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EXECUTIVE SESSION

Mrs. HUTCHISON. Mr. President, Senator HATCH will be on the floor shortly. Before he gets here, I want to talk about one of the nominees who we will be voting on, once again, with cloture votes on Friday. That is Justice Priscilla Owen. Justice Priscilla Owen has had a vote in the Senate. She has had four or five votes in the Senate.

If we were adhering to the Constitution of the United States, she would be sitting on the Fifth Circuit today. There are three vacancies on the Fifth Circuit. They need to fill their bench. She should be sitting there because she has gotten more than 51 votes. But Priscilla Owen is not sitting on the Federal bench today because we have a new standard that has been put in place for the first time since 1789. Last year, we started having a 60-vote standard for Federal judges.

So Priscilla Owen, although she has repeatedly and every time, gotten over the required 51 percent, is not sitting on the Federal bench today. No. Instead, this very qualified supreme court justice of the State of Texas is doing her job, doing it very well, serving as a supreme court justice in the State of Texas, even though she has gotten the requisite number of votes on repeated occasions to be confirmed as a Federal judge by the standards of this Congress from 1789 until 2002, until the rules were changed because we are now filibustering Federal judge nominees.

Priscilla Owen was endorsed by every newspaper in Texas when she ran for reelection. Priscilla Owen made the highest grade—the highest grade—on the bar exam when she took it. She graduated at the top of her class from Baylor Law School. She has had an exemplary record both as a supreme court justice for the State of Texas and as a practicing lawyer. She is experienced. She is qualified. She was rendered qualified by the ABA system, the committee, and she has been endorsed by Democrats and Republicans throughout Texas. She has been endorsed by Democratic supreme court justices with whom she served on the Supreme Court of Texas.

The former chief justice of the supreme court, a Democrat, named John R. Hill, who also was a Democrat attorney general in the State of Texas—a very fine one, a very respected lawyer

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ROBERT W. NEY, *Chairman.*

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in Texas; supreme court chief justice and attorney general of our State—said Priscilla Owen is unqualifiedly the best we could have for this court. She is a person who ought to be on the Federal court.

In fact, he came up here and tried to meet with Democratic Senators to talk about how qualified she is. That Priscilla Owen is not sitting on the Fifth Circuit today is a tragedy, and it is not right.

She is not the only one who has been asked to meet this higher standard. Look at Miguel Estrada, who came to our country as a boy and did not even speak English, who studied so hard that he was able to go to Columbia and become a Phi Beta Kappa, and then to Harvard Law School, where he graduated, again in the top of his class.

Miguel Estrada, the American dream; Miguel Estrada, who sat here since May of 2001, who got the requisite number of votes to be confirmed for the DC Circuit—well over 51—time and time and time again, but he is not sitting on the DC Circuit. He finally said: I can't take this anymore. I have to get on with my life. In September, he said: Take my name off the list.

Why? Why have we set a higher bar for Priscilla Owen and Miguel Estrada—these two perfectly qualified people, with great academic standing, with great records, with experience, everything you would want on the Federal bench?

What are we going to do to the people who would ask for Federal benches in the future? I am very concerned that after watching this process so many of them are going to say: Please, don't throw me in that briar patch.

So, Mr. President, I do not think we should change the Constitution of the United States without going through the process of a constitutional amendment. Have we had a vote on the floor that got a two-thirds majority saying that we will have a 60-vote requirement for confirming Federal judges? Have we done that? That is the process for amending the Constitution of the United States.

But I do not think that since I have been here I have seen a vote that would say: No, it is not a 51-vote margin; it is 60. No, Mr. President, we have not had that vote. But, in fact, the amendment to the Constitution is being put forward without going through the process. Because we now have six people nominated to the circuit court bench who are having to meet a higher standard than 51. And that is not right.

To date, our President, President Bush, has had 63 percent of his nominees to the circuit court confirmed. The previous three Presidents have had 91 percent of their circuit court judges confirmed by this time in their terms.

So I am going to turn the floor over to the distinguished chairman of the Judiciary Committee who has done a wonderful job trying to get these nominations through the process. He has done a magnificent job in trying to bring these great nominees to the floor.

But we are standing here tonight because this is a constitutional issue, and it is important. It is important that these good people, who have submitted themselves for this process to be confirmed as Federal circuit judges, be able to, with dignity, have a vote up or down with the same standard that we have had since 1789; and that is a 51-vote margin.

Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER (Mr. SUNUNU). The Senator from Utah.

Mr. HATCH. Mr. President, I have been listening to this debate and the populist arguments being made by Democrats who seem to think that having Federal judgeship nominees treated fairly, as they always have been in the past, once they have been brought to the floor, seems to be not right because they think we ought to do something about jobs.

Well, why haven't they? This recession began in the last year of the Clinton administration. I went through just some of the things that show they have had a pattern of obstruction from day 1 around here since we have taken over control of the Senate.

The pattern of obstruction was set on the first day of the 108th Congress when the motion to adjourn was forced to a rollcall vote, something that is usually never done. The long overdue 2003 appropriations bills were finally enacted after we became the majority in 2003, on February 20.

For the first time in history, filibusters were used to defeat the President's circuit court nominees. I have mentioned upwards of 15 that some Democrats have told me they are going to filibuster. They are not going to filibuster all of them, but they are certainly filibustering already more than four. There are six right now by the time you get through with Friday.

I can tell you, there are a whole raft of others they are planning on filibustering. First time in history, treating a President like dirt, and these nominees, which is even more important in this sense, because these nominees—we are going to find that we cannot get the top people in the country to take these positions, especially if they are very liberal or very conservative, even though they are in the mainstream. And that is a big phony shibboleth. Every time they say: Well, they are outside the mainstream of American jurisprudence. They were saying that about Bill Pryor, criticizing the cases that he won as the Alabama attorney general before the Supreme Court. So who is out of the mainstream? It certainly is not Bill Pryor, nor is it any of these other nominees.

Like I say, Priscilla Owen, who has been held up for 3 years now—better than 3 years—Priscilla Owen is on the Texas Supreme Court. She was one of the first women partners in this country. She broke through the ''glass ceiling'' for women. They ought to be giving her a medal instead of treating her in this despicable fashion, and they are only doing it because these inside-the-beltway groups control, in many respects, what they do. It all comes down to abortion.

Now, there are sincere people on both sides of that issue. That is why I did not allow the issue of abortion to stop otherwise qualified candidates from getting a vote up or down on the floor, even though I am personally pro-life and cannot imagine why anybody would want to go for a regime of abortion on demand. There were 1.6 million abortions a year at one time. Forty million abortions in this country—the barbaric practice of partial-birth abortion, which many of my colleagues voted for, even some on this side.

Let me go down a few further here: Needed legal reforms, I mentioned, to stop lawsuit abuse against doctors, businesses, and industries have been virtually banned by the tactics of the minority.

Jobs have been lost right and left because of their refusal to allow decent laws to be passed. Medical liability, class action reform, gun liability, and asbestos lawsuit reforms have all been subject to delays or filibusters by our colleagues on the other side.

As I said, we spent 22 days on an Energy bill last year, and then we had to spend 18 days on an Energy bill this year, when we basically enacted the same bill we did last year.

Bioshield legislation is very important for those of us who work heavily in the area of health care and antiterrorism. Bioshield legislation is necessary to ensure proper vaccines and medicines to counter bioterrorism attacks has still not cleared objections.

The State Department reauthorization was stalled by Democrats insisting upon unrelated poison-pill amendments being voted on prior to passage.

The District of Columbia appropriations bill is subject to a rolling filibuster threat over a provision giving low-income students school choice, where we spend over $11,000 per student and have the lousiest school system in the country.

Last year Senate Democrats failed to pass a budget resolution for the first time since the Budget Act was written in 1974, and they have the gall to come in here and say: Well, we ought to be taking care of jobs.

We are going to take care of jobs if we can get some cooperation from them. But all the taking care of jobs in the world may not amount to much if we do not have a good Federal judiciary to make this system work, to make sure our constitutional way of life continues.

They passed no welfare reform. They took no action to ban cloning. They passed no Medicare prescription drug plan. They confirmed a record low number of judges. They enacted only 2 of the 13 appropriations bills and delayed enactment of a Homeland Security Department for months. It is this

dismal record of inaction that Democrats hope to repeat.

Now, we are committed to delivering the Healthy Forests bill and the CARE Act to the President's desk. The Democrats are refusing to name conferees to the bill that passed with strong bipartisan support. I could go on and on.

But my friend from Nevada—it is kind of interesting to me that he would take 10 hours out of the Senate's time on Monday to filibuster, when we all came here prepared to vote on appropriations bills.

I think it is pretty bad to come in here and say that we should not do what we should for judges, when they themselves have been filibustering not just judges but virtually everything else with a slow walk.

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

Mr. HATCH. I am glad to yield, without losing my right to the floor.

Mr. MCCONNELL. I notice my friend's voice from Utah is cracking a bit, and I thought I might give him a moment's relief by asking him a question or two.

Mr. HATCH. Sure.

Mr. MCCONNELL. I would ask the chairman of the Judiciary Committee, was it not the case that the current DC Circuit Judge John Roberts and nominee Miguel Estrada were nominated on the same day in May of 2001?

Mr. HATCH. That is correct.

Mr. MCCONNELL. I would ask my friend from Utah, is it not true that the rationale for defeating Miguel Estrada given by the other side was that either he or the Justice Department or both of them refused to turn over the working papers that he had produced during his period as a lawyer in the Solicitor's Office of the Justice Department?

Mr. HATCH. That is correct. These are the most confidential private papers of the Solicitor General's Office, the lawyer who represents all of the public.

Mr. MCCONNELL. Right. Was it also not the case, I ask my friend from Utah, that every single living Solicitor, who are either current or former Solicitors, the majority of which are Democrats, concurred with the Justice Department's position that these working papers should not be turned over?

Mr. HATCH. That is correct. Four of the seven former Solicitors General were leading Democrats, who said that what the Democrats are doing is wrong.

Mr. MCCONNELL. People such as Seth Waxman and Archibald Cox?

Mr. HATCH. Right.

Mr. MCCONNELL. All concurred?

Mr. HATCH. Right.

Mr. MCCONNELL. All concurred that these types of working papers should not be turned over?

Mr. HATCH. That is right.

Mr. MCCONNELL. Is it not the case, I ask my friend from Utah, that both John Roberts and Miguel Estrada worked in the Solicitor's Office?

Mr. HATCH. They both worked there. They both were excellent appellate lawyers. By the way, Estrada worked not only with the Bush administration but with the Clinton administration. And he had high marks.

Mr. MCCONNELL. The same two gentlemen we just discussed, who were nominated on the same day back in May of 2001, by President Bush, for the very same court?

Mr. HATCH. Right.

Mr. MCCONNELL. Nominated to the same court, the same experience in the Solicitor's Office. And is it not the case, I say to my friend from Utah, that John Roberts was passed out of committee and subsequently confirmed on a voice vote in the Senate?

Mr. HATCH. A unanimous voice vote on the floor, but only after waiting 12 years through three nominations by two different Presidents.

Mr. MCCONNELL. He certainly had to wait a while, did he not?

Mr. HATCH. Right.

Mr. MCCONNELL. Is it not the case that you had two nominees nominated on the same day, to the same court, having had the same experience in the Solicitor's Office, and one nominee was rejected because internal papers in the Solicitor's Office were requested and not turned over, and no such request for the same kind of office papers were made of now Judge Roberts?

Mr. HATCH. John Roberts, who was one of the finest appellate lawyers in the country, as was Miguel Estrada, was treated completely differently once the Judiciary Committee considered him. And I had to force them to consider him. Yet he passed this body by unanimous consent.

Mr. MCCONNELL. So the request was made for certain papers of one nominee and the precise same papers of the other nominee were not requested?

Mr. HATCH. That is exactly right. They treated Miguel Estrada differently from John Roberts.

Mr. MCCONNELL. Let me ask my friend from Utah, is there any conceivable basis for such disparate treatment for the same two people, nominated for the very same court on the very same day, going through the very same Judiciary Committee? Can the Senator from Utah think of any rational reason for this kind of disparate treatment?

Mr. HATCH. Not a legitimate reason. The only reason was they believed him to be pro-life. I don't know whether he is to this day because we do not ask those questions.

Mr. MCCONNELL. But the stated reason, I would say to my friend from Utah, you just confirmed a moment ago. The stated reason for not confirming Miguel Estrada was that he would not turn over these papers or the administration would not turn over these papers.

Mr. HATCH. The phony reason.

Mr. MCCONNELL. That was the stated reason.

Mr. HATCH. The phony reason they hid behind.

But let me make this point. Miguel Estrada, as great an attorney as he is, having argued 15 cases before the Supreme Court, having the highest recommendation of the American Bar Association, their gold standard, they did not want him to come through this process because they knew, or at least they perceived, that he was on the fast track to become the first Hispanic on the Supreme Court and they just cannot tolerate having a conservative Hispanic on the Circuit Court of Appeals for the District of Columbia, let alone on the Supreme Court.

Mr. MCCONNELL. So I say to my friend from Utah, what we have is a situation where a white male nominee, to the very same court, with the very same experience, was treated one way and a Hispanic-American nominee, nominated to the very same court, on the very same day, was treated differently?

Mr. HATCH. That is absolutely right. But even Roberts had to go through a lot of pain to get there—12 years waiting, nominated three times by two different Presidents.

We put him out of the committee after a 12-hour hearing. You hardly have that much for Supreme Court nominees. There were two others on that list. They complained because there were three on one day's hearing. They ignored the fact that TED KENNEDY, when he was chairman, had seven circuit nominees one day, and another four. We had at least 10 other times when we had three.

Then once we put him out of the committee, I had to bring him back in the committee so they could have another crack at him. They could not touch him. He was that good. So he had to go through an inordinate process to get there. But they knew they did not have anything on him. They know they didn't have anything on Miguel Estrada.

Mr. MCCONNELL. It sounds to this Senator, I wonder if the chairman concurs, that there was a sort of rule created and applied to Miguel Estrada——

Mr. HATCH. It was a double standard.

Mr. MCCONNELL. That was not applied to John Roberts, two nominees considered for the same court at the same time.

Mr. HATCH. Absolutely right. Roberts was treated like all other nominees during the Reagan years, Bush 1 years, and the Clinton years. He was not asked to give his opinions on future issues that might come before the Circuit Court for the District of Columbia.

Because Miguel Estrada answered the same way basically as all the other people who had passed in prior years, they held that against him. The big phony issue was knowing that the Solicitor General's Office did not give the most privileged, private documents in that department without making that department unworkable.

Mr. MCCONNELL. Which is why, I say to my friend, they didn't ask for those papers on John Roberts.

Mr. HATCH. That is right. They did treat Roberts differently, no question about it. They gave him a rough time, too. Miguel Estrada is in a league of his own in the way he was mistreated, but Roberts was mistreated, too. Roberts sits on the Circuit Court of Appeals for the District of Columbia after having been unanimously approved here.

Let's talk about how important that is. We have had 40 rollcall votes on the floor. You talk about delays. You talk about fouling up this body. We have had 40 rollcall votes on people who got unanimously confirmed. Can you imagine what it takes to go through 40 rollcall votes? It slows down the Senate like you can't believe, and muscles up the Senate like you can't believe. It is all a big game to try and make this President not successful. But Miguel Estrada had to go through that as well.

Mr. MCCONNELL. So I say to my friend from Utah, and I will conclude with this, the practical result of that is this immigrant who came to the United States as a teenager, speaking broken English, realized the American dream, went to undergraduate and law school, was a star student, argued 15 cases before the Supreme Court, was denied an opportunity to get an up-or-down vote on the Senate floor by the creation of a standard that was not applied at the very same time to another nominee who was not a minority.

Mr. HATCH. And, by the way, was never applied to any nominee, to my knowledge, in the past. Miguel Estrada was singled out with a double standard for the sole purpose of defeating his nomination and getting him to withdraw.

Mr. MCCONNELL. They were having a hard time, I say to the chairman, trying to find some basis upon which to defeat this guy. He was unanimously well qualified by the ABA, right?

Mr. HATCH. Their gold standard.

Mr. MCCONNELL. He argued 15 cases before the Supreme Court.

Mr. HATCH. Very few people even argue one case.

Mr. MCCONNELL. He received outstanding recommendations from everyone with whom he worked. They were having a real struggle, weren't they, I say to my friend, the chairman, trying to find some basis upon which to reject this truly outstanding nominee.

Mr. HATCH. It shows the lengths they would go to on that side—at least the leaders on that side—to screw up a nomination of a very good person.

Take Janice Rogers Brown. She is a terrific African-American justice on the California Supreme Court. She wrote the majority of the majority opinions on that court last year, and yet they come here and say she is outside the mainstream. They are outside the mainstream when they make arguments such as that.

There is only one reason they are against Janice Rogers Brown and filibuster her: because she is an African-American woman who is conservative and pro-life. For these inside-the-beltway groups, that is their single issue.

I had friends on the other side tell me, when I asked, ''Why are you doing this,'' say, ''Well, the groups will score this as a vote, and then they will come against whoever votes that way in the next election.'' These guys don't have the guts to take on the groups.

Mr. MCCONNELL. Isn't it true, I ask my friend from Utah, in California where the justice to whom you just referred serves on the supreme court, you have to stand periodically for continuation?

Mr. HATCH. That is right.

Mr. MCCONNELL. You can be rejected. Is it not true she got three-fourths of the votes?

Mr. HATCH. Better than that. She got 76 percent of the vote. She was the top vote-getter among four supreme court nominees.

Mr. MCCONNELL. This is in that bastion of conservatism, California.

Mr. HATCH. I think the Senator makes a very good point.

Mr. MCCONNELL. This nominee who was called outside the mainstream—outside the mainstream—gets about three-fourths of the vote in that bastion of conservatism—California—and the other side suggests she is somehow unacceptably conservative? That is absurd on its face, I argue to my friend.

Mr. HATCH. It certainly is. I went to one of my friends on the other side—and I won't mention the name because I don't think that would be proper—and I said: What did you think of Janice Rogers Brown? His answer was: She's terrific—which she was in front of the committee. Yet every Democrat went against her in committee and I think cited horrendously bad arguments to do it.

They can point to 8 or 10 cases with which they didn't agree, but with which a lot of people do agree, and then they say she is outside the mainstream when she has tried hundreds of cases and decided, as a majority opinion writer, the most majority opinions in that court last year and I think in prior years as well.

It is really unseemly, and that is why we are so upset here. Let me tell you, if we continue down this course, we are going to severely harm the Federal judiciary and get only people who really are not only outside the mainstream, but are Milquetoast, who can't make a decision to save their lives. Once you get to the Federal bench, you have to be able to make tough decisions.

Mr. MCCONNELL. Isn't it also true, I say to my friend, the chairman, that one of the arguments used on some of the nominees is because they have certain personal beliefs, that they won't uphold the law? Has that been an argument frequently made?

Mr. HATCH. That is a frequent argument. I think the best illustration of that happens to be Bill Pryor.

Mr. MCCONNELL. Which is what I was going to ask my friend, the chairman.

Mr. HATCH. They criticized him for cases he won before the Supreme Court, saying he is outside the mainstream because they disagreed with the cases. In fact, they think Rehnquist is out of the mainstream. They think Scalia is out of the mainstream. They certainly think Clarence Thomas is out of the mainstream because they want a single approach, a minority approach to everything that has to be liberal, and if you are not liberal, you are outside the mainstream, even though some of the greatest judges ever to sit on the Federal courts and Supreme Court were conservatives. Some of the great ones were liberals, too, but understood the role of judges.

Mr. MCCONNELL. This is the same Bill Pryor who is currently standing up against the Alabama chief justice.

Mr. HATCH. Right.

Mr. MCCONNELL. Who has been defying a court order by refusing to remove the Ten Commandments from a public building. It is very unpopular in Alabama to be against that guy.

Mr. HATCH. Bill Pryor is getting savaged by the rightwing because he basically sued to have the chief justice removed for not following the rule of law.

Mr. MCCONNELL. A classic example of following the law and not his own personal beliefs; is that not correct?

Mr. HATCH. That is absolutely correct. Just fast forward to this week. As the Atlanta Journal Constitution reported this week, Bill Pryor filed a pretrial brief asking the Alabama Court of the Judiciary to remove Judge Moore from the Alabama Supreme Court because of Moore's defiance of the Federal court order to remove the Ten Commandments display. Bill Pryor's brief stated, quoting from the Atlanta Journal Constitution article: Moore should be removed because ''he intentionally engaged in misconduct and because he remains unrepentant for his behavior.''

I could go on about Bill Pryor. During his hearing—a lengthy hearing—he was asked over and over by virtually every Democrat who showed up about his deeply held personal beliefs. He answered every question the way a judicial nominee should. Even though he had deeply held beliefs, he would obey the law.

The PRESIDING OFFICER. The time controlled by the majority has expired.

Mr. HATCH. I thank the Senator for his excellent questions.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, I ask the time of the half hour allotted to this side be divided between myself and Senator DODD and that I may proceed for 15 minutes.

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

Mr. LEVIN. Mr. President, what I wish the majority would be allowing tonight is consideration of legislation that addresses the loss of over 3 million jobs in this country during the last few

years, most of them manufacturing jobs.

What I wish the majority would be allowing us to do tonight is to consider legislation to extend the unemployment benefits to those Americans who have lost their jobs in this recession, the way we have extended unemployment benefits in previous downturns.

Those needs of the American people and a dozen other needs are what we ought to be spending our time on tonight and every day until those issues, and many other critical issues, are addressed.

Instead, those on the other side of the aisle decided to spend 30 hours rehashing the reasons that 4 out of the 172 of President Bush's judicial nominees have not been confirmed by the Senate. That is their right, but it is wrong.

In my home State of Michigan, the unemployment rate is 7.4 percent. In fact, Michigan has lost and continues to lose more manufacturing jobs than almost any other State in the Nation. Mr. President, 2.5 million of the 3.3 million jobs which the U.S. economy has lost since January 1, 2001, were in manufacturing. We lost over 160,000 of those jobs in Michigan alone. Other States face large job losses, but what we should be doing is helping people who lost jobs, acting to stop the currency manipulation by China, Japan, and other countries, and the one-way street in trade which has been such a large part of the loss of jobs in this country.

The first act of this Congress last January was to extend unemployment benefits through the end of this year because Congress did not act last year. That made the 2002 holiday season mighty grim for those workers whose benefits had expired. Current law provides 13 weeks of additional Federal aid to laid-off workers who have exhausted their 26 weeks of regular State benefits. However, this administration has shown no interest in either extending the deadline for the program or authorizing new benefits. The trust fund that is to be used for unemployment benefits currently has over $20 billion in it. Why this administration balks at extending unemployment benefits is beyond me since that is what the money in that fund is for.

I, along with a number of our colleagues, propose we extend the December 31 deadline for another 6 months so newly unemployed workers can receive Federal assistance, but also making available an additional 13 weeks of Federal unemployment benefits for a total of 26 weeks. That is what we have done in prior recessions. We responded during the 1974 recession. Federal benefits were extended to 29 weeks.

In the 1981 recession, Congress extended benefits to 26 weeks. In the 1990 recession, 26 weeks were provided, 33 weeks to States with high unemployment.

While the unemployment numbers released last week were somewhat of an improvement, in terms of manufacturing jobs, that loss continues, and the long-term economic forecast continues to be pessimistic.

On this track, this administration will be the first administration to lose private sector jobs since Herbert Hoover.

In one moment I am going to propound a unanimous consent request that I know my Republican colleagues will want to hear, and I want to alert them of the fact I will be propounding that request in a moment. I hope our Republican colleagues will give us consent to take up unemployment insurance extension legislation this evening. Perhaps then this 30-hour exercise will be fruitful.

I think I have alerted the Republicans that we would be making this unanimous consent request.

UNANIMOUS CONSENT REQUEST—S. 1853

I ask unanimous consent that the Senate proceed to legislative session; that the Finance Committee be discharged from further consideration of S. 1853, which is a bill to extend unemployment insurance benefits for displaced workers; that the Senate proceed to its immediate consideration; that the bill be read a third time and passed; and that the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection?

Mr. MCCONNELL. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. LEVIN. Mr. President, since the majority has now determined we will spend 30 hours of the time of the Senate rehashing 4 of the 172 judicial nominations that haven't been confirmed, I want to address what is an even deeper issue than the majority's effort to weaken and water down the role of the Senate in exercising its advice-and-consent responsibility.

That even more fundamental issue is our Nation's historic and constitutional system of checks and balances. Those checks and balances are an integral part of the unique design of our founding document in restraining the potential excesses and extremes of the executive branch. We share the obligation and responsibility with the judicial branch.

Our rules in the Senate are aimed at restraining the potential abuse of the rights of the minority by the majority within the legislative branch itself.

In June of this year, Robert Caro, the eminent Pulitzer Prize winning historian and author of ''Master of the Senate,'' his great biography of former President and Senate majority leader Lyndon Johnson, wrote to our Senate Rules Committee addressing this subject and quoting from his book. Here is what he said:

> . . . in creating this new nation, its Founding Fathers, the Framers of its Constitution, gave its legislature . . . not only its own powers, specified and sweeping . . . but also the powers designed to make the Congress independent of the President and to restrain and act as a check on his authority, [including the] power to approve his appointments, even the appointments he made within his own Administration . . . and . . . the power to approve Presidential appointments was given to the Senate alone; a President could nominate and appoint ambassadors, Supreme Court Justices, and other officers of the United States, but only ''with the advice and consent of the Senate.''

Robert Caro goes on to say:

> The Framers wanted to check and restrain not only the people's rulers, but also the possibility that the majority will be used in Madison's words ''to oppress the minority.'' The Framers, he [Madison] said, established the Senate as the body ''first to protect the people against their rulers; secondly to protect the people against the transient impressions into which they themselves might be led . . . The use of the Senate is to consist in its proceeding with more coolness, with more system. . . .

One of the historical tools for the protection of the minority which is developed in the Senate from its earliest days is the principle of extended debate. The exercise of this right of Senators, particularly when it is used to block actions which the majority fervently wishes to take, is embodied in our Senate rule that you must have a supermajority of 60 percent of the Senate on matters where there is strong opposition.

Filibusters have played an important role in moderating action in the Senate. It is widely recognized the Senate is a less partisan place—you may not be able to discern that tonight, but generally this is a less partisan place than the other body in our Congress or virtually any other democratically elected legislative body anywhere in the world.

As Senator BYRD said in his series of scholarly addresses on the floor of the Senate about Senate history:

> Arguments against filibusters have largely centered around the principle that the majority should rule in a democratic society. The very existence of the Senate, however, embodies an equally valid tenet in American democracy: the principle that minorities have rights.

Senator BYRD goes on to say in his study:

> The most important argument supporting extended debate in the Senate, and even the right to filibuster, is the system of checks and balances. The Senate operates as the balance wheel in that system, because it provides the greatest check against an all powerful executive through the privilege that Senators have to discuss without hindrance what they please for as long as they please . . . Without the potential for filibusters, that power to check a Senate majority or an imperial presidency would be destroyed. It is a power too sacred to be trifled with.

Lyndon Baines Johnson said in 1949:

> . . . If I should have the opportunity to send into the countries behind the iron curtain one freedom and only one, I know what my choice would be . . . I would send those nations the right of unlimited debate in their legislative chambers.
>
> If we now, in haste and irritation, shut off this freedom, we shall be cutting off the most vital safeguard which minorities possess against the tyranny of momentary majorities.

In May of 1994, when the Republican minority blocked Senator CLINTON's nomination of Sam Brown to be ambassador, one of our Republican colleagues said the following:

In considering the nomination of Mr. Samuel W. Brown to be the Ambassador to CSCE, I have reflected on the latitude which ought to be accorded the President in making this decision for the ambassadorship, reflecting as well on the constitutional responsibility of the Senate for advice and consent as a check. . . . . I am troubled by a situation where the only pressure point Republicans have in the U.S. Government is on cloture. Once cloture is obtained, there are more than enough votes on the other side of the aisle to cover the day. While the House is not involved in this matter, the House is overwhelmingly Democratic; there is a Democrat in the White House. The only place Republicans can assert any effective, decisive action is by stopping somebody from coming up. We have 44 votes, and we have more than enough, if there is unity among the Republicans, to do that. I think Mr. Brown's nomination and the responsibilities at the Conference on Security and Cooperation in Europe are sufficiently important to preclude his nomination.

The filibuster succeeded in blocking this nomination.

There are many reasons to at least consider modification to the Senate rules regarding the procedures for ending debate, the process we call cloture. Those rules have been modified a number of times before, but one of the reasons to consider modifying our rules is not the reason which is motivating our current majority in the Senate: irritation with the fact that only 98 percent of President Bush's judicial nominees have been confirmed by the Senate. That irritation that a substantial minority of Senators would stand in the way of getting their way 100 percent of the time has led to this 30-hour talkathon and their apparent desire to amend the Senate rules to let them get their way 100 percent of the time.

We find ourselves tonight debating not whether unemployment insurance should be extended for Americans who have lost their jobs, not how to create more jobs in our economy, not how to better provide for the education of our children, or to strengthen our homeland security, or reduce the cost and increase the availability of prescription drugs, but, rather, listening to the re-argument of the case for the 4 nominees out of 172 nominees the Senate has not confirmed.

They want a 100 percent confirmation success record, and they appear to be willing to throw over the very essence of the Senate and its check-and-balance role to accomplish it. The Constitution says the President shall nominate, and, by and with the consent of the Senate, shall appoint ambassadors and judges.

William Maclay, one of the first two Senators from Pennsylvania, wrote the following:

Whoever attends strictly to the Constitution of the United States will readily observe that the part assigned to the Senate was an important one, no less than that of being the great check, the regulator and corrector, or, if I may so speak, the balance of this Government. . . . . The approbation of the Senate was certainly meant to guard against the mistakes of the President in his appointments to office [and] the depriving power should be the same as the appointing power.

I thank the Chair, and I yield the floor to my friend from Connecticut.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I begin by thanking my colleague from Michigan for his comments. I intend to share some similar thoughts this evening.

First of all, let me begin by stating my own views about this process this evening and note—some have chosen to use the word anger—but I rise more in sadness.

We are gathered to engage in this—I do not know what it is properly called—I guess a filibuster. It is unique in that the majority is conducting a filibuster. Normally, a filibuster, for those who are interested in how this works, is conducted by a minority within a minority, but we find ourselves this evening a few short days away from the end of this particular session with a tremendous amount of unfinished business, and we are spending the next 30 hours—or 26 hours, whatever is left—on this particular debate and discussion, which I suppose has some value in the mind of some. As far as this Member is concerned, I regret in some ways even addressing the matters before us this evening. The better approach might have been to protect the rights of the minority but not to engage in this debate.

There may be four votes that will occur on Friday. Three of them involve individuals who are seeking appointment to the Federal judiciary. With all due respect to these particular nominees, putting aside one's views or whether they are for or against them, history will probably little note nor record for any great length of time who they were. That is not in any way to suggest they are not worthy individuals, but in the passage of time, these nominations will not register terribly significantly in the history of the debates of this great Chamber.

I arrived as an employee of the Senate about the age of 17 when I sat on these steps. Lyndon Johnson was the majority leader of the Senate. There was Everett Dirksen and Senator McClellan. It was a sea of giants who served in this body. I tried to imagine this evening whether or not they might proceed in a debate like we are having, but I cannot imagine them doing so, quite candidly.

I am afraid we are diminishing dramatically the incredible historic role of this institution by this process. When I think of all the matters that deserve our attention, when I think of all of the Herculean debates that have occurred in this Chamber throughout the 217-year history of our country, some of the great debates deciding who we were as a society—I sat on that step over there and listened to the all-night debates on civil rights in the early 1960s. I listened to southerners argue vehemently on behalf of their position regarding States rights. They were incredible debates. Never once in all of that process that I watched as a child sitting out there did I ever hear anyone suggest we ought to change the rules of the Senate.

Even among those who were outraged that there were those who were arguing about denying a substantial minority of citizens of this country the right to participate freely in the democratic institutions of America, never once did anyone suggest we ought to somehow curtail the right of a minority to be heard in debate, extended debate. Never once. Yet here we are tonight, having an extended debate over three or four judicial nominations. We may be asked on Friday to cast a ballot about amending the rules of the Senate to fundamentally change what has been a central ingredient of why this institution has been as celebrated and honored throughout the 217-year history of this country. That I find rather appalling, that we would gather at this hour with all of the other issues in front of us.

I spent 2 hours yesterday at Walter Reed Hospital. I took my 2-year-old daughter out to visit with the young men there, many of whom are missing limbs. I saw several of my colleagues out there, by the way. SAM BROWNBACK was out there. I went to spend a quiet couple of hours to express to these young men my great admiration for what they had done for their country.

I would like to think they might think something larger of this institution other than that we would engage in a discussion and debate tonight about three or four judicial nominations. Other of my colleagues have made comments about the numbers that have been approved and not approved. I am not a member of the Judiciary Committee. I have heard my colleagues extol the virtues of these nominees. I have heard others excoriate them. I will leave that debate for others. The vote I am most worried about is the possible fourth vote that may occur on Friday, and that is whether we are going to change the nature of this institution because some of us are disappointed about some outcomes of votes. I would hope whatever else ensues or passes over these next 30 or 40 hours that when it comes to that vote, maybe there will be those who will get up and defend this institution.

It is inappropriate for me to do so, but I will note the fact that there are those watching this debate this evening in this Chamber who are of a younger generation. They are students, I suspect, in some way wanting to participate or witness what some have tried to describe as an historic event. I would hope they take note of the arguments in debate about what is important, why the Founders created this institution, why we are not a unicameral body, as some State legislatures—why

we are a bicameral body, why it is there is down this corridor a House of Representatives at that end of the building and a Senate at this end. What are the fundamental distinctions between these two branches of one House? Why are we different? Why do we exist? What did the Framers have in mind when they created this institution? It is this very debate that gives justice, gives rationale to the existence of the Senate.

One needs only to go back to the Federalist papers, and as I look around this Chamber there are the forebears of those who sit in these seats who made the most eloquent arguments on behalf of the notion, of the idea, of having extended debate and the right and power to amend. Those are the two central ingredients which make this institution so unique.

When we begin to erode those very powers, then the very justification for this institution begins to diminish. We end up creating nothing more, potentially, than a mere image of the body that is at the other end of this hall.

I gave some remarks going back a number of weeks ago in front of the Rules Committee. I am the ranking Democrat of the Rules Committee. As such, I bear a responsibility, along with my colleague from Mississippi, who is the chairman of the committee, to consider such matters. I have great respect for the majority leader, but I would hope as we discuss the idea of amending rule XXII, that we would keep in mind what the Framers had in mind when it came to nominations, particularly nominations of a life tenure.

It is one thing to be talking about nominations during the duration of a given administration, but with judicial nominations it is for life. Depending on how young that person may be, an Federal judicial appointment can go on for decades. And so the Framers, given the experience they had come through, with the tyranny of a king, desired to create a system whereby the third coequal branch of government would have powers delineated between the executive branch to appoint and the legislative branch to approve, to provide its advice and consent.

If the ability of this institution to thoroughly exercise that right of advice and consent is destroyed, then we run the risk of creating a judicial branch, a coequal, that becomes nothing more than the hand servant of the executive. That is what the Founders worried about. It is what Senator Rutledge of South Carolina argued for when he spoke eloquently about the importance of keeping an independent judiciary.

In fact, for many weeks, during the constitutional convention, they argued the President ought to have no rights when it came to judicial nominations, that that right ought to be exclusively contained in the Senate of the United States. As a result of compromise, it was ultimately decided that the power to nominate individuals should reside in the executive, and the power to approve should remain here, thus guaranteeing, to the extent possible, an independent judiciary.

What is being suggested by the fourth vote we may be asked to cast on Friday is that we undermine that very principle which has survived for 217 years. I would hope with a resounding vote, both Democrats and Republicans, whatever strong feelings there may be about these three or four nominees, or whatever the number is, that we would not allow this institution to be diminished, caught up in the passions of these nominations.

History will not record nor remember who these people are, but if we undermine this institution's ability to do what our Founders asked us to do, then history will record forever our shortsightedness.

I regret in a sense having to engage in this debate. I was stunned to learn that in addition to this 30 hours of ''circusry'' going on here, and the three votes that will occur on Friday, there may be a serious effort to vote on whether this institution should give up its right to be able to have extended debate on judicial nominations.

This institution and its history deserve more. The fact that the Senator from Michigan and I have to arise at 10 at night to argue about something as fundamental as a rule change in the Senate and to be asked to vote on it with maybe 5 minutes of deliberation before that ballot is cast on Friday is incredible to this Member. It is incredible we would have to do this.

Does not anyone care about being here? We are only temporary stewards. My colleagues and I are just guaranteed a short amount of time to be a part of this institution. We do not own this. We bear an historical responsibility to those who came before, but an even greater one to those who come afterward, to see to it we maintain the order and the ideals embodied in the creation of this institution. That we would relegate a fundamental change in the rules of the Senate to a debate occurring between 10 and 2 and 3 and 4 and 5 a.m. in the morning, with a vote to that may be cast on Friday without further deliberation, I find stunning in its dimensions.

This is a matter that deserves far more deliberation and thought, whatever one's views may be on these nominations. To find ourselves, with all of these other issues that are in front of us, to have to defend the Senate in the wee hours of the morning about a rule that has sustained us as an institution, is something I regret deeply.

I hope my colleagues, whatever their passions may be about Miguel Estrada, Priscilla Owen, William Pryor, and Charles Pickering—I do not know these individuals. I presume they are good people, whatever differences we may have, as I am sure there have been people who have been nominated in previous administrations who are also good people who were rejected because the majority today disagreed with them. I am sorry that happens to people, but unfortunately, that is one of the aspects of a process such as we have, as imperfect as it is.

The idea that our passions are so wrapped up in these individuals that we are willing to squander the rules of the Senate is disturbing. We should always know that it may only be a short time before roles may be reversed. This party in the minority may be the party of the majority in the future. And in the future, the party of the President may, of course, be different. I would hope we would never suggest changing the rules of the Senate because we are momentarily disappointed that certain individuals, whatever contributions they may have made in their lives and to their communities, are so deserving that they warrant changing the rules of the Senate because they are not getting a position they seek. I hope we have not come to that.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I enjoyed the stirring remarks of my colleague. However, I think he completely ignores the fact that the filibuster rule did not even begin until 1917, and it did not come into fruition until the 1940s. Nevertheless, we have changed the rules in this body many times. But we are not asking for a change of the rules. We are asking for a recognition. There is a difference between the Executive Calendar, where the precise meaning of the Constitution is advise and consent under section 2, clause 2 of the Constitution, and the legislative calendar where we do have a right to filibuster. So that distinction needs to be made.

I yield 5 minutes to the distinguished Senator from Pennsylvania, and then I will be happy to take questions on this side.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, I want to respond directly to the comments made by the Senator from Connecticut. I too sit on the Rules Committee and I take a responsibility here, being a steward, as the Senator from Connecticut said, a temporary steward of this place. One would think, if they listened to the comments of the Senator from Connecticut, that what the Republicans are trying to do is change the rules.

I have a chart of the last 11 Presidents since the ''filibuster rule'' has been around: 2,372 judicial nominations confirmed, zero filibustered.

Who is changing the rules? This is a wonderful world we have: That left is right, right is left, up is down, in is out.

The rules have been changed by practice. They hold up a chart 168 to 4. This states 2,372 to nothing. Never been done. Walk through these Halls. Stand in this Chamber. If the walls could speak of the great debates, the intense,

partisan, vicious debates that occurred in this Chamber, fights that have occurred on the floor of the Senate because of the passions of the moment, so firmly believing that what you were fighting for was right.

But not once, not one time did they put that passion for that short-term partisan or political or policy game in front of the sacred constitutional process that governs this country.

What does that constitutional process dictate in the case of judicial nominations? Look at the precedent my friends. Look at the precedent. No filibusters. Because the Constitution says that it is a majority vote. In spite of the rancor, in spite of the partisanship and the stakes so high so many times in our country's history, they always had the perspective because, yes, I say to the Senator from Connecticut, they knew they were temporary stewards. They took that responsibility seriously so they did not corrupt the rules.

Why are we changing the rules? We are not trying to change the rules. We are trying to bring back the rules that have been in this country for 214 years. We are trying to change the rules? We are not being good temporary stewards? Me thinks thou doest protest too much. We are simply trying to set this Senate back to the days the Senator from Connecticut recalls as a boy, when giants did stroll this Senate, where big matters were at stake, but they put the integrity of the process, the integrity of the Senate because we are a country of laws and rules and constitutions. We do not twist them and corrupt them to meet the short-term political needs that some interest group off the Hill was pleading for you to do.

That is what is happening here. That is what occurs here, and will occur, unfortunately, if we do not have a change of heart by a number of people on the other side of the aisle again on Friday so the 98-percent button that I see and the 168 to 4 will now be 168 to 6 and then 168 to 7 and then to 8 and then to who knows? Because once we corrupt the system, once we twist the rules to meet our partisan end, there is no end other than a complete debasement of what this Senate has stood for 2,372 times before.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. HATCH. I yield without losing my right to the floor a question of the Senator from——

Mr. REID. We cannot hear you.

Mr. HATCH. I yield to the Senator from Colorado without losing my right to the floor.

Mr. ALLARD. I thank the fine Senator from Utah.

Mr. HATCH. I have laryngitis. What a time to have laryngitis. But that is the way it is. I apologize for my voice.

Mr. ALLARD. I thank the fine Senator from Utah for yielding.

Many papers in the State of Colorado have expressed a concern that we are not voting on judicial nominees, along with many papers throughout the country. I have three papers that expressed a view. I would like to have the chairman respond to the comments made in these three papers.

