a wide range of legal matters is, to say the least, troublesome.

But the failure to make OLC opinions available to the Judiciary Committee during the consideration of a nominee for a seat on a circuit court is unacceptable. Even White House Counsel Alberto Gonzalez, in a letter Mr. Bybee cites in his written responses, agrees that there is no universal bar to disclosure of OLC opinions. Gonzalez wrote that:

> No bright-line rule historically has governed, or now governs, responses to congressional requests for the general category of Executive Branch ''deliberative documents.''

The administration should be able to agree to an acceptable procedure to allow the Judiciary Committee to review Mr. Bybee's OLC opinions. Given the recent history of many OLC opinions being made public, it is hard to believe that there are no opinions authored by Mr. Bybee that could be disclosed without damaging the deliberative process. Indeed, it is very hard to give credence to the idea that OLC's independence would be compromised by the release of some selection of the opinions of interest to members of the Judiciary Committee or the Senate.

Without the OLC memos, important questions about the nominee's views on how far the Government can go in the war on terrorism, enforcing the rights of women, enforcing the rights of gays and lesbians, and other important issues do not just remain unanswered, they apparently remain off-limits.

One of Mr. Bybee's responses may explain the reluctance to make any OLC materials available. In his response to a question from Senator BIDEN about why DOJ did not create an independent Violence Against Women Office at DOJ as required by Congress in a bill passed last year, Mr. Bybee left the impression that OLC may have either intentionally omitted or ignored the key portions of the legislative history in crafting its opinion.

In a series of questions from Senator BIDEN about his involvement in DOJ's decision on the VAWO, Mr. Bybee was given the opportunity to clarify his view of the law and correct what appears to be a clearly erroneous interpretation of the legislative history. Instead he seems to try to downplay the importance of his office's legal analysis on the decision. He states at one point:

> The structure of the letter would thus indicate that legislative history had no significant bearing on its analysis or conclusion.

The members of the Judiciary Committee are entitled to better. How can we be confident that Mr. Bybee will put aside his personal policy views and fairly interpret and apply the law as passed by this body, when it seems that his office crafted a legal opinion designed to allow the Department of Justice to willfully ignore clear legislative intent? Perhaps the legal opinion itself will shed some light on this question, but we are not being permitted to see it.

Mr. Bybee also mischaracterized many of his own writings and speeches and failed to directly answer most of the questions put to him about them, claiming he would simply follow existing Supreme Court precedent. As we all know, the Supreme Court has not answered every legal question. It is our circuit court judges that are routinely in the position of having to address novel legal issues, not the Supreme Court.

For example, I asked Mr. Bybee about his views, published in a law review article, that we should consider repealing the 17th Amendment which provides for the direct election of Senators. The nominee now simply states that Senators should be popularly elected, almost claiming he had never argued to the contrary in his article.

His answers to my questions about this article were evasive, not forthcoming.

Another telling example is his response to a series of questions from Senator EDWARDS about a 1982 article in which he criticized the IRS decision to deny tax exempt status to Bob Jones University because of its racially discriminatory practices. The article is full of statements revealing a disdain for anti-discrimination policies and warned of a parade of horribles should the government continue to use its spending power to advance such policies.

Yet, in his written responses, Mr. Bybee seems to deny the very clear meaning of his written words. He goes so far as to claim that he was only commenting on the Government's change in position in the case and not the very important public policy issue at the heart of the case. That, it seems to me, is an adventurous reading of the article, at best.

Based on Mr. Bybee's unwillingness to answer any question about his views on a wide range of issues, his distortion of his own limited but telling written record, and the failure of the administration to provide any of his numerous OLC opinions to the Judiciary Committee for review, I must vote no on his nomination to the Ninth Circuit Court of Appeals.

Mr. DURBIN. Mr. President, I rise today in opposition to the nomination of Jay Bybee for the Ninth Circuit Court of Appeals. Mr. Bybee recently passed out of the Judiciary Committee by a vote of 12 to 6.

Mr. Bybee is a smart person and a talented attorney—there is no argument about that. But he is one of the most strident voices in the country in advocating states' rights over Federal rights.

For example—and I think members of the Senate here should take special note of this—he wrote a law review article arguing that the 17th amendment was a bad idea. The 17th amendment, of course, is the amendment that allowed for direct election of United States Senators.

Mr. Bybee believes that ratification of the 17th amendment has resulted in too much power for the Federal government, and too little for the States. Here is what he said in his law review article:

> If we are genuinely interested in federalism as a check on the excesses of the national government and therefore, as a means of protecting individuals, we should consider repealing the 17th Amendment.

I, for one, disagree.