Many people throughout Colorado wonder what the impact might be on having a filibuster and how that will affect the Federal judiciary. Many of them live in the great city of Pueblo. In fact, the Pueblo Chieftain observed, ''some liberals are trying to create a second legislative body,'' referring to the judiciary, ''that will pass measures which they cannot get passed because they're often opposed by a majority of Americans.'' The paper fears this will lead to ''a serious erosion of the separation of powers.''

Does the Senator from Utah share those concerns?

Mr. HATCH. I sure do. The paper got it just right. I have seen three major editorials from the Chieftain and from the Rocky Mountain News calling the Democratic filibuster an irresponsible escalation of the judicial nominating war.

I agree with both. The Denver Post said ''a change in Senate procedure is long overdue.'' ''[T]here is no good reason to oppose a supermajority of the Senate that was not contemplated in the Constitution.''

They got it just right.

Mr. ALLARD. That is correct. I thank the chairman for responding to those comments made in those three major papers in the State of Colorado.

We do need to move on for a vote. They express the view of many in Colorado. I thank the chairman for giving me an opportunity to ask the question.

Mr. HATCH. I yield to the distinguished Senator from Virginia without losing my right to the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. ALLEN. I wish the Senator from Michigan, Mr. LEVIN, were still on the floor. In his arguments, he cited a quote from Lyndon Baines Johnson as to what would be the best gift that could be given, I believe he said, to the Soviet Union or those behind the Iron Curtain. He thought the best gift would be unlimited debate.

I could think of a lot of other things you would want to give people who are repressed than unlimited debate. Maybe freedom of speech, freedom of expression, freedom of religious beliefs, private property rights, due process, equal protection of the law, maybe even the right to bear arms so they can overthrow the dictatorship.

Unlimited debate—that does not strike me as what is needed in a democracy. What one wants is adherence to the Constitution, accountability and responsible action by those who are elected by the people. And we want fairness, which is being denied here, without potential for filibustering.

This is what Senator LEVIN said that President Johnson said: ''If I should have the opportunity to send into countries behind the iron curtain one freedom, and only one, my choice would be to send those nations the right of unlimited debate in their legislative chambers.''

I expect they could have had all sorts of unlimited debate but what one wants is adherence to our U.S. Constitution.

Let me share with our distinguished chairman of the Judiciary Committee, Senator HATCH, some words that have been said recently: Judgeships are currently vacant, causing undue delays in justice for citizens served by the court. The candidates for these vacancies deserve to have an up-or-down vote on their nominations. The Senate should not be playing politics with the Federal judiciary.

Guess who said that? Senator CARL LEVIN in a press release on May 24, 2000.

Then Senator LEVIN said, on October 3, 2000, in the CONGRESSIONAL RECORD: I believe the Nation as a whole deserves to have these nominees and other nominees awaiting hearings and votes acted on by this Senate, as well. I believe it is also unfair. Perhaps this is the most important of all to the people who await justice in their courts.

Senator LEVIN said that on October 3, 2000.

Then Senator LEVIN also said that leadership had a responsibility to advise and at least vote on judicial nominees.

And parallel to the debates we are having on several of the judges this evening that will go on through tomorrow and into the morning on Friday, he said: Two of the women who we are focusing on today are from Michigan. They are nominees for the court of appeals. The truth of the matter is that the leadership of the Senate has the responsibility to do what the Constitution says we should do which is to advise and at least vote on whether or not to consent to the nomination of nominees for these courts.

That was September 14, 2000, 3 years ago. I wish that Senator LEVIN were still on the floor so I could ask him whether he was right in 2000, saying the Constitution demanded and required Senators to act and vote on nominees. Or does he really believe that the most important responsibility is for endless debate?

I say to the Senator from Utah, Mr. HATCH, what we have seen is stalling and more stalling and more stalling. They can debate endlessly, but at the end of every debate, at the end of every examination, of everyone's qualifications and capabilities, and whether Miguel Estrada, Priscilla Owen, or any other of the nominees, ultimately the responsibility is, as Senator LEVIN said 3 years ago, it is our responsibility to act, to vote. The Constitution demands it. Accountability to our constituents and our respective States demands it. And fairness should not continue to be denied to these many nominees because

of the obstruction and also the very inconsistent statements that have been made this year compared to past years.

I ask the chairman of the Judiciary Committee, would you find these statements to be prior inconsistent statements which call into question the desirability of having endless debates in the Senate or in the committee, especially after the committee has decided on a majority vote to report out, favorably, a judicial nominee?

Mr. HATCH. That is a good question because it seems as if our friends on the other side forget when they were in the majority and they had the Presidency and they all wanted votes up and down and all of a sudden they do not.

The Senator is right in pointing out these disparities. All of a sudden when the worm is turned, they do not want to live up to their own words. I am not sure that Senator LEVIN does not want to live up to his own words, but if he does want to live up to his own words, then he should not be voting with the Democrats. He should be voting for cloture.

Mr. ALLEN. I have a followup question. In view of our friend from the Commonwealth of Pennsylvania and his articulate, passionate statement, Senator SANTORUM, out of the thousands and thousands of nominations, how many have been filibustered? Zero, is that not correct?

Mr. HATCH. Zero. Until this.

Mr. SCHUMER. Will the Senator yield?

Mr. HATCH. I will yield to the distinguished Senator from Virginia for a question and then I will yield to the distinguished Senator from Minnesota without losing my right to the floor.

Mr. WARNER. Mr. President, first, may I thank the distinguished chairman of the Judiciary Committee.

Mr. SCHUMER. Will the Senator yield?

The PRESIDING OFFICER. The Senator from Utah has yielded to the Senator from Virginia for the purposes of asking a question.

Mr. HATCH. The Senator will have his half hour in about 15 or 20 minutes.

Mr. WARNER. I thank the Presiding Officer and I thank the distinguished chairman of our Judiciary Committee.

I say to my colleague from Virginia how proud we are to be from the Commonwealth of Virginia from whence so many Framers of the Constitution came. I compliment you on your remarks tonight. I am privileged to serve with you because you represent, in my judgment, all the fine things about the Commonwealth. I try, in my humble way these 25 years, to do the same.

The Senator referred to this Constitution. The question I have to our distinguished chairman is very simple. I want to go back to the hot summer of 1787, when 55 individuals had gathered from the Colonies to work from May 25 to September 17 to frame this precious document. It was a long, hot summer. Tireless trips from their homes to Philadelphia. As a consequence, today, our form of government is the oldest continuously functioning government on Earth today. I have been challenged on it. But almost every other government in existence at the time this Constitution was written have fallen into the dustbin of history. Someone challenged me about Switzerland. Yes, Napoleon crossed the Alps and ceased that government for a period of time. This is a government that has continued to function.

As the delegates emerged on the final day, September 17, Ben Franklin walked down the steps and was met by a reporter. I thought of that little history tonight when a reporter asked me, what is it that you are doing tonight in the Senate? Mr. Franklin answered that question on September 17, 1787. He said to that reporter: We have given you a Republic, if you can keep it.

This Constitution explicitly gives to the President of the United States the power to appoint the judges. In Section 2, it explicitly gives to the Senate, not the Congress, but to the Senate, the responsibility of advice and consent.

Three coequal branches of the Government and the judiciary perform that critical function of keeping the power of each of the other two, executive and legislative, in balance. That is what we are doing tonight. I ask the distinguished chairman, are we not, in the immortal words of Ben Franklin, here tonight for one sole purpose, to keep our Republic?

Mr. HATCH. That is the way I view it. I have to say this is a very dangerous thing the Democrats are doing for the first time in history. It has caused a tremendous amount of angst on everyone's part and awful partisanship because it has never been done before. It is time to move on.

I yield to the distinguished Senator from Minnesota.

Mr. COLEMAN. Mr. President, I thank the distinguished chair of the Judiciary Committee, the Senator from Utah, for yielding. I have a question that reflects upon the implications, changing the constitutional standard. The Senator from the Commonwealth of Pennsylvania noted that of the past 11 Presidents' judicial nominees, 2,372 were confirmed, zero filibuster. The President was elected and he has served his responsibilities on the part of his office; we have our responsibility. I take it that the Senator from Utah would say part of those responsibilities in the Constitution give us the opportunity to vote, a majority vote to confirm or deny the confirmation of judges.

The question I have concerns a comment that appeared in a Minnesota paper. Like the Senator from Colorado, Minnesota papers have commented on this problem. There was a column by George Will, a nationally syndicated columnist, that appeared in the Duluth News Tribune. He said the following, and I ask the Senator from Utah whether he would agree with this statement: If the Senate rules, exploited by an anticonstitutional minority, are allowed to trump the Constitution's test and two centuries of practice, the Senate's power to consent to judicial nominations will have become a Senate right to require a 60-vote supermajority for confirmations by thus nullifying the President's power to shape the judiciary, the Democratic Party will yield a Presidential power without having won a Presidential election. Would the Senator from Utah agree with this statement?

Mr. HATCH. I certainly do. That is what is behind this. I think the Senator points it out very well. So did George Will.

Mr. SCHUMER. Would my colleague from Utah yield for a question?

Mr. HATCH. Not on my time.

Mr. SCHUMER. We have had some misstatements on the floor about how many filibusters we have had.

Mr. HATCH. About what? I did not hear the Senator.

Mr. SCHUMER. I said, we have had some misstatements repeatedly by the Senator from Virginia and the Senator from Minnesota about how many have been filibustered. There have been a bunch who have been filibustered, it is just that we happened to succeed. Isn't that correct?

Mr. HATCH. I am not going to yield at this time to the distinguished Senator. I will yield to the distinguished Senator from Tennessee.

Mr. COLEMAN. Will the Senator, if I could just follow up—so the record is clear——

Mr. HATCH. Yes.

Mr. COLEMAN. It is clear, in the history of this great Republic, the Senate has not denied a confirmation of a circuit court nominee by filibuster?

Mr. HATCH. That is right, in the history of the Senate. Absolutely, Will was right, because that same commentary was pointed out by Alexander Hamilton. He wrote in Federalist Paper 76 the Senate's role is to refuse nominations only for ''special and strong reasons'' having to do with ''unfit characters.'' That is not what our Democratic colleagues are doing. What they are doing here is denying up-and-down votes to very qualified people, who by their own gold standard, the American Bar Association, are proven to be qualified.

I believe it is abysmal that has happened. I think Senators have pointed out here this evening this is a very important debate that has to occur.

The American people need to know a militant minority, 45 Democrats, basically, is thwarting the will of the majority and taking away the dignity of an up-and-down vote to qualified judicial nominees by this President, which has never happened, once they hit the floor, which has never happened before.

In the Clinton years, all 377 judges were confirmed—only one was rejected, but he got an up-and-down vote, which is more than our people are getting.

Mr. COLEMAN. I thank the Senator.

Mr. HATCH. I yield to the distinguished Senator from Tennessee, without losing my right to the floor.

Mr. ALEXANDER. Mr. President, if I could ask the Senator a question. Maybe he could help me understand something I am having a difficult time understanding.

I had the privilege of serving as a law clerk in the 1960s to the Honorable John Minor Wisdom on the Fifth Circuit Court of Appeals. Judge Wisdom was among the four Republican-appointed judges who presided over the peaceful desegregation of the South. I have lived in the South and grown up in the South and know something about what those years were like.

I have been mystified, since I am not a member of the Judiciary Committee, by the treatment of Judge Pickering of Mississippi and Attorney General Bill Pryor of Alabama. I do not know Judge Pickering. I have met him briefly only twice. My staff and I studied his record. I have heard insinuations and words that were carefully chosen by the other side to suggest he was guilty of not being sensitive on racial issues. Yet when I looked into his record, I discovered, quite to the contrary. He had been living in Laurel, MS. In 1967, just to cite one example, he had testified in public against the leader of the White Knights of the Ku Klux Klan, which were the closest thing we had to terrorists in the United States of America in the last half century—an act of courage.

So here is a man who throughout his whole life was far out front on issues of race relations. He was living in an area where it was hard to do, and he had not been quiet, he had not been backward, he had been far out front of his neighbors on issues of race relations.

Then I learn about Mr. Pryor, the Attorney General of Alabama, and I realize in hearing Senator SESSIONS talk that he, too, was a law clerk to Judge Wisdom, the great civil rights judge in the South. I hear it said Mr. Pryor is somehow insensitive to racial and other matters.

Yet looking into his record, I learned he is at the moment seeking to oust the chief judge of Alabama in the case involving the chief judge's failure to obey a Federal court order to remove the Ten Commandments from the State Supreme Court, that the State Attorney General of Alabama wrote all the football players and coaches in Alabama to say they could not pray before football games because the law did not allow it, that he wrote to the district attorneys telling them they could not enforce a law against abortion, that he took a case all the way to the United States Supreme Court that was against the Republican party to which he belonged. It seemed to me here is a man who I recall Judge Wisdom talking about as a wonderfully talented young man. The judge was very proud of him. Here he has this record of upholding the law when it would be enormously unpopular in Alabama and certainly must be against his own views.

What is it about these two southerners, the latter one, the editor in chief of the Tulane Law Review, a law clerk to Judge Wisdom, this distinguished person; and then Judge Pickering, who was a leader for civil rights, endorsed by former Governor William Winter, the Democrat, endorsed by Frank Hunger, Al Gore's brother-in-law. What is it about the other side that will not allow us to have an up-or-down vote on those two southerners who have been nominated by the President to be a judge?

Mr. HATCH. Well, to be honest with you, it all comes down to abortion, according to some of my top Democrat friends. That has become a litmus test issue for Democrats because the inside-the-beltway groups the Democrats talk about do not want people on the courts who are pro-life, even though they are committed to upholding Roe v. Wade because that is the law of the land.

In the case of Judge Pickering, Judge Pickering was unanimously confirmed as a Federal district court judge in 1990. He has served well. He is one of the people who brought about racial conciliation in the State of Mississippi and was treated in a despicable fashion here.

In the case of Bill Pryor, I do not think anybody who looks at his record can say he will not uphold the law, no matter how much he disagrees with it, because that is what a judge will have to do.

Mr. ALEXANDER. May I ask the chairman, did he not, as Attorney General of Alabama, advise the local district attorneys they could not enforce a law passed by the Alabama State legislature——

Mr. HATCH. That is correct.

Mr. ALEXANDER. Because it would be in violation of a Supreme Court decision?

Mr. HATCH. That is right. If I recall it correctly, it had to do with partial-birth abortion, even though he hates partial-birth abortion, as anybody who looks at it carefully. It is a barbaric practice, at the very least. He upheld the law.

I do not know you can ask anything more of anybody than that. Plus, this is a fellow who graduated No. 1 in his class from Tulane University School of Law, who is very bright and was very candid and open with the committee, and yet being filibustered for no good reason. It really is unseemly.

Mr. ALEXANDER. I wonder if the chairman remembers—I have heard a lot of talk tonight about what a great protection of minority rights the filibuster is.

Mr. HATCH. Yes.

Mr. ALEXANDER. I am trying to think back to the 1950s and the 1960s. How many rights of African Americans in the South were protected by the filibuster in the 1950s?

Mr. HATCH. That is right.

Mr. ALEXANDER. In the 1960s? How long was civil rights legislation held up in this very body by the filibuster? What was it that caused the cloture rules to be changed so now it takes 60 to override instead of 67? It was the Nation's anger about the filibuster, denying equal rights for African Americans in the South in the United States.

What is so great about the filibuster in terms of protecting the rights of minorities and individuals if it delayed progress on civil rights for so long in this country?

Mr. HATCH. The distinguished Senator raises some good points. There is no question the filibuster rule was despicably used during that time. But I still believe most of us would agree that rule XXII, the filibuster rule, can and should apply to the legislative calendar. We have a right to set our own rules through the legislative calendar. But the Executive Calendar is a calendar that is subject to our right to advise and consent, which under article II, section 2 is a majority vote, and it is being distorted by our friends on the other side.

The PRESIDING OFFICER. The time controlled by the majority has expired.

The Senator from Nevada.

Mr. REID. Mr. President, first of all, I want to lay it on the record that CARL LEVIN, the senior Senator from Michigan, is not inconsistent in any way. We all know what happened to CARL LEVIN and the Michigan delegation is the fact that there were no hearings on the judges he wanted—no hearings.

That is the reason some 20 percent of the Clinton nominees never made it. They refused to hold hearings. CARL LEVIN would have welcomed the procedure we are going through because if it had gotten here, and there had been an attempt to filibuster, cloture would have been invoked.

CARL LEVIN, I say to my friend, the junior Senator from Virginia, is not and has not been inconsistent in any way.

I want to refer to this. We have to understand what we are talking about here. Mr. President, 168 judges have been approved; 4 have been disapproved. For people to continually come on this floor, as if history facts have no bearing on what they are talking about—they believe, on the other side, if they keep saying it long enough, that there have never been filibusters before—that people will believe it.

I show everyone this New York Times headline of September 25, 1968. Headline: ''Critics of Fortas Begin Filibuster, Citing 'Property'.'' ''Griffin Attack Lasts 3 Hours. . . .''

Of course, we know that was a filibuster. Senator BYRD participated in it, as we recall. I say to my friends on the other side of the aisle, please do not say this is the first time there has been a filibuster, because it is not true. It is not true.

I also want to refer to the next chart, something that is important to the American people. What do I think we should be dealing with? During the time President Bush has been President, we have lost more than 3 million

jobs in the private sector. I think that is fairly significant.

Also what we should be talking about is my next chart to show what the President of the United States and his administration have done to create jobs in America.

Here is what the President has done to create jobs. Can everyone see this chart? In fact, we can turn it around. It is the same on the other side, isn't it? Let's see what is on the other side. Yes, the same thing. This is what the President has done to create jobs: nothing.

He has lost 3 million jobs. That is what we should be talking about here tonight, not the fact this is the first filibuster we have ever had in the history of the country. You can say it once, twice, 1,000 times—it is not true. Other judges have been filibustered and we have had attempts to invoke cloture. It has been successful sometimes; sometimes it has not been successful.

Let's look at this next chart. It is interesting we are spending 30 hours talking about things we should not be talking about. We are talking about judicial vacancies, which are at the lowest rate in almost 15 years. What we should be talking about are those things that are going up, not the thing that is going down. We should be talking about the 44 million Americans who tonight will go to bed with no health insurance. That is what we should be talking about. We should also be concerned about the millions of Americans who are underinsured.

Mr. President, 44 million people have no health insurance, and we are here spending our time lamenting about the 4 people who want job increases; that is, they want to get better jobs. Miguel Estrada, let's not shed too many tears for him. He makes a half a million dollars a year. I think we should be talking about the people who have no health insurance, about the people who have lost jobs in this administration—the 9-plus million people who are unemployed, as we speak. Why can't we spend that time, that is, 30 hours dealing with issues that are important to the American people?

We also know, in addition to having 44 million people uninsured, that during the last 3 years those people who are poor in America have increased in numbers. The numbers have ballooned. We have the poor getting poorer and the rich getting richer, and we are squeezing the middle class so it is getting smaller and smaller. Wouldn't it be nice if we talk about poor people? I recognize they do not have lobbyists. Maybe they do not have Gucci shoes and these big limousines, but they still deserve our time.

The poor are getting poorer and the rich are getting richer. Shouldn't we spend part of this 30 hours talking about them? The unemployed: We have talked about that issue. I have talked about it tonight on more than one occasion. But the American people have to recognize that during the administration of George Bush the unemployment rolls have gone up.

The national debt: What has happened to the national debt during the last 3 years? It has gone up, way up. It is interesting to note that during the last 3 years of the Clinton administration, we were spending less money than we were taking in. We were actually paying down the national debt. We were being criticized for paying it down too fast: Be careful; you can't do that.

Well, whoever heard that term really took it in spades because the fact of the matter is, we are now increasing the national debt. This year's budget deficit will be the highest in the history of our great country.

Everything that is going up we are not talking about. We are talking about people who have jobs, and they lost an opportunity to get a promotion.

I ask unanimous consent that the Senate now return to legislative session and proceed to the consideration of Calendar No. 3, S. 224, the bill to increase the minimum wage, that the bill be read a third time, passed, and the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection?

Mr. CORNYN. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. REID. I am not surprised. I am not surprised. We have the audacity on this side of the aisle to ask that the minimum wage be increased from $5.15 to something more. Why, these people who draw minimum wage, think about it, if they work 40 hours a week, 52 weeks a year, and don't get any time off for vacation, they can make the grand sum, working a whole year, of $10,700. What pigs. They want to get that much money?

I say we should recognize the people drawing minimum wage are not a bunch of high school kids working in a fast food chain. The fact of the matter is 60 percent of the people drawing minimum wage are women. For the majority of those women, that is the only money they get for them and their families. I cannot imagine that we have had such a difficult time bringing up something so important to the American people, the minimum wage, to increase it from $5.15 an hour, maybe increasing it $1, maybe increasing it $1.50.

I know that is pushing the envelope a lot to think this body would take up something as unimportant as people getting an increase in the minimum wage. No. What we should do is worry about four people, four people, one of whom makes a half a million dollars a year downtown. Then we can also worry about other people, those other three who, between them, make about a half a million dollars.

I have no understanding in my heart how the majority can continually deny us the opportunity to do something about the minimum wage.

Remember, the judicial vacancies are at their lowest level in almost 15 years. While we are here talking all night about judges, 44 million people, as I have indicated earlier, will go to sleep tonight with no health insurance, none, and millions of others have insurance that is not very good.

Nine million, almost 10 million people will go to bed tonight wondering if tomorrow they will finally be able to find a job—recognizing that the average person who loses a job in America today is out of work for 5 months. That is the average, 5 months. And it does not matter. It does not matter what strata we are talking about. People in America have trouble finding jobs. The average is 5 months.

We have tried earlier today, through a unanimous consent request, to spend some of these 30 hours talking about having an extension of unemployment benefits. No.

We have asked tonight to increase the minimum wage, to debate that. No.

I think it pretty well describes what is going on here today.

This is an issue that people think if they talk about how unfair we are, that, yes, what we have done here is so bad—we have approved only 98 percent of the President's requests to become judges. Only 98 percent. If we had it up to 99 percent, would we only be here for 15 hours?

I think this is a travesty. I say that without any question. Others have referred to it as a carnival and a circus. Whatever it is, the unemployed, those people who are poor, those people who have no health insurance are not getting their time in the Senate.

Who is getting time? Four people: Estrada, Owen, Pickering, and Pryor. That is not fair.

I yield to the Senator from New York.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. I thank the Chair.

Mr. President, I listened to the debate, and I would say basically, kindly, it is just a repetition of arguments we have heard over and over again. A little less kindly, sound and fury signifying nothing.

I tried to ask some questions of the other side a few minutes ago and was rebuffed. It is no wonder because we are not having a coming together here. We are not having an elucidation. What we are having is a rehash of arguments we have heard over and over again.

It is not going to change anything, I say to my colleagues. It is not going to change a thing. There is only one way to change things, and that is for the President and the other side to follow the Constitution and take the words ''advise and consent'' seriously. If they think we can be bludgeoned, if they think more talk radio makes a difference, it is not going to make a difference. In fact, I would argue to my colleagues, this debate is helping us because the hard-right media, the talk radio, and the others don't mention this fact.

This chart is worth 30 hours of palaver, of gibberish. The Wall Street

Journal today has an editorial with the pictures of the six. Do they mention how many have been approved? They don't dare. They have had editorial after editorial and some of them criticize me. I write letters, and they don't publish them. You would think if they are going to do a whole editorial being critical of someone, they would give them the courtesy of publishing a letter. They are not interested in the debate of facts. No.

At least we are getting a chance to show this. One picture is worth a thousand words; one chart is equal to all the talk we have heard. Nothing will change that.

This is actually going to help our side. It is backfiring. I know many of you on the other side didn't really want to do this, but I guess I have to say to those of you who argued for it, thanks.

I heard from a constituent earlier tonight. They were watching the debate. I said: Did you know about 168 to 4? No. Most people don't because the big storm on this has come from a small narrow band on the hard right. We know the other side has to pay attention to them. They accuse us of being subject to beltway liberal groups. There are groups on both sides. They both feel as passionately.

I don't know why one group is any better than the other, but the group on that side has made this an issue. They just can't stand the fact that four have been rejected—four.

I begin by saying, better be careful about what you wish for because this at least is an even airing of the facts. What I would like this to be is a real debate. I would like us to ask each other questions. I would like us to challenge each other's assumptions and misstatements. But it is obviously not happening. Obviously not at all.

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

Mr. SCHUMER. I will be happy to yield for a question. I give the Senator from Texas the courtesy I was not given.

Mr. CORNYN. I would like to ask the Senator from New York, of the individuals he has listed on his chart, isn't it true that all but Judge Fortas were ultimately confirmed to the positions to which the President appointed them?

Mr. SCHUMER. Yes, reclaiming my time, that is exactly the point. I haven't gotten up to this chart, but I will go to it now.

Mr. CORNYN. If I may——

Mr. SCHUMER. Let me please answer my colleague's question. The bottom line is the other side has said—and in the chart of the Senator from Pennsylvania, he was careful. He said ''successfully filibustered, none.'' Then when it was repeated by many of the other colleagues, they said there has never been a filibuster.

As my good colleague from Nevada pointed out, there have been filibusters. Here are some of the judges who have been filibustered.

Don't claim there has never been a filibuster. In fact, I would ask anyone on the other side, when you filibustered just 3 years ago, did anybody object and say the Constitution is being defiled? Judge Berzon was filibustered in 2000. Judge Paez was filibustered in 2000. Judge Sarokin was filibustered in 1994.

I didn't hear the outcries from the Senator from Pennsylvania or others that filibuster is constitutionally wrong. Oh, no. Oh, no. So the one difference——

Mr. CORNYN. Will the Senator yield?

Mr. SCHUMER. Let me finish—the one difference—and then I will be happy to yield for a question—is this. We succeeded. Do you know why we succeeded? I will tell you why. Because President Clinton made an effort to nominate moderate judges, by and large; because President Clinton did far more of the advise-and-consent process than President Bush, and President Clinton was able to persuade 15 or 20 Members from the other side to finally vote for these judges.

We have had no advice, meaning consultation. I am consulted in New York, and we have filled every vacancy. On the main court of appeals nominees, there is no advise, and that means there isn't consent.

I would argue this to my good friend from Texas: No President has chosen judges through an ideological prism more than President Bush. He said it when he ran, to his credit. He was going to appoint judges in the mold of Scalia and Thomas, two of the most conservative judges we have. Some of them are to the right of Scalia and Thomas. Clearly, Justice Brown is. I believe Miguel Estrada was. He has appointed judges ideologically. Then we are supposed to not challenge that ideology? It is two-faced. It is hypocritical.

Most of President Clinton's nominees—not all, but most—were not legal aid lawyers or ACLU attorneys. They were partners in law firms; they were prosecutors. Anyone who has followed this knows President Clinton decided to nominate, by and large, decidedly moderate judges. That is why the filibusters were not successful.

Our filibusters are successful, frankly, not because of any of us. It is because President Bush has decided to nominate people from the hard right so that he gives us no choice. Nothing would please me more—and I am one of the leaders in this—nothing would please me more than for Counsel Gonzales to call some of us in and say: How do we come to some kind of comity? Guess what, the same thing that happened in New York and a few other States will happen nationally.

Will most of the judges be far more conservative than me? Yes. Will many of the judges disagree with my view on choice or affirmative action or anything else? Yes. But at least we will feel they will interpret the law, not make law.

As my good friends know on the other side, the Constitution requires interpretation of the law, and ideologues, far left or far right—I don't like far-left judges, either—want to make law because they feel they are so right and the country is so wrong, and so they try to make law.

Mr. CORNYN. Will the Senator yield——

Mr. SCHUMER. The Founding Fathers in their wisdom—I will yield in a minute, and maybe the Senator would ask the others on their time to yield to us as well. Then we can get some debate here and maybe make a little progress instead of just talking past one another.

The bottom line is this: We are defending the Constitution. We are saying there should be some balance. President Bush didn't win by a landslide. This Senate is not 62 to 38 or 70 to 30. This country is narrowly divided, and that means when laws are made, they tend to move to the middle. The prescription drug law is an example right now. But judges don't have to move to the middle. Once they are appointed, they are there for life, and they have virtually absolute power over cases. All we have is the constraints within their own heads.

My good, learned friend from Texas knows that in the ''Federalist Papers,'' Alexander Hamilton said ideology should play a role. My good friend from Texas—he is a student of history—knows one of the first nominees of George Washington, John Rutledge, was rejected because of his views on the Jay Treaty. My good friend knows in that Senate that rejected John Rutledge were a good number of the Founding Fathers. So this is not new. This is not made up. In fact, what is new is the view on the other side that if they don't get their whole way, they want to change the rules. If there had been for 20 years protests from many of my colleagues who sat in those seats in 2000 and 2000 and 1994 and 1994 when there were filibusters, maybe we could feel there was some genuine feeling here, some genuine fidelity. Instead, I would argue most of those who study logic know that things can be made; that the weakest arguments are outcome determinant. In other words, you look for the outcome you want and then you make the argument. That, I would argue, with all due respect, is what my colleagues are doing.

The bottom line is filibusters were not an abomination to the Constitution when President Clinton nominated. And, by the way, in the inverse case, holding back judges from even getting a vote in the Judiciary Committee was perfectly OK. That didn't unbalance the Constitution.

What my colleagues have done is taken the result they want, which is 172 to 0, and then come up with an argument that all of a sudden filibusters are bad. Blocking judges can't be bad because look at all these judges the other side blocked and didn't even

allow to come up for a vote. So it can't be that blocking judges is wrong. But it also can't be that filibusters are wrong because they did them in recent history. They just didn't succeed.

Now they have this twisted logic that only a successful filibuster is bad. That doesn't make much sense. I am sure my good colleague from Alabama wishes his filibuster had succeeded. He felt it passionately. He felt Judge Berzon and Judge Paez were too far over, maybe.

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

Mr. SCHUMER. I will be happy to yield since I mentioned the Senator's name.

Mr. SESSIONS. Did the Senator know that although the Senator from Alabama strongly opposed Berzon and Paez and voted against both those nominees, that there were holds on those nominees, and the Republican leader, TRENT LOTT, moved for cloture to move the nominations forward, and this Senator, as did TRENT LOTT, voted for cloture to bring an up-or-down vote and voted against the nomination although we——

Mr. SCHUMER. Let me reclaim my time.

Mr. SESSIONS. That is not the kind of filibuster we have going on today.

Mr. SCHUMER. I simply say to my colleague——

The PRESIDING OFFICER. The Senator from New York controls the time.

Mr. SCHUMER. Thank you, Mr. President.

What I said before was, and I say it again, I did not hear an outcry about filibustering being wrong or being unconstitutional or being evil when these judges came up. I didn't see people get on the floor for 30 hours. There were four of them in the last 6 years. I didn't even hear people get on the floor for 3 hours and take up time to say why filibustering is bad.

Do you know why they say it is bad now? Because we have succeeded. Again, why have we succeeded? Because President Bush has changed the way people are appointed to the judiciary. He has nominated judges through an ideological prism to a far greater extent than any President in history.

I say to my colleagues, do you want to get it to be 172 to 0? Tell the President to sit down with us, to advise, to come to some compromise, and then you will probably get 172 to 0. But as long as this process continues where there is no advise and consent, as long as this process continues where certain judges who believe decisions that have been discredited 50 and 100 years ago should be law, we have no alternative but to do what we are doing.

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

Mr. SCHUMER. I will be happy to yield to my colleague for a question.

Mr. REID. Does my friend from New York support the unanimous consent requests—plural—that have been entered today on the record and rejected by the majority, first of all to extend up employment benefits? Does the Senator from New York believe we would be better advised to go forward on something like that than on these four people who do have a job?

Mr. SCHUMER. I say to my colleague, most definitely, because, first, not only do these people have a job, but they shouldn't be on the bench.

Mr. REID. I ask another question. Does the Senator also agree that rather than going through 30 hours of this—first of all, with all due respect, everybody, including me, everything that has been said so far tonight in these 5 hours has already been said.

Mr. SCHUMER. More than once.

Mr. REID. And I am sure for the next 25 hours, there will still be nothing new. Having said that, I ask my friend from New York, does he think it would be a good idea that the unanimous consent requests I proffered where I asked to do something about the minimum wage right here on the Senate floor tonight, does the Senator think that would be a good idea to help the American people?

Mr. SCHUMER. I say to my colleague, it would be an excellent idea. This debate, as I mentioned earlier, is not going to accomplish a thing. In fact, if it accomplishes anything, since we haven't had the media drumbeat on our side the way the others have, it is going to help us; it is going to get this very fact out. Why not have a debate on something we haven't debated, such as minimum wage, such as health care, such as energy policy, instead of having two people decide energy policy. Nobody knows what the conference report will be. Let's have a debate about that.

Here we are repeating over and over and over and over again the arguments that have been made and made and made.

The bottom line, I say to my good colleague from Nevada, is there are 100, 200, 300 better ways to spend 30 hours in the Senate than redebate these issues. If this is frustration on the other side because 4 of the 172 have been blocked, the solution is not to repeat the same arguments which we regard as specious. The solution is to come to the middle and compromise and talk to us, as we have done in certain States.

I say this to my colleagues: Stop using outcome-determinative arguments. Filibusters are fine when you do them. Only when we do them successfully are they no good. And blocking judges? That is just fine. You blocked so many more than we have. This argument is like trying to thread a needle: Blocking judges is OK; filibustering is OK; only successful filibustering is unconstitutional.

I doubt many legal scholars of any political persuasion would be able to sustain the contradictions in my friends' arguments from across the aisle.

The bottom line is simple: We believe advise and consent really means what it says.

The PRESIDING OFFICER (Mr. ENZI). The Senator has consumed his time.

Mr. SCHUMER. We believe keeping judges in the mainstream is within what the Founding Fathers wished us to do. I will have more to say in the next hour.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, it is my understanding that there is a rough sense between the Democratic and Republican sides that the next hour, at least on our schedule, had been designated, that the Republican time would take half an hour and the Democratic side half an hour. If there is a different point of view on that side, perhaps that could be expressed. Otherwise, we would go forward. If there is not, then what I would like to do at this time is yield 5 minutes to the Senator from Idaho.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, I have spent a fair amount of time on the floor tonight listening. I am a freshman on the Judiciary Committee. There are a great many things Senators can do. They can speak flamboyantly, they can speak articulately, they make history, but they cannot rewrite history.

I heard a few phrases tonight that were trying to rewrite a little of the history. So I thought for a few moments I would read from a letter from the Senator who was there for the Abe Fortas debate, not a filibuster but a debate, a cloture vote. We are trying to say tonight that cloture votes are somehow filibusters. Well, my goodness, what an interesting term of art. Most importantly, what an interesting play of words.

Filibusters are nonstop speaking. Cloture votes are simply to gain the majority necessary, a supermajority, to continue the work of the Senate. Now, those are the rules of the Senate.

Let me read a letter that came to us from Robert Griffin, Republican Senator from Michigan. He writes to the Honorable JOHN CORNYN, chairman of the Subcommittee on the Constitution:

> Dear Mr. Chairman: An Associated Press piece which appeared yesterday in many of the Sunday newspapers (copy attached) speculated that Chief Justice Rehnquist and/or Justice O'Connor might retire this year or next, and concluded with this comment: Presidents have not had much success in appointing Supreme Court justices in election years. . . . The last person to try it was Lyndon Johnson in 1968, when he failed to elevate Justice Abe Fortas to replace Chief Justice Earl Warren. Republicans filibustered the nomination and Johnson backed off.

That is what the article in the paper said. Here are the facts from a Senator who was on the floor at the time debating the Abe Fortas nomination. He goes on:

> Whether intended or not, the inference read by many would be: Since the Republicans filibustered to block Justice Fortas from becoming Chief Justice, it must be all

right for Democrats to filibuster to keep President Bush's nominees off the appellate courts. Having been on the scene in 1968, and having participated in the debate, I see a number of very important differences between what happened then and the situation that confronts the Senate today.

First of all, four days of debate on a nomination for Chief Justice is hardly a filibuster.

He goes on to speak of the remarks that he gave in closing out that debate.

When is a filibuster, Mr. President? . . . There have been no dilatory quorum calls or other dilatory tactics employed. The speakers who have taken the floor have addressed themselves to the subject before the Senate, and a most interesting and useful discussion has been recorded in the Congressional Record.

Those who are considering invocation of cloture at this early stage on such a controversial, complex matter should keep in mind that Senate debate last year on the investment tax credit bill lasted 5 weeks—

In other words, Senate leadership is now considering imposing a cloture vote on the debate that has gone on for 4 days. Nothing was said about a filibuster. So we go on, and he speaks about that. Then he says:

While a few Senators, individually, might have contemplated the use of the filibuster, there was no Republican Party position that it should be employed. Indeed, Republican leader of the Senate, Everett Dirksen, publicly expressed his support for the Fortas nomination shortly after the President announced his choice. Opposition in 1968 to the Fortas nomination was not partisan. Some Republicans supported Fortas; and some Democrats opposed him.

Then he goes on to speak about the cloture vote. There were 45 in favor of the motion and 43 against.

What happened the next day, when the President, a Democrat President, could see he simply did not have bipartisan support on the floor for a majority, 50 plus 1? He pulled the Abe Fortas nomination. There was no filibuster. There was simply a cloture vote.

Now, it is a term of art that is trying to be finely defined tonight and finely written. When is a filibuster a filibuster? When is a cloture a cloture? Well, my colleagues cannot use the Abe Fortas example as a filibuster because simply this Senator will never allow other Senators to rewrite history. History is what it is at the time it is recorded and the CONGRESSIONAL RECORD clearly demonstrates——

Mr. SCHUMER. Will my colleague yield for a question?

Mr. CRAIG. I will not yield at this time.

It is simply a fact recorded in the CONGRESSIONAL RECORD, so spoken by Robert P. Griffin, then the Senator from Michigan, who was there debating the cloture.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, I yield 5 minutes to the Senator from Virginia.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. ALLEN. Mr. President, I thank the Senator from Arizona. We have heard some comments about we ought to be talking about jobs and the economy. On this side of the aisle, we are always looking at ways to make our tax laws, our regulatory policies, and our legal system more conducive to more jobs with more investment in this country.

We have heard this evening all sorts of excuses and justifications for filibustering. For example, we heard mentioned earlier by the Senator from Michigan, Mr. LEVIN, a citation as justification from Lyndon Johnson who said: ''If I should have the opportunity to send into countries behind the iron curtain one freedom and only one, my choice would be to send those nations the right of unlimited debate in their legislative chambers,'' to which my view was, gosh, there are a lot more important rights, such as freedom of expression, freedom of religion, property rights, due process under the rule of law.

When we get to the rule of law and how important that is for the credibility in this country, whether it is people in this country or outside of America to take a risk and invest in this country, the fair adjudication and administration of laws is very important. It is vitally important that we have judges on the courts so that if there are contractual disputes, or if property is being taken, or if there is a dispute, it is as expeditiously handled and decided rather than being delayed because of insufficient judges.

In many of these circuits, we have judicial emergencies. In fact, it is a fundamental principle of the American judicial system that justice should be blind, that people can get a fair hearing regardless of who they are, where they come from, or what they look like. Surely, nominees to the Federal bench deserve the same rights to a fair hearing as any of us.

Our sense of what is right for the country tells us that the most political among us realize that it is imperative that our courts are in working order. Common sense tells us that many of America's highest courtrooms do not have judges to run them and as a result the legal system cannot function.

When it is said that the economy is somehow not doing as well as it should, all of us, on this side of the aisle, President Bush and his Cabinet, are working to make sure that our economy gets stronger and more jobs are created. In fact, the gross domestic product is the best in nearly 20 years. We had negative growth in 2001, obviously because of a variety of factors, including, of course, the terrorist attacks. The gross domestic product has grown every quarter since the passage of the Economic Growth and Tax Relief Reconciliation Act of June of 2001.

It grew our economy by a 7.2-percent annual rate the third quarter of this year. This was the fastest pace of growth since 1984, almost 20 years ago. Employment continues to make gains. Payrolls increased by 126,000 new jobs, net new jobs, in October. The stock market continues to grow. That means more money for people's nest eggs, for their security and retirement.

Business is reacting favorably to tax relief and corresponding economic growth, where businesses are growing, thereby providing more jobs. We also find an increase in disposal household income, where mothers and fathers have more money so they are spending it on their children, which is great for those who are selling whatever products or services that they are purchasing, as well as whoever is packaging, transporting, fabricating, assembling, or manufacturing what they are purchasing.

Dividend relief also is leading to billions of new dividends distributed to shareholders. All of this is going on now. It also is important, though, that we have judges and the fair administration of the rule of law in the laws that we pass.

We cannot have activist judges. Activist judges create uncertainty. Businesses want to know what the laws will be so they can make those strategic long-term decisions. To have judges coming up with activist inventions of new laws that were not written or adopted by the legislative branch is dangerous for security, jobs, and investment in this country.

To put a fine point on judges, look at the Ninth Circuit Court of Appeals. Ask those affected every day by the decisions by our Federal appellate courts whether confirming circuit court nominees is important.

The people of California almost had their constitution gutted by a three-judge panel in the Ninth Circuit only to have a larger panel of the same circuit reinstate their constitutionally authorized gubernatorial recall election. I think it is pretty important who sits on the Ninth Circuit.

I am sure those in circuits where, for example, schoolchildren in Montana, Nevada, Arizona, and Idaho, who cannot say the Pledge of Allegiance because of leftwing activist judges in that circuit, who say that if one person takes offense at some other revering our flag, then the pledge is unconstitutional, would say these judges do matter.

They matter in our everyday lives. They matter in our schools. They matter in our businesses. Let's put in judges who will interpret the law, not invent it.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, I thank the gentleman for his comments, both on the status of our economy and the great economic growth that we are now enjoying, but also the last point about the importance of confirming judges.

I hope people around America are watching tonight so they will understand why we are talking about the importance of confirming judges nominated by the President to the Federal bench.

We have all heard the phrase, ''justice delayed is justice denied.'' The

reason that is a common phrase is because there is a lot of truth to it. What we are seeing around the country today is delay in justice because the Senate is denying the President a mere up-or-down vote on some of his nominees to the bench.

While it is possible for minority members, along with some in the majority, to defeat a judge on an up-or-down vote, that has only happened one time, a few years ago, since I have been in the Senate.

The judges who are being denied confirmation would all pass with a majority vote, but the minority is holding them up through the mechanism of the filibuster. I will have more to say about that mechanism in a moment.

The key point the Senator from Virginia made was that it is important we confirm these judges, as important as many of our other functions.

Let us reflect for a moment. The Senate was given some very unique responsibilities by the Framers of our Constitution. Among those unique responsibilities is the sole ability to ratify treaties and confirm nominations of the President. Advice and consent of the Senate is the way the Constitution refers to it.

The House of Representatives, with all of the great responsibilities of that body, does not have this authority. This is alone the job of the Senate, and it is a job that the Senate, throughout its entire history, has taken very seriously. Never, in the history of the Senate, has there been a successful filibuster of a nominee to the bench by the President. That is what is so striking, what is so important, what is so significant, about the activity of the minority party during the course of the last couple of years, and it is why we are here tonight talking about this and trying to move America to move our Democratic colleagues to recognize that it is only fair to provide an up-or-down vote for these candidates. That is all we are asking.

We have talked about the fairness to the nominees themselves. Miguel Estrada, one of the most competent attorneys in the country, after more than 2 years, finally withdrew his name from consideration because he had to move on with his career. We could talk about the fairness to these nominees of having to languish for months, for years, without even the courtesy of an up-or-down vote. We could talk to the fairness of the President. We could talk to the fairness of the majority in the Senate.

What I want to address briefly is the fairness to the American people in denying justice by the delay in filling vacancies, vacancies which are emergency vacancies.

What is an emergency vacancy? An emergency vacancy is one which has been determined by the Judicial Conference, which is a nonpartisan entity that acts as the principal policymaking body for the administration of the U.S. courts, that there are so many cases per judge in a particular circuit or district that an emergency exists; there are not enough judges to take care of the cases in any reasonable timeframe, as a result of which litigants suffer.

Perhaps the clearest way to make this point is, every schoolchild knows that the Constitution of the United States guarantees a criminal defendant a speedy trial, but they cannot get a speedy trial if there is no judge. So what happens is that all of the other litigants in the courts have to go to the back of the line and stay there until all of the criminal defendants have had their speedy trial.

In some cases, that means the civil cases languish for 3, 4, 5, 6 years. That is justice denied in the case of those litigants whose justice has been delayed.

What are these judicial emergencies? There are 12 judicial emergencies on the circuit court of appeals including the Ninth Circuit, the Fifth Circuit, the Sixth Circuit, and the Fourth Circuit. Democrats are obstructing nominees for every one of those circuits. For all three of the nominations who have already been filibustered—Priscilla Owen, nominated to fill one of the two Fifth Circuit judicial emergencies; Charles Pickering to fill one of the Fifth Circuit judicial emergencies; and Bill Pryor, nominated to fill an Eleventh Circuit judicial emergency—in each case, the filibuster is preventing us from filling a seat which has been declared a judicial emergency.

This is not some theoretical exercise. This is a problem that has to be dealt with, and the Senate is falling down in its responsibility to fill these emergencies.

Democrats have also threatened to filibuster other nominees who have been named to fill judicial emergencies in other circuits, by name, Carolyn Kuhl, who I would like to speak about a little later, nominated to fill a Ninth Circuit judicial emergency, Henry Saad for the Sixth Circuit, Susan Neilson for the Sixth Circuit, Richard Griffin for the Sixth Circuit, David McKeague for the Sixth Circuit, and Claude Allen to fill a judicial emergency in the Fourth Circuit.

The cost of judicial vacancies to litigants in civil rights cases not being able to vindicate their civil rights in commercial disputes, in contract disputes, in regulatory cases involving Federal regulations, in every kind of case one can mention, there are cases languishing and litigants who are not being given their rights because there are not sufficient judges to hear their cases.

I mentioned the Ninth Circuit. That is the circuit in which my home State of Arizona is located. I am very familiar with the delays in that circuit. It is hurting the economies of our States. It is hurting the rights of litigants in our States. I will mention a couple of details to make the point.

The Ninth Circuit is the largest circuit in the country. It hears appeals from California, Arizona, Nevada, Idaho, Montana, Washington, Oregon, Alaska, and Hawaii. There are over 5,200 cases pending in the Ninth Circuit. It has the largest civil docket in the Nation, more than 1,500 cases. Since early 2001, cases filed in the district court of the Ninth Circuit and that make their way through the court of appeals take longer to resolve than they did 2 years ago. In 2001, it took 30 months for a case to go from original filing to a final decision on appeal. By June 2003, it took 31 months. This 1-month increase in delay may seem small but the delay adds up across the circuit. There are more than 4,100 cases in the Ninth Circuit affected by this delay.

That means there are more than 123,000 extra days that have been spent by both parties waiting for a decision. It takes 5 months longer to resolve a case in the Ninth Circuit than the national average of courts of appeal, 31 months versus 36 months. That is what has affected my State and other States in the United States Court of Appeals. The filibuster that has been conducted by the Democrats is responsible for the inability to fill these vacancies. Not just vacancies, but judicial emergencies.

The last point I make before yielding time, if the Senator from Alabama is still here and would like to speak briefly, to answer a question that has been asked of me by constituents in Arizona. They remember the movie ''Mr. Smith Goes to Washington'' with Jimmy Stewart. A couple of them have read in the history books about the great filibuster Strom Thurmond conducted over 24 hours. They asked me, if the Democrats are filibustering these judges, why can't you make them talk all night? The answer to that question is, that is not the nature of a modern filibuster. When Jimmy Stewart and Strom Thurmond were speaking that long, they were trying to hold the floor, as our colleague from Nevada did a couple of nights ago when I think he spoke over 8½ hours. He did not want to give up the floor because he did not want business to be conducted.

In the case of Strom Thurmond and Jimmy Stewart, in the movie, they did not dare give up the floor because they were a one-man band for their cause. They may have had one or two colleagues with them, but basically they were it. They knew as soon as they gave up the floor, the leader would say: I ask unanimous consent we now vote on the matter they were arguing about. They would object and say, I object, and under Senate rules that is enough. It only takes one person to object to go to the next stage. The next stage is filing a cloture motion and then a vote occurs. If 60 Senators say, ''We are ready to vote,'' you take the vote on whatever matter it is. In this case, it would be the nomination of these judicial nominees. They might pass by 51 votes, but you cannot take the vote until 60 Senators agree.

That is the rule that applies on the legislative calendar. Up until now no one thought it would be a rule that would be abused with respect to the Executive Calendar, the calendar on which the judicial nominees are considered.

The Democrats have decided to seek to apply that 60-vote rule so if more than 40 of them vote no to take a vote, we would not have the 60 votes necessary to take that vote and the majority rule would never be permitted to prevail. That is the way it has been for the last several months. We have taken a cloture vote several times and each time there are 44, 45 Democrats who vote against cloture. They vote against taking the final vote. That means there may be 55 or 56 on the other side with some Democrat support, obviously, willing to take the vote. But we cannot get that number up to 60.

Up until now, in the interpretation that has prevailed, we cannot take the final vote which would pass for all of these nominees; 51 votes would be secured for every one of the nominees that have been filibustered. That is why we cannot make someone talk all night. If our colleagues on the Democrat side wished, they could have one person on the floor all night tonight and simply object to our request to go to these votes. But they would not have to talk if they did not want to.

I am pleased they are joining in this debate so we can actually have a discussion about these candidates. In that sense, I guess we have forced an all-night discussion. It is a discussion that should have occurred a long time ago. It is a useful discussion, but it is not a discussion at the end of the day that I suspect will change any of their minds, as a result of which, as long as we adhere to the 60-vote rule that has always been the rule in the past, we cannot get to a vote where the majority would be able to prevail. That is what the Senate rules are.

On Friday, we will have a vote to change the rules. That vote requires a two-thirds majority to pass. It is unlikely that will occur, either.

That is the state of play right now. That is why, to answer the question, ''Can you make somebody talk all night,'' the answer is no, not if they have 40 friends, because if they have 40 friends, all they have to do is vote ''no'' when you have a cloture vote and you cannot go on to your final vote. That rule may sound arcane, but I also say on legislative matters, it has been used by both parties to defeat legislation that did not have a 60-vote majority. It is a right Senators have always felt important, for important matters to require 60 votes. To pass a treaty, it takes two-thirds. The Constitution explicitly spells that out. But to confirm a judge, the Constitution has no super-majority requirement.

There are a lot of people who believe the real intent of the Framers was that a simple majority should apply. Perhaps one day that issue will be tested. Until then, we are with the proposition that as long as any Senator objects, it takes 60 votes to get to a final vote in which a simple majority would prevail. As of right now, that is what is being applied in the case of these judicial nominees.

The important point for Americans to understand is the minority has thwarted the will of the majority; that the consequences are significant for the country; that emergency judicial vacancies are not being filled; and while this is unfair to nominees themselves, it is even more unfair to the American people because the judicial vacancies remain vacant.

It is a solemn responsibility of the Senate to act on the President's nominees. We are not fulfilling that responsibility. It is for that reason the Republican majority decided to take this time tonight and tomorrow to try to bring this matter to the attention of the American people to urge our colleagues to reconsider their position in opposition to even taking a vote on these nominees so eventually we can get to the point where we can simply have an up-or-down vote on the nominees President Bush has made for these important positions.

I reserve the balance of the time allotted to the Republican side during this hour. If there is another Republican wishing to speak, I am happy to recognize that person. If not, I am happy to yield the floor to colleagues on the Democrat side for whatever time is remaining and pick that up a little bit later.

I yield the floor.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. I am happy to yield to my colleague.

Mrs. HUTCHISON. I am happy for the Senator to go forward and then we will come back at the end of the hour.

Mr. KYL. Mr. President, I inquire how much time remains of the half hour?

The PRESIDING OFFICER. Two and ½ minutes.

Mr. KYL. If either Democrat who is on the floor would like to speak, fine. Otherwise I will go ahead and use that time.

Mr. REID. Mr. President, it works better when we use our time and do not get mixed up so no one owes time.

Mr. KYL. I am happy to follow the precedent we have established and use the remaining 2½ minutes.

I wanted to speak to the qualifications of some of these nominees. Obviously, during the short period of time I have, I am not going to be able to do that except that I said I wanted to mention the qualifications of one of these nominees, Judge Carolyn Kuhl, nominated to the Ninth Circuit Court of Appeals, a judge who would be sitting on cases I might argue to the Ninth Circuit Court.

She has been a judge in a State trial court in Los Angeles since 1995. The American Bar Association rated her ''well qualified,'' their top rating for the Ninth Circuit Court of Appeals. She has served as a superior court judge in Los Angeles County in both the criminal and civil divisions and supervising judge of the civil division, the first woman to hold that position. Before that, she was a partner in a prestigious law firm in California. Before that, she served in the Department of Justice. She worked as a deputy solicitor general of the United States and argued cases before the United States Supreme Court in that capacity. She has extraordinary bipartisan support. A bipartisan group of 23 women judges on the superior court who serve with Judge Kuhl have written to our Judiciary Committee and said, ''As sitting judges, we, more than anyone, appreciate the importance of an independent, fair-minded and principled Judiciary. We believe that Carolyn Kuhl represents the best values of such a Judiciary.'' That is from a bipartisan group of judges.

A bipartisan group of nearly 100 judges who serve with her said: We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge.

There are a variety of other endorsements that have been made of this fine candidate. The bottom line is we reviewed her record, we heard her testimony. She made a tremendous impression on all of us on the committee. The worst a couple of people on the other side can say is they disagreed with a couple of her decisions. I daresay if that was the test of every one of us as Senators, we would be in a sorry position because we cannot go very long without people disagreeing with us philosophically on positions.

Judge Carolyn Kuhl, it is plain, will follow the Constitution. She is one of the candidates we need to act upon. I urge my colleagues to consider these remarks in consideration of her nomination.

Mr. REID. Mr. President, the first 15 minutes will go to the Senator from California, Mrs. BOXER, and the second 15 minutes to the Senator from New York, Mr. SCHUMER.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. I am glad Senator KYL brought up the Kuhl nomination because I will be talking a little bit about that nominee and her background and the number of people from all sides of the spectrum who oppose this nominee and the fact there is a very serious case involving a breast cancer patient who she ruled against in terms of her privacy rights. I will get into that. Judge Kuhl was overturned immediately. I will get into that and why it is we have taken a stand on a handful of these very extremist, very controversial judicial nominees.

First, I remind us of the scorecard. If I were the Republicans and I got 168 of

the judges I wanted and only was turned down for 4, I would do what my mother said when I was a kid: ''Honey, if you get 90 percent of what you want, say thank you, give the person a hug, and leave the room.''

Instead, what do we have? We do not have smiling, we do not have thank you's. We have 30 hours of wasted time to hear people complain and whine about the fact they did not get four.

Somebody wrote a book once, called ''All I Really Need to Know I Learned in Kindergarten.'' I honestly think this is the most childish situation. The President gets 168 and does not get 4 and his party is up in arms.

How does that compare to President Clinton? Let's take a look at that. President Clinton had 63 nominees blocked, or 20 percent of his nominees. President Bush has, up to now, four—I suspect if we get these new two women we are talking about coming forward on Friday, hopefully, there will be six, but tonight there are four. That is 2 percent, and we have complaining going on.

I do not get it. I feel like BARBARA in Wonderland. It makes absolutely no sense. I cannot figure it out. It is like the kid who comes home from school and says to his dad, ''Dad, I got 98 percent; aren't you proud of me?'' Dad says, ''What happened to that other 2 percent?'' What is it about? We all learn to be gracious when we win. When we win 98 percent, we should be gracious.

Here are the names of the Clinton nominees who were blocked. Fifteen times more judicial nominees blocked than that of President Bush. Why were they blocked? The other side felt, for whatever reason, maybe they did not feel they came from the mainstream.

I remember speaking to Senator HATCH. He actually called me into his office. We had a very good talk. This is when he was chair of the Judiciary Committee and President Clinton was President. He said to me: ''I just want you to know, BARBARA, if your side sends over from California liberal judges, they will never go anywhere. Do not send me liberal judges.''

I said: ''Orrin, I get it. I am a pragmatist. I have a committee advising me. I will so instruct them.'' We got almost all of our nominees through.

When President Bush was elected, I said to Senator HATCH: ''I hope you are not going to send us rightwing nominees, because they are out of the mainstream and this President promised us mainstream nominees.''

Remember the night the Court decided he had won the election? The President came out—I will never forget it—we needed healing, and he came to the mike. It was very healing. He said: ''I will govern from the center. I am a uniter, not a divider.''

Yet we see some of these nominees who are coming down who are so far off to the right they are falling off the charts. I want to be clear. I want to say this unequivocally to my colleagues. I don't deserve to be here if I don't exercise the right given to me in the Constitution of the United States, which I revere. If I don't exercise that right, I do not deserve to be here. If I don't stand up and block some of these people, I do not deserve to be here. It is as simple as that. You can come to my State, you can call me every name in the book, it does not matter to me, because my constituents want me to stand up for what is right. What is right is to support mainstream candidates for the judiciary and stand up to extremist nominees and those who are out of the mainstream. I have to do it. It is my job.

Do you want to come and talk about it for 30 hours when we could be doing other things? That is fine with me. I can talk about it for 630 hours. That is how strongly I feel in my heart about what we have done.

What does the Constitution say about our job? The Constitution says: The President—that means this one and every other one—must seek the Senate's advice and consent. It does not say ''sometimes.'' It does not say ''usually.'' It does not say ''when you feel like it.'' It says very clearly, the President must seek the Senate's advice and consent. That does not mean notifying Senators, ''This is who we are coming up with.'' It means sitting down with us. It means talking to us. I have to say, this administration falls short.

When Carolyn Kuhl was nominated, I said to Alberto Gonzales, the President's man on this, Give me some time. I wanted to support a woman for this judgeship. Members know my record. I said, Let me get back to you. Lo and behold, what did I find out? I want to tell you what I found out.

First I found out about this case. Think of yourself as the woman in this circumstance, perhaps as her husband or as a relative. A woman had a mastectomy. It is a brutal operation. She is frightened. She is sick. She is going to the doctor for a followup exam. She is in the office. The doctor has another person in the office, dressed in a white coat, and the exam takes place. This other gentleman is leaning over this woman in one of the most embarrassing moments, her most frightened moments, her most humiliating moments, and he is fanning her. He is involved in this. He is staring at her the whole time. When she leaves the doctor's office on the way out, something did not feel right to her. She asks the receptionist, ''What doctor was that in the office with me?'' The receptionist said, ''That was no doctor; that was a drug salesman.''

The woman was appalled. A drug salesman had been in this room with her without her permission, without her knowledge.

The bottom line of all of this, she sues. The case comes before Judge Kuhl, who is a new judge in the State. Judge Kuhl rules against this woman. The case is appealed and Carolyn Kuhl is overturned.

Is this someone you think should be rewarded with a lifetime appointment? I say not.

Let's see what the National Breast Cancer Coalition has written. This is a group that does not get involved in politics. This is a group that does not get involved. They were so upset, they said:

> We cannot afford to have Judge Kuhl on the court of appeals where she will have a greater effect on women with and at risk of breast cancer and our family and friends.

The National Breast Cancer Coalition getting involved in a judicial nomination. I will tell you, if I did not stand up for the women across this country—how many of us get breast cancer? About one in nine. If I did not stand up for them, I do not deserve to be here.

So if you want to talk about it for 30 hours, for 40 hours, for 50 hours, count me in—count me in—because if I were to roll over and allow someone such as that to get on the bench, someone who is hostile to women, someone who is hostile to civil rights, someone who is hostile to privacy rights, someone who is off the deep far right end of the spectrum, I do not deserve to be here because I promised my constituents I would support mainstream judges. I have supported many judges, 90 percent of the judges President Bush has brought forward. But once in a while you have to take a stand.

Let's look at the number of groups that are against Carolyn Kuhl's nomination, which is going to be brought up on Friday. I cannot even read all of these to you. It would take too long. But I will give you a few: the AFL–CIO, the American Association of University Women, the American Federation of School Administrators, the Asian Pacific American Labor Alliance, Breast Cancer Action, the Breast Cancer Fund, the Women's Law Center, Clean Water Action, Communication Workers, Defenders of Wildlife, the Feminist Majority, the Foundation for a Smoke-Free America, Friends of the Earth, the International Federation of Professional Technical Engineers, Los Angeles County Federation of Labor, NARAL, Moveon.org, National Breast Cancer Coalition, National Center for Lesbian Rights, National Council of Jewish Women, National Employment Lawyers Association.

It goes on and on and on, and there are reasons why these groups have gotten involved in this. Because all you have to do is see the record of this woman and you understand why these groups are against her.

Office and Professional Employees International Union——

Mrs. HUTCHISON. Mr. President, will the Senator yield?

Mrs. BOXER. No, I will not. People for the American Way, Physicians for Social Responsibility, Planned Parenthood, Pride at Work, Progressive Jewish Alliance, the Sierra Club, Smoke Free Educational Services—this goes on—Taxpayers Against Fraud, United American Nurses. It goes on and on.

There is more: the Wilderness Society, the Women's Leadership Alliance; the Members of the California delegation: the Honorable NANCY PELOSI, BARBARA LEE—all the women of California who are on the Democratic side in the Congress.

So you want to talk about it for 30 hours? We will talk. We will talk.

This is from 102 law professors from across the United States on Judge Kuhl:

> Judge Kuhl has spent her entire professional life—in the Government, in private practice, and on the State bench—aggressively promoting an extremist agenda that is hostile to women, minorities, injured workers, and the environment.

Judge Kuhl's record goes back to when she worked in the Reagan administration and tried to persuade the Reagan administration to say that it was OK that Bob Jones University get a tax deduction. She was called part of a band of zealots who did that.

So you want to talk about Judge Kuhl. I know her record inside out. I wanted to support a good woman from California. My whole life is spent promoting women but not women who would be hostile to other women and hostile to the guy who maybe needs to join an organization and perhaps get into a law suit. She does not even like the fact there are juries. She does not like the fact there are juries.

So here we are. It is a quarter to 12 at night. I am all perky now. The reason is, I feel deeply about this. This is a chance to stand here and say, ''What are you doing?'' to the other side of aisle. You have 168. You did not get four. You are whining and you are complaining and you are crying and you are marching into the Senate and you are stopping progress.

What about the millions of jobs that have been lost? Three million jobs lost, 2.6 million in manufacturing. Let's talk about that for 30 hours—instead of crying, crying about not getting 100 percent but only 98 percent of what you want.

The PRESIDING OFFICER. The Senator's time has expired.

Mrs. BOXER. I ask for 1 more minute, and then I will turn it over to my colleague from New York.

Mr. SCHUMER. I yield a minute to my colleague from California.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. So here we see the problems. We have lost jobs. You do not want to talk about that. I think right now I ought to ask unanimous consent that the Senate now return to legislative session and proceed to the consideration of Calendar No. 3, S. 224, the bill to increase the minimum wage, that the bill be read the third time and passed, and the motion to reconsider be laid upon the table.

Mrs. HUTCHISON. I object.

The PRESIDING OFFICER. Is there objection?

Mr. SANTORUM. Mr. President, reserving the right to object.

Mrs. BOXER. Was there an objection?

Mr. SANTORUM. Mr. President, reserving the right to object.

Mr. REID. Mr. President, there was either an objection or no objection.

Mr. SANTORUM. I object.

The PRESIDING OFFICER. Objection is heard.

Mrs. BOXER. Just finishing up my minute, this proves my point that they want to complain about four judges who already have jobs. But they do not want to deal with the people who are unemployed and this terrible economic situation we have in our country today.

The PRESIDING OFFICER. The Senator's time has expired.

Mrs. BOXER. I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Thank you, Mr. President.

First, I thank my colleague from California. She is feisty any time of the day but, not only feisty, on target. I very much appreciate her great work, particularly in bringing to our caucus's attention the problems with Judge Kuhl.

Now, I would like to review the bidding so far. First, we have had a lot of talking, virtually none of it new. Second, there have been repeated refusals to go on to issues that we do not talk about, such as minimum wage, loss of jobs, health care. Third, we believe this debate is helping us because the rightwing radio and the rightwing groups have talked about their argument.

I mentioned the Wall Street Journal editorials that never mention this number, what anything fair would be. We are getting this number out: 168 to 4.

When I go to parades in upstate New York, conservative areas, they say: Why are you stopping the President's judges? I say: It is 168 to 4. They say: Never mind. Well, that is what this debate is doing. The American people are going to say: Never mind.

Finally, I think we have revealed how our colleagues' arguments are outcome-determinative. Lawyers will tell you they are the weakest arguments. You pick your outcome and then you determine it.

Are they against filibusters? No. Again, I will repeat my challenge: Let a Senator on the other side show me that they got up and demanded 30 hours or 3 hours or 5 hours when Members on their side attempted to filibuster Judge Barkett, Judge Sarokin, Judge Marsha Berzon, Judge Paez. Did anyone get up and complain? No.

So you are not against filibusters and you are not against blocking judges. Here they are. You have blocked a whole lot of judges. You did not use filibuster. You refused to give them a vote. But they were blocked—same effect. The only thing you seem to object to is a successful filibuster. Where is the logic there?

Finally, you want to have viewer-successful filibusters? Talk to us. Come and meet with us. Nominate judges who may be conservative but are not so far out of the mainstream, such as Justice Brown who believes that Government is evil. She is against all zoning laws, at least according to her speech to the Federalist Society. And she thinks the Lochner decision, one of the most discredited decisions which said the State government could not regulate the number of 60 hours—New York State said 60 hours is when a bakery worker could not work any longer. They can't do that.

So nominate some people who are conservative but not so far out that they want to make law, not interpret law. That is the bidding so far.

Now, one other point that was made since I last spoke. My good friend from Idaho, I love him. He is a fine guy. We even worked together on a gun control bill, so it shows you anything is possible around here. But he is saying Judge Abe Fortas was not filibustered? What is this argument? A cloture vote is not a filibuster? As my daughter would say: ''Hello.''

Why do we have a cloture vote? Because there is a filibuster. Here is the headline in the New York Times: ''Critics of Fortas Begin Filibuster. . . .'' Why is that not a filibuster? But the New York Times, they are one of those wacky, liberal publications, and this is one of these slanted liberal headlines.

So let's take the U.S. Senate Web site. What is the headline? October 1, 1968: ''Filibuster Derails Supreme Court Appointment.'' I am paraphrasing: In June 1968, Chief Justice Earl Warren informed President Lyndon Johnson that he planned to retire because of a filibuster.

Mr. President, I ask unanimous consent to have a document from the Senate's own Web page printed in the RECORD. I would ask all of my colleagues who believe that Abe Fortas was not filibustered to make a motion to correct the Web site.

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

FILIBUSTER DERAILS SUPREME COURT APPOINTMENT

In June 1968, Chief Justice Earl Warren informed President Lyndon Johnson that he planned to retire from the Supreme Court. Concern that Richard Nixon might win the presidency later that year and get to choose his successor dictated Warren's timing.

In the final months of his presidency, Johnson shared Warren's concerns about Nixon and welcomed the opportunity to add his third appointee to the Court. To replace Warren, he nominated Associate Justice Abe Fortas, his longtime confidant. Anticipating Senate concerns about the prospective chief justice's liberal opinions, Johnson simultaneously declared his intention to fill the vacancy created by Fortas' elevation with Appeals Court Judge Homer Thornberry. The president believed that Thornberry, a Texan, would mollify skeptical southern senators.

A seasoned Senate vote-counter, Johnson concluded that despite filibuster warnings he just barely had the support to confirm Fortas. The president took encouragement from indications that his former Senate

mentor, Richard Russell, and Republican Minority Leader Everett Dirksen would support Fortas, whose legal brilliance both men respected.

The president soon lost Russell's support, however, because of administration delays in nominating the senator's candidate to a Georgia federal judgeship. Johnson urged Senate leaders to waste no time in convening Fortas' confirmation hearings. Responding to staff assurances of Dirksen's continued support, Johnson told an aide, ''Just take my word for it. I know [Dirksen]. I know the Senate. If they get this thing drug out very long, we're going to get beat. Dirksen will leave us.''

Fortas became the first sitting associate justice, nominated for chief justice, to testify as his own confirmation hearing. Those hearings reinforced what some senators already knew about the nominee. As a sitting justice, he regularly attended White House staff meetings; he briefed the president on secret Court deliberations; and, on behalf of the president, he pressured senators who opposed the war in Vietnam. When the Judiciary Committee revealed that Fortas received a privately funded stipend, equivalent to 40 percent of his Court salary, to teach an American University summer course, Dirksen and others withdrew their support. Although the committee recommended confirmation, floor consideration sparked the first filibuster in Senate history on a Supreme Court nomination.

On October 1, 1968, the Senate failed to invoke cloture. Johnson then withdrew the nomination, privately observing that if he had another term, ''the Fortas appointment would have been different.''

Mr. SCHUMER. I thank you, Mr. President. So I guess I have caught a little of the feistiness of my friend from California.

Now, Senators, this is a serious issue. Many of my colleagues have done a great job of bringing up the issue of jobs and health care and all of that. I think we should do that because we have heard these arguments over and over and over and over again. We have not talked about the minimum wage once or for providing health care for the uninsured or many other issues. But so be it.

Let me again go over what our Constitution says. Does our Constitution say, ''Do not filibuster''? It does not say that. In fact, our Constitution says the Senate ought to be the cooling saucer.

We all know the story. James Madison was explaining, I believe it was to Thomas Jefferson, why there was a Senate. Jefferson thought it looked too much like the House of Lords. He had been over in Paris. And he had not written the Constitution.

He came back and he goes over to James Madison's house and Madison is pouring tea. He says: You see. He pours the boiling water into a cup, and he says: You see the boiling water in the cup? That is the House of Representatives, where the people's passion bubbles over. Then he poured some of the water into the saucer, and he said: The Senate is the cooling saucer.

Well, James Madison, we have been, by stopping these four nominees, a little bit of that cooling saucer. Our job, when the President goes too far, as he has with some of these nominees, is to be the cooling saucer.

Now, unfortunately, our being the cooling saucer gets some of the others on the other side very hot. But we are defending the Constitution. The idea that a successful filibuster is bad has nothing to do with the Constitution. That comes from a few of my colleagues' view that they want to get every nominee. So let's make an argument. Because if a successful filibuster is bad and an unsuccessful filibuster is OK—and we have been through that before—then you cannot make any argument about a filibuster.

Again, I would like my colleagues to read this over and over and over again. There is nothing in there that says: No filibuster. There is nothing in the Constitution that says: A majority will decide judges, a 51-to-49 majority. It says the President must seek the Senate's ''Advice and Consent.''

Constitutional scholars will tell us that the reason we have these rules in the Senate—unlimited debate, two-thirds to change the rules, the idea that 60 have to close off debate—is embodied in the spirit and rule of the Constitution.

Yes, my colleagues, we are the cooling saucer. When the President's passion for hot rightwing judges who might make law rather than interpret law gets overwhelming, we will cool the President's passion. That is what the Constitution is all about, and we all know it.

By the way, when, again, my colleagues thought President Clinton was nominating a few judges too far left, what did they do? What did you do over there? You filibustered. Paez and Berzon were very liberal, no question about it. But because President Clinton had, by and large, nominated moderate nominees, nominated moderate people, your filibuster could not last.

Let me say something to my colleagues. We did not want to undertake a filibuster. Many of us on the Judiciary pleaded with Chairman HATCH to go to the White House and say: Meet with us. No. Many of us pleaded with Counsel Gonzales to come meet us a little bit of the way. No.

So we had no choice. Either we could be a rubberstamp or we could use the only means we had at our disposal to stop the President from getting every nominee, and that was the filibuster. Again, it is in keeping with the Constitution. We believe we are fulfilling our constitutional obligation.

Again, I see my colleague from Pennsylvania brought up his chart: No successful filibusters. Did my colleague object to the unsuccessful filibusters of Barkett, Sarokin, Berzon, and Paez? Did my colleague say he wanted 30 hours on the floor because a filibuster was wrong?

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

Mr. SCHUMER. I am happy to yield. I want to finish my point and then I will yield to my friend from Virginia, who is one of the most respected and erudite Members of this body, and I consider him a friend of mine.

I would simply say that the argument that filibusters are OK but successful filibusters are not OK just melts under even the sunshine of a distant logic.

I yield to my colleague from Virginia.

Mr. WARNER. Mr. President, I have had the privilege of leaving the floor and talking with a number of visitors. It is remarkable how many people have come from all across the country to be here. They have asked me, in a very straightforward manner: Senator, we have followed this debate and we cannot understand how one side says there is no filibuster and the other side says there is a filibuster.

So, Mr. President, I would hope we could enter into a colloquy and allow the colleagues here—the former attorney general of Alabama, who is on the Judiciary Committee, and the distinguished Senator from Pennsylvania, who has taken such a leadership role—to see whether or not in colloquy we can provide some clarity to those trying to follow this very important debate on this highly technical use of the word ''filibuster.''

So I am just wondering if you would state what your understanding is, and then my colleagues on this side will state their understanding.

Mr. SCHUMER. I thank my colleague from Virginia for that excellent inter—I do not mean interruption—I mean it in the classical sense, trying to bring us together.

I will be happy to yield to either of my colleagues from Alabama or Pennsylvania and ask them, because I would like to have debate here instead of each of us getting up and making speeches. I asked a few times and my colleagues were not on the floor.

Mr. WARNER. So, Mr. President, you have your chance. So let's go.

Mr. SCHUMER. Well, this is a good interjection by my friend from Virginia.

Why is it that a successful filibuster is wrong but an unsuccessful filibuster is OK? Because we have had them before, and many on your side participated in them. We did not hear any of these arguments about the Constitution or anything else. I would be happy to yield to my colleague from either Alabama or Pennsylvania for an answer. Maybe we can come to some meeting of the minds.

Mr. SESSIONS. Mr. President, maybe I would suggest, as we go forward here, the time be counted to each side. We are now in the next hour anyway. Is that where we are?

The PRESIDING OFFICER. We are 15 seconds from the minority's time running out.

Mr. SESSIONS. All right. So in the next time block we set aside perhaps we can count the time against each side if we speak.

Let me explain what happened. The Senator from New York was not here—

The PRESIDING OFFICER. The minority's time has expired.

Mr. SESSIONS. I thank the Chair.

Mr. SANTORUM. Mr. President, I ask unanimous consent that, during this colloquy, whatever time is consumed by whatever party member run off the time of that hour of that side of the aisle.

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

Mr. REID. So we make sure we understand, what we are saying is whoever is talking, time will be taken off their side; is that right?

Mr. SANTORUM. That is correct.

Mr. SESSIONS. The Senator from New York was not here during the Clinton years in the Senate; he was in the House.

Mr. SCHUMER. Will my colleague yield? I was here the last 2 years of the Clinton years. I was here for Berzon and Paez.

Mr. SESSIONS. Let's talk, then, about Berzon and Paez and get this straight. That is real good to remember. I just assumed the Senator couldn't have been here or he might have understood a little differently.

Holds are placed on legislation by Senators. Holds are placed on nominees by Senators. One way to break that hold is to file for cloture which guarantees an up-or-down vote. Holds were placed on Berzon and Paez. President Clinton was President of the United States. These were two of his most liberal nominations to the most liberal circuit in America; the one that struck down the death penalty, struck down the Pledge of Allegiance, struck down the ''three strikes and you're out'' law in California, and Berzon and Paez participated in all those opinions.

Anyway, when they were up for nomination, I strongly believed those were not good nominees and opposed them. We discussed these nominations within the Republican ranks. Somebody said: Why don't we filibuster? The chairman of the Judiciary Committee, Senator ORRIN HATCH, said: No, filibusters are not appropriate for judges. We should not enter a filibuster.

A Democrat said: We want a vote on Berzon and Paez. We have waited long enough. So we got to the point where TRENT LOTT, the Republican majority leader, the equivalent of TOM DASCHLE in this circumstance, filed for cloture. He said: Let's bring these two nominations up for a vote.

I and a whole lot of others did not support the Berzon and Paez nominations but did not believe in filibusters. The Senator from New York suggested we were unprincipled. He suggested that we are now opposing filibusters which we then favored. But when TRENT LOTT moved for cloture, I voted for cloture. Only half a dozen or so voted against cloture, and the nominees came up, and they got an up-or-down vote. TRENT LOTT voted against the nominees. I voted against the nominees. They had an up-or-down vote, and they were confirmed.

You can say that is a filibuster, but it is not the same thing as a filibuster organized by the Democratic leader and unified Democratic ranks to block now six nominees from even getting an up-or-down vote. It is not the same. I don't think there is any doubt about it, it is the first time a filibuster has been used systematically under these circumstances.

Mr. SCHUMER. If I might respond to my colleague from Alabama, let me say to everyone here, I have great respect for my colleague from Alabama. We work together on the Judiciary Committee quite well. We have had some legislation together. Let me make a few points.

First, I don't disagree that Paez and Berzon were very liberal. There could be made an argument—I didn't agree with it—that they may have been out of the mainstream and maybe should have been blocked. Certainly, that is what our former colleague, Mr. Smith from New Hampshire, believed.

In fact, I agree with the Senator from Alabama. I think the Ninth Circuit is a very liberal circuit. I voted for Jay Bybee, who is far to the right of me, because I thought the Ninth Circuit could use some balance. I don't have a problem with people saying Paez and Berzon were very liberal and we ought to try to block them.

Let me make two points in reference to what is a hold. A hold is saying ''I am going to filibuster.''

Mr. SESSIONS. No.

Mr. SCHUMER. If I might finish. That is why the hold is able to hold things. There is nothing in the rules about one Senator can hold things up, but the way things work around here, you say: If you bring this to the floor at this point, I am going to keep talking and you are going to need 60 votes. I don't know it to be any different than a filibuster. It is certainly not a difference that makes a difference. One may call it a hold rather than a filibuster, but it is a filibuster.

Second, I say, in all due respect to my colleague, again, let's not get semantical here. It is true that my good friend from Alabama opposed cloture. How many Senators voted for cloture? How many voted against? Thirty-one? I don't think there was a Democrat among them—maybe; maybe one. I don't recall if Senator Miller was here then. Thirteen voted against Judge Berzon.

But immediately after on the vote for Paez, my colleague from Alabama got up and made a motion to ''indefinitely postpone the nomination.''

Let's not get semantical here. If you are indefinitely postponing the nomination, you are seeking to do what we are seeking to do, which is block a nomination you thought was ideologically incompatible.

The bottom line is this: I will make this argument and then yield—I defer to our great whip here—we have divided up all our time and I am taking somebody else's time; maybe my friend from Minnesota, and I don't know who the other Senator was—Senator BOXER. So I don't want to take too much of it.

I simply say, again, these arguments sort of, a little bit, contain a bit of sophistry. Blocking a judge is the goal—successful filibuster, unsuccessful filibuster, a motion to indefinitely postpone, not allowing a judge to come to a vote. When either side has thought a judge out of the mainstream, they have used the device that was available to them to allow the Senate, I would argue, to do what the Founding Fathers wanted us to do, which is to be the cooling saucer. Sometimes it was successful, sometimes it wasn't, but it is not a difference that makes a difference, as the law professors used to say.

I yield the floor.

Mr. REID. Parliamentary inquiry, please: How much time remains on our side following the statement of the Senator from New York?

The PRESIDING OFFICER. Twenty-six and a half minutes.

Mrs. HUTCHISON. No, Mr. President, parliamentary inquiry: It is now the majority's time, as I understand it. The minority time has finished.

The PRESIDING OFFICER. The time that is used will be taken off the sides. It has been taken off when it was being used.

Mrs. HUTCHISON. That is right, but Senator SESSIONS and Senator SCHUMER took equal amounts of time. Wouldn't the majority time follow since the minority time——

Mr. REID. We know that.

The PRESIDING OFFICER. The majority has 26 minutes left and have a priority on that unless they wish to continue the agreement they had of having an open debate.

Mr. REID. Mr. President, we will go back to the original system we had.

Mr. SESSIONS. I object to the change, if he is making a point.

Mr. SCHUMER. If I might make a parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, while the Senator from New York is here, and he is such a good advocate, as we say in Alabama, you make soup out of slop. A motion to postpone is not a filibuster. It is an up-or-down vote to delay.

I was in negotiations with the Senator from California and the White House to say we can let Berzon and Paez go but at least put more decent, more mainstream judges in California. We didn't get that agreement, and they moved forward with the vote. That was not a filibuster.

I want it to be clear that the leadership on this side, the chairman of the Judiciary Committee, the majority leader, and this Member of the Senate did not vote to maintain any kind of extended debate but voted for cloture which would have guaranteed a vote and did guarantee a vote for them. That is not a classic filibuster.

Mr. GRAHAM of South Carolina. Will the Senator yield for a question?

Mr. SESSIONS. Yes.

Mr. GRAHAM of South Carolina. The Senator from Virginia made a good point. There are a lot of people confused, and the Senator put me in that category. I sat here and listened to this debate.

Is it true that the main difference between the example they are using and our problem is that these two people are on the court?

Mr. SESSIONS. That is certainly a distinct and obvious difference. Both of these nominees were moved forward by the action of TRENT LOTT, the Republican leader, to move a Clinton nominee for an up-or-down vote. He got the up-or-down vote. Both those nominees were confirmed. That is exactly correct.

And you want to talk about consistency, I ask the Senator from New York if he still stands by his statement he made that the basic issue of holding up judgeships is the issue before us, not the qualifications, which we can always debate; it is an example of Government not fulfilling its constitutional mandate because the President nominates and we are charged with voting on the nominees?

And PATRICK LEAHY, the chairman of the Judiciary Committee——

Mrs. HUTCHISON. Will the Senator yield?

Mr. SESSIONS. I will for a question.

Mrs. HUTCHISON. I want to clarify a point because the Senator from New York tried to equate a filibuster with a hold. I was hoping the Senator from Alabama would show the difference between a hold and a filibuster. If we start calling a hold a filibuster, then we have really changed the rules around here because holds are used for a variety of purposes. They are used for negotiation, and they may or may not lead to a filibuster, and usually they don't.

To say that someone put a hold on someone and then there was an effort through extended debate to get those holds taken off is a filibuster is a misreading of the rules; would the Senator agree?

Mr. SESSIONS. I would certainly agree, and as the Senator from Georgia suggested, we do that a lot around here.

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

Mr. SESSIONS. I will.

Mr. CHAMBLISS. I noticed my friend, the Senator from New York, for whom I have great respect, made a comparison between a hold and a filibuster but yet at the same time he has shown this chart over and over again, showing where we have 168 approved and only 4 filibustered. But as the Senator well knows, the Senators from Michigan have had holds on numbers and numbers of judges for months and months. So his number four, instead of being four, should be about eight, if he really believes a hold was equivalent to a filibuster. So his argument simply doesn't hold water, if I may pose that in the form of a question to the Senator.

Mr. SESSIONS. I agree, if a hold is a filibuster, then there are a lot more Bush nominees now being filibustered than have been suggested. I think there are four being held by Senator LEVIN.

Mr. SESSIONS. I yield for a question from the Senator from Virginia.