On behalf of a conservative foundation, Mr. Bybee wrote a successful amicus brief in the 2000 case United States v. Morrison, in which the Supreme Court struck down part of the Violence Against Women Act. Mr. Bybee wrote that Congress had no power under either the Commerce Clause or the 14th amendment to pass crucial provisions of this law. I thought this was settled law 75 years ago. Mr. Bybee thinks it is time to revisit this notion.

In addition, I am troubled by Mr. Bybee's positions regarding gay rights. He has been very critical of the Supreme Court's 1996 decision, Romer v. Evans, that struck down a Colorado constitutional amendment that prohibited local governments from passing laws to protect gay people. He called such laws that protect gay people from discrimination ''preferences for homosexuals.''

In another gay rights case, he wrote a brief defending the Defense Department's policy of subjecting gay and lesbian defense contractors to heightened review before deciding whether to give them security clearances. He argued that this policy was not a violation of the Equal Protection Clause and argued that such reviews were justified, in part, because some gays and lesbians experienced ''emotional instability.''

I am also concerned that Mr. Bybee—as head of the Justice Department's Office of Legal Counsel—has been involved in shaping some of the most controversial policies of the Ashcroft Justice Department. For example, he may have been involved in the new interpretation of the second amendment.

He may have been involved in the TIPS program, in which people in the United States are encouraged to spy on their neighbors and coworkers and report any conduct they find to be ''unusual.''

He may have been involved in the decision to declare the al Qaeda and Taliban detainees at Guantanamo Bay as prisoners of war under the Geneva Convention.

I say ''may have been involved'' because he refused to tell us. In written responses to 20 different questions we posed to him, he gave the following answer:

> As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice.

Mr. Bybee is the most recent example of an appellate court nominee who has stonewalled the Senate Judiciary Committee. I do not believe that such conduct should be rewarded.

I oppose the nomination of Mr. Bybee to the Ninth Circuit.

NOMINATION OF MIGUEL A. ESTRADA, OF VIRGINIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT—CONTINUED

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The assistant legislative 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 Executive Calendar No. 21, the nomination of Miguel A. Estrada to be United States Circuit Judge for the District of Columbia Circuit.

Bill Frist, Orrin Hatch, Trent Lott, Robert F. Bennett, Peter Fitzgerald, Jeff Sessions, John Ensign, Kay Bailey Hutchison, Rick Santorum, Don Nickles, Jim Talent, Lindsey Graham of South Carolina, Lisa Murkowski, Conrad Burns, John Warner, John Sununu, Gordon Smith, Elizabeth Dole, Saxby Chambliss, Christopher Bond, Susan Collins, Wayne Allard, Lamar Alexander, Norm Coleman, Pat Roberts, Craig Thomas, Larry E. Craig, Olympia Snowe, John McCain, James Inhofe, Jon Kyl, Lincoln Chafee, Judd Gregg, Richard G. Lugar, George Allen, Chuck Grassley, George V. Voinovich, Mike Crapo, Michael B. Enzi, Thad Cochran, Mike DeWine, Arlen Specter, Sam Brownback, Ben Nighthorse Campbell, Richard Shelby, Ted Stevens, Chuck Hagel, John Cornyn, Pete Domenici, Mitch McConnell, Jim Bunning.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Miguel A. Estrada, of Virginia, to be United States Circuit Judge for the District of Columbia Circuit shall be brought to a close?

The yeas and nays are required under the rule.

The clerk will call the roll.

The senior assistant bill clerk called the roll.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from North Carolina (Mr. EDWARDS), and the Senator from Massachusetts (Mr. KERRY) are necessarily absent.

I further announce that, if present and voting, the Senator from North Carolina (Mr. EDWARDS) and the Senator from Massachusetts (Mr. KERRY) would each vote ''No.''

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

The yeas and nays resulted—yeas 55, nays 42, as follows:

[Rollcall Vote No. 53 Ex.]

YEAS—55

Alexander	Dole	Murkowski
Allard	Domenici	Nelson (FL)
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Breaux	Frist	Santorum
Brownback	Graham (SC)	Sessions
Bunning	Grassley	Shelby
Burns	Gregg	Smith
Campbell	Hagel	Snowe
Chafee	Hatch	Specter
Chambliss	Hutchison	Stevens
Cochran	Inhofe	Sununu
Coleman	Kyl	Talent
Collins	Lott	Thomas
Cornyn	Lugar	Voinovich
Craig	McCain	Warner
Crapo	McConnell	
DeWine	Miller	

NAYS—42

Akaka	Clinton	Feingold
Baucus	Conrad	Feinstein
Bayh	Corzine	Graham (FL)
Bingaman	Daschle	Harkin
Boxer	Dayton	Hollings
Byrd	Dodd	Inouye
Cantwell	Dorgan	Jeffords
Carper	Durbin	Johnson