Mr. WARNER. In the nature of a question, first, I ask the Presiding Officer to inquire of the Parliamentarian if the word ''filibuster'' appears in any of the rules of the Senate. My understanding is that it does not.

The PRESIDING OFFICER. The Senator from Virginia is correct.

Mr. WARNER. So the word ''filibuster'' is not in the rules. I want to clarify that. I have done a lot of study on this question, and I think I can work our way through it. It is not in the rules. Let's go to Webster's Dictionary. It is rather interesting, the word has been used throughout history in many ways.

Filibuster—the first definition: ''An irregular military adventurer; an American engaged in fomenting insurrections in Latin America in the mid-19th century.'' But then we get to the last definition, and herein I think is some guidance: ''a: the use of extreme dilatory tactics in an attempt to delay or prevent action, esp. in a legislative assembly. b: an instance of this practice.''

I think somewhere in between lies the truth. So perhaps with this background and the assurance it isn't in the rules, the Senator from Alabama can continue to educate the Senate as to his perspective, and the Senator from New York can continue to educate the Senate from his perspective, and let us hope we have brought some light on this issue.

Mr. SCHUMER. I thank the Senator.

Mr. WARNER. Mr. President, if I can add one more thing, there is a very fine book issued by the Library of Congress. I ask the Presiding Officer the title of that book. The Parliamentarian knows of it.

The PRESIDING OFFICER. The title would be ''The History of the Cloture Rule.''

Mr. WARNER. Yes, I have studied that, and it is issued by the Library of Congress; am I not correct in that?

The PRESIDING OFFICER. That is correct.

Mr. WARNER. For those who want to pursue this in great depth. I thank my colleague for this colloquy, and I hope perhaps we got some clarity to the issue.

Mr. SESSIONS. I thank the distinguished chairman of the Armed Services Committee, Senator WARNER. He has brought wisdom here and helped us to keep from going around in circles.

There is an argument that can be made by the Senator from New York that holds that were ended by cloture votes are filibusters, but they were not really filibusters in the sense we are facing them today. What we are seeing today is a sustained deliberate attempt by the leadership of the Democratic Party to block judges by having less than 50 votes to do so. They block judges by requiring through the procedural rules of the Senate that we have to have 60 votes to confirm a judge instead of 51.

We know that in each one of these nominees that have been held up that more than 50, usually as many as 55, 54, 53 votes are there to confirm the nomination, but they have been blocked by a sustained filibuster led by the Democratic leadership and TOM DASCHLE and his team. That is what has brought us to this point. I think we have clarified that issue.

I say on the question of are we changing our views on this side, I reject that point. This side was principled during the Clinton years. This side did not resort to the filibuster as a tool of the opposition, as the Democrats have. There can be no debate about that. Their nominees were moved forward. We did not adopt this policy.

I see the Senator from Texas is here. She has some thoughts she would like to share with us about a particular comment that was made about the nominee from California, Judge Kuhl. I yield time to her.

Mr. REID. Parliamentary inquiry: How much time is left on both sides?

The PRESIDING OFFICER. Seventeen minutes on the majority side; 25½ on the minority side.

Mr. REID. It would be, I think especially for the wee hours of the morning, better if we continue with what we started with so there is not a fight for who gets recognized. Does anybody have a problem with the way we have done it?

Mr. SESSIONS. I am not exactly sure of the way we have done it.

Mr. REID. What we have done since 6 o'clock; the majority would take the first half hour and we take the second half hour.

Mr. SESSIONS. En bloc.

Mr. REID. Yes. I hope we can go back to that arrangement. That is my request.

The PRESIDING OFFICER. I assume you mean during this hour the majority would get its 16 minutes——

Mr. REID. Absolutely, and we will get our 25.

The PRESIDING OFFICER. And the next hour would be half hour first for the majority and——

Mr. REID. Yes, starting at 1 a.m. going back to the regular system.

The PRESIDING OFFICER. Unless the Senator agrees to an alternate position, that would be the policy.

Mr. REID. That request is granted?

The PRESIDING OFFICER. That is the way the unanimous consent was set up to begin with.

Mr. REID. Thank you, Mr. President.

Mr. SESSIONS. I yield 5 minutes to the Senator from Texas.

Mrs. HUTCHISON. Mr. President, I wanted to tell the rest of the story on Judge Carolyn Kuhl because I think a misimpression was left by the Senator from California regarding the case of the woman who was having a breast exam, and when she left the office, she asked who the doctor was, and the receptionist said: That wasn't a doctor, that was a pharmaceutical company representative.

When I first heard about that, I definitely wanted to hear more because that did not sound like the kind of judge I would want on the bench, a judge who would dismiss the case against the pharmaceutical company for having a person in the room when the patient was not even told this person was not a doctor or who this person was. I, in fact, did look at the rest of the story and I found a very different story. In fact, the plaintiff sued both the pharmaceutical company and the doctor. The doctor was sued for negligence in not informing the patient and asking the patient's permission, or having the patient have the right to say, no, I do not want that person in the room. The plaintiff sued the doctor, the doctor's firm, and the pharmaceutical company.

Judge Kuhl allowed the case to stay open, which she dismissed against the pharmaceutical company, because the case against the pharmaceutical company was common law intrusion upon seclusion, which was not settled law in California at the time, but she kept the case against the doctor for his failure to consent. The judge allowed the cause of action, the trial, to go forward against the doctor and the medical partnership for failure to obtain consent, and the plaintiff did recover. The plaintiff should have recovered, and the plaintiff did recover. Judge Kuhl allowed that to happen by keeping the lawsuit open against the doctor who was the person negligent in this case.

I think it is very important that when we know the full story it shows Judge Kuhl, in fact, was very sensitive to this woman's claim and allowed it to go forward. She made sure it went forward, and, in fact, the woman did settle for a full recovery.

I just wanted to set the record straight because I thought there was a misimpression in the record about Judge Carolyn Kuhl, and I would hope we would acknowledge she did let this case go forward and there was a recovery.

I think Judge Kuhl is an outstanding judge. After looking at her record very fully, I am very pleased to support her. I am very aware she is supported in a bipartisan way by many people in California, and most certainly when we talk about needing some balance on the Ninth Circuit Court of Appeals I think Judge Carolyn Kuhl would be an excellent addition to bring some balance to this circuit that is the most reversed circuit in the entire United States of America. Of all the circuit courts of appeal in the United States of America, the Ninth Circuit is the most reversed by the Supreme Court. I think that would tend to show we need some balance on this court, and I would hope Judge Carolyn Kuhl would get a fair vote, because if she does, she will get the majority in this body. They will look at the facts in her record. They will see how qualified and balanced she is, and she will get confirmation if she has a fair shot.

I thank the Senator from Alabama for letting me bring out the rest of the story, as Paul Harvey would say, and make sure the record is complete on behalf of Judge Carolyn Kuhl.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I thank the Senator from Texas so much for those comments. I remember when that came up in the Judiciary Committee. We heard these allegations that this woman, Carolyn Kuhl, was insensitive about the rights of women and she had made this big error in this case. What she said simply was, as the Senator mentioned, the doctor allowed this man to come into the room, and not the drug company who hired this gentleman. They did not even know about it, I am sure. The permission was given by him, and if anyone committed a wrong, it was that doctor. She allowed the case to go forward, and under California law, the full recovery can come out of any one defendant who is liable, and the full recovery did come in fact from the doctor. It is an important matter to note.

I will just share, since the issue was raised, about this side not being principled and I pointed out during the 8 years of President Clinton's administration, the leadership on this side of the aisle absolutely rejected filibusters. During that same time when President Clinton was seeking to get judges confirmed, the Democratic Senators also were attacking filibusters and used a lot of language that would make that clear.

For example, Senator BOXER on May 14 of 1997 said: It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the floor.

Senator FEINSTEIN said: A nominee is entitled to a vote. Vote them up, vote them down.

Senator DASCHLE, now the Democratic leader, said: I find it simply baffling that a Senator would vote against even voting on a judicial nomination.

Senator LEAHY, the chairman of the Judiciary Committee during the time of the Democratic majority, said: I think the Senate is entitled to a vote in this matter. I think the President is entitled for the Senate to vote—he is talking about President Clinton—and I think the country is entitled for the Senate to vote.

Now Senator LEAHY is leading the filibuster. So is Senator DASCHLE. They are completely changing their position, and this side did not do that.

Senator HATCH explained to us why filibusters were bad, so this side rejected that and did not go forward.

Senator KENNEDY said: It is true that some Senators have voiced concerns about these nominations, but that should not prevent a rollcall vote which gives every Senator the opportunity to say yes or no.

Mr. CHAMBLISS. Will the Senator yield?

Mr. SESSIONS. I would be pleased to yield to the Senator from Georgia.

Mr. CHAMBLISS. Just like the Senator from Alabama, I was somewhat shocked by the comments of the Senator from California about the fact that if you get 98 percent you ought to be happy with what you get and go home. The fact of the matter is, never before in the history of the United States of America has any President gotten 98 percent. Every other President, prior to this President, prior to the obstructionism coming from the other side of the aisle on these judicial nominees, has gotten 100 percent. It is zero and four filibusters out there right now.

I remind the Senator from California of her comment made back on March 9, 2000, as per the CONGRESSIONAL RECORD: I make an appeal, if we vote to indefinitely postpone a vote on these two nominees or one of these two nominees, that is denying them an up-or-down vote, that would be such a twisting of what cloture really means in these cases. It has never been done before for a judge, as far as we know, ever.

So the Senator from California agreed with us back in March 9 of 2000. Again, it would be in line with what Senator LOTT said when he said these people deserve an up-or-down vote.

The thing about these votes is that if people disagree with them, if any Senator on the other side of the aisle or if any Senator on this side of the aisle disagrees any judicial nominee is qualified to serve on the Federal bench at the district level or on any circuit court, they should have the right to vote against them, but they are entitled to a vote.

I agree 100 percent with the Senator from California when she made her comment in March of 2000 that we ought to have an up-or-down vote; that it has never—and I repeat her statement—it has never been done before for a judge, as far as we know, ever. It has never been done.

When it comes to saying ''has there been a filibuster'' or ''has there not been a filibuster,'' I agree with the Senator from California; there has never been a filibuster before of a circuit court nominee. There ought not be a filibuster that continues on these judges. We ought to have an up-or-down vote.

I yield back to the Senator from Alabama.

Mr. SESSIONS. Mr. President, how much time remains on our side?

The PRESIDING OFFICER. The Senator from Alabama has 5 minutes 40 seconds.

Mr. SESSIONS. If the Senator from South Carolina wants to make a comment, I will yield to him.

Mr. GRAHAM of South Carolina. Just very briefly. I thank the Senator for yielding.

I never thought in a 30-hour debate you would have to fight to get something to say. We may want to extend this thing.

It has been good to hear everybody's perspective about what has gone on in the past. I am really more worried about the future. I am new to the Senate. This is my first year here. I do not know who shot John 5 years ago or 10 years ago, and who is still mad about what happened during Clinton, Bush 1, or George Washington. That is not my concern.

My concern is I am in the Senate at a time when I know that if this continues, we are going to destroy the judicial nominating process as I have understood it to be since law school. We are going to drive good men and women from wanting to serve because the nominees who are being filibustered—I have been on the Judiciary Committee—have had a hatchet job done on them. They have had an opinion here and a dissenting opinion there taken out of context. They are all well qualified by the American Bar Association. They all come highly recommended by the people who know them best.

For one of the nominees, they used a letter he and his wife wrote to his diocese about Christian marriage. Mr. Pryor from Arkansas was asked about whether or not he chose to take his kids to Disney World during Gay Pride Day. You are asking people questions I feel are unbelievably uncomfortable asking anybody as to whether they are qualified to be a judge.

This process is broken. The past has its abuses on both sides, but this process is broken. There is no precedent for what is going on here.

I may be wrong, and if I am wrong somebody correct me, but it is my understanding, in the history of this country, over 200 and something years of following the Constitution, we have never had an occasion where somebody came out of the Judiciary Committee, was voted out of the committee, and was unable to get a vote on the floor, until now.

If that is the case, then we are doing something different that is really bad, in my opinion, because it will be answered in kind down the road. If this is successful, to expect the Republican Party to sit on the sidelines if there is a Democratic President and not answer in kind is probably too optimistic.

If that happens, you are taking the Senate in a death spiral of where 40 people, 41 people, answering to special interest groups, are going to hijack the Constitution. This is a big deal. This is wrong and it needs to stop. It has never happened before. It should not happen now. Whatever problems we have had in the past with judges, you have taken it to a new level that will destroy the ability to follow the Constitution, and you will take politics to a level that it has never been before in a rule-of-law nation and we will all suffer greatly.

Mr. SESSIONS. Mr. President, how much time remains?

The PRESIDING OFFICER. The Senator from Alabama has 2½ minutes.

Mr. SESSIONS. Mr. President, I agree so strongly with the Senator from South Carolina that this has the real danger of undermining the independence of the judiciary and injecting politics into the judiciary in a way we do not want to do.

I had the opportunity to obtain information from one of our greatest understanders of Senate rules on holds. I think I would like to share that with the Presiding Officer, Senator ENZI, who is as skilled on the history of the Senate as anyone.

He just notes this: What is a hold? A hold is a request by a Senator to be notified so a unanimous consent request can be objected to. If somebody is going to move a bill, legislation, or a judge, and you want to talk more about it or so forth, you put a hold. They have to call you before they will do a unanimous consent without your knowledge and slip something through you want to talk about or debate. It is not a filibuster.

A filibuster would be a continuous success by less than a majority of the Senators to stop progress to a vote in an action or a matter. It is a success continually by a minority of the Senate to stop the majority from bringing a matter to a vote. A cloture, more than a majority, stopped by a minority, 55 votes for cloture to stop debate, can be defeated by 45 Senators who vote contrary to that, is a filibuster, as has been admitted by the Senators on the other side.

I think we have been playing some games with words, but the bottom line is what has occurred this year is unprecedented. It is a systematic, organized filibuster by the Democratic leader, TOM DASCHLE, and his team and the assistant leader and most of the Members on the other side—but not all—but on these now six nominees to date we have not had 60 votes to shut off debate.

That is what we are talking about. You can call a hold a filibuster if you choose. Maybe you could justify that. But I do not think it is.

The PRESIDING OFFICER. The majority's time has expired.

Mr. REID. We will divide the time on this equally between the Senator from California and the Senator from Minnesota.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, how many minutes do I have?

The PRESIDING OFFICER. The Senator has 12 minutes 42 seconds.

Mrs. BOXER. Well, here we go, more of complaining and more upset from the other side. They just did not get 100 percent of what they wanted. They only got 98 percent. The score is 168 to 4. Other charts can be printed, but here is the truth. Do my colleagues want to see it another way? Here are the names of the people we have confirmed to the Federal bench for George Bush, 168 strong, and there are 4 we believe are out of the mainstream, who we believe would actually hurt the rights of our people to privacy, to dignity, to fairness, to justice, and we have stood up and we have said, no. The other side cannot believe they did not get 100 percent of what they wanted. Maybe in their life they get 100 percent of what they want. Most of us do not. Most of us work hard for what we believe and we are happy to get maybe close to what we want.

We have more complaining and more bickering, more upset, 30 hours taken away from other issues. This is where we are. We even had Senator GRAHAM stand up and throw out this fact: No one is going to apply for judgeships. No one is going to apply for lifetime judgeships that pay a lot of money because Democrats stood up and said 4 did not meet the test of fairness, 4 were outside the mainstream and, yes, 168 were fine. So now people are not going to apply for judgeships anymore? Well, if I spoke to someone who said, do you think I ought to apply for a judgeship, the first thing I would say is, well, your odds are pretty good, 168, and only 4 did not make it. So I would say your chances are pretty good.

Then we hear all this talk about we Democrats are doing something different, we have never filibustered, never, even though on the Senate Web site itself there is discussion that there have been filibusters, and CHUCK SCHUMER put that in the RECORD.

Let me read something much more recent than that one. This is just a couple of years ago, when we had the Berzon and the Paez nominations. The other side today is saying those were not filibusters. Well, let's hear what Republican Bob Smith said as he launched, yes, a filibuster.

I wish my colleagues would listen, but it is okay, their minds are made up. He said: It is no secret that I have been the person who has filibustered these two nominees.

Let me say that again. A couple of years ago, Bob Smith said: It is no secret that I have been the person who has filibustered these two nominees, Judge Berzon and Judge Paez.

The issue is, why are we here? What is the role of the Senate in judicial nominations? The Constitution gives the Senate the advise-and-consent role. We are supposed to advise the President and consent if we think the judge should be put on the court.

Republican Bob Smith, who led the filibuster against two Californians, goes on to say—do I remember it? It is etched in my mind forever. These were two terrific people who were held up, one for 4 years and one for 2 years, and then we finally got them to the floor and Bob Smith launched a filibuster

saying a filibuster in the Senate has a purpose. It is not simply to delay for the sake of delay. It is to take the time to debate, to find out about what judges' thoughts are, et cetera.

Can we please not have a debate over whether the other side ever launched a filibuster? They admitted it. I ask unanimous consent that this be printed in the RECORD at this time.

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

THE PAEZ FILIBUSTER

So that the record on this point, this dramatic reversal in positions, is clear, I feel constrained to mention that the 15 Senators who voted to continue to filibuster the Paez nomination and to, in fact, postpone it indefinitely, (voting both against cloture and for indefinite postponement) were Senators Frist, Bob Smith, Jessie Helms, Wayne Allard, Larry Craig, Michael Enzi, Phil Gramm, Asa Hutchinson, James Inhofe, Frank Murkowski, Sam Brownback, Jim Bunning, Mike DeWine, and Richard Shelby. How many of the current Senators among them have you seen on this Senate floor claiming that [President Bush's] judicial nominees are entitled to an up or down vote and that delaying or filibustering is wrong? I have seen some of them. It is their right to change their minds, but at least acknowledge their past efforts to block President Clinton's nominees, which kept many seats for this President to try to pack.

I will let the words of the Senators who filibustered Clinton nominees speak for themselves. For example, in 2000, just three years ago this month, Senator Smith noted during the filibuster of Judge Paez and Marsha Berzon, a Ninth Circuit nominee:

''[I]t is no secret that I have been the person who has filibustered these two nominees, Judge Berzon and Judge Paez. The issue is, why are we here? What is the role of the Senate in judicial nominations? The Constitution gave the Senate the advise-and-consent role. We are supposed to advise the President and consent if we think the judge should be put on the court. . . .

Filibuster in the Senate has a purpose. It is not simply to delay for the sake of delay. It is to get information.

It is to take the time to debate and to find out about what a judge's thoughts are and how he or she might act once they are placed on the court.''

So, those who came before the Senate and said no Republican ever filibustered a Clinton nominee were dead wrong. Senator Smith went on to explain:

''As far as the issue of going down a dangerous path and a dangerous precedent, that we somehow have never gone before, as I pointed out yesterday and I reiterate this morning, since 1968, 13 judges have been filibustered by both political parties appointed by Presidents of both political parties, starting in 1968 with Abe Fortas and coming all the way forth to these two judges today.

It is not a new path to argue and to discuss information about these judges. In fact, Mr. President . . . [w]hen William Rehnquist was nominated to the Court, he was filibustered twice.

Then, after he was on the Court, he was filibustered again when asked to become the chief Justice. In that filibuster, it is interesting to note, things that happened prior to him sitting on the Court were regurgitated and discussed. So I do not want to hear that I am going down some trail the Senate has gone down before by talking about these judges and delaying. It is simply not true.''

This straight-forward Republican from New Hampshire proclaimed:

''Don't pontificate on the floor and tell me that somehow I am violating the Constitution . . . by blocking a judge or filibustering a judge that I don't think deserves to be on the court. That is my responsibility. That is my advise-and-consent role, and I intend to exercise it.''

Thus, the Republicans' claim that Democrats are taking ''unprecedented'' action, like the White House claim that our request for Mr. Estrada's work while paid by taxpayers was ''unprecedented,'' is simply untrue. Republicans' desire to rewrite their own history, while understandable, is just wrong. They should come clean and tell the truth to the American people about their past practices on nominations.

They cannot change the plain facts to fit their current argument and purposes. It is also noteworthy that, before the debate on Bush nominations this year, the distinguished chairman of the Judiciary Committee, my good friend from Utah, admitted that the Republicans had filibustered Judge Paez's nomination in 2000. After cloture was invoked in Paez's nomination, Senator Sessions made a motion to indefinitely postpone a vote on the nomination; this motion failed by a vote of 31 to 67.

Senator Hatch then admitted there had been a filibuster: ''I have to say, I have served a number of years in the Senate, and I have never seen a 'motion to postpone indefinitely' that was brought to delay the consideration of a judicial nomination post-cloture. ''Indeed, I must confess to being somewhat baffled that, after a filibuster is cut off by cloture, the Senate could still delay a final vote on a nomination. A parliamentary ruling to this effect means that, after today, our cloture rule is further weakened.''

Mrs. BOXER. Let me quickly say about Judge Kuhl, Senator HUTCHISON said, in fact, that Judge Kuhl showed a lot of compassion to this victim who went into a doctor's office and was subjected to the humiliation of having a drug salesman witness her exam without her permission. Senator HUTCHISON said she was very, very kind to this victim.

Let's see what the victim says about Judge Kuhl.

My name is Azucena Sanchez-Scott. I am a survivor of breast cancer and Judge Kuhl's courtroom. I stand before you now because I want to tell my story so that other people will never have to relive it.

Nothing about my cancer is easy. Not the chemotherapy, not the fear, and certainly not the emotional pain of disfigurement. As a person battling cancer each visit to the doctor brings questions about my future and my health. That is where I was when my doctor and a stranger walked in. The doctor offered no introduction and proceeded to examine me and asked that I disrobe. It was only when I left the office and inquired with the receptionist that I learned that the stranger was a sales representative for a drug company with no medical reason for being there.

The bottom line, Carolyn Kuhl ruled against this woman, and when Senator HUTCHISON said she allowed the case of the doctor to go forward, that is what Judge Kuhl said. Then she retracted that and said: I made a mistake; I never had the doctor's case before me.

So let's get the facts straight here. Why do you think we have three major breast cancer organizations—Breast Cancer Action, Breast Cancer Fund, the National Breast Cancer Coalition—asking us to defeat Carolyn Kuhl? Not because Carolyn Kuhl was compassionate. But because of the opposite reason: She turned her back on a woman in need, on a sick woman. And Carolyn Kuhl was overturned in a unanimous vote by the court of appeals. For that, my friends want to promote her to this lifetime appointment.

I say if I caved in to that, again, I do not deserve to be here. Sometimes you have to stand up for people who need protection. Carolyn Kuhl had that chance. She took a hike. She ruled against this woman. This woman has been scarred in more ways than one from that experience.

Here we are. It is 12:45. We could be working on issues that really matter to people instead of rehashing these judgeships. They got almost everything they wanted. But they are going to pound their fists and say the same thing over and over, ''This has never happened before''—despite the fact it has and make it sound as if we are being unfair when we are not. We are just doing our job. But there we are.

Look at what we could be doing. We have lost almost 3 million jobs in this country. This President has the worst record of any President since Herbert Hoover on private-sector employment. Why don't we spend 30 hours talking about that? Why don't we pass the 6-year highway bill? We got it out of our committee thanks to Senator REID and Senator INHOFE today. Why not bring that bill down, I say to my friend, Senator REID? Let's vote on the 6-year highway bill. Do you know how many jobs we would create in this country? In my State, 80,000 jobs.

Let's pass a manufacturing jobs tax credit so that manufacturing stops leaving this country. Let's raise the minimum wage. I tried to do that by unanimous consent. The other side objected. They do not want to do that.

With our salary, we make the minimum wage for a year in just a couple of months here. But no, they are spending 30 hours talking about 4 people who already have jobs and they do not want to talk about the 3 million jobs that were lost. They do not want to protect overtime. As a matter of fact, they tried to take it away from workers. They do not want to extend unemployment insurance.

Nothing is getting done that really matters to people. That is a sad, sad situation.

Long-term unemployment: These are the people who have been out there and out there—2 million, plus. That is a terrible record. Long-term unemployment tripled since George Bush took over.

How about the tax cuts? Let's look at how fair they are. They are 80 times larger for millionaires than for middle

income households earning about $50,000 to $75,000.

The Bush economic record? The only administration going back to Eisenhower with a decline in manufacturing output—big manufacturing job losses.

No, we cannot talk about that. We cannot have an action plan to get people back to work. And I have not even talked about school construction, which would really employ a lot of people. I visit some of my schools and the tiles are falling off the ceiling. No, we cannot talk about that. We do not have time. But we have time to discuss, for 30 hours, judgeships that we have gone over and over. And they are winning. They got 168 through and they did not get 4. They are worried about 4 people; I am worried about 3 million people. I am worried about the unemployed in my State, the people without health insurance.

I will tell Members what else I am worried about. We have a President who has rolled back so many environmental laws—I have them on a scroll and I cannot show them because it is not allowed by the Senate rules. But I will hold this up. If I took this scroll and I rolled it across the Chamber, it would go from one end to the other. It goes on and on and on. It is small print. It shows all of the environmental rollbacks of this administration.

Just 2 weeks ago they came up with an incredible idea. When there are PCBs on your land—those are the most toxic chemicals there are; they are carcinogens—we always had a rule if you had PCBs on your land you had to have a plan to clean it up and EPA had to oversee it. No. Gone. Now you can sell your land and God help the people who buy it with PCBs on it.

Superfund under President Clinton, 80 sites a year we cleaned up—the most toxic sites. Now we are down to 40 a year.

How about arsenic and playground equipment? In the latest hit of the administration, they announced they will allow the use of arsenic-treated lumber for playground equipment. Wake me up when this environmental nightmare is over.

It is 12:35 in the morning and I can still feel it in my heart that we are doing the wrong thing tonight. Why not try to reverse this horrible record and protect our children and protect the health of our people and get our people working again? Instead, we are debating 168 to 4.

I close with this, and I will probably dream about these numbers all night—what is left of the night. They got 168, and they did not get 4. They cannot accept the fact that 98 percent is pretty good. I don't know what else we are supposed to do, but I will say, whatever it takes, I will not be intimidated into voting for nominees that are so far right they would roll back the hands of time. They will not protect the health of the people, the privacy of the people, the safety of the people. I am not going to do that.

I was sent here on a promise that I would stand up for the people of my State. That is what I intend to do. With 168 to 4, they ought to be smiling instead of whining.

I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. DAYTON. Mr. President, I have learned politicians' priorities can be measured by their passions. What do they care about most? What stirs their souls? For that reason, the exultation of my colleagues across the aisle about this session, their fervor, their apocalyptic predictions, their press announcements, other than tax cuts for the rich and the super-rich, I have not seen that much passion across the aisle in my 3 years in this Chamber. Frankly, it does not do that for me.

My passion tonight is what my colleague from California said: to work on other matters. We would be far more aroused talking about how to put Americans back to work, the over 3 million who have lost their jobs since this administration took office less than 3 years ago. And not just a return to any jobs, but jobs that are the same as, as good as or preferably better than the jobs they held before. Not minimum wage jobs with no benefits, no health coverage for spouses and children, no pensions, no protections, no real future.

I would like us to talk about how we replace the 2.6 million manufacturing jobs lost in this country in the last 3 years, jobs moved offshore to someplace other than America. Many of them, I fear, are not coming back to America.

The majority of the Republican caucus leadership has the authority to decide the Senate's agenda and has decided we will spend 30 hours on 4 jobs. We have not spent 30 minutes on jobs for the other 3 million Americans out of work who are looking for jobs. We have not spent 3 minutes on jobs and survival assistance for the over 2 million Americans who cannot find jobs for so long that they have exhausted their unemployment benefits. Many are completely broke. If we do not provide them with some support soon, more will be completely broke.

Every time we have tried to bring up a bipartisan bill to extend unemployment benefits for Americans out looking for work, except one time last year, someone has objected across the aisle and we cannot proceed. No one has objected to spending 30 hours on 4 people, but we do not spend 30 seconds on most people affected by unemployment in this Nation.

I will try again. I ask unanimous consent that the Senate proceed to legislative session and the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for displaced workers; that the Senate proceed to its immediate consideration, the bill be read the third time and passed, and the motion to reconsider be laid on the table.

That would extend the basic program unemployment for 6 months. It would extend the long-term unemployment for an additional 13 weeks and would benefit 5 million Americans.

The PRESIDING OFFICER. Is there objection?

Mr. SESSIONS. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. DAYTON. As I said, you can tell the priorities and what arouses people's passions. I could get really compassionate about the Senate's whole last week and the disaster aid for Minnesota and elsewhere where crops have been devastated by the summer's drought. Many of Minnesota's farmers had their crops totally destroyed. I did not detect as much passion and priority or concern among Members of the caucus, combined, as in one of them tonight for the misfortune falling on thousands of Minnesotans.

I get passionate talking about prescription drug coverage for seniors on Medicare, which went to the Republican-controlled conference committee last July and has not come out since. That is only half as good as the resources committed to the Members of Congress, which is why I introduced my ''taste of their own medicine'' amendment which passed the Senate months ago by a vote of 93 to 3. It says that prescription drug benefits that Members of Congress receive can be no better than what we vote for seniors and others under Medicare.

Over 17,000 Minnesotans were compassionate enough about that principle that they signed a petition at the Minnesota State Fair in 12 days. That is what Minnesotans are passionate about.

I could get passionate about learning the truths about the present conditions in Iraq. After being told for weeks now how much they are improving and that things are getting better, I read today a CIA report disclosed by two people high up in the administration who cannot get their message through at that level any other way than going to the American people and saying, You do not know all the facts. You do not know even the right perspective on what is going on there.

We have sons and daughters and husbands and wives and children of Minnesotans who have given their lives, who are giving their bodies and well-being or giving their livelihoods, and we cannot find out the truth about when they are coming home or whether their stay of duty will be extended and for how long.

Those are things that Minnesotans can get very passionate about. That is real life or death.

What is important to people? If we do not manifest it here, people will not care about the institutions such as the Senate. I do not question my colleagues' right to their choice of priorities. I don't question their right to have different views on policies and judges or any other matter. That is the

nature of our process. That is the strength of our process. That is the wisdom of our process.

I have been, in less than 3 years, in the parity, even, 50–50 Senate, with the Vice President, the tiebreaker, but in committee and conference committees equal, and in the majority for a year and a half and this last year in the minority. The previous year and a half there were 69 cloture votes that the Democratic leader, the majority leader, then had to file to move to proceed to legislation, to consider legislation, voting on legislation, issues that were far more important and affected a far greater number of Minnesotans and other Americans than a particular judgeship: health care for senior citizens; benefits for our veterans; environmental protection. And now this year, the conditions have changed.

As somebody once said, how a minority reaching majority, seizing authority, hates the minority. So we have, as colleagues across the aisle noted, and I agree, seen a certain role reversal. But that is, in part, the different responsibilities of minority and majority caucuses, and it is particularly the difference of the responsibilities of those in the party other than the President and in the party the same as the President.

I don't question the right of my colleagues, one of them or all of them, to support the President, whether he is right, whether he is wrong, whether they believe he is right or wrong. Those are individual decisions of conscience and politics.

The Founders of this country—and this applies whether the President of the United States is Democrat or Republican, in which case the situation is reversed—understood that the incredible foresight and wisdom of the separation of powers, this coequal authority of the legislative branch, equal to that of the executive branch, was critical in every respect, critical to this country's genuine freedom and preservation of our democracy.

Judge Brandeis, almost 100 years ago, said the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction inherent in the distribution of governmental powers among the three branches, to save the people from autocracy, to save the people from despotism, from tyranny. That is what they were concerned about. That is the practice that has served us well in this Nation and in this institution of the Senate for 216 years.

So it concerns me, and I do not question anyone's right to take whatever position they wish, but it concerns me as I read my colleagues on the other side who were designing this debate, this forum, have a combined number of years of experience in the Senate that amounts to less than one half of 1 percent of the combined collective wisdom achieved by nearly 1,900 men and women who have served in this body in its 216-year history. Yet I hear Members of this body who have been here less than a year saying emphatically this system is broken and it should be radically overhauled and that somehow the process we are engaged in is one that illserves our country and is even, they say, a violation of our Constitutional responsibilities. That is one of the most serious charges that anyone can make against a fellow Senator, because when we take this office, we stand, each of us, and recite the same pledge——

The PRESIDING OFFICER. The Senator's time has expired.

Mr. DAYTON. To uphold the Constitution of the United States.

Mr. President, I ask unanimous consent for 1 minute to complete my thought.

The PRESIDING OFFICER. Under the time agreement——

Mr. REID. What was being asked?

Mr. DAYTON. A unanimous consent request for 1 minute to complete my thought.

Mr. REID. Well, we will just take that out of our time from the next half hour.

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

Mr. DAYTON. Thank you, Mr. President.

That is the most solemn oath I have ever taken, to uphold the Constitution of the United States. I do not question the commitment of anybody in this body to upholding that oath and carrying it out as he or she believes is right, which is the reason we are elected independently, to exercise that independent authority.

But when people put out releases saying these matters we are engaged in are dangerous and irresponsible, that we have no right to be doing this, that it is a dangerous dereliction of our constitutional duty, those are very serious accusations.

If anyone in this body believes what we are doing is unconstitutional, they should take that question to the proper court. If anyone believes what we are doing in this body is a violation of Senate rules and procedures, they should take that question to the Parliamentarian.

I was told earlier today that the Parliamentarian has not been asked. I believe the Parliamentarian, based on all the rules and precedents of the Senate—this book of 1,400 pages of precedents that have been adopted over 216 years—would find we are acting responsibly and within that authority which is our responsibility and our right.

Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER. The minority's time has expired.

The Senator from South Carolina.

Mr. GRAHAM of South Carolina. Thank you, Mr. President.

As we go into the 1 o'clock hour, Jimmy Buffett says it is 5 o'clock somewhere. But it is 1 o'clock here. We will try to reorient ourselves as to what was going on in the last hour. It is kind of an update, a CNN headline update.

The last hour was pretty interesting, I thought. We had examples used by our friends on the Democratic side to say basically that what we Republicans have done in the past we complain about now. I reiterate, as far as I am concerned, the past is the past, and I am more worried about the future. I have been here a year and all I have known since I have been here is fussing and fighting about everything, particularly judges. It has not been too pleasant to be on the Judiciary Committee because a lot of good men and women have had a hatchet job done on their professional qualifications and who they are as people, to not be allowed to be voted on. There have been a lot of manufactured reasons.

But as I understand, from having listened to the debate the last hour, the idea of holding a judge has been used as an example of an abuse, that holds have been put on judges, which is apparently a process in the Senate to deny somebody from going through the committee process, or to go forward.

The example Senator SCHUMER used was two judges: Paez and Berzon. I hope I have their names right. They were two judges who were appointed by President Clinton, and I think Senator Smith from New Hampshire tried to block their nominations, put a hold on it. There was a real contention about what was going on with those two judges. But the curious thing to me was there was an intervention in those cases, in those two nominations by the Republican leadership, as I understand it, that basically brought to a close the process of blocking those judges from having a vote after they came out of committee.

To me, that illustrates that in the past, when efforts were tried or were being used to basically hijack the constitutional requirement of a majority vote, once the nominee was presented to the Senate, there has been intervention to right the ship.

Since I have been here, the only intervention I have seen is to shut down what has been going on for 200-some years. Now, it is like a cricket match. It is 168 to 4. It is 168 to 16. Cricket goes on for 3 days. It is pretty interesting for the first hour or 2, but 3 days later I kind of get blurry-eyed watching cricket—the same way here with these numbers.

The point is, there never has been in the history of the country a situation where somebody was reported out of the Judiciary Committee to come to the floor of the Senate to be voted on as a judicial nominee, that they were not eventually voted on—until now. There have been cloture motions made, but they were always made to bring about a vote.

There has been a concerted effort by the Democratic leadership to block judicial nominees in an unprecedented

way. That is why we are all here tonight. Not only is it unprecedented, it is very dangerous. The reason I think it is dangerous is because it effectively changes the constitutional standard.

I am going to read, since we have 30 minutes here, where the Constitution talks about a supermajority vote: The ''Concurrence of two thirds'' of either the House or the Senate is required to ''expel a Member'' of Congress.

That is kind of self-serving. But we do not want to throw each other out until we get two-thirds of our colleagues to agree we should be thrown out. So that is a real check on us keeping our jobs.

Also: ''And no Person shall be convicted'' by the Senate in an impeachment trial ''without the Concurrence of two-thirds of the Members present,'' according to article I, section 3.

I have a little experience with that article. That is a very high standard to achieve. And it should be a high standard to achieve. Can you imagine what would happen if, by Senate rule, we changed the impeachment standards so the President of the United States could be impeached by a majority vote?

I am sure the Supreme Court would not allow that to happen. I am sure there would be a great outcry by the public if we, in a partisan fashion, changed the way you impeach a President because we did not like that person or their agenda. There would be a huge outcry in the country because we would have subverted the Constitution.

That is exactly what is going on here in reverse. Instead of a two-thirds requirement to confirm a judge, like we have to throw somebody out of the House or the Senate, or to impeach the President, or to ratify a treaty—why two-thirds to ratify a treaty? The Founding Fathers were worried about a President making a deal with some foreign power that was not in the best interests of the country, so you had a high standard to ratify. You had a check over Presidential power.

They give the power in the Constitution for the President to veto legislation coming out of these bodies, to make sure we do not get off track. The only way we can override a Presidential veto is the two-thirds vote.

There was a lot of thought going into supermajority votes. It was not just by accident that the Constitution has six or seven provisions that require a majority vote, and I would argue strongly it is not by accident that the majority vote requirement applying to judges was put there on purpose.

Our job, as I see it, is not to say what we would do if we were President. Our job, as the Constitution lays out for us, is to advise and consent by a majority vote to make sure the President—whoever he or she might be—is not sending over their brother-in-law or sister-in-law or unqualified people.

What we have done this year, different from other years, is we have taken our political differences and our desire to make the court go one way versus the other and we have hijacked the Constitution for political reasons.

Our friends on the other side of the aisle lost badly in 2002. There was an article right after the election where the conference came together and started inventorying: Why did we lose? There was a strain of thought on the Democratic side that they lost because they were too accommodating to the President, and the Democratic base was deflated; that you are working with them too much on taxes, you are helping him with homeland security, that you are doing this and that with President Bush. One thing you might want to do to fight back—and this is in the article; and I do not have it with me—is to go after his judges.

Well, that certainly gets people fired up. Republican and Democratic base voters very much follow issues such as this: who the President may pick for the Supreme Court, who the President may pick for the Federal bench.

I am asking, in all sincerity, that somehow we find a way out of the box that we are in. Because I have been in the Senate for a year—I do not know how much longer I will be here but I do understand what is going to happen down the road.

If this is successful—and why they pick people, I really do not know. I have been on the Judiciary Committee. They do not do this to everyone. But they pick certain people for court of appeals jobs right below the Supreme Court and they will pick a few out of the herd, and they will start saying awful things about them—I will talk about that in a moment—and they will wind up, after they come out of committee, not getting an up-or-down vote in the Senate—for the first time in history. I will talk about this later when I have more time.

There are dozens of quotes by Democratic Senators saying it is really an abuse of the Senate's power not to allow somebody to be voted on up or down. They were right then. They were talking about a situation in President Clinton's term where they thought the Republicans were denying people a chance to go through committee and they were latching on to the constitutional provision of a majority vote, the advise and consent vote, saying: The high road for the Senate to take is if you do not like these people, if you do not like their philosophy, and if you do not think they are qualified, vote against them, but do not change the constitutional standard because it would be bad for the country.

That way of thinking has been replaced. I think the reason it has been replaced is because the political moment is so hot. We are a divided nation. The year 2000 was a very close election. In 2002, there was a change in the Senate's makeup. It is 51 to 49. And we are being consumed by the political moment.

I can tell my colleagues on the other side of the aisle, and my Republican colleagues, that if we keep up this practice, it will do long-term damage to this country.

The one thing I like most about America is it is a rule-of-law nation. Instead of having to go in the parking lot and fight people, you have a court to go to. There is a way in this country for the weak to make the strong answer; and that is called the courtroom. The people you put in the courtroom are important. We have constitutionally, in the Federal system, given that power to the President. We, by majority vote, say yes or no to that nominee.

What we have done is politicize this process in an unprecedented way, in a dangerous way. If you don't think down the road it will be answered in kind by the Republican Party, I think you are very naive. I hope I will have the courage not to go down that road as an individual Senator.

But the animosity being generated by this practice is red hot among both bases, and it will be almost impossible, in my opinion, for this not to become the norm. Payback is hell. That is a phrase with which we are all familiar. Payback, when you are messing with the Constitution, is dangerous. Political payback has to have boundaries. When you are messing with the constitutional standard about judges, I think you have gone too far.

The question is, is this really a filibuster?

It is obvious that it is a filibuster in terms of these nominees because they have come out of committee and they cannot get a vote because our Democratic colleagues, behind their leadership, have united, with a few breaking away, to deny a vote. We have had hours of debate on all these nominees. They cannot come to the floor for an up-or-down vote. The Democratic Party has changed its whole opinion about whether that is a good or bad idea, and they have adopted a practice that no one has done before in the history of the country.

But we are having a hard time. It is 1:15 in the morning and we cannot get the other side to admit that their filibuster going on here is different than anything that has happened before.

I used to be a prosecutor, and the old saying was: Follow the money. If you want to know what happened in the criminal enterprise, follow the money.

Well, let me tell you about an e-mail that was sent by a good friend of mine. Senator CORZINE is a very nice person. His job is to retake the majority for the Democratic Party. He is in charge of the Democratic Senatorial Committee. Senator ALLEN, who sits right next to me, is in charge of the Republican Senatorial Committee. Their jobs are to go out and recruit candidates and raise money so the party will be effective in taking over the majority, if you are a Democrat, or retaining it, if you are a Republican.

Here is what an e-mail said about what is going on right now:

Senate Democrats have launched an unprecedented effort. By mounting filibusters against the Bush administration's most radical nominees, Senate Democrats have led the effort to save our courts.

November 3, 2003, it was an e-mail to donors from Senator CORZINE. I would argue that when he said they are engaging in ''an unprecedented effort . . . mounting filibusters against the Bush administration's most radical nominees'' that he was not tricking people, that he was telling them: We are up here fighting by using the filibuster.

One of two things are true: The e-mail is accurate, which I think it is, and it is designed to get people to send in money; or he is tricking people and he ought to give their money back. Because if you listen to our Democratic friends on the other side, this e-mail is wrong, and these people deserve a refund. They are raising money on the idea that they are filibustering Bush's nominees. That is the best evidence of what has gone on here. They are trying to get people to open up their wallets to give their money because they are doing something that is unprecedented. What is that something? We are ''filibuster[ing] against the Bush administration's most radical nominees.''

There are a bunch of quotes out there. Senator BOXER:

Frankly, from my perspective, if people are off the charts on the right wing, I am not going to vote for them. I will not filibuster them.

February 26, 2003.

One of the people being filibustered comes from California, Justice Brown.

Let me tell you a little bit about her, and then I will yield to my friend from Georgia.

Justice Brown sits on the California Supreme Court. She has been there since May of 1996. In California, people get to vote on who they want to be on the court. She received 76 percent of the vote in her last election.

Now, the last time I checked, California is not a hotbed of Republican conservatives. I do not know why we lose so badly; and we do. We have lost almost every national election in California since Ronald Reagan. But she received 76 percent of the vote from people who live in her State.

A little more about her: She is the daughter of a sharecropper, born in Greenville, AL. She attended segregated schools. I grew up in South Carolina. The first African American I ever went to school with, I was in the 6th grade—not something to be proud of but a fact. She preceded me.

She has an academic record that if she were your daughter you would be unbelievably proud. She received a BA in economics from California State, her JD from the UCLA School of Law. She received an honorary degree from Pepperdine University. She has authored more majority opinions for the California Supreme Court than any other justice.

This is how nasty this has gotten. This is a cartoon from something called ''The Black Commentator,'' September 4, 2003. This person is a racial stereotype. Your eyes can tell you better than I can. It says: ''Welcome to the Federal bench, Ms. Clarence . . . I mean, Ms. Rogers Brown. You'll fit right in.'' And the people clapping are a caricature of Justice Thomas, Colin Powell, and Condoleezza Rice.

This is what people are having to go through. This is the way they are being characterized and being attacked. I think it is a low for the Senate. I am very sorry that she had to go through it, but she is being filibustered after having come out of committee.

If you don't like Justice Brown, then you can vote against Justice Brown, but you don't have the right to take the Constitution and turn it upside down for petty politics, and that is exactly what is going on here.

I can tell my friends on the other side, if they think we are not going to fight back, they are dead wrong. They are going to have a fight on their hands as long as this goes on, and at the end of the day, the loser is going to be the American people if we don't find a way out of this mess because 40 people are a lot easier to gather up than 50 when it comes to politics. Sixty is really hard to get.

What is going to happen if this continues is that we are going to have special interest groups, whether it is environmentally driven, abortion driven, gun driven—there is a group for everything out there—that is going to be upset with a particular nominee, and they are going to try to get 40 Senators to jump on their side.

The people being empowered from this practice are special interest groups, and the big loser is the average, everyday American. The big loser is the 76 percent of the people who voted for Justice Brown.

I yield to my friend and colleague from Georgia to talk about another abuse that exists in California.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I thank my friend from South Carolina. He and I served together for 8 years in the House of Representatives. We were both elected in 1994 and came in with a bunch of revolutionaries who came to Washington to change the world. We were staying up all night on the House side on a regular basis. He and I looked over at the Senate, and said: The decorum is great; they go to bed at a reasonable hour. What do you know, here we are.

I am sorry the Senator from California has left the floor because she made the point over and over that President Bush had his nominees confirmed 98 percent of the time. The fact is, the Constitution of the United States must be complied with 100 percent of the time. Ninety-eight percent of the time is not good in that particular instance.

There are some other situations where 98 percent of the time isn't that great, and that is why I am really sorry she is not here. If I told my wife that I was faithful 98 percent of the time——

(Disturbance in the Galleries.)

She wouldn't be all that happy with me. I wouldn't be happy if my food was 98 percent free of E. coli bacteria. I would not be happy if my car started 98 percent of the time.

The PRESIDING OFFICER. The Senator will suspend. The Galleries are not allowed to react to any statement on the floor. The Senator will resume.

Mr. CHAMBLISS. I would not be happy if my soap was only 98-percent pure. I would not be happy if our voting machines had a 98-percent accuracy rate.

I would not be happy if the power worked only 98 percent of the time. And I would be awfully nervous if the airplane that I was flying on had a track record of landing safely 98 percent of the time.

So the Senator's reference to this President getting 98 percent of his judicial nominees confirmed simply does not hold water.

I wish to talk for a minute about Carolyn Kuhl. Again, she was referenced by the Senator from California about her qualifications and her abilities to serve on the Ninth Circuit Court of Appeals.

Carolyn Kuhl is a very special lady. She has been a judge in California since 1995. But prior to that, Carolyn Kuhl had an exemplary record that includes service both as a committed advocate as well as an impartial jurist. She has outstanding qualifications and bipartisan support.

Her qualifications include having graduated cum laude from one of those liberal universities—excuse me, one of those conservative universities called Princeton University and having graduated Order of the Coif at Duke University Law School. The Senator from South Carolina and I graduated from the University of South Carolina and the University of Tennessee, respectively.

Order of the Coif means you were in the top one or two, not percent, the top one or two in your class. Neither one of us was there. That is something special. She was a law clerk to then-Judge Anthony Kennedy of the Ninth Circuit. She then worked in the Department of Justice as a Special Assistant to the Attorney General, Deputy Assistant to the Attorney General, and Deputy Solicitor General.

She was a partner in the very prestigious law firm of Munger, Tolles & Olson. She was the first female supervising judge of the civil department of the Los Angeles County Superior Court. Carolyn Kuhl brings excellent, outstanding educational credentials to the bench.

There are a number of individuals who have registered their support for Judge Kuhl. There has been some indication that maybe some female members of the bar are upset with her over some of her decisions, and one decision in particular.

Let me show you what 23 members of the Los Angeles Superior Court, 23 women judges on the Los Angeles Superior Court bench said about Judge Kuhl, and this was a bipartisan group:

Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges. . . . She has helped promote the careers of women, both Republican and Democrat. . . . As sitting judges, we more than anyone appreciate the importance of an independent, fairminded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary.

There was a case that, if you listened to the Senator from California, you would have thought that Judge Kuhl was the doctor in the office who was being sued, not the judge on the bench who was reviewing the case.

Let me tell you what the appellate court judge who wrote the opinion in the case, referenced by the Senator from California, said about Judge Kuhl and about that specific opinion that he reviewed:

On appeal, I was the author of the Sanchez-Scott opinion. . . . Judge Kuhl's order sustaining the demurer without leave to amend was not an act of bias or insensitivity. . . . In fact, a strong argument can be made that she correctly assessed the competing societal interests the California Supreme Court requires of all jurists in this State to weigh in determining whether the tort of intrusion has occurred. With respect to those who have criticized Judge Kuhl as being insensitive or biased because of my opinion in Sanchez-Scott, they are simply incorrect.

Judge Kuhl brings impeccable credentials to the bench. She brings impeccable educational credentials, as well as jurist credentials, to the bench. She brings bipartisan support from the women, from the men, from the Republicans, and the Democrats in the State of California who know her best.

For us to have to go through the exercise here of, once again, contending with a filibuster from the folks on the other side of the aisle with respect to the nomination of Carolyn Kuhl, is truly an injustice and is one of those injustices that, as my friend from South Carolina has said, there will be a payback on. That is not the way we want to operate. It is not the way this body has operated for well over 200 years since we have been approving judges, and it is not the way we should operate in the future.

There is still time to correct the process that we are going through, and based upon what we are doing here tonight, I hope the profile of this issue is going to be brought home to the household of every American and every voter, and that they will understand there is a group in the Senate who wants to move forward to make sure their lives are made better because good judges are going to be put on the bench, and good judges ought to be confirmed by the Senate; and that there is another group in the Senate who is being obstructionist and is doing everything within their power to prevent the President of the United States from having the judges that he thinks are the best qualified from being put on the Federal bench all across America.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Thank you, Mr. President. On this half hour to which we are entitled, the two Senators from Arkansas are going to split the time, with Senator LINCOLN taking the first time, whatever time she may consume, leaving the remainder to the junior Senator from Arkansas.

The PRESIDING OFFICER. The senior Senator from Arkansas.

Mrs. LINCOLN. I thank the Chair. Mr. President, I am proud to be here this morning to see that this age-old institution is acting as it should. We are looking at, reviewing, and exercising our constitutional responsibilities.

I am not, however, proud of the fingerpointing that is going on—as we say to young children, I hope no one's eyes get put out—and all the fingerpointing that goes on in these 30 hours of discussion and debate, the warnings we have just heard: There's a payback; there's a payback.

I do rise this morning, however, to express my extreme disappointment and dismay that we are expending such a large portion of our remaining time and energy on this unnecessary debate. We probably have only a few days left in this session to deal with important issues on which we have not yet completed action this year. How many seniors have my colleagues talked with in their travels back home to their States about the need for prescription drug coverage for our elderly?

How many of them have they talked with as they traveled with Meals on Wheels and other programs and talked with these seniors who are telling you that they are cutting their medications in half, that they are not going to be able to afford their heating bill this winter and their prescription drugs?

I implore my colleagues, how many have you talked with in your travels back home?

Looking at education funding, how many teachers have my colleagues spoken with as they traveled back home—teachers who are telling them they are going to have to spend their own money on supplies come February because they don't have enough glue and construction paper for their children or that they are having to spend an undue amount of time meeting demands that we have put on these school districts and yet have been unwilling to provide the resources for them to meet those demands?

How many of those single mothers who are working day and night to pull themselves up by their bootstraps, to leave the welfare rolls and bring dignity to their children and to put bread on the table—how many of those have my colleagues spoken with as they have traveled home to their States when we could be doing the welfare reauthorization bill and making it bigger and better than we did before?

The highway bill: How many people have they talked with when they go home to their States? I had a group come to me the other day who said: We come to you all in Congress begging every year for a few million dollars to try to create the infrastructure that we need in rural States, such as Arkansas, to improve our economy, and all of a sudden $87 billion falls out of the sky? What about us at home? Are you all going to talk about us? Are you going to bring us up? Are you going to do something about the things we need to make our lives stronger, to make our families better, to strengthen the fabric of this Nation?

Those are the issues about which we should be talking, Mr. President, and I wish we were. We have not yet completed action on all the appropriations bills. We have an Energy bill that should have been finished in 2002 to bring our country into the 21st century. For the last 25 years, we have needed a new energy policy in this country. Other countries are leaving us behind in the new and innovative ways they are looking to provide renewable fuels to improve not only their economy and their environment but to lessen their dependence on foreign oil.

These are the issues about which we should be talking, and genuine concern about what we want to do to strengthen our Nation.

We are still waiting. We are still waiting for these to be completed, time tonight that could be spent in dealing with those very important issues.

Faced with these and many other pressing issues and faced with a tight schedule, what does the leadership propose? They propose to spend 30 hours of our time, and far more time in preparation and staff hours, overtime for police officers and multitudes of others who are here for these 30 hours, debating four or five judicial nominees, all of whom have been debated, generated significant opposition where they live and work. All have been given adequate review time, and all of whom, in my judgment, should not be promoted to a lifetime appointment on the Federal bench.

Instead of focusing so much time and attention trying to promote a lifetime position for these individuals who already have very good jobs, my wish would be that President Bush and the Republican leadership would focus more of our time on issues that truly impact the lives of all of our constituents, and particularly the lives of the Arkansans I represent—issues such as creating good paying jobs in Arkansas, improving public education and expanding access to affordable health care and prescription drugs for our seniors, and, yes, providing something we all have agreed would make a big difference in people's lives: a refundable child tax credit, something that got overwhelming support in the Senate but is buried in a couple of conferences

and here, there, and yonder because it is not a priority.

Those people in this country who make between $10,500 and $26,650 are not important enough for us to deal with. Somehow they don't work hard enough, although they have to work, they have to bring home a paycheck, and they have to be raising children to be eligible for a refundable child tax credit. But for some reason, they are not a priority here anymore.

We could have done that months ago, but we didn't. Here we approach the holidays, people have been in school, a multitude of needs that families across this country have, and we fail once more to even look at the small ways we can be helpful.

There are any number of issues that merit careful and lengthy consideration in the Senate, but filling a handful of judgeships should not be given a priority given the backlog of pressing issues the Senate has yet to complete this year.

Unfortunately, this is a manufactured crisis to distract the American people from the very real crises that we are going through; the ones that we are facing, such as the fact that in the next 15 to 20 years, we are going to go from 41 million Americans over the age of 65 to over 70 million Americans over the age of 65. We as a nation are so completely underprepared for that crisis.

We have 126 medical schools in this country. Only three of them have a department in geriatrics. We are training less geriatricians, and we are training even less academic geriatricians who will teach those geriatricians who might be there to take care of me, and I am the youngest in this body.

We are so underprepared with health care, a reform in Medicare, and a prescription drug package to meet these unbelievable numbers that will cause a crisis in this country.

We are here tonight, tomorrow, until midnight tomorrow talking about four people who did not get a job they wanted. It is unbelievable.

What about our children? What about educating our children to be prepared in the 21st century, to be competitive in a global economy, teaching our children the skills they are going to need to be competitive? They are the future of this country. They are our future workers. They are our future leaders.

We came up with a great bipartisan bill to educate our kids, and we do not have the guts to pay for it. Out of the $8 billion for the education plan for our kids, we are only funding $2 billion of it from the President's budget, a quarter. I have to say, that is a misspent priority there.

We have record deficits that are going to be heaped on the shoulders of our children. Sixty-six percent of that debt comes due in 4 years. What happens to our constituents if all of a sudden somebody comes up and says, ''Guess what, your debt is due and I want it on demand. No, you cannot refinance, no way. I am going to call that debt on you''?

These are serious crises we should be addressing and we are spending our time pointing fingers and not addressing the issues of the American people.

We have a conflict in Iraq that is taking the lives of American soldiers every day, and there is no end in sight. These are crises, not the fact that four people who wanted a job did not have the support of enough Senators and that is what we are spending all this time on.

Today, 95 percent of Federal judicial seats are filled. This is the lowest number of judicial vacancies in 13 years. This 5 percent vacancy rate is lower than the U.S. unemployment rate and the poverty rate, and I know because I represent a State that is very high in poverty. I come from one of the 20 highest poverty counties in the country.

Today there are more lifetime-appointed Federal judges serving than at any time in our Nation's history. Furthermore, since President Bush was elected, the Senate has confirmed 168 Federal judges and rejected only 4—2 percent of his nominees.

By comparison, when Republicans controlled the Senate during President Clinton's administration, more than 60, or 20 percent, of his nominees never received a vote in the Senate.

Sadly, I think the Senate's record on this matter truly speaks for itself. I believe all executive and judicial nominations that come before the Senate are entitled to courtesy and respect, but I also believe the Senate's role of advice and consent is a very important check and balance our forefathers designed and instituted. It is an obligation I do not take lightly.

Senators are not elected to play a ceremonial role in the nomination process. This is not an issue of whether one likes the President or does not like the President. This is not an issue of whether one thinks these nominees are good people. They are all good people. Ours is not a ceremonial role in this nomination process. Instead, we have an obligation to carefully consider each nominee individually, to help ensure the judiciary is fair and balanced and to ensure the American public maintains faith in our judicial branch of Government. We have a responsibility to make sure these judicial nominees will not be partisan in their decisionmaking, that they will not be biased or partial to their own personal beliefs, but will institute the rule of law, the Constitution, and the precedent of the higher courts.

Given the undue attention that has been lavished on these four nominees, I certainly believe it is worth revisiting a bit of their cases just to reconsider why they have not been confirmed. In each case, it is clear each of the nominees who has not been confirmed has shortcomings that in my opinion disqualify these individuals for the important positions to which they have been nominated. This does not mean I do not think they are good people. It does not mean I do not like the President. It simply means I am doing the job the people of Arkansas sent me here to do, to evaluate these people.

When we look at Ms. Owen, after reviewing the record and meeting with Judge Owen, discussing her tenure with members of the bar who practice in Texas and in Arkansas, I was not satisfied this nominee could set aside her personal views and give each side a fair hearing. She had not in the past. In some instances, it is not just me. Judge Owen's own colleagues have criticized her failing to understand and abide by the plain meaning of statutory provisions before her as a judge on the Texas Supreme Court.

Likewise, we look at the case of Alabama's Attorney General William Pryor. He is one of the most strident and outspoken nominees we have seen. After reviewing some of the statements General Pryor has made about sitting Supreme Court Justices and the decisions of that Court, I am concerned that he does not possess the necessary judgment and temperament to be a Federal judge, to oversee that element of the judiciary.

Judge Pickering of Mississippi, who I do think is a good man, has also been invoked in this debate and his record does bring me concern. His record raises serious questions about his ethical conduct on the bench. His repeated contacts with the Justice Department in an attempt to obtain a lesser prison sentence for a convicted defendant, and his solicitations of letters of recommendation from lawyers in Mississippi who had cases before him are well-known examples.

Finally, consider the case of Miguel Estrada, who withdrew himself from consideration earlier this year. By many accounts, Mr. Estrada was a distinguished attorney with a very talented legal mind. However, when we in the Senate attempted to verify this assessment by asking Mr. Estrada to come before the Judiciary Committee to answer additional questions and submit all of the relevant information that was necessary, and the burden of proof was in his court—we asked the same of President Clinton's nominees—Mr. Estrada indicated he would rather not. To me, and many of my colleagues, Mr. Estrada's response simply was not acceptable.

It is important to note there are good, solid reasons as to why these people were not confirmed. These reasons had nothing to do with any personal beliefs or characteristics. They had nothing to do with partisanship. They had nothing to do with working against the President. I opposed these nominees because I am not convinced they meet the requirements of what is expected of those who receive a lifetime appointment to the Federal bench. That is my job.

Again, these are 4 nominees. Out of 172, 4 have not been confirmed. Do 4

nominees constitute any sort of judicial crisis? Of course not. Of course they do not. If we do math, the Senate has confirmed 98 percent of President Bush's nominees. I do not know about you, but you are right in that we do not want our automobile to work at 98 percent, but let me tell you 98 percent is pretty good. It is not 100 percent, but that makes me think about my kids. If they come home from school after they make 98 on their test, am I going to send them to their room? Am I going to punish them for that? Am I going to say, well, I cannot believe you did not do 100? No.

What I am going to do for my children is what we should be doing. I am going to sit down with them and I am going to help them reach 100 percent. I am going to work with them. That last 2 percent may be the most difficult, but the most difficult is worth working towards. When we work together, we can get there. In working together, we could reach that. But the administration does not want to do that. No, telling them they had not done good enough is not what I would do. I would work hard with them to get to where we needed to be.

It is my sincere belief if President Bush would make a good-faith effort to work with Democrats in a spirit of cooperation, all of his nominees would be confirmed, with little or no controversy or opposition. Unfortunately, it has become apparent the President is more interested in staging a fight and casting blame, which is really a recipe for gridlock. In gridlock, the only ones who get hurt are the American people.

It is disappointing the President and the Senate leadership are expending so much time and energy to secure jobs for four people who already have good jobs, particularly considering the millions of people who are out of work and finding it increasingly difficult to make ends meet. The people who lose out in this fictional crisis are the American people. Tying up the Senate for 30 hours on 4 judicial nominees means we are not talking about the issues that matter most to the people we represent. It means we are not talking about how we are going to finish that prescription drug bill in order to help seniors cope with the rapidly rising cost of those prescription drugs. It means we are not spending our time focused on improving our schools and educating our children, so they can get the best possible start towards competing in that global marketplace. It means we are not doing all we can to create jobs and move our economy forward. It means we are not building that infrastructure that is so necessary in rural America and elsewhere across this country.

Just this week, I learned Arkansas has experienced its highest rate of unemployment in a decade. While my colleagues on the other side of the aisle point to the improving economic indicators as evidence that the doldrums are behind us, I can assure them that for most people in Arkansas those numbers are just abstractions. They want to see jobs, and they want to see real action in the Senate to get things done on behalf of the voters who sent us here.

Unfortunately, I think we have taken this time and used it most unproductively. Many Members have come to the floor tonight to talk about the past. I have heard some very eloquent speeches about their times as pages and debates they have heard, many quoting history from centuries ago. I think the most important thing we can talk about tonight is the future. I think we must talk about the future. I think we must talk about all of these crisis issues we are faced with, and I think we must come back to our children and let that be our focal point.

All of us in this body are so blessed. I started out speaking about how blessed I feel to even be in this body, to be in this place tonight, to be a part of an institution that is so incredible that it has lasted over 200 years. We are all blessed in many things, and for whatever faults some people may find in our Government, I believe, and I think the American people believe, we still live in the greatest country on the face of this Earth.

Tonight I looked at one of my greatest blessings, my children. I put them in bed before I came over. I tucked them in. I thought about what we were going to talk about tonight. I thought about this great country we live in. I thought about the conflict in Iraq. There were mothers who were putting their children to bed tonight whose husbands may be stationed abroad. There were children who were being put in bed tonight tucked in by their grandparents because their mothers had been called up and were in a strange and dangerous land. I thought about the fact my children are so blessed to live in this country under a rule of law that separates us from the rest, a rule of law that, when it is administered without bias, without the interjection of political issues or personal views, can create security and safety. It creates freedom. It creates a life I want my children to have.

I look in the eyes of mothers across the globe who do not put their children to bed in a nice, warm home, who have not been fed. They live in violence and terrorism. They live in a land that is stricken with famine because there is no rule of law, or what law exists is implemented through a political regime. That is what separates us from them, that we have a system designed specifically to separate the political from the rule of law.

I am proud to be here. I do not have the background many of my colleagues do, having been Governors and attorneys general, having served in this body for a long period of time, but I challenge any of them to match my pride, my pride of this country and in what that rule of law represents to me, not only as an American but as a mother and as a Senator.

I have no qualms in doing my job the people of Arkansas sent me here to do, to make sure these individuals we send to the Federal bench to implement the rule of law in this Nation, the Constitution, and the precedent of the higher courts do not interject their political views, their bias, or their personal views because we know that through these years a nonbiased judicial branch of government has served us well. It is what has separated us from those countries that right now we work so hard to change.

I yield time to my colleague who I am extremely proud to serve with, the other Senator from Arkansas.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. PRYOR. Mr. President, how much time do we have remaining?

The PRESIDING OFFICER. Two and one-half minutes.

Mr. PRYOR. Mr. President, in this 2½ minutes, I would like to thank some people for tonight. I would like to thank the staffers who are here on both sides. I would like to thank the Senate staff, the Sergeant at Arms staff, the doorkeepers, the cloakroom staff, all the various people who make the trains run on time around here, because I certainly understand they have families to go home to, that they have lives outside of these halls. I know the sacrifice they are making tonight to be here.

I also want to thank my colleagues on the other side of the aisle for their viewpoints. We may differ on some of these issues, but I appreciate their opinions and respect their viewpoints and the zealousness by which they approach the subject at hand.

I want to thank colleagues on my side who are here in the wee hours of the night and will be here throughout the day tomorrow to talk about these issues that are very important to the people of this country. I know members of the Senate on our side of the aisle are equally passionate about these issues. Some of this is a matter of opinion. Some of it is a matter of fact and history and tradition. Certainly people on this side of the aisle are very passionate about this.

In the couple of minutes I have remaining, I want to acknowledge some of the hard work the people in this institution and around this institution have put into this 30-hour filibuster or marathon debate, whatever one wants to call it, because it has come at quite a sacrifice to the members of the staff in this body.

Do I have any time remaining?

The PRESIDING OFFICER. Twenty seconds.

Mr. PRYOR. I would again thank my colleague from Arkansas. We have a great tradition in our State of sending strong Senators to Washington, and certainly Senator LINCOLN is one of those. She shows great leadership not just for the State but for the Nation. I want to thank her for her contribution tonight.

The PRESIDING OFFICER. The time of the minority has expired.

The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I am very proud of the State I represent. The State of Georgia is, in my opinion, the greatest State in our country because that is where I come from, and I am very blessed to represent that State. A number of great individuals from our State have served in this very august body. We have had a tradition of strong leadership in the Senate from Georgia, the Walter Georges, the Richard Russells, the Sam Nunns, the Paul Coverdells.

Outside of the Senate, we also have had a history of strong leadership coming from our State. For the past 30 years the man who has epitomized political leadership and strength in our State is now our senior Senator. It has been a great privilege and pleasure for me to have the opportunity, No. 1, to know this man over the past 35 years or so, but to have an opportunity to serve with him in the Senate and for him to be my senior Senator has truly been a great honor to me.

It is with great pride, and I consider it a great privilege, to be able to yield such time as he may consume to the Senator from Young Harris, GA, senior Senator from Georgia, Mr. MILLER.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. MILLER. Mr. President, I stand here proudly next to a copy of the U.S. Constitution. It is a document that has stood the test of time. It is a document that is revered throughout the world. As a history professor, I have read it many times. But I need to know tonight where in the U.S. Constitution does it say the President's nominees for the judiciary must have a supermajority to be confirmed? Where does it say that? I have searched high and low for that clause and that provision. I cannot find it. Maybe these old 71-year-old eyes are getting kind of dim. Perhaps I need a magnifying glass.

I seek. I search. I hunt in vain. For is it not there. Even if I had the eye of an eagle I could not find it because it is simply not there.

No, the U.S. Constitution says only the Senate is to advise and consent on the President's nominees. Somehow that has been twisted and perverted into this unmitigated mess we have today where 59 votes out of 100 cannot pass anything because 41 votes out of 100 can defeat anything. Explain that to Joe Sixpack in the Wal-Mart parking lot.

Explain that to this man, James Madison, who wrote that Constitution. He predicted and he feared some day someone would try to finagle this system, that they would try to plot and conspire and pervert the process in just the way they have. James Madison warned about this in Federalist Paper 58. He said: If that should happen, ''The fundamental principle of free government would be reversed. It would be no longer the majority that would rule. The power would be transferred to the minority.''

But don't just take my word for it. Look at others who are far smarter, far wiser than I will ever be and how they have expressed the kinds of things that are going on around here.

On June 1, 1950, a brave woman who was then the Senator from the State of Maine, Margaret Chase Smith, gave one of the most courageous speeches ever given on the floor of this Senate. It has been called the ''declaration of conscience'' speech. Senator Smith questioned what was happening at that time in the Senate. It was not about filibusters but, make no mistake, it was about intrigue, and it was about character assassination.

Let me give you a few excerpts from Senator Smith:

> The United States Senate has long enjoyed worldwide respect as the greatest deliberative body in the world. But recently that deliberative character has too often been debased to the level of a forum of hate and character assassination sheltered by the shield of congressional immunity.

She went on:

> It is ironic that we senators can during debate in the Senate [and in committee], directly or indirectly, by any form of words, impute to any American who is not a Senator any conduct or any motive unworthy or becoming an American—and without that nonsenator American having any legal redress against us.

She went on:

> It is strange that we can verbally attack anyone without restraint and with full protection, and yet we hold ourselves above the same type of criticism here on the Senate floor. Surely, the United States Senate is big enough to take self-criticism and self-appraisal. Surely we should be able to take the same kind of character attacks we dish out to others.

She continued:

> I think it is high time for the United States Senate and its members to do some real soul searching and to weigh our consciences as to the manner in which we are performing our duty for the people of America and the manner in which we are using or abusing our individual powers and privileges.
>
> I think it is high time we remembered that we have sworn to uphold and defend the Constitution. I think it is high time that we remembered that the Constitution, as amended, speaks not only of the freedom of speech but also of trial by jury instead of trial by accusation.

So said Margaret Chase Smith in 1950.

Let me tell you what Thomas Sowell, in his recent book ''The Quest for Cosmic Justice'' writes about the role of a judge:

> The traditional conception of the role of judges was expressed thousands of years ago by Aristotle, who said that a judge should ''be allowed to decide as few things as possible.'' His discretion should be limited to ''such points as the lawgiver has not already defined for him.''
>
> A judge cannot ''do justice'' directly in the cases before him. This view was strongly expressed in a small episode in the life of Justice Oliver Wendell Holmes. After having lunch [one day] with Judge Learned Hand, Holmes entered his carriage to be driven away. As he left, Judge Hand's parting salute was: ''Do justice, sir, do justice.'' Holmes ordered the carriage stopped. ''That is not my job,'' Holmes said to Judge Hand. ''It is my job to apply the law.''
>
> Elsewhere Holmes wrote that his primary responsibility as a judge was ''to see that the game is played according to the rules whether I like them or not.''

Lastly, I want to quote a Georgian named Phil Kent. In his book ''The Dark Side of Liberalism,'' he takes the liberal argument in this controversy and states it. He says:

> The United States [according to the liberals, according to the Democrats in this debate we are in today] comprises diverse people and cultures. As such, judges should have the power to change laws when circumstances dictate. The U.S. Constitution is a document in flux, and is many times irrelevant in modern society. Therefore, federal judges should be chosen on the basis of their views or the positions of their issues and should be tested on their ideologies.

That is what the Democrats have been saying to us in all this debate. Then Kent answered that premise:

> We are a nation of laws, not of men. Our government is constitutional, not political. Our highest court is the arbiter of constitutional controversies, and the protector of unalienable rights. As former President Ronald Reagan underscored, ''Freedom is indivisible—there is no ''s'' on the end of it. You can erode freedom, diminish it, but you cannot divide it and choose to keep some freedoms while giving up others.''
>
> Ignoring the law, whether seen as politically expedient or ideologically sound, suggests that the courts are merely devices to be used to change policy.
>
> The courts, however, are partners with specific duties separate and apart from lawmaking and law execution. We've missed that point as a nation for too long, to our great peril.

That brings me to this map of the United States. I ask you to look at the faces on this map. They are the faces of America. These are the faces of America. There is Miguel Estrada, who spoke little English when he came to this country as a teenage immigrant from Honduras. But a few years later, this immigrant graduated magna cum laude from Columbia College in New York and from Harvard Law School. He clerked for Justice Anthony Kennedy on the highest court in this land, the U.S. Supreme Court. He continued to soar with a very distinguished law career. Yet the Democrats in this Chamber have decided this man could not even have an up-or-down vote. It is a shame, and it is a disgrace.

There is Bill Pryor, a devout Catholic and a southerner who grew up in a house where both John F. Kennedy and Ronald Reagan were revered. He graduated magna cum laude from Northeast Louisiana University and Tulane University Law School. He also has had a very distinguished law career, including winning statewide election twice as Alabama's attorney general. Yet the Democrats in this Senate will not give him an up-or-down vote.

Then there is Charles Pickering, another southerner, a grandfather, a courageous and a deeply religious man. He graduated at the top of his law school

class at the University of Mississippi, served in elective office for 12 years, practiced law for 30 years, and has served this country ably on the U.S. District Court since 1990. Yet the Democrats in this Senate refuse to give Judge Pickering an up-or-down vote.

There is Priscilla Owen, who grew up on a farm in rural Texas and later rose to win election to the Supreme Court of Texas. Along the way she graduated in the top of her class at Baylor University Law School and practiced law for 17 years. In her successful reelection bid to the Supreme Court in 2000, every major newspaper in Texas endorsed her. Yet in this Senate, this woman cannot get an up-or-down vote.

Finally, there is Janice Rogers Brown. I have spent a lot of time with this woman. I have read dozens of her speeches. I love and admire her. The daughter of an Alabama sharecropper who rose to serve on the California Supreme Court, she attended segregated schools until she was in high school and decided to become a lawyer after seeing African-American attorneys in the civil rights movement praised for their courage. In 1998, 76 percent of Californians voted to retain Justice Brown, an approval rating most of us can only dream of. Yet this African-American woman will not be given an up-or-down vote because the Democrats in this Chamber refuse to let her do it. They are standing in the doorway and they have a sign: Conservative African-American women need not apply, and if you have the temerity to do so, your reputation will be shattered and your dignity will be shredded. Gal, you will be lynched.

These are the faces of America, men and women who pulled themselves up, who worked hard, who played by the rules, and excelled in the field of law, and now all of their hard work and success has landed them in the doorway of the Senate, and each one of them is having that door slammed in their faces. The very least they deserve, the very least they deserve is an up-or-down vote. Surely, in the name of all that is fair and reasonable, surely, in the name of James Madison, surely in the United States of America in 2003, that is not too much to ask, just an up-or-down vote, just an up-or-down vote, just an up-or-down vote.

The majority of this Senate deserves to have its voice heard.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I thank my colleague from Georgia for his always direct, forthright, from-the-heart statement. He knows he and I share an awful lot with respect to this issue and so many others. Again, it has been a pleasure for me to serve with him.

I want to talk about one of the men he just mentioned who is one of the faces on that map and is one of the individuals who is being filibustered. That is Judge Charles Pickering.

What an injustice to an individual is being carried out with respect to the filibuster of the nomination of Judge Charles Pickering to the Fifth Circuit Court of Appeals. I feel a very special relationship to the Fifth Circuit because when I began practicing law in 1969, I was a member of the Fifth Circuit. At that point in time, all of Georgia was a part of the Fifth Circuit.

Then I believe it was 1979 or 1980, we split off. We became the Eleventh Circuit and the Fifth Circuit became the circuit that handled cases from Texas, Louisiana, and Mississippi.

This man, Charles Pickering, grew up in Mississippi. It has been said by his critics on the other side of the aisle—and I quote because I was in the chair presiding Monday when this statement was made by one of the individuals from the other side of the aisle on the floor, in talking about his record on race, ''He has a bad record.''

Nothing could be further from the truth. Judge Pickering has been a strong advocate of the civil rights movement since the very early days of his career. Judge Pickering was one who came through a very difficult time in the history of our country, particularly coming from the South. Those of us who grew up in that same South, particularly in the rural South during those days, know the difficult times we faced and how far we have come since then. We are still not where we need to be. But boy, what strides we have made. It is only because of men like Judge Charles Pickering that we have made those strides.

So for anybody to say this man has a bad record on race is simply not just incorrect, but it does a grave injustice to a man who worked so hard to make sure civil rights did come to his part of Mississippi.

Judge Pickering, in 1967—you have to think back. In rural Mississippi, a part of Mississippi where the Ku Klux Klan, which today we would brand as terrorists—at that point in time, they were very active in that part of Mississippi. Judge Pickering stood face to face, eye to eye with the Ku Klux Klan. He went to court and testified against the Imperial Wizard of the Ku Klux Klan in Mississippi. For those who had not lived through that time, you cannot have a real appreciation for what he did, how brave, courageous, and how much integrity this man showed by doing this. He testified against the Imperial Wizard in a criminal action, in which the Imperial Wizard of the Ku Klux Klan was charged with the murder of a man named Vernon Dahmer.

Unfortunately, although Judge Pickering did that, now on the floor of this Senate it is said he has a bad record when it comes to civil rights. Judge Pickering is a strong, religious man. He has a very strong faith. He believed there ought to be equality among children in schools. For that reason, he made sure his children went to integrated schools from the very first day they were eligible to go to school.

Again, for those of us who grew up in the South during those days when integration began, this was not a very popular thing to do in the white community, to say the least. But Judge Pickering, again, stared racial injustice in the eye and he said we have to do the right thing and we have to make sure all of our children have an equal opportunity, so he sent his children to the same schools as the African-American community sent their children to during, again, this very difficult time.

The list goes on and on about what Judge Pickering has done with respect to race relationships, from organizing local committees, to organizing statewide committees dealing with the issue of racial justice in the State of Mississippi.

Judge Pickering served on the Federal bench in the district court where he lived for several years. He has been criticized for having a bad judicial record. Well, let me tell you about his judicial record. Some 99.5 percent of his cases have either been affirmed or not appealed—99.5 percent. They have either been affirmed or not appealed. Of those appealed, Judge Pickering has only had a reversal rate of 7.9 percent, which is 20 percent lower than the U.S. Department of Justice's national average of 9.1 percent, and 2 times lower than the average district court judge under the Fifth Circuit Court of Appeals.

Judge Charles Pickering is not just a good man, Judge Charles Pickering is an outstanding judge. This is the kind of man the folks on the other side of the aisle are being obstructionist about and are not allowing an up-or-down vote with respect to his confirmation on the floor of the Senate. It is wrong, it is unjust, and it ought not to continue.

I want to talk to you about one other individual very quickly, and that is Miguel Estrada. Miguel Estrada has withdrawn his nomination, after being under consideration for years. He decided he was not going to put his family through this any longer and he decided the best thing to do was withdraw his nomination and move on.

Miguel Estrada came to the United States as a teen from Honduras. He spoke very little English. He made sure he learned English quickly enough to enter school and he graduated cum laude from undergraduate school and went to Harvard Law School, where he graduated with honors and was a member of the Harvard Law Review. He has given his life to public service. Most recently, his public service included being in the office of the Solicitor General of the United States of America under both a Republican President, President George Herbert Walker Bush, and a Democratic President, Bill Clinton. In both instances, he served under a Solicitor General who has now come forward and said this man is a good man, an outstanding lawyer, and this man deserves to be confirmed to the DC Circuit Court of Appeals.

Obstruction came from the other side of the aisle, and they would not even

give Miguel Estrada an up-or-down vote to confirm his nomination to the DC Circuit Court of Appeals.

I want to spend the last part of my time here talking about this issue of cloture. The Senate has operated under various different rules on cloture, which is the ability of the Senate body to terminate debate on a pending matter. From 1789 until 1806, the Senate cloture rule allowed debate to be shut off by a simple majority vote. For 17 years after the country began operating under the U.S. Constitution, the Senate rules provided a simple majority vote was all that was needed to cut off debate.

In 1806, the Senate eliminated its first cloture rule which, in effect, put the Senate under a system where unanimous consent was required to end debate. This unanimous consent system lasted for over 100 years and survived 3 unsuccessful attempts to bring back some sort of cloture rule.

In 1917, the Senate filibustered a proposal supported by President Woodrow Wilson to arm American ships against German submarines, prior to America's entry into World War I. This filibuster was rather controversial and led to support for the Senate approving the first version of today's cloture rule, which is rule XXII. That required a vote of two-thirds present and voting to end debate on ''pending measures.''

Rule XXII was again amended in 1949 to extend cloture to any measure, motion, or other matter, but cloture became inapplicable to any rule change, making it more difficult to change the rules again. Part of this 1949 rule change raised the required number of Senators for cloture from two-thirds of those present and voting to two-thirds of all Senators.

Ten years later, in 1959, rule XXII was extended to rule changes, but the number of required Senators was moved back to two-thirds of those present and voting. In 1975, our esteemed senior Senator from West Virginia, Senator BYRD, championed another amendment to rule XXII that changed the required number of Senators for cloture to three-fifths of Senators duly sworn and chosen—in other words, a hard 60 Senators, without regard to how many are present and voting. The 1975 rule change left the cloture requirement for rule changes at two-thirds of Senators present and voting.

In 1979, Senator BYRD again proposed another amendment to rule XXII. This time, the amendment imposed a 100-hour limit on post-cloture debate. This was reduced to 30 hours in 1986.

We started off in 1789 with the cloture rule that closed off debate by a simple majority vote. The original rule was clearly constitutional because it didn't impose more than a simple majority to end debate and proceed to the question of an up-or-down vote on the President's nominees. Now it is interesting, and I think very telling, that the Framers of the Constitution set out only five instances where they thought the Senate needed more than a simple majority vote to act. That is what is referred to as a supermajority, such as three-fifths, two-thirds, and such—anything but a simple majority.

Those five instances requiring a supermajority are: impeachment, expulsion of a Senator, the override of a Presidential veto, ratification of a treaty, and adoption of a constitutional amendment.

I ask unanimous consent that I be allowed to continue and that my time be taken off of the next hour, same as we have been doing.

The PRESIDING OFFICER. Is there objection?

Mr. DASCHLE. I have no objection.

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

Mr. CHAMBLISS. I thank the minority leader.

In contrast, the approval of Federal judges should occur frequently. I would go so far as to say 100 percent of all qualified nominees should be approved by the Senate. This is why there is no requirement in the Constitution for more than a simple majority to confirm these nominees. The Constitution charges this body with the responsibility of advice and consent on the President's nominations.

With this in mind, when the Senate began operations, it required only a simple majority vote to end a filibuster. We have come a long way in the last 214 years. As you have just heard, we have tinkered with the cloture rule on a number of occasions. I am of a mind that the number of cloture rules we have had since the original rule were, or are, unconstitutional, including the present rule XXII, where they are applied to prevent a majority of Senators from confirming the President's judicial nominees. But that has never happened before this year. We have never in our Nation's history had a minority of Senators try to prevent a vote on the President's nominees under the guise of rule XXII.

By acting in this way, a minority of Senators has found a way to make the cloture rule unconstitutional in practice. The Framers of the Constitution knew the situations where they wanted more than a simple majority for the Senate to act. Confirmation of the President's nominees was not one of these instances.

If you look at the text of article II, section 2, in the second paragraph, you see in the very same sentence where the Framers require two-thirds of Senators present to ratify a treaty, they charge the Senate with responsibility for advice and consent without a word said about a supermajority requirement; just a simple majority is clearly all they thought was needed to advise the President.

With respect to the Senate's consideration of nominees, I think the only constitutional cloture rule we have ever had was the first one, which stood for the first 17 years the Senate was in operation. We have tolerated a number of different accommodations over the years, including the absence of any cloture rule for over 100 years, where we could only end debate by unanimous consent and a lot of other compromise cloture rules along the way. Ultimately, what decides whether a rule is constitutional is whether 51 Senators say it is constitutional.

We have another proposal offered this year to resolve the impasse that has prevented the Senate from discharging its constitutional duty to advise the President on nominations of the individuals we are here talking about.

Senate Resolution 138, of which I am a cosponsor, was introduced by Majority Leader FRIST and has bipartisan support from the senior Senator from my State, Senator MILLER, who is an original cosponsor of the resolution.

S. Res. 138 is a reasonable compromise to break the impasse we now face. Instead of setting a fixed supermajority requirement of 60 votes to end debate and bring a nominee to a vote, S. Res. 138 starts with a 60-vote requirement and gradually reduces the number of necessary votes until ultimately a simple majority of Senators present on the floor can decide whether to consent to the President's nominee. While respecting that the filibuster has a historic role in the Senate, this bill assures that, ultimately, the will of the majority will prevail. Over the past few years, measures similar to S. Res. 138 have received bipartisan support at various times.

We have a history of support of this concept from people on both sides of the aisle for a needed change to the cloture rule. Now is the time to come together and make it happen. We can end this filibuster by cooperation in a bipartisan fashion, or we will have to decide other options that might work.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The minority leader is recognized.

Mr. DASCHLE. Mr. President, when will the Democratic allotment of time expire?

The PRESIDING OFFICER. At 3:05.

Mr. DASCHLE. I thank the Chair for the information.

Mr. President, the distinguished Senator from Arkansas has been a stalwart participant during the wee hours here. I want to publicly acknowledge his presence and laud him for his willingness to not only be on the floor, but to stay on the floor. I asked if he would mind if I would take a couple of minutes, and then I will relegate the balance of time for this allotment to him. He has some important remarks to make and I, like others, would like to hear him.

Let me respond briefly to the comments made by the distinguished Senator from Georgia. He noted, of course, that the Constitution provides the authority to the Senate to write its rules. That, in essence, is what we have done, as he has also noted. There have been various ways with which the Senate

addressed the issue of unlimited debate, which is the essence of this institution. Having unlimited debate means an opportunity for Senators to be heard for whatever length of time, but it also means an opportunity to protect the minority—the minority being whatever the case may be, whether it is a political minority, ethnic minority, minority on a given issue, regardless. That was really the essence of what the Founding Fathers saw with regard to the delegation of this authority to the Senate to write its rules with an expectation that filibusters, this extended debate, would be part of the deliberative spirit and soul of this body.

But my colleague from Georgia fails to recognize, and certainly others have ignored the number of times our Republican friends have used the rules of the Senate, the filibuster, to advance their position. There have been a number of occasions over the course of the last three decades where filibusters and cloture votes have been cast. There were 63 occasions where nominees from the Clinton administration did not even reach the floor because of an effective filibuster within the committee. One Senator would say: I will not allow this nominee to go forward. That assertion was respected and, ultimately, 63 of the Clinton nominees never got out of committee because of a Republican filibuster. That has not happened, of course, during this Congress. The Republicans have moved their nominees at will, and the only option we have available to us, of course, is to vote either against or for the nominee in committee, and then on cloture as some of these nominees with whom we have grave concern come to the Senate floor.

No. 1, this is not unprecedented. No. 2, it was used to a far greater degree by our Republican colleagues during the 8 years of the Clinton administration—as I said, on 63 occasions.

That issue should not be debated. It is not even arguable. I don't think this debate should be about 4 jobs, which, by the way, are generating incomes of over $100,000. It is our view that the debate tonight should be about the 3 million jobs that have been lost under this administration and the 9 million jobs which are lost and for whom people are attempting to find some way to survive financially and economically.

Those 3 million jobs have been lost, in our view, because of a mismanaged economy that needs to be addressed if indeed we are going to bring this economy back. All one has to do is look at the comparison between the Clinton and Bush administrations to gain some understanding of the degree of difference between the Democratic approach and the Republican approach to the economy. The Clinton administration created 22 million jobs in 8 years. The Bush administration has lost 3 million jobs in 3 years. Our view is, if we are ever going to turn this around, it is important we do three things.

First and foremost, we address the concerns of those who are unemployed today by providing unemployment compensation beyond the limits that have now been put in place. There are too many people who have, through no fault of their own, been unable to get employment and who have run out of unemployment benefits. We need to address that. I hope the Senate will do so before we leave this year.

The second thing we need to do is to ensure those who are employed have the kind of incomes they deserve. That means, in some cases, increasing the minimum wage for the first time in now almost 7 years and addressing the fact that at minimum wage we are at the lowest purchasing power in the history of minimum wage.

It also means we protect people's overtime. Contrary to what the administration would like to do, we need to ensure those 8 million people who could see their overtime lost are provided the confidence and the knowledge they will not lose the overtime and will be compensated as we have done now for almost 70 years, for time they have worked over a 40-hour work week.

Finally, I think it is critical we understand we must provide some relief for the extraordinary costs our working people especially are facing with regard to health care. Health insurance costs have skyrocketed—some 15 percent a year.

There are a number of ways with which to create jobs—the highway bill, the manufacturing job tax credit. We offered tonight unanimous consent requests with the hope our colleagues might join us in at least allowing this legislation to go forward. Obviously they have objected. But that is the first thing we need to do—create the jobs for those 3 million people who have lost their jobs in this administration.

Second, we need to ensure the incomes of those who are working are protected.

Third, I hope we can recognize that, even with incomes, they can't afford their health insurance today unless we help them to find ways in which to bring its cost down.

There is a lot more to talk about with regard to jobs and this economy, but as I said, the distinguished Senator from Arkansas has been waiting. He has done an extraordinary job of representing this caucus on the Senate floor and I yield the floor now for his remarks.

The PRESIDING OFFICER (Mr. CHAFEE). The Senator from Arkansas.

Mr. PRYOR. Mr. President, I would like to acknowledge and thank my colleague from South Dakota, who has done such an outstanding job tonight, and always.

Tonight I would like to read a portion of a book that won the Pulitzer Prize recently. It is called ''Master of the Senate.'' It is about Lyndon Baines Johnson as a Senator, not as President. It was written by Robert Caro. It is 1,040 pages. I assure you I am not going to read all thousand pages tonight. I am just going to read a few excerpts from chapter one. Chapter one is entitled ''The Desks of the Senate.'' I am only going to read a small portion of chapter one. I will be starting on page 3. But I think it is important for us to all put this in context and remember what the Senate is all about and how it works and how it is designed to function within our constitutional system. So, if I may start midway down, on page 3.

When a person stood on the floor of the Senate Chamber, however—in the well below the dais—the dais was, suddenly, not plain at all. Up close, its marble was a deep, dark red lushly veined with grays and greens . . .

In fact, on this pilaster behind me you can see those colors Mr. Caro is referring to here.

. . . and set into it, almost invisible from the galleries—

We have a number of people in the gallery tonight.

. . . almost invisible from the galleries, but, up close, richly glinting, were two bronze laurel wreaths like the wreaths that the Senate of Rome bestowed on generals with whom it was pleased, when Rome ruled the known world—and the Senate ruled Rome.

From the well, the columns and pilasters behind the dais were, suddenly, tall and stately and topped with scrolls, like the columns of the Roman Senate's chamber, the columns before which Cato spoke and Caesar fell, and above the columns, carved in cream-colored marble, were eagles, for Rome's legions marched behind eagles. From the well, there was, embroidered onto each pale damask panel, an ornament in the same pale color and all but invisible from above—a shield—and there were cream-colored marble shields, and swords and arrows, above the doors. And the doors—those seven pairs of double doors, each flanked by its tall columns and pilasters—were tall, too, and their grillwork, hardly noticeable from above, was intricate and made of beaten bronze, and it was framed by heavy, squared bronze coils. The vice presidential busts were, all at once, very high above you; set into deep, arched niches, flanked by massive bronze sconces, their marble faces, thoughtful, stern, encircled the Chamber like a somber evocation of the Republic's glorious past. And, rising from the well, there were the desks.

Let me pause here because these desks have a lot of history. In fact, I think it is safe to say almost all of American history in some way or another has flowed through the Senate. I don't think that is an overstatement.

The desks of the Senate rise in four shallow tiers, one above the other, in a deep half circle. Small and spindly individually, from the well they blend together so that with their smooth, burnished mahogany tops reflecting even the dim lights in the ceiling so far above them, they form four sweeping, glowing arcs. To stand in the well of the Senate is to stand among these four long arcs that rise around and above you, that stretch away from you, gleaming richly in the gloom: powerful, majestic. To someone standing in the well, the Chamber, in all its cavernous drabness, is only a setting for those desks—for those desks, and for the history that was made at them.

The first forty-eight of those desks—they are of a simple, federal design—were carved in 1819 to replace the desks the British had

burned five years before. When, in 1859, the Senate moved into this Chamber, those desks moved with them, and when, as the Union grew, more desks were added, they were carved to the same design. And for decades—for most of the first century of the Republic's existence in fact; for the century in which it was transformed from a collection of ragged colonies into an empire—much of its history was hammered out among those desks.

Daniel Webster's hand rested on one of those desks when, on January 26, 1830, he rose to reply again to Robert Hayne.

I am not going to go into that story because it should be known by most people who follow Senate history, one of the more famous exchanges in the history of the Senate. Let me skip on to page 7 and talk about what I really think is important for us to consider this morning:

The long struggle of the colonies that were now become states against a King and the King's representatives—the royal governors and proprietary officials in each colony—had made the colonists distrust and fear the possibilities for tyranny inherent in executive authority. And so, in creating the new nation, its Founding Fathers, the Framers of its Constitution, gave its legislature or Congress not only its own powers, specified and sweeping, powers of the purse (''To lay and collect Taxes . . . To borrow Money on the credit of the United States . . . To coin Money'') and powers of the sword (''To declare War, grant Letters of Marque and Reprisal . . . To raise and support Armies . . . To provide and maintain a Navy . . .'') but also powers designed to make the Congress independent of the President and to restrain and act as a check on his authority: power to approve his appointments, even the appointments he made within his own Administration, even appointments he made to his own Cabinet; power to remove his appointees through impeachment—to remove *him* through impeachment, should it prove necessary; power to override his vetoes of their Acts. And the most potent of these restraining powers the Framers gave to the Senate. While the House of Representatives was given the ''sole power of Impeachment,'' the Senate was given the ''sole power to try all Impeachments'' (''And no person shall be convicted without the Concurrence of Two Thirds of the Members present''). The House could accuse; only the Senate could judge, only the Senate convict. The power to approve presidential appointments was given to the Senate alone; a President could nominate and appoint ambassadors, Supreme Court justices, and all other officers of the United States, but only ''by and with the Advice and Consent of the Senate.'' Determined to deny the President the prerogative most European monarchs enjoyed of declaring war, the Framers gave the power to Congress as a whole, to House as well as Senate, but the legislative portion of the power of ending war by treaties, of preventing war by treaties—the power to do everything that can be done by treaties between nations—was vested in the Senate alone; while most European rulers could enter into a treaty on their own authority, an American President could make one only ''by and with the Advice and Consent of the Senate, provided two thirds of the Senators present concur.''

I will skip to page 8. It is a discussion of James Madison, the primary designer of our constitutional system of government. Certainly it was a committee effort, but James Madison has been historically credited with playing the major role in its creation, in its design:

How, Madison asked, is ''the future danger''—the danger of ''a leveling a spirit''—''to be guarded against on republican principles? How is the danger in all cases of interested coalitions to oppress the minority to be guarded against? Among other means by the establishment of a body in the government sufficiently respectable for its wisdom and virtue, to aid on such emergencies, the preponderance of justice by throwing its weight into that scale.'' This body, Madison said, was to be the Senate. Summarizing in the Constitutional Convention the ends that would be served by this proposed upper house of Congress, Madison said they were ''first to protect the people against their rulers; secondly to protect the people against the transient impressions into which they themselves might be led.''

''The use of the Senate,'' Madison said, ''is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch.'' It should, he said, be ''an anchor against popular fluctuations.'' He drew for parallels on classical history, which, he said, ''informs us of no long-lived republic which had not a Senate.'' In two of the three ''long-lived'' republics of antiquity, Sparta and Rome, and probably in the third—Carthage (about whose governmental institutions less was known)—senators served for life. ''These examples . . . when compared with the fugitive and turbulent existence of other ancient republics, [are] very instructive proofs of the necessity of some institution that will blend stability with liberty.'' Thomas Jefferson had been in Paris during the Convention, serving as minister to France. When he returned, he asked George Washington over breakfast why the President had agreed to a two-house Congress. According to a story that may be apocryphal, Washington replied with his own question: ''Why did you pour your tea into that saucer?'' And when Jefferson answered, ''To cool it,'' Washington said, ''Just so. We pour House legislation into the senatorial saucer to cool it.'' The resolution providing for a two-house Congress was agreed to by the Constitutional Convention with almost no debate or dissent.

And to ensure that the Senate could protect the people against themselves, the Framers armored the Senate against the people.

One layer of armor was bolted on to allay the fears of the states with fewer people, that the more populous states would combine to gain a commercial advantage or to control presidential appointments and national policies; the small states were determined that all states should have an equal voice in the Congress, so, in what became known as the ''Great Compromise,'' it was agreed that while representation in the House would be by population, in the Senate it would be by states; as a result of that provision, a majority of the people could not pass a law; a majority of the states was required as well. But there were other, even stronger, layers. One was size. ''Numerous assemblies,'' Madison explained, have a propensity ''to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.'' so the Senate would, in Madison's phrase, be ''less numerous.'' Each state, the Farmers decided, would be represented by only two senators; the first Senate of the United States consisted of just twenty-six men.

Now I am going to skip to page 10.

Senators would also be armored against the popular will by the length of their terms, the Framers decided. Frequent elections mean frequent changes in the membership of a body, and, Madison said, from a ''change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success.'' What good is the rule of law if ''no man . . . can guess what the [law] will be tomorrow?'' Guarding against ''mutable policy,'' he pointed out, requires ''the necessity of some stable institution in the government.'' Edmund Randolph, as usual, was more blunt. ''The object of this second branch is to control the democratic branch,'' he said. ''It it not be a firm body, the other branch being more numerous and coming immediately from the people, will overwhelm it.'' Senators, he said, should ''hold their offices for a term sufficient to insure their independency.'' The term sufficient, the Farmers decided, would be six years. Senators would hold office three times as long as the members of the ''democratic branch.'' They would hold office longer than the President held office. And around the Senate as a whole there would be an additional, even stronger, layer of armor. Elections for senators would be held every two years, but only for a third of the senators. The other two-thirds would not be required to submit their record to the voters (or, to be more accurate, to their legislatures) at that time. This last piece of armor made the Senate a ''stable institution'' indeed. As a chronicler of the Senate was to write almost two centuries after its creation: ''It was so arranged that while the House of Representative would be subject to total overturn every two years, and the Presidency every four, the Senate, as a Senate, could never by repudiated. It was fixed, through the staggered-term principle, so that only a third of the total membership would be up for re-election every two years. It is therefore literally not possible for the voters ever to get at anything approaching a majority of the members of the Institution at any one time.''

Now I'm going to skip to page 11.

The coat of constitutional mail bolted around the Senate was sturdy indeed—by design. Under the new Constitution, the power of the executive and the power of the people would be very strong. So to enable the Senate to stand against these powers—to stand against them for centuries to come—the framers of the Constitution made the Senate very strong. Wanting it to protect not only the people against their rulers but the people against themselves, they bolted around it armor so thick they hoped nothing could ever pierce it.

And for many years the Senate made use of its great powers. It created much of the federal Judiciary—the Constitution established only the Supreme Court; it was left to Congress to ''constitute tribunals inferior,'' and it was a three-man Senate committee that wrote the Judiciary Act of 1789, an Act that has been called ''almost an appendage to the Constitution.'' The Judiciary Act established the system of federal and district courts, and the jurisdictional lines between them, that endure to this day, and established as well the principle, not mentioned in the Constitution, that state laws were subject to review by federal courts. And when, sixteen years later, this new creation was threatened by a concatenation of the very forces the Framers had feared—presidential power and public opinion—the Senate saved the Judiciary.

By the way, Mr. President, the Senate has a history of saving the judiciary in critical times. That should be a discussion for a later time. But there is no question that the Senate has served

as protector of the judiciary in our system of government.

The desks (there were thirty-four of them by 1805) had been removed for this occasion, and the Old Senate Chamber had been arranged as if it were a tribunal. In the center of one wall stood the chair of the presiding officer, Vice President Aaron Burr, as if he were the chief judge, and extending on his right and left were high-backed, crimson-covered benches, on which the senators sat, in a long row, judges in a court from which there was no appeal.

Mr. Caro goes on to explain the impeachment trial of Supreme Court Justice Samuel Chase; here again, the rule of law and the fact we are a nation of laws and not men built up by the Senate. It is the Senate's tradition to stand up for our liberty and for our law.

I wanted to bring this to the Senate's attention. I know my time is drawing to an end. At this point, I yield the remainder of my time.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, thank you.

The Democratic leader came to the floor and spoke, as many have on that side of the aisle, attempting to change the subject on the issue of jobs.

The number keeps coming up about 3 million jobs being lost in this administration since this administration took office. I want to share with you a chart that looks at the survey of the U.S. employment level. This includes everybody. The numbers that the Democratic leader referred to do not include everyone. It was a different survey of jobs. This is the most comprehensive one. You can see from this comprehensive survey, here we are: the most jobs in the history of the United States.

If these include all the jobs, whose jobs does the Democratic leader say don't count? What jobs don't count, according to the Democrats? If you are self-employed, if you are an individual doing work, you don't count. The Democratic leader is not going to count you as someone who is working. If you are a domestic worker or you work for a private household, you don't count—you are not a worker; you don't have a job. If you are self-employed, if you are a domestic worker for a private household, you don't count. If you work on a farm, you don't count. If you are someone who works—it is probably some of the hardest work that is done in this country—on a farm, according to the Democratic leader, your job doesn't count. If you work in a family-run business part time, you don't count. In fact, there are 8 million workers on farms, family businesses, households and self-employed, under the Democratic leader's survey, who don't count. We believe you do.

By the way, when it comes to paying taxes, the Democratic leader counts your job. He makes sure we collect your taxes. But, as far as being employed or not, for political purposes, you don't count. It is 138 million, a record and growing.

Why are they coming up here and talking about this? Because they want to criticize the President's plan for turning this economy around. It probably says they do not have a plan.

Mr. COLEMAN. Mr. President, will the distinguished Senator from the Commonwealth of Pennsylvania yield for a question? I want to talk about judges in a second.

Mr. SANTORUM. I am happy to yield.

Mr. COLEMAN. Is the distinguished Senator familiar with some of the statistics that came out recently regarding jobs and growth in the economy?

Mr. SANTORUM. I have seen some of them. In fact, they were revised a couple of months prior to the most recent report—I believe it was August and September—the net new jobs created on the original projection was 16,000. They have revised them up to almost I think 150,000.

Mr. COLEMAN. I believe about 50,000 double to over 100,000. As the distinguished Senator from the Commonwealth of Pennsylvania is aware, that payroll employment increased by 126,000 jobs in October.

Mr. SANTORUM. If you look at the last 3 months, almost 300,000 new jobs, net new jobs were created in this economy.

Mr. COLEMAN. Is the distinguished Senator from the Commonwealth of Pennsylvania aware that the gross domestic product—by the way, the gross domestic product is the way we measure growth in this economy—increased at a 7.2-percent annual rate?

Mr. SANTORUM. I believe that is the highest rate of growth in almost 20 years.

Mr. COLEMAN. Is the Senator from Pennsylvania aware of the actions that this Senate has tried to take to grow jobs? One of the things we attempted to do was to pass a bill regarding class action reform. Does the distinguished Senator from the Commonwealth of Pennsylvania believe that class action reform, if it were passed, would help grow jobs?

Mr. SANTORUM. I don't think there is any question that the drain on this economy is one of the major impediments to creating jobs, increasing the standard of living in America and giving a better quality of life for the average American.

Mr. COLEMAN. I ask the Senator from Pennsylvania, on the issue of malpractice litigation regarding doctors and the impact that has on the cost of health care, and the impact the cost of health care has on small business and growing jobs, does he see a correlation between the increased litigation costs and the impact it has on the condition of the economy?

Mr. SANTORUM. The No. 1 crisis in my State with regard to health care is medical lawsuit abuses.

Mr. COLEMAN. Would it be fair to say that our friends on the other side of the aisle have obstructed our efforts to pass malpractice reform?

Mr. SANTORUM. They have blocked every form of reasonable and balanced litigation reform that balances the interests of those who rightfully have a plea before a court for compensation and the right of society not to have outrageous awards, which make us unproductive, which raises the cost of health care, and which limits the availability of health care to millions of Americans.

Mr. COLEMAN. If the Senator will yield the floor—and I would very respectfully disagree with his last assertion that our colleagues on the other side of the aisle have no plan; they have a plan. The plan is to roll back the President's tax cuts. Listen to the candidates. They want to roll back that tax cut. The lowering of the tax rates has generated more income in the pockets of Americans.

Mr. SANTORUM. They want to roll back the reductions that the President put in place. They do not like the dividend proposal. The stock market has added $2 trillion in value. What does that mean to the millions of Americans who now participate in the market? You are talking about real wealth. You are talking about retirement security for millions of Americans because of the economic plan of this administration passed by the Senate. And they would like to roll that back. I guess they do not like markets going up. I guess they do not like employment going up. I guess they do not like economic activity and job creation.

Mr. COLEMAN. Has my colleague from the Commonwealth of Pennsylvania talked to small business owners about the impact of accelerated depreciation?

Mr. SANTORUM. We saw in just the last few quarters the business community—which has really been lagging, and which is an indicator in all of the economy—as a result of the accelerated depreciation expensing provision in the tax package that we passed, is finally beginning to invest, and by doing so they are increasing productivity which means higher wages for workers. It is a little bit of a challenge. If productivity goes up, that means higher quality jobs, higher paying jobs, and more productive jobs. As growth continues, so will the employment.

Mr. COLEMAN. Is the distinguished Senator aware that business investment increased in the last quarter about 15 percent? Does that have a relationship to growing jobs?

Mr. SANTORUM. Absolutely. The fact is that incentives for businesses to invest in capital and equipment and purchasing capital equipment for manufacturers here in this country means they are improving their productivity. They are being more competitive internationally. We are not losing those jobs. We are keeping those jobs here. They are more productive jobs and higher paying jobs. It is a win-win all across.

Mr. COLEMAN. Mr. President, I would respectfully suggest again that

our friends on the other side of the aisle have a plan. The plan is to roll back the tax cuts. Again, look at the statistics. Look at what is happening in the economy. Any American being out of work is a terrible thing. I am a former mayor. I always understood the best welfare program, the best housing program, and the best health care is jobs. But you have to plan a vision. The Bible said people without a vision will perish.

This President has a vision, and that vision is producing results. We are seeing it. There is an increase in consumer spending as a result of tax cuts.

Mr. SANTORUM. I thank the Senator from Minnesota for his questions. I think we settled this issue pretty clearly as to the importance that we have put on jobs and the response of the Republicans in the Senate and this President to grow the economy as a result of a recession which started in the Clinton administration and which was exacerbated by 9/11. The President responded with certainty and with a dynamic plan, with an innovative plan, and it is working in our economy.

Now we turn to another area where the Democrats have obstructed; the issue of Federal judges we are spending the evening here tonight on. I have said throughout the time I was going to be on the floor that we are going to ask for votes. We should be able to get votes—up-or-down votes.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Senate now proceed to consideration of Calendar No. 455, the nomination of Janice R. Brown to be a United States Circuit Judge for the District of Columbia Circuit; provided further that there then be 20 hours of debate equally divided for the consideration of the nomination; provided further that following the debate the Senate proceed to the vote on the nomination, and that there be no further intervening action or debate.

Mr. PRYOR. I object, Mr. President.

The PRESIDING OFFICER. Objection is heard.

Mr. SANTORUM. I have just asked that a justice who was elected in the State of California by 76 percent of the vote—no elected official from California in this Chamber can make that claim—76 percent of the vote in the State of California and we can't get a vote on her nomination, up or down; a judge who wrote more majority opinions than any other member of that court, who is a qualified African-American woman; we cannot get a vote on the floor of the Senate after 20 hours of debate. I will agree to 30 hours. I amend it to 30 hours of debate. I ask unanimous consent that the previous unanimous consent that I read be modified to allow for 30 hours of debate.

Mr. PRYOR. I object, Mr. President.

The PRESIDING OFFICER. Objection is heard.

Mr. SANTORUM. This is not a matter of debate. This is not a matter of due consideration. This is a matter of not allowing a qualified judge, a justice of the supreme court of the largest State in this country, who was elected by 76 percent of the people in the State of California, who is now being assailed as not being within the mainstream. How small is the stream? How small is the stream that 24 percent of Californians are in compared to the rest of America? That is not mainstream? That is extreme. We are not talking about the mainstream judges. We are talking about fighting to only put on extreme judges. This is a travesty. If this woman were nominated 10 years ago, we wouldn't even have had a vote on the floor of the Senate; or 5 years ago, she wouldn't have even been voted on. We would have confirmed her with a voice vote, and everybody in this Chamber knows it.

This body was once a place where sense of history and duty and responsibility meant something, to be a steward of this incredible body, this famed institution. It used to mean something to be a Senator to uphold the tradition of this body.

That is why for 214 years no one put their partisan whim, their short-term political gain in front of the process that kept this institution whole. But tonight in this session of Congress we are throwing that all away. What is so important? What is so sacred to those who would contort the rules of the Senate as never done in the history of this Senate? Senators have a chance to do it. But there is some higher calling not to give in, not to give in to that notion, You know, I really do not like this judge—not to give in because of the consequences for the long-term future of this country is just too dire. What caused so many to be so willing to give up and give in and thereby fail the Senate and cause this body to become so rancorous?

I ask my colleagues, as someone who never voted against a cloture motion—I have never voted against a cloture motion for a judge, judges who I thought would be the worst judges who are against everything I believe in. Paez and Berzon are two examples. I lost sleep because I knew the damage they could do with the Ninth Circuit and are doing. By the way ''under God,'' Paez and Berzon, stricken from our Pledge of Allegiance.

These are radical activist judges. I knew it. They will destroy the very fabric of our Constitution. I knew it. I gave them an up-or-down vote because this body, this Constitution, the process by which we do business here is more important.

No more. The puppeteers of the special interest groups around Washington, DC now carry much more weight than the Constitution. This is a sad time. People ask why we are doing this. Because we have a right to tell the public what is going on. This is ugly. This is the worst of our nature. I plead, as someone who wanted to do what you are doing worse than you could possibly imagine but didn't because there are bigger things than the next election.

I yield the floor.

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

Mr. COLEMAN. Mr. President, I have the greatest respect and compassion for my colleague from the Commonwealth of Pennsylvania and for his commitment to what this institution is all about.

I don't know if I can find the words to describe the feeling that I have, elected just this year to the Senate, to these hallowed halls. I listened to the reading from my friend and colleague from Arkansas from Caro's ''The Master of the Senate.'' It is a humbling honor to be part of this body, to be part of the flow of history, a flow that has helped develop the greatest nation in the world. We got there due to divinely inspired guidance from the Founders of this great Republic who gave us a Constitution which provides a sense of clarity of our roles and responsibility. If we decide to only abide by it 98 percent of the time and the folks who follow us decide to abide by it 98 percent of the time, we are in trouble. My colleagues across the aisle have a sign that says 168 to 4. They are proud of that. I am stunned. I am absolutely stunned. If the airline I flew back and forth to Minneapolis would advertise 98 percent of the time they would get me there safely, I wouldn't fly.

Think about the Constitution. I could walk you through it. First amendment of the Constitution; Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press. If there were 172 newspapers in the United States and I said 168 of them are going to have freedom of the press, but not the other 4, where would we be?

Second amendment to the Constitution: Right to bear arms.

In Minnesota, we bear arms. A lot of folks were out deer hunting last weekend there. If I were to tell a group of 172 Minnesotans that 168 of you have the right to bear arms, but not 4, 98 percent, I don't think they would be happy Americans.

I could go through every amendment. Third amendment: no soldier shall in a time of peace be quartered in any house without the consent of owner, nor in time of war but in a manner prescribed by law, the third amendment to the Constitution. If I went to a group of homeowners and said, you are going to quarter soldiers, 2 percent of you are, they wouldn't be very happy, and they shouldn't be.

We took a solemn oath to preserve and defend and abide by the Constitution of the United States. That is how we got here. That is our obligation once we got here. It wasn't a partial thing. It wasn't an almost thing. It wasn't a but-for thing, and it wasn't a 98 percent thing. It was to preserve the Constitution.

The fifth amendment to the Constitution: Individuals cannot be compelled to testify against themselves. Can you imagine if we said that applies 98 percent of the time? It doesn't work that way. It should not work that way. There is a reason why. You have to think about this. Again my colleague read the history of the Senate. It is a magnificent history. But the public out there has to ask the question: Why in the over 200 years of this Republic has there never been up until now a partisan filibuster that has stopped judges from being confirmed.

Yes, we have the right to advise and consent. The Constitution gives the President the opportunity to appoint judges. We are then to advise and consent. He nominates. We advise and consent. But we do it by a simple majority. We cast our vote. If you don't agree, you vote them down. If you agree, you vote them up. But for the history of this Republic, we have a process which we abide by, the Constitution. That was reflected in the readings from my colleague from Arkansas. Treaties, as he noted in his comments, require in the Constitution a supermajority, but not judges.

Mr. TALENT. I wonder if the Senator from Minnesota will yield for a question.

Mr. COLEMAN. I yield.

Mr. TALENT. I wonder if the Senator knows how many court of appeals appointments Presidents on average have gotten over a 4-year term since Jimmy Carter? It is 40. There were 10 per year. I went back and looked. Does the Senator know how many court of appeals judges the other side has filibustered or will filibuster by Friday? It is six. I11Does the Senator know how many more they have threatened to filibuster? It is another six. I wonder if the Senator is aware of the fact that out of 40 court of appeals judges President Bush figures to get in a 4-year term, the other side has filibustered or threatened 12. So it is not four out of 168. It is 12 out of 40, or 30 percent. I don't know how the Senator feels about that. I wonder if he doesn't think that is a more relevant figure that maybe we should be using.

Mr. COLEMAN. Even if it was 2 percent, we don't disregard the Constitution. Certainly if you are looking at 30 percent, that is outrageous. That is outrageous. One of the things that troubles me as a new Senator, as is my colleague from Missouri, as is my colleague from Arkansas—I think we still have this great kind of sense of awe, but one of the things that troubles me—and I haven't been here, but I have heard so much of the debate—they say, they did it to us in the past.

Let the record be very clear. Of the past 11 Presidents' judicial nominees, there were 2,372 confirmed. None were stopped by a filibuster. This whole thing about what you did to us in the past, of course, now we are doing to you. Then what will those who follow us do? What are the consequences of that?

I will tell you, I will stand on the floor of the Senate and say I will apply the same standard to judges with a Republican President that I will if there were ever to be a Democratic President and I am serving in this institution. Are they competent? Are they committed to preserving and upholding the Constitution? That is what the judges we are talking about all have said.

You have to get right to it. They are being opposed because there are special interest groups who don't like their position on a particular issue, most probably abortion. Judge Pickering, by way of example, is somebody. When I ran for the Senate, I had a debate with the former Vice President of the United States, Walter Mondale, a magnificent American, a great public servant, who I simply disagreed with on certain issues. But in the debate that came up, I talked about it at that time, saying: We can't obstruct.

The PRESIDING OFFICER. The time of the Senator has expired.

Who seeks recognition? The Senator from New Jersey.

Mr. CORZINE. Mr. President, I would like to start with a little bit of perspective on the judiciary, and I would like to respond a bit to the economic arguments I heard discussed over the last 30 minutes which are sort of not in touch with reality, certainly not in touch with the reality of those folks who live and work in New Jersey and those across the country.

Let's start with a simple proposition that there are 172 nominations before the Senate. The commonsense reality is, 168 have been confirmed, 4 have been held up. I hear this view that people should not have the ability to express their point of view about judicial philosophy, temperament, the perspective of the individual judges. But I don't know what we are here for if we are not supposed to exercise our judgment and work within the rules as established. One hundred sixty-eight to four seems to be a pretty favorable ratio by most human standards anywhere across America, when you look at judgments about the quality of folks you would interview for a job. It is sort of common sense.

In my own State of New Jersey, we are six for six, including a circuit court judge. We worked very carefully with the folks at the White House about background, worked in a cooperative sense. That has not happened across all of America. That is what people are arguing is now the case with the four who are on this board. There is a legitimate right to debate one's judicial philosophy. The rules of the Senate are very clear and have been used many other times.

This idea that there have been no filibusters is blatantly false. We can go back to the Abe Fortas situation, and there are other situations where it may not have been the end game but it was certainly the starting point for holding back, going forward with judicial nominations. There are a number of them. I am sure these have been identified here on the floor, whether it was the Fortas nomination for chief justice; Rosemary Barkett, a judicial nominee, had a similar situation; Supreme Court Justice Steven Breyer, Judge Paez, Lee Sarokin, and Marsha Berzon.

It has been argued and researched that 63 judicial nominees of the committee and 6 judicial nominees on the floor have been filibustered in the past. It is not something that is new. But what is really hypocritical, in my view, is we are focused on a technique that has been used to stop four judges many of us on this side of the aisle find extreme, when 55 Clinton nominees were not given hearings to be even discussed, 55. I could read the list of them. That is about, if my mathematics are correct, relative to the number, 30 percent stopped, cold dead stopped, without even having an opportunity to be reviewed, 55 Clinton nominees against 4 Bush nominees.

I don't know that it serves a useful purpose to say, we did this and we did that. The fact is we need to have a serious review of judges, and people ought to be able to express their opinions within the rules about whether they think they are qualified on the basis of standards that are generally accepted: Judicial philosophy, whether they will uphold the Constitution, settled law, all those kinds of issues.

The fact is in another time or another place, people primarily used the committee process to keep judicial nominees from even being reviewed.

What is the result? I want to reconfirm that 98 percent of those nominees President Bush has put forward have been confirmed. Only 2 percent have not. Again, that is an overwhelming commitment to moving judges through this process and significantly better than has occurred in previous administrations.

Again, the filibuster has been used as well. I just don't think we are reciting facts properly and history right.

There is another very fundamental situation here. Contrary to the claims we hear, we think there is some kind of vacancy crisis in our Federal courts. I would like to have 100 percent myself, but 95 percent of Federal judicial appointments are now filled. When we had a change of administration, because of that 55 and the process that went through, it was only 75 percent. There was a distinct process of holding back, pushing back with regard to what the folks on the other side were prepared to do when working with another President. That is why when people talk about 168 to 4, that perspective is not being brought to the discussion.

It is very simple: 55 folks stopped in the last 4 years, and there has been 4. People can argue that somehow from their perspective those 55 were outside the mainstream. Some were not brought up for discussion in the committee. But the process we are using here is to make sure the debate on the

floor brings out these extreme views, operating within the rules. I think we have facilitated a significant improvement in the ability of the courts to fulfill their function. That is what is the practical element. Those 168 are real because they are dealing with the issues the American public has to deal with. Our court system is actually functioning better than it has because we have been very facile in making sure judicial appointments have gone through. It is just a matter of perspective.

Mr. TALENT. Will my friend from New Jersey yield for a question?

Mr. CORZINE. Certainly.

Mr. TALENT. Are you aware with regard to any of those committee actions or inactions to which you refer, was there ever a case where a majority of the committee expressed a desire to vote up or down on those nominees?

Mr. CORZINE. The Senator from Missouri maybe has reviewed all of the transcripts from those committees. I have not. I do know the President of the United States sent nominations here and in most instances they were. The 55 that I have, and there are a number of them I haven't reviewed, there was an attempt to try to get a number of those before the committee, and they were not allowed to be debated. It never got started. I can't speak to all 55. I have not reviewed all of the transcripts.

Mr. TALENT. I am not going to intrude on the Senator's time. He referred to a lack of respect. I think the reason is because I don't believe there has been a situation where a majority of the committee or body wanted to vote up or down on a nominee when they didn't have that chance. I thank the Senator for yielding.

Mr. CORZINE. I appreciate the discussion with the Senator from Missouri.

What we have here, in my view, at 20 minutes of 4 on a Thursday morning, is a view that there were different techniques used by the folks on the other side of the aisle to restrict a President from having the kinds of judges and the number of judges they wanted to put into the courts which actually led to something that wasn't good for the American people; that is, a much higher vacancy rate in the Federal district courts than is the case today. I know in my own case and in the State of New Jersey, we are five for five on district judges and one for one on circuit judges, because we are working in a cooperative manner to try to get to a result that will allow the courts to have the judges to be able to deal with the cases. I think 168 is showing that happened across this country. So because there are three or four judges people believe are outside the mainstream—the special-interest stuff I have a hard time understanding. I am not a lawyer, but I read some of these cases where people don't believe in the incorporation of businesses and want to take away fundamental purposes of how that works in this world. That is outside the mainstream. That is difficult for me to understand. Therefore, I think it is perfectly reasonable to question whether that is an appropriate appointment to one of our most important appeals courts.

So, again, one of those four—or maybe it will be six, as the Senator talks about, by the time we get to whatever hour in the morning we vote on this stuff on Friday; maybe that will be the case. But I think it is important we as Senators review the record and, within the rules, use our judgment to decide whether someone is in the mainstream of judicial philosophy. Apparently, that was happening in previous administrations for 55 folks; they were just using a different technique as opposed to this particular one.

Again, I go back to the fundamental issue. It left a gaping hole in the ability of our courts to deal with the American public's needs in the Federal courts—the 75 percent fill ratio, or 25 percent vacancy ratio. Now we have a 4.8 percent vacancy ratio. I think, ultimately, somebody is going to say what is going on here? Are we actually dealing with the issues the American people need, which is having the judicial system that actually works.

I have to talk a little bit about the economy because I heard some other questions, and we talked about payroll employment versus other measures. Frankly, I don't know a single serious economist in America who doesn't say we measure the standard job performance of this economy, this country, by looking at payroll employment. It is accepted as the base standard by economists across the country. The kinds of comparisons to other standards, those are all well and good. I think they reflect, frankly, the growth in the population.

We are not creating jobs rapidly enough to actually reduce the level of unemployment. That is why payrolls have always been used as a basic issue, because it takes into account the growth of the population as well, which, by the way, we are at about the lowest—I think we had a little uptick, a minor uptick in the last 2 months in the percentage of Americans who are working out of the total population. The fact is we have lost something approaching 3 million payroll jobs under this administration. What is more important is to get to the basic fact, which is 9 million Americans are unemployed. That is the real deal. It is not whether it is growing—certainly, it is a painful experience for those who lost jobs, but there are 9 million Americans who want to work and cannot do it. It is up by 3 million since this administration took hold. Nobody is pulling that number out of the air. That is why we are trying to talk about those jobs versus the four judicial jobs within the perspective I tried to relate.

When you have 95 percent of the positions filled in the judiciary, I think somebody is doing their job filling those holes. But we are not doing the right things about creating jobs for Americans. That is just fact. It is not hyperventilation. Nine million Americans are looking for work and they don't have it. By the way, 2 million of them have been unemployed longer than 6 months. One could ask what are we doing about that. You know, we have not passed a minimum wage, we have not extended unemployment insurance for people who are now coming on the rolls of the long-term unemployed. We are not really creating a jobs program in a serious sense. We have certainly cut taxes and I guess—to go back to Econ 101, at some point if you throw enough money into the system, we will create some jobs. We have about a $300 billion budget deficit and a 1 percent interest rate, and we have had them for a very long period of time, at these stimulative levels. At some point, you are going to get job growth. Was it an efficient way to do it? I wonder, when we have created about $5,000 in debt for every individual in America. That doesn't seem to jibe with an efficient use of resources. It certainly is not a rampage of growth or a booming economy that we have for most Americans.

The latest economic statistics came out and everybody said how wonderful they were. They weren't too good in New Jersey. We lost another 11,800 jobs—11,800 manufacturing jobs in the month of August. We have a little bit of lag between when the State numbers come out and the Federal numbers. We are about to close our last two auto plants in New Jersey. We are closing the Ford plant for sure, in Edison, and we have the GM plant, which they are going to extend at about half production for the next 2 years, and they are going to look at shutting it down.

Every week, we get another major employer laying off manufacturing jobs in the State of New Jersey. New Jersey probably has had as strong an economy as anyplace because we have the pharmaceutical industry, which is growing. But our manufacturing base is out the window.

We don't talk about those 9 million jobs. We are talking about four jobs here, and I don't get it. I don't see what our priorities are. We are trying to talk about minimum wage and about transportation and we are trying to talk about a whole host of things that would allow us to have the opportunity to get this economy going and create jobs for those 9 million people—not these 4 folks, where we have already approved 98 percent of those interviewing for those jobs.

I don't know. I am sort of simple, but I think a 98 percent positive conclusion out of 172 folks interviewing for these jobs is pretty good. We have actually filled in the holes in the Federal judiciary, and we have a major problem with 9 million Americans who are looking for work. We don't spend any time talking about how we are going to create jobs here, except we are going to

have tax cuts every hour on the hour between now and the next decade, which will put debt on my kids and then their kids to follow. We may get some job growth as a function of doing this, but was it efficiently provided to the American people? I think that is very hard to say.

UNANIMOUS CONSENT REQUEST—S. 224

Mr. President, I ask unanimous consent that the Senate return to legislative session and proceed to the consideration of calendar No. 3, S. 224, a bill to increase the minimum wage, that it be read a third time and passed, and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Is there objection?

Mr. COLEMAN. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. CORZINE. Again, I think we have our priorities mixed up here. There are a whole bunch of folks in this country who benefit enormously from the minimum wage. When they go out and buy things, that will stimulate the economy. One of the great opportunities for us is to deal with some of these economic issues that we have, instead of haranguing. I think, unfortunately, about these four folks, about whom I think there is legitimate reason to have a debate—where they stand on judicial philosophy, and how their history is, or how their writings fit with settled law and from a constitutional perspective.

Again, we have put 98 percent of the nominees to work. We have not done anything about the 9 million Americans who don't have a job, who want to work. There are a whole bunch more who have dropped out of the system—I think about 4 million, if memory serves me correctly. It strikes me we have our priorities mixed up. I don't understand it. By the way, I will go through some other statistics. It is actually mind-boggling to me that we are spending so much time on four people, when the unemployment rate is 6 percent, and 9 million folks are without jobs. That is up from 4.1 percent 3 years ago. The poverty rate is up from 11.3 percent to 12.1 percent; I think that is 4 million people. The percentage of uninsured has gone up from 14.2 percent to 15.2 percent. About 2 million people have lost their health insurance in the last 3 years. The deficit has gone from a $236 billion surplus to a $304 billion deficit.

If somebody was running my company and they had a negative cash flow of 500 some odd billion dollars, I think I would find a new CEO. The national debt went from $5.6 trillion to $6.8 trillion. I guess that is for my grandkids to worry about, and it will be explosive. And judicial vacancies have gone down from about 10 percent to 4.6 percent. What is this picture? I just don't know where our priorities are in the scheme of things. We are talking about four people and we have 9 million Americans and a whole bunch who haven't had an increase in the minimum wage in 7 years. We cannot even get a vote on it and haven't been able to get a vote on it. They are not interested. Does that make any sense? I don't get it.

This is not the right priority where I come from, or for most Americans. I would rather fight like crazy for the 9 million people who want to work than just four judicial nominees out of the 168 judges who have already been approved. It is very important, in my view, that we have a proper prioritization and perspective on what is going on here, particularly when you look at it in the context of other techniques being used to hold up a whole bunch of judges at another period of time. We are talking about four here. I am no great legal constitutional scholar, but 168 to 4 is a pretty real number, and 55 folks left out by the other side is a real number.

I see my very good friend from Arkansas. It looks like he is chomping to go to work here. I would very much appreciate it if he has a comment on either of the things I have said, or I am sure he has more brilliant remarks to make.

I yield the floor to my friend from Arkansas.

Mr. PRYOR. Mr. President, I am not sure we have anybody in this Chamber or in this body who is more knowledgeable about the economy and economic principles than our colleague from New Jersey. He has proven himself on the field of battle on these economic issues.

How much time do I have left?

The PRESIDING OFFICER. Seven minutes 15 seconds.

Mr. PRYOR. I want to spend the next few minutes talking about a man who was one of President Bush's nominees for a judicial post in the Eastern District of Arkansas. He is from Arkansas. While I was not consulted on his nomination, I do support his confirmation. Actually, this ties in a little with Senator TALENT's question of a few moments ago. I notice Senator TALENT did not accuse the Democrats of being obstructionists. Some have, of course, but I know he did not do that tonight.

This is, as Paul Harvey might say, the rest of the story, or at least a part of the rest of the story. Leon Holmes is a very distinguished lawyer in Little Rock. His academic accomplishments and his love of academia are more than evident when you look at his background and qualifications for office. He has been a clerk for the Arkansas Supreme Court. He has worked for some very prestigious, very well known Little Rock law firms. He has been appointed judge on a couple of occasions for the Arkansas Supreme Court. In fact, I had the privilege of practicing with Leon Holmes in Little Rock in a law firm called Wright Lindsay & Jennings, which is truly a wonderful place to practice law. I got to know Leon well there and saw his legal acumen up close.

I understand Leon's qualifications for office. He has won different awards. The American Bar Association gave him a well qualified/qualified stamp. He and I may differ on some issues; nonetheless, he is very broadly supported by members of the Arkansas bar, and I support him.

Let me tell you a little bit about the nomination. He was nominated by President Bush on January 29 of this year. He went to the Judiciary Committee. He got out of Judiciary on May 1—over 6 months ago. He got out of Judiciary and he has been languishing on the Executive Calendar ever since. In fact, today I sent a letter to the Senate majority leader, BILL FRIST, and the Judiciary chairman, ORRIN HATCH, inquiring about the status of Leon Holmes' nomination, asking them to bring his nomination forward. If I may, I would like to read a portion of this letter into the RECORD. It says:

> I am writing to express my concerns regarding the nomination of Leon Holmes to the U.S. District Court for the Eastern District of Arkansas.
>
> Mr. Holmes has garnered overwhelming support from the Arkansas State Bar, of which I am a member, and received the rating of Qualified/Well Qualified from the American Bar Association. He possesses the skill, ability, and experience to enable him to serve as a member of the judiciary. While Mr. Holmes and I may differ on some issues, I believe he is well able to carry out his duties according to the Constitution and that he will apply established precedent as judicial canons require.

The letter goes on basically asking the majority leader and chairman of the Judiciary Committee to bring his nomination to an up-or-down vote. There is no effort on the Democratic side to filibuster Mr. Holmes' nomination, even though I have no doubt a number of my Democratic colleagues will vote against him. I remain perplexed as to why he has not come to the floor yet.

I am puzzled why the Republican leadership has yet to bring up his nomination. I hope I will receive a response to the letter soon. So as Paul Harvey says, that is the rest of the story.

One reason I wanted to tell this story is because I receive phone calls in our office from Arkansas and around the country asking me to vote for certain of President Bush's nominations. Our staff will tell them: Senator PRYOR already voted for 67 of President Bush's judicial nominations, and their response is, ''no, he hasn't.''

Well, sure I have. See, the rest of the story is not being told. I think a lot of people around the country perceive we are blocking every single judicial nomination that comes down the pike, but that is not true. As Senator CORZINE mentioned a few minutes ago, the 168 nominations is a historically high number, just like the 98 percentage number is a historically high percentage for approved judicial nominations. I don't think you will find that repeated in American history.

We need to keep this in context. Here I am from Arkansas, and I support one

of the President's nominees, but I cannot get him to the floor. There is no obstruction on Mr. Holmes, and there is not going to be a filibuster. I have talked to many Senators on our side and on the Republican side. Yet he has not come up for a vote yet.

There is one other thing I want to mention in the time I have remaining, and that is, back in April, I signed a letter with a number of my Republican colleagues, freshman colleagues, about this judicial nomination process. I asked the leadership, Senator FRIST and Senator DASCHLE, to try to work together with the White House to try to make sure we don't get to this point where we are this morning—that is, gridlock over some of these nominations.

There is enough blame to go around, and the last thing I want is a 30-hour blame-a-thon. I don't want to participate in that. But I do think we need to revisit what we are doing. I think we need to put things in the past and leave them there and move forward on these nominations. If it is payback upon payback, we are never going to get anything done. Both sides have some responsibility there.

Also, I say I believe a big portion of the responsibility rests with the White House. After all, the White House starts this process. The President is the one, under the Constitution, who does the nominating, and I know many of my Democratic colleagues feel they have not been consulted—I know I have not been. They feel they have not been consulted and, in fact, they have been deliberately shut out of the process. I think we need to work with the White House to try to make this better.

I think the White House has a responsibility. We all have some responsibility. I think if we work hard, we can make this process work much better.

How much time do we have on our side?

The PRESIDING OFFICER. The Senator's time has expired.

Mr. TALENT. Mr. President, I wish I could say it is a pleasure to be here with you at 4 o'clock in the morning. It is certainly always enjoyable to see you. This is a subject that is certainly worth discussing and it is extremely important. I have not been all that involved in it before. There are a number of other issues on which I have been working.

I am here this evening because, when I look at the qualifications of the four nominees we are considering, Judge Owen, General Pryor, Judge Kuhl, and Justice Brown, those qualifications to me seem so outstanding that it seems that, had these nominees come up in the past, they would not only have been voted on but they would have been approved, and not only approved but approved by an overwhelming majority; as the Senator from Pennsylvania said a little while ago, approved by a voice vote. Now they are being filibustered.

For the first time in the Nation's history, court of appeals nominations by the President of the United States are being stopped on the Senate floor by a minority using the filibuster. It never happened before. They filibustered four to this point. I hope that the minority will not filibuster two more on Friday.

I understand there are six other nominations the President has made to the court of appeals for whom there is a threat of a filibuster. So it is quite possible that by the end of the year a minority of this body will have filibustered and stopped on the Senate floor, 12 court of appeals nominations, and that has never happened, not even once, in the history of the United States.

Then there are some who stand here and say this is nothing new. It is not only new, it is unprecedented. It is not only unprecedented, it is action on a scale that nobody even contemplated before. You cannot look at the total number of nominations; you have to look at the nominations for the courts of appeals. You have to compare apples to apples and oranges to oranges if you want these figures to mean anything.

The President of the United States has nominated 46 people for the court of appeals so far; 29 of them have been confirmed, 6 of them have been filibustered or very probably will be filibustered by Friday; another 6 are threatened to be filibustered. I certainly invite my friends who have been part of this filibustering minority to stand here and tell us tonight if they don't intend to filibuster any more besides the six we are talking about. I don't think they are going to do that. That will make a total of 12 filibustered or threatened to be filibustered, 12 out of the 46 nominations the President has made to the court of appeals.

One-quarter of the nominations the President has made to the court of appeals have been or are threatened to be filibustered. In the past 200 years, not one was successfully filibustered. It is an unprecedented usurpation or attempt to usurp the President's power from the Constitution, and the traditions of this body, to nominate people and get them appointed to the court of appeals.

I heard the senior Senator from New York speak. He is my friend and I work with him on a number of issues. I find him to be delightful—well maybe not delightful, but he is my friend. He is a delight.

He said the problem is, if they just come to me, I am the ranking member of the courts subcommittee, if the White House will just come to me before they make these nominations and consult with me. What he was saying is that together we could come up with good nominees. I think this is what the minority here is aiming to do. When I say the minority, I mean the group of people who are filibustering. They want a co-Presidency, as far as this is concerned; they hope the President will consult with them before making the nominations.

I love my friend, the senior Senator from New York. Nobody from Missouri had a chance to vote for him. We have one President. He makes the nominations. The Senate's job is to vote to confirm. How has that job been conducted in the past, and exercised in the past? It is worth looking at. I say this not as a person who has been a Member of this body before this year, but as a citizen of the United States. I have looked at what happened in the past when we had these vacancies.

When the President nominates, what do Presidents traditionally look at? What do you think? They look, first, at personal integrity. They want to nominate people who have integrity and a reputation for integrity. They look for people who they know or people who they know, know. In other words, if you want to be nominated to a judgeship, you try to talk to people in the administration you know or talk to people who know people in the administration. So you contact your Senator or you contact somebody in the Department of Justice, just like applying for any other job. If you know somebody, you contact him.

And, of course, Presidents look at qualifications. They look at the achievements of prospective nominees in particular fields and then they look at relevant biographical information that may be specific to that appointment. Perhaps they are looking for a particular ethnic diversity or geographic consideration. Then the President and Department of Justice put all that together and they nominate somebody and send him down here. And then the Senate votes to confirm.

How has the Senate done that in the past? The Senate has acted as a kind of check. The Senate looks at these nominees to make certain they have the positive qualifications that the President has said they have. The Senate looks at nominees to make certain they have minimum achievements and experience so that a lawyer, looking at a nominee, would say, yes, that is what a person ought to have to be on the Federal court bench.

The nominee may have been a law professor. They may have been a practicing lawyer or a public official. Have they been out of law school long enough, received awards, published in their fields, litigated enough cases? The Senate looks at that for a minimum. We don't want to confirm somebody where the bench and bar around the country would look at that person and say, no, they haven't been out of law school long enough to serve on the Federal bench.

Then, of course, the Senate looks at integrity. That is really a negative check: to make certain what they don't have. To make certain that they don't have stains on their record such that they should not serve on the Federal bench. They didn't cheat in law school. They have not been found guilty of ethics violations in the practice of law. There are not any notorious examples of incompetence in their background.

That is what the Senate has looked at in the past: where nominees have met those qualifications; had that minimum that the Senate looks for; have not had the negative things the Senate wants to make certain they have not had. In the past, those nominees got a hearing. They were voted out of committee. They not only were put on the floor, but they got a vote on the floor. They not only got a vote on the floor, but they were confirmed, and they were not only confirmed, they were typically confirmed by overwhelming majorities, even by Senators who were of a different party, who disagreed with their jurisprudence. That is what has happened in the past and we have had a tremendous break from that precedent and that tradition in this Senate.

Of that action in the past—some here have said that the Senate should not be a rubberstamp. Was the Senate a rubberstamp for 200 years? No, it was not. What the Senate did was show a respect for the constitutional separation of powers, which a minority of this Senate now refuses to show.

Let's suppose families have, in their own way, constitutional arrangements just as this country does. Let's suppose that in some family the husband and wife have talked about who is going to handle the finances. They have decided that because the wife is maybe better at those things, or better able to handle those things, that the wife is going to handle the finances. If this is beginning to sound like my family, the analogy is pretty apt. So the wife in this specific family makes decisions regarding investments, and then goes to the husband and says: What do you think, I would like to put some money in this? Or I would like to invest in this thing.

The wife gives him the benefit of the doubt. Is that a rubberstamp? That is a recognition, then, of the tradition of that family. The wife in that case has traditionally done this because that is how it is set up. It is not a rubberstamp; it is giving the benefit of the doubt, when appropriate, according to the arrangements that have traditionally prevailed in that family. That is what the Senate did for 200 years and that is what the minority is not doing now. That is why we are losing perspective about it.

I will say this to my good friend from New Jersey, who is accusing us of losing perspective: Yes, we are losing perspective because about a quarter of the President's nominees to the court of appeals have been filibustered or threatened to be filibustered; because the Members who are filibustering want to be consulted. They want to be the ones who make the nominations when nobody had a chance to vote for them for President. That is enough to cause us to lose perspective.

Why has it changed? What is causing this to happen?

My friend from Pennsylvania asked that: Why? Why are we doing this? It's disrupting this body, it's dividing us, and it's an injustice to these people. I am going to get to that at the end if I have time. The worst thing about it is these people, who should be confirmed, or would have been confirmed 10 years ago, deserve to serve. They worked hard and millions of people around the country are going to wonder what is wrong with them because we can't even get a vote. It is not right. Why has it happened?

I hear different things. I don't know. I talked to some people. I hear things that maybe Members on the other side at some point went to a retreat and a bunch of law professors met with them and told them if they didn't do something like this there would be an imbalance in the Federal courts. If that is true—I hear this, I don't know—I can immediately see a basic part of the problem, because we have law professors giving advice about something besides the law. I have a rule that when law professors give advice about something besides the law, it is almost always wrong. I say this as a person who used to be a kind of law professor. I never actually made it. I was a fellow, an adjunct professor. And they are brilliant and you get them out of their field and it is risky to take their advice about anything.

Let's go back to imbalance. Going back through the Carter Presidency, which is back about 26 years—the last generation in the modern era. In the last 26 years, there has been a Republican President 14 years, a Democratic President 12 years. By the way, I am going to give overall figures for district court and court of appeals numbers but they don't vary. If you break them out and separate them, they don't vary that much.

President Carter had confirmed 265 nominees to the bench; President Clinton, 377, for a total of 644, which is about 53 confirmed per year. President Reagan had 384. He was there for 8 years. The first President Bush had 195. Up to this point the current President Bush has had 168, for 747 over 14 years which is, Mr. President, about 53 per year.

Where is the imbalance? That a Republican President for 14 years, Democrat President for 12 years, they each got about 53 per year and it is the same basically whether you break it out for court of appeals. They each got basically 10 court of appeals judges per year. There is no imbalance.

We have had balance for the last 200 years, and the reason it has worked pretty well, is that the people have elected Presidents from different philosophies and different parties. That is how you get balance. The only way you get imbalance is if you have Presidents of one particular philosophy or one particular party elected year after year, term after term after term, and that has happened and there is a technical term for that. It is called representative government.

Yes, if you lose a lot of Presidential elections in a row, there is going to be an imbalance on the Federal bench. That is the way it happens. The only time it has happened in the 20th century, by the way, is when the Democrats had the White House more than 20 years in a row, through President Roosevelt, and then through the only President ever from Missouri, our great Harry Truman. I don't recall hearing Republicans filibustering and claiming imbalance at that time.

How much time do I have left?

The PRESIDING OFFICER. The Senator has 16 minutes.

Mr. TALENT. I have 16 minutes.

What is the other argument I hear over and over? This is why I think it is really working, and I respect this because it reflects a sincere philosophical conviction. I respect that. One of the things I tell people as I travel around and talk about the Senate and about the Congress is that I am not an institution guy. I don't stand up and wax on and on about how great the Senate is, although it is a great honor to be here.

But I will say about my colleagues, that most people who believe out there that people in the Senate don't have convictions are wrong. That is why we are here at 4 in the morning. That is the one thing that unites us. We are here because we have convictions. We all have other places we could be—in bed. We are here because we have convictions.

The other reason, which is what I really think is working here, is out of conviction, the sense that these nominees they are filibustering or threatening to filibuster are somehow too extreme. We all know what they mean when they say that. We use codes here. It means they are too extreme on social issues. Those who are filibustering disagree with these nominees on the social issues, and particularly, let's say it, that one big social issue: abortion. They disagree with them on that. So they are too extreme to be confirmed, too extreme to vote for, too extreme even to have a vote because they disagree with them on the social issues.

I have to say, because I have convictions on this, too, that we ought to look at what a definition of extreme is here. A lot of folks who are saying this voted against the ban on partial-birth abortion. I respect their conviction an awful lot but that is a pretty heinous procedure and I think America is entitled to ask: Who is extreme?

The truth is, for this process, for the purpose of confirming Federal judges, that is not the kind of analysis either side should be using. Because the truth is, if we are honest about it, on the social issues, there is not a mainstream. There are tens of millions of Americans who are on both sides of those social issues and they are good people, they are honest people, and their views deserve respect. People who hold those views deserve not to be disqualified, held as unfit for office under the Constitution of the United States, just because we disagree with them.

My wife and her law firm visited Washington over the weekend so I

stayed in town with her. Normally I go home every weekend. There is a reason for this digression. Members of her firm visited around town, had a great time, and visited the Supreme Court. Justice Breyer was kind enough to speak for a few minutes to them. And wasn't it great of him, Mr. President, to take his time to do that? He is an able jurist, one of the smartest people on the Federal bench.

He wrote the opinion of the Supreme Court striking down a partial-birth abortion ban. I couldn't disagree with him more on his jurisprudence on that issue. It wouldn't occur to me not to vote to confirm him for the Supreme Court. It would not occur to me to say his view is extreme on that, because his view is shared by millions and millions of people who are part of this political community, too.

This is one of the reasons why I feel so motivated to be here. Can the Senate contain the disagreements that we conscientiously have on issues such as this or will those disagreements blow up this process that has allowed us all to live together and legislate together for 200 years? That is the question. It will do that, unless we start treating these people we disagree with, with respect.

We can't force people to come around to our view on these issues, as passionately as we may feel. We have to persuade them. You can't persuade people unless you can talk to them and listen. And that means you can't treat them as if they are pariahs. You can't say to Janice Rogers Brown, who served for years as a justice on the California Supreme Court, and has overcome obstacles in her life that would have stopped 99 percent of other people—and you can't say to her: We disagree with you about this so you don't even get a vote. We don't respect you enough even to give you a vote. Let's not do that.

In the past, this body has debated a whole lot of difficult issues, issues that were tearing at the fabric of the country. But we have to continue as one body and we can't do that unless we treat people with respect. We have to understand there is not a mainstream on this.

We may wish everybody would agree with us, but they do not. We can't make that a litmus test. That is what is happening here. That is I think what is underlying a lot of things.

I want to focus on the human element a little bit.

How much time do I have left?

The PRESIDING OFFICER. Ten minutes.

Mr. TALENT. Ten minutes left to inflict myself on the Senate at 4:20 a.m. I think I will talk a little bit about Judge Kuhl. I have gone over her background. It is really extraordinary. I am a lawyer. I actually clerked on the court of appeals for a great judge, a good man, Richard Posner of the Seventh Circuit. I know something about Federal judges and how they get there. I don't mean any disrespect. I am trained well enough as a lawyer not to do that. I guess we are protected by the speech and debate clause here. They couldn't come after me if I didn't respect that. I respect Federal judges. I wish they all had the qualifications these people have.

There are some of them who got on the court of appeals because they knew somebody; in some cases, because they knew somebody in this body.

Judge Kuhl has been nominated to the Ninth Circuit. She has been a judge since 1995; before that, for 9 years she was a partner in a prestigious Los Angeles law firm. She was a litigator. We can forgive her that. From 1981 to 1986, she served in the Department of Justice as Deputy Solicitor Attorney, as Deputy Assistant Attorney General, and as Special Assistant to Attorney General William French Smith. She argued cases before the Supreme Court and supervised work of other attorneys. She clerked for Judge Anthony Kennedy, then a judge in the Ninth Circuit and now a member of the Supreme Court. In 1977, she graduated from Duke Law School. She has extraordinary bipartisan support. Listen to what people say about her.

Vilm Martinez, former Director of the Mexican American Legal Defense and Educational Fund, said:

> I'm a lifelong Democrat. . . . Even though we don't share the same political views, necessarily, I consider her mainstream. . . . She's careful and she's thoughtful. She's been an excellent [state court] judge, and I think she will be an excellent 9th Circuit judge, one who will approach that job the way I think that job should be approached: with great care and deference.

I wish everybody in this body had the broadmindedness of Vilma Martinez. Congratulations, Ms. Martinez.

Twenty-three women judges on the Superior Court of Los Angeles say:

> Judge Kuhl is seen by us and by members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias.

She can't get a vote. Don't tell me the Senate has operated this way. It hasn't operated this way in the past. They have filibustered, or they are threatening to filibuster, about a quarter of President Bush's nominees to the circuit court of appeals. Not one ever before successfully filibustered on this floor; not one ever before filibustered with the support of the leader of either party. It isn't right.

Mr. SANTORUM. Will the Senator yield?

Mr. TALENT. I will yield, and the Senator is probably doing the Senate a favor by getting me to yield.

Mr. SANTORUM. I want to review what the Senator talked about. See this chart: 168, but that 168 includes district court judges.

Mr. TALENT. Absolutely.

Mr. SANTORUM. Explain the difference between a district court judge and a circuit court judge when it comes to matters of law and the impact of those decisions.

Mr. TALENT. I am happy to comment on that. Everybody knows what is going on here. They are filibustering the court of appeals judges because, yes, they are appellate judges. They are the more important ones. They are letting the little fish go. They are filibustering, or threatening to filibuster, about a quarter of the court of appeals judges. Another reason is they think some of these people might get nominated to the Supreme Court.

Mr. SANTORUM. At the District of Columbia level are trial court judges who basically preside over trials and the circuit court or appeals courts decide matters of law that apply across the circuit, and it can have an influence in other circuits. Is that correct?

Mr. TALENT. That is absolutely correct.

Mr. SANTORUM. Most decisions that are appealed from the trial court go to the appellate court, or the circuit court, but very few go up to the Supreme Court. Is it not true the appellate court makes the final decision in a lot of these cases?

Mr. TALENT. I have read about a group of law professors concerned about an imbalance on the court of appeals. That imbalance just doesn't exist. The same statistics I read before show Presidents back through Jimmy Carter have had each around 10 court of appeals appointments per year. It is a little bit more for the Republican Presidents; a little over 10, and a little under 10 for the Democrats, but there is no real difference. That is why it is very balanced, and we are just coming off two terms of a Democrat President. We are now in one term of a Republican. The next election is probably going to be close. I think that is probably what is working here. I hope my friends on the other side of the aisle who are filibustering don't continue to compare apples to oranges. Let us at least be fair. If you want to talk about how many were filibustered, it isn't 4 out of 168. If they follow through on this threat, it will be 12 out of 46, which is about a quarter. That was not a high point, even though that is just about a quarter. That means that only around 75 percent of them are going to be given an up-or-down vote.

My friend from Arkansas and I work on a lot of things together. She is a great Senator. She was saying if her kids brought home 98 percent in math, she would be pretty pleased about it. I would, too, if my kids brought that grade home. I have three kids. If they brought home 75 percent in math, I would be a little bit concerned, particularly when in the past it has been 100 percent.

Mr. SANTORUM. I think the analogy of the Senator from Minnesota—the Senator from Minnesota says if we are forcing what the Constitution requires 98 percent of the time, or much worse, 75 percent of the time, I think the American public would have a right to throw us out on our ears. I think they expect the Senate to enforce the Constitution 100 percent of the time. Anything less than 100 percent is an abdication of that oath we walked over

there right there on those steps before the Vice President and took. The oath has something to do with defending the Constitution—not 98 percent of the time, not 75 percent of the time, 100 percent of the time. That is not what is going on.

Mr. TALENT. I certainly thank the Senator from Pennsylvania.

How much time do I have left, if any?

The PRESIDING OFFICER (Mr. BURNS). The Senator has 2 minutes 22 seconds.

Mr. TALENT. I thank the Senator for his clarification. I think that it is very important.

In the remaining time, I will just close by reading a little bit more about Judge Kuhl. These are real people who are getting unjustly treated in this body which is supposed to be about justice.

Here is what Gretchen Nelson said. She is the officer of the Litigation Section of the Los Angeles County Bar Association and a prominent plaintiff's attorney. She probably gave money to my opponent in the last election. Here is what she said:

> I am a life-long Democrat. I am also a plaintiff's attorney. My political views are and always have been liberal. I firmly agree with U.S. Supreme Court's opinion in Roe v. Wade, and I trust that the decision will remain viable. I am opposed to the appointment of any judicial nominee who is incapable of ruling based upon a considered and impartial analysis of all the facts and legal issues presented in any matter. Judge Kuhl is not such a nominee and she is well-deserving of appointment to the Ninth Circuit.

That is what Senators would have said 5 years ago on this floor. Don't say it hasn't changed.

Anne Egerton, former law partner of Judge Kuhl:

> I understand some have raised concerns about Judge Kuhl's commitment to gender equality and reproductive rights. I don't share those concerns.

Anne Egerton goes through her background with the Arizona Women's Political Caucus.

> I have been a registered Democrat for 30 years, and I have supported [Democratic legislators]. I have no reservations in recommending Judge Carolyn Kuhl for appointment to the Ninth Circuit. I know her to be committed to the rule of law and the application of governing precedents in the area of reproductive freedom; that precedent, of course, includes Roe v. Wade and the many cases which have applied.

I don't think there is anything more to be said. I wish we could get consent to vote on these nominees and then we could go on to other business of the Senate. This is important.

What is happening to these people is wrong. What is happening to the Senate is unfortunate and bad for the country. That is why I am here and that is why we are all here at 4:30 in the morning.

I yield the floor.

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from Rhode Island.

Mr. REED. Mr. President, we are here this morning to discuss the status of judges. My colleagues on the other side of the aisle have been rather adamant in claiming they may have been mistreated. I think there is a contradiction in their argument. Frankly, what I witnessed here as a Member of this body over the last several years in the Clinton administration was a process of systematically denying the nominees of President Clinton—qualified, indeed, very qualified nominees in their positions on the Federal bench—doing it not on the floor as we are doing here openly, but using what I would describe as a pocket filibuster. We are all aware of the notion of a pocket veto. The Constitution allows the President a certain number of days to exercise his veto, but at the end of a session he doesn't have to exercise that. He simply has to put the bill in his pocket and it will not become law. That is essentially what the Republican majority did here to so many of President Clinton's nominees. They refused to give these individuals hearings. They refused to take up the nominations or to seriously allow a process for the committee to deliberate and to consider and to recommend them for an up or down vote.

Today, for the majority to come and claim they are being mistreated and that the Constitution is being violated is to me a profound contradiction because they have very determinedly and consistently denied even a hearing to so many well-qualified individuals who were nominated by President Clinton.

That is not to suggest we are in any way trying to match their conduct. The fact we are here on the floor exercising our rights under the rules of the Senate and the Constitution of the United States to make a statement about judges, to make a statement about individuals who we feel for many reasons lack either the qualifications or the judicial temperament to serve successfully on the Federal bench, makes the record quite clear. That is in contrast to the pocket filibusters.

We have been very active and cooperative in moving 168 judges through the committee process to the floor of the Senate and to ultimate confirmation by the Senate. It is a remarkable record.

In the last year alone, I believe we have confirmed more judges than were confirmed under President Reagan's tenure with a Republican Senate at the time. This is not a record of evasion of our constitutional responsibilities. This is a record of meeting our constitutional responsibilities, one of which is to exercise our individual judgment as Senators as to the qualification of anyone to serve on the Federal bench. But as I mentioned before, what we saw so consistently and so persistently under the previous President was a Republican strategy of blocking judges by a pocket filibuster; not here on the floor, but off the floor, denying them right to a hearing.

Let me suggest this has a very pernicious effect on so many women who were nominated by President Clinton. This is a report of some of the judges nominated by President Clinton for consideration by this Senate:

Kathleen McCree-Lewis for the Sixth Circuit—again, my colleagues have been going on and on about the importance of the circuit judges. They are important. What happened when President Clinton nominated Kathleen McCree-Lewis to the Sixth Circuit? She never got a vote; never got around to the process of hearings, a debate in committee, a recommendation to the floor of the Senate; never got through to us for a vote. Helene White to the Sixth Circuit, never got a vote; Elena Kagan to the D.C. Circuit, never got a vote.

By the way, Ms. Kagan is today dean of the Harvard Law School. Is there anyone who would suggest she was not qualified to be a Federal judge? I think that would be quite an extreme statement. She was more than qualified to be a Federal judge, but she never got a vote.

Elizabeth Gibson to the Fourth Circuit, never got a vote; Christine Arguello to the Tenth Circuit, never got a vote; Bonnie Campbell to the Eighth Circuit, never got a vote; Patricia Coan to the District of Colorado, never got a vote; Valerie Couch to the District of Oklahoma, never got a vote; Rhonda Fields to the District Court for the District of Columbia, never got a vote; Dolly Gee to the Central District of California, never got a vote; Marian Johnston to the Eastern District of California, never got a vote; Sue Myerscough to the Central District of Illinois, never got a vote; Lynette Norton to the Western District of Pennsylvania, never got a vote; Linda Riegle to the District of Nevada, never got a vote; Cheryle Wattley to the Northern District of Texas, never got a vote; Lynee Lasry to the Southern District of California, never got a vote; Wenona Whitfield to the Southern District of Illinois, never got a vote; and Anabelle Rodriguez to the District of Puerto Rico, never got a vote.

That is the record of the pocket filibuster; nominated by the President of the United States; qualified; and, indeed one of these individuals I point out is now the dean of the Harvard Law School, but they never got a vote of any kind.

That is what we saw: The rules of the Senate being used by the majority to frustrate the nominees of the President of the United States. Then to come to this floor and claim this is now unprecedented and a usurpation of the Constitution of the United States when we are simply exercising our rights on the floor under the rules of the Senate to express our opinion as to the quality and qualifications of nominees to the Federal bench is I think certainly a contradiction.

With respect to some of these judges, I think the key issue here is judicial temperament. Indeed, there is a certain degree of sensitivity about judicial

temperament as one goes from the district court to the court of appeals. It is often the case that a district court judge is younger and the thought is that person will mature on the bench and maybe in future days will be of such experience and demonstrated judicial temperament that she or he would be promoted to the circuit court of appeals, and then there are direct nominees to the circuit court. But again, you have to look at someone's breadth of experience, maturity, and intellect, and again their judicial temperament.

The nominees who have been identified and have been questioned by Democrats are individuals by and large whose judicial temperament is quite questionable.

Priscilla Owen has had a long history of putting her own personal opinion above the law, of injecting political ideology into the law, rather than following precedent.

One of the things about a circuit court judge is you have to follow precedent. The Supreme Court can try to create law, but a circuit court must follow precedents of the Supreme Court. In case after case after case, there were such situations in which she just defied precedent. There is a case of medical malpractice, Weiner v. Watson, when one of our colleagues, the junior Senator from Texas, was on the Texas Supreme Court Justice, and he unequivocally rejected Judge Owen's argument, stating it was contrary to the Texas State Constitution.

Are we going to put people on courts of the United States who have a predilection to not follow the Constitution? I think not. That is one example.

You can see the same with Justice Brown who is a justice of the California courts. She has been criticized on the bench for injecting her own personal views and not following precedent. On a number of occasions, Republican colleagues have criticized her dissenting opinions for their judicial activism. In one case, Brown was ''chastized for imposing a personal theory of political economy on the bench contrary to established precedent.''

In another, she was chastized for refusing to accept acknowledged previous judicial precedent. That charge is extremely serious when you are dealing with a judge who is charged with following the precedent, following the Constitution, and following the law.

The same may be said about Judge Kuhl; again, ideology rather than legal temperament and legal reasoning seems to be her forte.

There is case after case after case. There are reasons, solid reasons to question these nominees. Our job as Senators is to raise those questions.

There have been 168 judges confirmed by the Senate for President Bush, a record number, a remarkable number. In fact, vacancies on the Federal judiciary are the lowest they have been in recent memory. It is because we have been working together. But that does not mean we surrender our obligation to question and challenge those judges who do not meet the test of judicial temperament, nonpartisan application of the law, and nonideological application of the law. And there are those whose nominations have failed.

That is what the Founding Fathers envisioned when they created a system of advise and consent. It is not advise and approve. It is advise and consent. The Senate plays an active role. There is no group of people who played a more active role in considering the nominees, certainly of President Clinton, than the Republican majority today. They did it persistently. They did it deliberately. They did it consciously. We are exercising constitutional powers.

One of the examples that was used and one of the judges who was an eminent jurist in California, nominated for the Ninth Circuit, is Judge Richard Paez. He was subject to cloture votes. He was subject to situations in which he was challenged. That is the rule. You get to do that. In fact, Judge Paez waited 1,500 days even to get a vote. That is not the case with these nominees. There were 1,500 days in which he was nominated to the Ninth Circuit. His nomination was in limbo. Finally, there was a vote and people rose up. Some supported a motion for cloture; others rejected it. So this notion that it is unprecedented to challenge a nominee for the Federal judiciary through the cloture process is fanciful. It has happened very recently. It happened with Judge Paez.

He is not the only one. Sixty-four of President Clinton's nominees never received a floor vote. One nominee, Ronnie White, was defeated on a floor vote.

We have a situation where the deeds and actions are not wrapped in the dim mist of history. These nominations were before the Senate 2 or 3 years ago. The deeds don't match the words we are hearing today. All of the outrage about the constitutional challenge and crisis. That outrage was certainly not manifested a few years ago when Judge Paez was waiting 1,500 days for a hearing and then was subject to a cloture vote just as these nominees are being subject to cloture votes.

That is one point. But there is a larger point. We are spending hours and hours and hours to demonstrate a supposed crisis, the fact that 4 individuals out of 172 have not been confirmed by this Senate, when in fact there are much greater problems facing this Nation. We have an unemployment rate that continues to hover around 6 percent, a budget deficit that is exploding and inhibiting appropriate action by this Senate on so many important issues—education reform, worker training, dealing with issues both large and small.

We have a crisis internationally that is costing us the lives of our soldiers and military personnel and billions of dollars from our Treasury. We are spending all night, long, precious hours conducting a demonstration, when we should be working on appropriations bills and we should be dealing with the issues that confront the families of America. I think it is really a demonstration of listen to what I say, don't watch what I do. Because when we watch what the Republicans do, the record is remarkable, the high number of President Bush's judicial nominees who have gone through. It is extraordinary compared to the treatment President Clinton received.

I would hope when we finish this exercise, we can in fact go forth and deal with the issues which are essential and should be dealt with. We have a minimum wage that has been stuck for years now. It should be increased. We have a host of other issues that need addressing. I hope we can.

I yield to my colleague, Senator CORZINE.

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

Mr. REED. I am happy to yield.

Mr. SANTORUM. The Senator from Rhode Island has complained about how the Clinton nominations were treated. Does the Senator from Rhode Island know there were 42 judges who were not brought forward out of committee. But at the end of the Bush presidency, Bush 1, there were 54 judges not brought forward out of committee? Under a Democratic Senate, President Bush 1 had 54 that were not considered. Under a Republican Senate, President Clinton only had 42 nominees. I would just suggest the record by the Republican Senate was actually better than the last Democratic Senate.

Mr. REED. Let me reclaim my time. I would simply say regardless of the residue of judges in the Bush administration versus the end of the Clinton administration, the point I am making is there was apparently a very consistent effort on the part of Republicans to deny votes to all manner of judges. I think 64 of President Clinton's nominees never got a vote, never got to the floor. I have the time. I think what it amounts to is a very deliberate protest, which the majority has the power to do, of using the committee process to deny hearings and to deny votes.

It is a contradiction then to come to the floor and say: We can use the rules of the Senate. We can use these rules and we can deny judges, but if the Democrats choose to use the rules of the Senate to challenge a judicial nominee of the President, Bush or otherwise, that represents a violation of the Constitution.

That is my point. The point is borne out regardless of the residue of judges of either administration. The record today, this Senate and the Senate under the leadership of TOM DASCHLE, shows we have done a remarkable job in confirming this President's nominees. That was not suggested in the treatment of President Clinton's nominees.

I yield to my colleague from New Jersey.

Mr. CORZINE. I appreciate the discussion my colleague from Rhode Island brought up. I wanted to clarify one point of questions about an individual. Did you suggest Elena Kagan is now the dean of the Harvard Law School?

Mr. REED. I suggested it because that is my understanding, that she was nominated for the District of Columbia circuit and she is now the dean of the Harvard Law School. She is a remarkable dean. I am somewhat prejudiced since I graduated from Harvard Law School, but she is a remarkable personality.

Mr. CORZINE. Was she unable to get a hearing in the Judiciary Committee when President Clinton nominated her for circuit court?

Mr. REED. Let me just say my recollection is she was not given a vote after being nominated to the court.

Mr. CORZINE. So she suffered from what you were suggesting, a pocket veto.

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

Mr. CORZINE. Yes.

Mr. SANTORUM. Do you know when the nominee you are talking about was nominated for that position?

Mr. CORZINE. As the Senator from Pennsylvania knows, I was just inquiring myself to try to find out more about this. This is not one of those I was aware of. I have a whole list of folks who waited 1,454 days, 1,000 days for a hearing, 602 days. If somebody looked at one of those nominees who was not allowed to come to the floor of the Senate for a vote, at least a broad group of folks who review the qualifications of an individual, you are qualified enough to be the dean of Harvard Law School but somehow not qualified to have a vote on the floor of the Senate.

Mr. SANTORUM. If the Senator will yield for a point of information.

Mr. CORZINE. Certainly.

Mr. SANTORUM. My understanding is the nominee you are referring to was nominated in August, 2 months before the election.

Mr. CORZINE. If the distinguished Senator from Pennsylvania would allow, I don't know what elections have to do with confirming nominees, if they have gone before the Judiciary Committee and they are qualified. That seems disingenuous in the context of, we have qualified folks. They ought to be dealing with the circumstance of having an opportunity to be reviewed and brought to the floor. What we are debating is what is the technique that has been used at different times in our history—by the way, the pretty immediate history—to deal with a very simple question that some people want to understand the judicial philosophy and actions, how an individual will deal on the court. Sometimes when Republicans are not controlling the White House, they are willing to use the committee system to make that happen. Some of us on our side of the aisle sort of wouldn't mind debating folks on the floor, using the rules to make sure we bring out extremists' points of view.

I point out, 168 to 4. I will go through the circuit courts in a minutes.

Mr. REED. Will the Senator yield?

Mr. CORZINE. Yes.

Mr. REED. A question has come up about Elena Kagan's nomination. I have some information. Ms. Kagan was nominated in June of 1999. For 18 months, there was no action on her nomination. I believe her nomination was certainly available for action by the committee and by the relevant bodies of the Senate for 18 months, yet she never received a hearing and there was no floor vote.

Mr. CORZINE. I appreciate the Senator from Rhode Island helping me respond to the Senator from Pennsylvania's question: 18 months, not 2 months; no hearing; no floor vote; someone who at least some folks who look at legal capacity and qualifications thought enough of, after she was not reviewed by the Senate either with a hearing or floor vote, to become the dean of the Harvard Law School.

Again, my point is, we seem to be talking out of a sort of surreal context. One hundred sixty-eight to four is on the face of it an important statement of how there has been cooperation. I went through in New Jersey five for five on district court judges and one circuit court judge. When people work together, you can get the positive results in this whole process.

The 168 to 4 shows we can have a positive result. Ninety-five percent of all judicial positions are filled. That, by the way, is in contrast with only 75 percent at the end of the Clinton administration, because there had been such a limited number of folks who had been able to actually get a hearing and ultimately a floor vote.

There is also the statement that we are somehow or another being far more restrictive. I do want to review that it is 10 times the number of nominees blocked by the technique of not giving hearings or allowing for nominations to be reported to the floor that occurred in the Clinton administration. It was 63 nominees blocked in the 1995-to-2000 period, against 2 percent so far in the 2001-to-2003 period of Bush nominees. There is something about the raw numbers of this that don't make sense and wouldn't to anyone if they actually focused on them in a commonsensical way.

I want to get to the circuit court judge issue. If you look back to the Carter administration on through, we heard it is roughly 10 circuit court judges a year per individual. This is sort of like figuring out when the best rate of return in the market is over the last 50 years. You can pick certain sections and everything looks wonderful. I would just like to look in this 1995-to-2000 period when Clinton nominees were languishing in the hearing room. Hearings held for judicial nominees averaged for the Clinton administration 9 versus 22 with respect to what is going on in the current situation. Judicial nominees given hearings, 43 versus 81. Circuit court judges, nominees given hearings, 9 under President Clinton, 19 circuit court. That is on average. The confirmation is 68 judges confirmed on an annual basis versus 38 in the Clinton years. That is 1995 to 2000. Circuit court judges, it was only 7, not 10 as we heard before, if you look at that 1995-to-2000 period. It is 12 judges under the current administration.

We can pick these numbers, any number you want, to try to make cases. But the fact is, we are approving more judges, we are dealing with the situation on a much more legitimate basis, on an ongoing basis than what occurred in the previous administration.

I just happen to have the yearbook of those folks who were left out in 1995 to 2000. There could be four we would have here supposedly under the current situation.

By the way, I happen to know one of these judges, Stephen Orlofsky, a district judge in New Jersey who was unanimously confirmed for district court judge and then never got a hearing. I happened to know the specifics of that because it was closer to home. Ultimately we just filled this position with Michael Chertoff who seems to me to be a fine appointment, one I recommended, stood by and pushed very hard for because people worked together. They cooperated, the White House, the folks in the Judiciary Committee, and the Senators from the area. I think this can be done. I think 168 to 4 shows it is being done. I would contrast that with the over 50 nominees, 1995 to 2000, who never got a hearing.

I am just going to point out two of these. Judge Helene White of Michigan was nominated to the Sixth Circuit, waited in vain 4 years, 1,454 days for a hearing. It may not be a filibuster on the floor, but for 1,454 days she couldn't get a hearing. I think it gets to the same result. We are not dealing with Presidential nominations. The fact is, there were 55 of these folks. In fact, we have only identified four who seemed to be so far out of the mainstream that a number of us are concerned about how that fits.

I could go through this. There is a James Beatty from North Carolina nominated to the Fourth Circuit. He didn't get a hearing either, waited 3 years, 1,033 days, never got a hearing. This went on. You could get on down into the weeds on a whole series of these folks. But these people never got a hearing. It is just a different technique. We are talking about four people. There is a legitimate view that their actions were outside the mainstream. Maybe they got votes once they got to the floor, but they never got out of committee. I think that is a major issue.

The other thing I will segue off into is the issue the Senator from Rhode Island talked about. What is really hard about this is there is an incredible agenda for America to be discussing. I think we could afford to spend 30 hours talking about how we put 9 million Americans back to work. I think it is pretty hard to understand how we got the priorities. We have 168 positive elements with regard to our judicial nominations accepted and only 4 turned down, but we have had 3 million lost jobs, 2½ million manufacturing jobs. We have had the deficit go from a $236 billion surplus to a $304 billion deficit. We have seen a $500 billion plus negative cashflow because we are managing the economy poorly. We have seen it hurt and bite real individuals, 9 million. Two million people have been unemployed longer than their unemployment benefits would allow; 4 million people have dropped off the rolls.

It is an incredible misprioritization, in my view, that we are talking about four judges when there are 9 million people that we ought to be figuring out how to get back to work.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. CORZINE. I thank the Chair. We will be back.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SANTORUM. Mr. President, I want to respond to what the Senator from New Jersey has said. I think to put it into the proper context, the Senator from New Jersey is talking about people who were nominated by President Clinton who didn't get hearings. Most of the people who didn't get hearings had blue-slip problems. Democrats, right now, are holding members of their States in committee—right now—with blue slips. That has been done.

In fact, there are a whole bunch from Michigan being held by the Senators from Michigan for the circuit court, by blue slips. Democrats are holding up judges right now. So the idea that we are going to compare that, which has been a historical right of Senators, to the home State being consulted on nominations for the district court—speaking as a Senator from Pennsylvania, I can certainly suggest to the President who I would like him to look at for the circuit court from my State. But I don't get a right to tell him who it is. The precedent has not been that way. The Senators from Michigan are blue-slipping these nominees and they have blue-slipped others.

Some of the nominees pointed out by the Senator from New Jersey, held by the Clinton administration, were actually pulled by the Clinton administration. The number that were actually not pulled because of FBI problems were 42, not 63; 42 did not receive a hearing. Some of them had blue-slip problems.

Members were not properly consulted from the States. Some were Democrats and some were Republicans. This has been a practice throughout Senate history. The question is not whether that practice should be changed. Some suggest—and, in fact, there has been a movement by several people to try to change that process. But this is something that is a prerogative of home State Senators, which has been a prerogative of home State Senators throughout the tradition of the Senate. It is one that I think most Members would say is probably a good thing.

Home State Senators are consulted by the President before people from their State are nominated. They should have some advice and consent into the process. When they don't, some Senators get very upset about that and they sign a negative blue slip.

So let's talk about apples to apples. We have 42 Clinton nominees not acted upon for a variety of different reasons; some the committee didn't like, some were blue-slipped, some were submitted late in the process. So there were 42, after 8 years. There were 377 confirmed nominees and 1 was defeated on the Senate floor. There were zero filibusters on the floor.

Under President Bush 41, there were 54 nominees not considered by the Democratic Senate Judiciary Committee—more than President Bush, substantially less number of nominees confirmed by the Senate.

Now, we don't know how many George W. Bush nominees are not going to be confirmed by the end of this year or next year, but there will be some. Some will be nominated late in the process, and it takes a while for the process to work. There will always be some in the pipeline. That is the way the process works. So the idea that we are going to take the normal process of processing judges here and say we have not considered every one of them and that sort of makes everything all equal, no it does not.

The issue here is that, once the Judiciary Committee has done their job, just as every committee here does their job—lots of committees have nominations. It is their job to scrub them and find out whether they are qualified and capable to do the job and report them to the Senate floor if they think they are.

I was on the Armed Services Committee. We reviewed thousands of nominations; some we didn't report out because we didn't think they were proper for promotion or appointment. That is the obligation of the committee.

We get lots of bills in these committees. Is every bill that we don't report out somehow as a result of a filibuster in the Senate? I don't think so. That is the job of the committee. Once the committee makes the determination and the majority of the committee—whatever it is, Democrat or Republican, or a combination—reports a nominee out, reports a bill out, the question is, what happens on the floor of the Senate?

With respect to nominations, since the filibuster rule was put into place, 2,372 nominations have come to the floor of the Senate, and not 1 has ever been stopped from an up-or-down vote. Not one. All of them received up-or-down votes.

This idea that 168 to 4—we keep hearing that is a good percentage. Is it? Is it a good percentage when the four are subjected to a process that has never been done before? It is soon to be 6, promises to be 12. All of a sudden, 4, 6, 12—exponential growth here. Why? Because we are going down a very twisted and tortured path, with the logic that is being followed by the minority in the Senate. What is happening here has never happened in the history of the Senate.

This is a great body. Incredible debates have occurred here in the past. This is the greatest deliberative body in the world. It should be. We should talk about these issues. It is great that we are here all through the night talking about this. But in the end, our responsibility, according to the Constitution, is what every other Senate for 107 sessions of the Senate, for 214 years, has done. Our responsibility under the advise and consent clause of the Constitution is to consider judicial nominations and give them a vote up or down. That is what every Senate leader, every Senator who had the opportunity to have an impact on this process—they all came down with the decision that that is what this constitutional provision meant—until this year.

Some have suggested, well, these judges are so far out of the mainstream; they are so bad; there have never been judges this bad; these guys are really bad; they are not just bad, they are really bad, worse than we have ever seen in 214 years; nobody has ever been this bad; therefore, we have to change the rules.

Let's talk about a couple of judges. One who I voted against—I will use one of them—was Judge Paez, who was referred to on the other side. I voted against Judge Paez. But I voted for cloture. I thought Judge Paez would be one of the worst judges this country would ever see. I didn't want him to be a judge. He was already a judge in district court, but I would loathe to put him on the Ninth Circuit because I thought he would absolutely take the Constitution and set a match to it and throw it in the trash can and do whatever he damn well pleased.

Well, they are saying that Judge Pickering is so far out of the mainstream that he would light a match to the Constitution and throw it away and do whatever he pleases. That is pretty much what they are saying. Well, let's look at Judge Pickering and Judge Paez and see what they did with two similar cases.

Judge Paez and Judge Pickering both had cases before them having to do with sentencing guidelines. Judge Pickering didn't like the sentencing guidelines that were before him in a case. The other side has used this case

as their principal reason—one of them—of opposing Judge Pickering. They didn't like the way he dealt with this case because he didn't like the sentencing guidelines. So what did Judge Pickering do that they really don't like? They find it deplorable conduct that this judge would do this. What did he do? He complained about it. He complained about it. That is it. Judge Pickering complained about it.

What did Judge Paez do? He struck it down and said it was unconstitutional.

Now, who is the judge that is throwing the Constitution in the trash can? What was the provision that Judge Paez struck down and said was unconstitutional? The three strikes and you are out provision, which was voted in by the people of California. What happened to Judge Paez? His decision was overturned by the U.S. Supreme Court.

Who is the mainstream and who is the extreme? Every time you hear mainstream over there, put an X in front of it. It has nothing to do with mainstream. It is extreme. It is dangerous.

Let's talk about some of other Judge Paez's decisions. He was one who tried to stop the California election a few months ago. Yes, he was one of the ones who said it is unconstitutional for them to do that. Oh, by the way, he was also on the Pledge of Allegiance case and said ''under God'' should not be in the pledge. Oh, he is very mainstream, the kind of guy we really want. The Senator from New York said tonight, ''I think he is in the mainstream.'' Understand, folks, what mainstream is: ''Under God'' not allowed in the pledge, the three strikes and you are out law is unconstitutional, and the California election is unconstitutional. If I don't like it, it is unconstitutional. That is mainstream? A government of men, not of laws is mainstream? This is very dangerous, folks.

People ask me all the time: Senator, why should this matter to us, what is going on here? Why does this matter? What do judges have to do with my life? Well, the answer to that question should be: not much. That is what the answer should be—not much. Unless you get into trouble one way or another, it should not matter that much to you at all.

What a judge should do is as little as possible. They should try to make decisions based on the narrowest law possible, not try to make pronouncements and change the law from the bench or amend the Constitution from the bench. They should do as little as possible.

See, that bothers a lot of my colleagues on the other side of the aisle. They don't want judges who will do as little as possible. What they are concerned about with Judge Pickering is not that he will do as little as possible. They are concerned he will do as little as possible, that he will make decisions based on the narrowest grounds, not broad, sweeping grounds, the grounds that change laws and create new rights or responsibilities. No, they want someone who will put their world view in the law that they cannot accomplish through the legislative process. They want judges who will do it through the judicial process. That is what they are getting. They don't want anybody who will say we are going to stop doing that.

That is not what the Founders wanted us to do here. If they wanted us to respect the legislative branch and presume that what they pass is constitutional—if in fact it is not, we have problems—then decide the issue on the narrowest grounds. That is what we want. That is not what they want.

I am really troubled. I am really troubled by what I see going on in the Senate of people who are willing—for what? For what cause? Are they willing to take the Constitution of the United States, when it comes to the confirmation of judicial nominees, which has been upheld by every Congress in history, and turn it on its ear to accomplish some goal?

My question is—and I asked it earlier—in 214 years, no group of Senators ever decided that it was what they cared about, with respect to the courts, that it was so important that they were willing to go against the Constitution, which says a simple majority for advise and consent. It did not require a supermajority. They were going to go against the Constitution and raise the bar. No Senate in history said we were going to raise the bar and require a supermajority vote, given all of the incredible issues that we had to deal with in the Senate; no Senate has ever said the issue today is so important that we need to raise this bar, that it is best for our country to do that. Why? Because most Senators always felt, as I deeply feel, that we are a Nation of laws, and this Nation of laws and of constitutional law is important to preserve. We should not just throw it over for an immediate political whim, or policy whim, because once the process is corrupt, once the law is violated, once the procedures are changed, you cannot put the genie back into the bottle.

What this debate tonight is all about, this process we are going through is is a plea. Someone suggested it is not a very effective plea because the chances of getting a vote up or down on the judges is not very high. Yet it is a plea. It is a plea to those who have done something unprecedented in the history of this Chamber to stop. If they stop and they admit this was wrong, that this was not the way to deal with judicial nominations, that this is not a precedent they want to set—not 4 times, or 6 times, or 12 times but probably many times after that—and that this is not the right way to handle judicial nominations, maybe then we can bring some civility back to this process. Maybe we can say to the people who want to serve this country in one of the most honorable ways they can—to be a judge—a very important function in our society, maybe we will be able to attract the best and brightest to come here and offer up their services and not feel they are going to be put through a washing machine or, worse yet, maybe somebody who cares about the long-term health of our judiciary, that we don't politicize it by applying litmus tests. Let's just lay the cards on the table. What is this cause? What is this cause that the other side is so passionate about that they had to change the rules? The cause is the right to privacy. That is the cause—Roe v. Wade.

I have given many talks on abortion on the floor of the Senate. I said the right to privacy under Roe v. Wade has had its tentacles reach out and corrupt so many areas of our culture: abortion, eugenics, euthanasia, stem cell research, cloning, the right to same-sex marriage—all of these rights come from this right to do whatever you believe is right for you to do. You are the law. You have the right to do whatever you want to do. That is where this right comes from.

I said it has infected and poisoned the culture beyond what people even today realize: the cheapening of the value of human life, the debasement of the family, the basic social structure of our country. It is corroding and eroding who we are. But I forgot one, it is now corroding and eroding the Senate.

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

Mr. SANTORUM. I am happy to yield.

Mr. HATCH. I would like to ask the distinguished Senator, we have seen this poster they have over there: 168, and only 4 stopped. But isn't it true that there are at least 12 circuit court of appeals nominees, ones who correct lower courts who many times make mistakes, who are being held up in filibusters here—not just four?

Mr. SANTORUM. I say to the Senator from Utah, the chairman of the Judiciary Committee, there have been 28 or 29 circuit court judges confirmed. Out of that 168, there are 29.

Mr. HATCH. Right.

Mr. SANTORUM. So as the Senator from Missouri said further, the little fish they let go through the nets but they catch the big fish, the folks who rule on the law, who have the ability to influence the character of the law in this country, the appellate level. They catch the big fish in the net. They have let 29 go through. But 29 to 12, that is about a third of the nominees that the President has put up for the circuit court who have been caught.

I ask the Senator from Utah if he knows what is the usual percentage of circuit court—by the way, let me state this. Never have circuit court judges ever been filibustered, ever. But let's set aside the unconstitutional filibuster occurring right now, the unprecedented abuse of the Senate rules that is occurring here right now. Let's go back as if this were being done on an up-or-down vote.

What percentage of Presidential nominees for the circuit court get through and are approved in a normal course?

Mr. HATCH. Normally in the Reagan-Bush I-Clinton years, 80 to 85 percent—85 to 90 percent.

Mr. SANTORUM. So 85 percent are approved; the rest are held in the committee.

Mr. HATCH. By the end of the third year.

Mr. SANTORUM. By the end of the term. Can you recall, let's say, what is the percentage in the first 2 years of an administration? What was the percentage in the last few years under Clinton, under Bush I, and under Reagan?

Mr. HATCH. Well, in the case of Bill Clinton, President Clinton, 91 percent, if I recall correctly.

Mr. SANTORUM. It was 91 percent.

Mr. HATCH. People don't realize how important these circuit courts of appeals are. We have shown this chart that they have is not only inaccurate, it is a bold-faced lie. Because they can't really come out here with a straight face and admit they are going to filibuster at least 12 circuit judges and some district court judges.

Mr. SANTORUM. I ask the chairman, my understanding is they are only putting four up so they are suggesting they are not filibustering Janice Rogers Brown and they are not filibustering Carolyn Kuhl.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Senate now proceed to consideration of Calender No. 455, the nomination of Janice Brown to a United States Circuit Court for the District of Columbia Circuit, provided further that there be—pick a number—50 hours of debate equally divided for the consideration of the nomination, provided further that following the debate the Senate proceed to a vote on the confirmation of the nomination with no further intervening action or debate.

The PRESIDING OFFICER. Is there objection?

Mr. BINGAMAN. I object.

Mr. SANTORUM. So that is 168 to 5. Let's go to the next.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Senate now proceed to consideration of Calendar No. 169, Carolyn Kuhl to be a United States Circuit Judge for the Ninth Circuit, provided further that there be 100 hours of debate equally divided for the consideration of the nomination, provided further that following debate the Senate proceed to a vote on the confirmation of the nomination with no further intervening action or debate.

The PRESIDING OFFICER. Is there objection?

Mr. BINGAMAN. I object.

Mr. SANTORUM. I think we need to change the chart. It has to be 168 to 6 now. Anytime the chart comes up I think everybody here, for the record, should make it clear, 168 to 4 is now an outdated chart.

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

Mr. HATCH. It is a total misrepresentation is what it is.

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

Mr. SANTORUM. I will be happy to yield for a question.

Mr. BINGAMAN. Will the Senator concede that there is a difference between a Senator objecting to a unanimous consent request which had not been presented before on the Senate floor and the stage of a filibuster?

Mr. SANTORUM. I say to the Senator that in normal cases I would say that may be the case. But it is clear we are going to have a cloture vote on Friday on this nominee. It is abundantly apparent to everyone who has been listening to these proceedings that the chances of the two gentlewomen from California, Ms. Kuhl and Ms. Brown, being given the record 60 votes to defeat cloture, or to get cloture, is highly unlikely. So we are not going to be able to get cloture. That is at least what we have been hearing from the other side. We are not going to get cloture. We can't get unanimous consent. It sounds like a filibuster to me.

So I agree in part getting a unanimous consent is not in and of itself a grounds for saying it is being filibustered but voting against cloture certainly is. Other than the Senator from Georgia, that has seemed to be the order of the day on that side of the aisle.

I am a very optimistic person so I am hopeful I am wrong.

Mr. ALLEN. Will the Senator from Pennsylvania yield?

Mr. SANTORUM. I am happy to yield.

Mr. ALLEN. When my colleague from the Commonwealth of Pennsylvania talks about what makes this different for the Democrats, the difference is really about 3 years and a different President. I have looked at previous statements made by Senators on these issues, though I was not a Member of the Senate until 2001, and I am listening to all of these arguments being made now. I was earlier in the day quoting—much earlier in this day——

Mr. SANTORUM. Yesterday.

Mr. ALLEN. Yesterday. Time really passes when you are having fun—I feel as if I should be singing like Faron Young: ''Hello Walls.''

As I was saying, Senator LEVIN is quoted as saying in 2000:

> We should not be playing politics with the Federal judiciary. Candidates for these vacancies deserve to have an up-or-down vote on their nominations.

Earlier this morning, I listened to Mr. REED, the Senator from Rhode Island and the Providence Plantation. But in 2000 he said:

> I ask my colleagues to take their constitutional duties seriously and vote for these nominees on the basis of their objective qualifications, not on the basis of petty politics.

Another quote from Senator REED of Rhode Island, this is from the March 9, 2000 CONGRESSIONAL RECORD. He said that there is ''considerable attention'' being paid to various nominations

> . . . especially among members of the Latino community because the Senate is not doing its job. This is troubling. In regards to nominations the public rightly expects us to move judiciously and expeditiously and without regard to politics.

Those are the prior statements. The statements we hear from our Democratic colleagues on this floor—whether late last night or early this morning, are inconsistent with previous statements. It is a double standard within their own ranks.

Mr. SANTORUM. I say to the Senator from Virginia that he is absolutely right. The Senator from the Commonwealth of Virginia is right. But I will tell you who has been consistent. Senate Republicans have been consistent. We said all along we are not going to filibuster judges. When holds are put on a nomination—a hold meaning I need to be notified for a unanimous consent and I may want to talk some on this nomination or this bill—we said we are not going to mess around with that. We are going to vow to wipe out holds, everything else. We are going to move nominations. We are going to get up-or-down votes. We are not going—we are going to have cloture. We are going to get the people's business done.

The PRESIDING OFFICER. The time of the Senator has expired. The Senator from New Mexico.

Mr. BINGAMAN. Mr. President, let me speak for a few minutes on this issue that brings us here at this early hour and then also talk about another issue that I think also deserves some serious attention by the Senate; that is, the health care crisis that we face in the country. But let me first talk about this process for nominating and confirming Federal judges.

The obvious question is, How is the system intended to work under our Constitution, under article II of our Constitution?

As I understand it, based on my reading of article II of the Constitution, the President has the authority to nominate judges and it is fairly clear from the language of that document that the intent is that he will consult with the Senate, that he will make a nomination based on that consultation, that then the Senate will review the nominee and confirm or not that nominee—then either go forward or not with that nomination.

In fact, with regard to most nominees I would say the system works very well. In fact, it has worked with previous Presidents. It is working with this President.

Yesterday I was present at a hearing of the Judiciary Committee where we had a nominee from New Mexico who has been nominated for our district court, Federal district court there. I

support that nomination, the nomination of Judith Herrera for that position. Senator DOMENICI strongly supports that nomination. He recommended her to the President for that position.

Frankly, the White House consulted with me—consulted, I am sure, with Senator DOMENICI but consulted with me as well—and asked if I would support this nomination.

I had the chance to meet with the nominee, to talk with her, and of course I have known her for many years, and I was very glad to support her nomination. That is essentially the process we have followed with regard to all of the nominees for Federal district court positions in my State of New Mexico and with regard to the court of appeals position which is reserved for our State, New Mexico, on the Tenth Circuit Court of Appeals.

There again, the President and Senator DOMENICI both consulted with me before a nomination was sent forward. I had a chance to review the nominee and concluded that I would strongly support that nominee.

So the system, in fact, generally works the way it is intended to work. We get very good people serving on our Federal courts as a result of that.

But for some reason as regards some of these judges we are arguing about, the President has chosen not to follow this approach. In some cases the President has chosen to nominate people without consulting with the Senators from the States those individuals hail from and has done so in many cases over the strenuous objection of Senators from those States.

There is strong opposition from the States, for example, to the two nominees I was hearing about a few minutes ago from the Senator from Pennsylvania, Judge Kuhl and the other is Judge Brown, from California.

In both of those cases, as I understand it, the President has determined to go ahead with nominations. He has nominated those individuals and he has done so over the strenuous objection of both Senators from the State from which those two nominees come. To my mind, it is somewhat unprecedented in the Senate that both Senators from a State would object strenuously to a particular nominee and the President would say, that's your problem; I am going to go ahead and nominate them anyway.

What's more, the Judiciary Committee would go ahead and confirm or recommend those two nominees for confirmation over the strenuous objection of the two Senators from the State I involved—to me that is unprecedented. We have all this talk about a blue-slip procedure. That is out the window as far as I can tell. The blue-slip procedure used to mean that unless you got—unless the judiciary had returned to it a blue slip signed by each Senator from that State, there would not even be a hearing on the nominee. That was the system that prevailed.

Not only are we to the point where, even if the Senators from the State where the nominees come from do not return a blue slip would they be voted out, they can even affirmatively object to those nominees and the Judiciary Committee goes ahead and votes them out at any rate. They put them on the Senate floor and they file a cloture motion and they say we are going to have a vote on the Senate floor on these individuals; we could care less what the Senators from the State involved think about these nominees. That, to me, is an unprecedented procedure. I am not familiar with that.

I think about my own situation. As I have indicated, I have been pleased with the courtesy and consideration I have received from the White House and, of course, from my colleague, Senator DOMENICI, with regard to nominees by this President for Federal judicial positions. I have always been consulted before the nomination was sent forward. I have been given a chance to meet with those nominees and have been given a chance to get back and say: Yes, these are people I would support.

I have assumed in going through that process that, if I had come to a different conclusion, if I had determined that I had a strong objection to one or more of these nominees, that would also be honored and that the President would find someone else who was acceptable to, of course, the President but to the two Senators from the State as well before going forward with the nomination. I have assumed that. I still assume that. But that has not happened in the case of some of these nominations.

As I understand it, tomorrow we are going to have a vote on a cloture motion on the two judges I mentioned. You can argue about the merits of the positions that these judges have taken, but the thing that sticks in my craw, the issue that I want to focus on is the process. Why would I want to vote in favor of going forward to confirm a judge when I know the two Senators from the State that the judge comes from strenuously object to that judge being confirmed?

If the shoe were on the other foot, if in fact I was the Senator who was objecting, I would hope my colleagues in the Senate would support my right to object and to keep that person from being confirmed as a Federal judge. I am not sure they would do that, but I would certainly request they do that. That is exactly the request we have received from the two Senators from California, one of whom serves on the Judiciary Committee, and both of whom have spent extensive time looking into the records of these two judges. Why in the world are we not willing to defer to their view on this and hold up on confirming these judges? It seems to me that is the tradition of the Senate and we ought to adhere to that tradition. I think the President ought to adhere to that position.

We are talking here about what might be wrong with the process for confirming judges.

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

Mr. BINGAMAN. I am glad to yield.

Mr. ALLEN. If I may question the Senator, using the criteria which he set forth insofar as the two judges being opposed and which we are now debating. My colleague said that the reason or a rationale for him to vote against them is because the two Senators from California are opposed to these two nominees? In the case of Priscilla Owen, both Senators CORNYN and Senator HUTCHISON are strongly in favor of Justice Owen. Does that mean that when we get to a vote on Justice Owen the Senator from New Mexico will then vote to move forward to at least allow a fair up-or-down vote on Judge Owen since both Texas Senators are strongly in favor of her?

Mr. BINGAMAN. Mr. President, let me first say I think that is a very good question. The answer is, no, I would not vote to move forward with a vote on Judge Owen because of the other problems that have surfaced with regard to her views and her judicial record. But I think as I approach this issue we have a threshold question. The threshold question is: Do the Senators from the State that is affected support these nominees? If they don't, the President shouldn't nominate them, and the Judiciary Committee should not report their nomination to the Senate floor. If they do support these nominees, there is still an obligation on each Member of the Senate to review the nominee and to determine whether in fact we believe that nominee should be confirmed for a Federal judgeship. That is the process we are going through.

I would say I do not think just getting the support of the Senators from a particular State entitles a person to a lifetime appointment to the Federal bench, but I do think that absent the support and in the face of strong opposition from the Senators from the State that is affected, the Senate should not be considering the nominees under these circumstances.

To criticize those of us who do not want to move ahead with an up-or-down vote on that on the theory we know how an up-or-down vote will come out on these issues, the President has very good ability to line up Republican Senators to vote for virtually anything, so far as I can tell—not just on judicial nominations, but virtually anything he opposes around here. I am amazed, frankly, at some of the willingness of some of my colleagues on the Republican side of the aisle to march down to the Senate well and cast a vote in favor of positions the President is advocating regardless of how it would affect our constituents. We know what the outcome will be if we go to an up-or-down vote. I think it would be a disservice to the Senators from the States affected for us to go

ahead and confirm these individuals over their strenuous objections.

I hope when we get to these votes on cloture tomorrow on these particular judges we have talked about that we will not move ahead and invoke cloture.

I do not think, as far as I know, based on the information I have, none of them are individuals I would favor promoting to the positions they have been nominated for.

I know my colleague is here and may wish to speak as well. I don't want to use all of our time.

Let me just talk for a minute about another issue. In many ways, this is a very unusual process we have gotten into here with a 30-hour diversion from the other business we could be pursuing here in the final weeks of this legislative session. There is other important business. Frankly, when I go home to my State of New Mexico, it is difficult for me to explain to people in my State who I represent why I am not dealing with some of the issues that directly affect them in their daily lives. Instead, we are here talking through the night about judicial nominees in many cases who are strongly opposed by the Senators from the States they come from.

I want to speak for just a few minutes about the health care crisis in the country. Earlier this year, I introduced the first part of a series of proposals to try to strengthen our Nation's health care safety net. That bill is entitled Strengthening Our States, or the SOS Act, of 2003. It seeks to protect the Medicaid Program, to improve the Medicaid Program. That is a program that is under severe stress and pressure because of the budgetary problems in our States. Dianne Rowland and Jim Talin of the Kaiser Commission on Medicaid say that:

> Medicaid is the glue that helps hold our health system together. It takes on the highest risk, the sickest and most expensive populations from private insurers and from Medicare.

That is a lot of people in my State who depend on the Medicaid system. We need to take steps to strengthen that system. Like a waterfront community that seeks to set up barricades against a rising river, defending the Medicaid Program from attacks such as the idea of a block grant is a top priority. This administration began this year recommending we adopt essentially a block grant approach to Medicaid. That concept is one which I strongly opposed. I am glad to see many of our Governors have now come out in strong opposition to that concept. It would be extremely adverse to those who depend upon this very important system in our States.

It is critical to maintain Medicaid, as it has correctly responded as a safety net program by adding coverage to millions of people as the country has slipped into recession. We are now pulling out of that recession—at least we all hope we are. Certainly the economy indicates we are. But as we have been in this slow period of economic growth, it has been clear the Medicaid system has been extremely important. The total number of individuals who are uninsured in this country have increased. Nearly 44 million people are without any coverage. Once the future of Medicaid is assured and protected, we also need to take some additional steps to confront the fact this nearly 44 million people—or 15.2 percent of the population—is without health insurance for the entire year of 2002. That is an increase of nearly 4 million people over those who were uninsured in the year 2000. The numbers for 2003 undoubtedly have gotten even worse.

The report of the National Coalition on Health Care says the confluence of powerful economic forces fueled by terrorist attacks of September 11 have unleashed a perfect storm that increases dramatically the number of uninsured in the United States with as many as 6 million people in total losing their coverage.

In light of this, I just make the point again it is somewhat shocking to me that we are spending 30 hours—essentially that means this whole week. The truth is our ability to get work done this week has been substantially impaired by the decision of the majority here in the Senate to devote 30 hours to talking about this handful of judicial nominees they would like to have confirmed for Federal judicial positions in spite of the serious problems that have been found with regard to that program.

The number of people in our country who need health care is staggering. New Mexico ranks second only to Texas in the percentage of its citizens who are uninsured. In New Mexico, we are the only State in the country with less than half of our population currently covered by private health insurance. That is a rather shocking statistic when you think about it. But it is true. Forty-two percent of the Hispanic population has employer-based coverage; that is, nationwide. That is not in New Mexico. That is in comparison to 67 percent of non-Hispanic whites who have employer-based coverage. To address the growing crisis, we have been working with the American College of Physicians since last fall on a legislative proposal we are calling the Health Coverage Affordability Responsibility and Equity Act of 2003. This legislation does a variety of things which I want to educate my colleagues on at some time when we have more opportunity to do so.

Our colleague from New Jersey wishes to speak again on the issue that brings us here at this early hour, so I will yield to him, but I think the course we are following with regard to judges is not a course any of us would choose at this point. If we could get the President back into the consulting mode with regard to all judges he has pursued, with regard to most judges, I think the problem would be eliminated and we would not have the difficulty and confrontation which has been required as a result of nominations so far this session.

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

Mr. BINGAMAN. I am glad to yield.

Mr. ALLEN. The Senator brought up the two Senators from California opposing two judges for the Ninth Circuit Court of Appeals as if the Ninth Circuit Court of Appeals is only in California. That court of appeals covers many States—I believe even the State which the Presiding Officer is from, Nevada, but also Idaho, Oregon, Washington, Hawaii, Montana Arizona and Alaska. It is not just the Senators from one State that are affected when you have a circuit as large as that. This is the same court that almost hijacked the Constitution of California. Three of these judges attempted to do just that until they were all overruled so they could go forward with the California recall election. It is not just one State that is affected when you are talking about a circuit.

Let us talk about the District of Columbia Court of Appeals. There are no Senators from the District. I will not get into that debate on this issue.

Who is the President to consult in the case of the D.C. Circuit Court of Appeals? The President consulted many people and put forth a person of impeccable credentials, Miguel Estrada, who is actually a resident of Virginia. Senator WARNER and I presented him to the committee. I will not speak about that wonderful day at this time. The President looked for people from all across the country and presented Miguel Estrada's nomination to the Senate. Seven times we tried to get an up or down vote on Miguel Estrada. The reason we are still fighting this right now is because the minority is denying me, as a Senator, and other Senators, the ability to advise and consent and fair up or down vote. I am not saying people have to vote for any particular judge. But we all have a responsibility to vote. From the perspective of the Senator from New Mexico, who is the President supposed to consult for the District of Columbia Court of Appeals when he put forward a superbly qualified and exemplary individual who was held up for over 2 years and finally could not continue with the years of delay and obstruction?

Mr. BINGAMAN. Mr. President, reclaiming my time, it is a very good question. My own view would be we clearly have in the Senate for well over a century now delegated the initial responsibility for reviewing judges to the members of the Judiciary Committee. I would suggest the President should be consulting with members of the Judiciary Committee, both Republicans and Democrats, and if he determines he can't get a single Democrat on the Judiciary Committee to support his nominee, that should be a signal to him he should find a nominee who could be supported by Democrats, as well as Republicans.

It is true the Democrats are in the minority at this point. But a great many Members of this body are Democrats and a great many members of the Judiciary Committee are Democrats. If to a person they are opposed to the nominee after they learn of the qualifications and the positions taken by the nominee, I think that is a signal to the President he should find someone else. Clearly, that is not the course he has chosen to follow.

I see my colleague from New Jersey. Let me yield the balance of my time to him.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. CORZINE. Mr. President, I thank the Senator from New Mexico for what I think is a very appropriate underscoring of the unprecedented nature of not working with the Senators from the State which the judge has been nominated.

I concur with the Senator from New Mexico. In New Jersey's case, we are 5 for 5 on district court judges because there has been strong cooperation back and forth between the White House and Senators from New Jersey. We are one for one on the circuit court judges where people work together to try to move things. That is how we ended up, frankly, in general with 168 to 4 because this process has worked a lot more smoothly than I think this 30-hour talkathon has indicated.

I want to use the last few minutes of my time this morning to talk about priorities.

One hundred sixty-eight to four—scratch that and make that six, if you want. The fact is that is about 97½ percent if it were 6 of all of the judges who come up have been approved. When there is an outreach toward cooperation, things work pretty well around here. For some reason that has worked pretty well in most instances, and we are trying to look at a very narrow segment of something I think reasonable people can have differences of view about—the qualifications of the individuals. That is exactly why the rules are being used the way they are.

I want to place this in context. It is really more important in how it plays off of what the Senator from New Mexico said.

We have real issues in this country right now. The fact is we have 9 million Americans unemployed. We can spend 30 hours here talking about four or six judges when we have 9 million people unemployed.

By the way, the statistics going down in national terms don't seem to fit New Jersey. The latest statistics we have show we have had 11,800 jobs lost in the last reported period. Unemployment has grown by about 258,000 since the year 2000. New Jersey has brought 55,000 manufacturing jobs in the Nation.

These are real people. At least when I go back to the streets of communities I represent, people are more interested in what is going on with their jobs and what is going on with the economy than whether we have a difference of opinion about four judges or five judges when we have confirmed 168.

It seems to me we have our priorities all messed up here when there are 9 million Americans left out of the economic system.

It is hard for me to understand why poverty is growing in this country. The number is up almost 1 percent—from 11.3 to 12.1 percent. In New Jersey, that is 69,000 people who have gone onto the poverty rolls who weren't there before the current administration's economic policies were put in place, and 148,000 New Jerseyans have gone off the rolls of those who have health care. These are real issues. These are the things that impact people's lives.

These 4 judges out of 172—it is pretty hard to understand why we are spending all night and all day talking about that when we ought to be doing something about health care in this country; when we ought to be doing something about prescription drugs, while we have been waiting for somebody in the dark of night to try to put together a bill. It doesn't make sense that we have the focus on something that is so narrow and is not even in the context of actual reality because we are actually filling those jobs. But we are not doing anything about the 9 million Americans who are losing jobs.

We can't get, by the way, an increase in the minimum wage. It has been 7 years since we increased the minimum wage around here. We can't get a debate on that.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Senate now return to legislative session to proceed to the consideration of calendar No. 3, S. 224, the bill to increase the minimum wage, that the bill be read a third time and passed, and the motion to reconsider be laid upon the table.

Mr. ALLEN. Objection.

The PRESIDING OFFICER. Objection is heard.

The time has expired.

Who yields time?

The PRESIDING OFFICER (Mr. THOMAS). The Senator's time has expired. The Senator from Virginia.

Mr. ALLEN. Mr. President, we are now entering the 13th hour of this debate. The reason it has taken so long is because some Democrats have denied a fair up-or-down vote on many nominees. The sun is rising, of course, along the eastern seaboard from Miami and Jacksonville. It is rising in Charlotte and Myrtle Beach and Virginia Beach, all the way up to Maine. I am sure there are truck drivers from Bangor, Maine to Bakersfield, California who have been listening very intently to this debate. It is nice to be here this morning with my Senate colleagues, but surely we did not start this day as advised by the great country singer Charlie Pride, ''to kiss an angel good morning.'' I do not see any angels around here. My angel is at home with our children getting them ready for school.

You hear arguments from the other side that they just have to stop these nominees as in the case of Miguel Estrada. In the case of Miguel Estrada, he even had the support of several Democrats. There were four Democrats who did vote for moving Miguel Estrada's nomination to an up or down vote. But the minority is setting a new standard, and I dare say not a constitutional standard. This new standard has crept into the Senate. While the Constitution says you are supposed to advise and consent and a nominee is confirmed by a majority vote, my colleagues on the other side have set a new standard for a supermajority. Because of that, a majority of us in the Senate have been denied our opportunity to act responsibly for our constituents and have the guts to stand up and vote yea or nay after examination, deliberation, exploration, inquisition, in some cases, interrogations of judges to determine their judicial philosophy.

I care a great deal about judicial philosophy. I believe strongly that judges should be interpreting and administer the law, as opposed to inventing the law.

Earlier the Senator from New Jersey was talking about economic matters. I clearly want to say, for all those who are bright eyed and listening this morning, the number one goal of us on this side of the aisle is to make sure America is competitive—to have the right tax policies, the right regulatory policies so businesses can invest, whether in New Jersey or Virginia or elsewhere in this country, and to help create more jobs. We have to have the right policies in place for this to occur.

And America's competitiveness directly relates to our courts. We have to make sure there is class action fairness so as a nation we make sure those who have grievances or injuries due to negligence have access to the courts, while helping to reduce frivolous lawsuits. Obviously, this is something that means a great deal for jobs.

What happened to the class action bill that was going to help create jobs and defend against junk lawsuits? We had obstruction on that. We were able to get 59 votes, but we had to get 60. This reform is important for jobs and the retention of jobs. We want to pass an energy bill, an energy bill that will help create 500,000 new American jobs with clean coal technology, advancements in hydrogen fuel cells as well as hopefully development of our domestic reserves of oil and gas. We want to create more jobs by passing an asbestos bill that ensures that people who have asbestosis or asbestos-related diseases can actually get compensated as opposed to the lawyers.

We successfully passed the Small Business Administration bill that will help create 3 million jobs. We want to make sure we get homeland investment or repatriation of profits to come back into this country. We have to pass a

variety of other measures so families, individuals, and businesses can prosper.

We have done a lot so far, and you are seeing the results of it. I was listening to the Senator from New Jersey. He seems not to have been listening in some regards to recent economic facts. We have had great gross domestic product growth in every quarter since we passed the economic growth and tax relief package in 2001. This most quarter we had the biggest growth in almost 20 years as far as gross domestic product. You are seeing in the beginning more jobs being created—126,000 net new jobs. The reason for this is businesses and individuals are reacting favorably to tax cuts. The Senator from New Jersey did not vote for those tax cuts. If it were up to the Senator from New Jersey, taxes would be higher on individuals, on families, and on small businesses. You would have less investment, fewer jobs, and less hope for opportunity, prosperity, and jobs in the future.

We are going to continue working to make sure our economy is running as strongly as possible. Are we satisfied with where it is? No. There are people still looking for work, and we need to make sure we address those issues. But it does not mean we ignore the issues of the third branch of our Government, the judicial branch. What we have here is an abrogation of our constitutional responsibility. What we have here is a diminishment of the accountability and responsibility of Senators. What we have here is a perpetuation of unfairness and an injustice to many judges.

The Senate has a clear responsibility in the judicial nomination process, as seen in Article II, section 2 of the Constitution. It is to advise and consent. It is not to obstruct and delay. Senators can be expected to examine different nominees in a fair method. We can have a debate. I don't expect any Senator to be a rubberstamp for any President. The Senate can properly give thorough and honest consideration of a nominee prior to a vote in deciding whether consent should be granted. That means every Senator has every right to vote against a nominee if they feel that person is unsuited to the bench.

The advise and consent in our Constitution does not, though, give the Senate the right to deny a simple up-or-down vote to a nomination once that nominee has been thoroughly debated and evaluated in the Judiciary Committee of the Senate and brought forward to the floor. The Constitution requires fairness and accountability from the Senate in confirming nominees. Without a proper up-or-down vote, I am afraid what you are finding here is the judicial nomination process, as laid out in our Constitution, is being hijacked by the minority—not every single Democrat, but a majority of the Democrats. Their position is one that is irresponsible and an obstruction of our constitutional responsibilities. There is no accountability. There is no fairness.

For over 214 years, the President has had the responsibility of nominating persons to vacant positions on federal courts. That is spelled out in the Constitution. This is essential to maintaining the constitutional framework of a separation of powers.

Five years ago, the New York Times said the Senate should ''rise to the occasion and address the institutional responsibilities of the Senate rather than surrendering to the petty tactics of the blockading few.'' This was in 1998. On this rare occasion, I agreed with the New York Times.

I would say to my colleagues, if you do not like Judge Janice Rogers Brown, Judge Carolyn Kuhl, Justice Priscilla Owen, or any other judicial nominee for whatever reason that may be, whether I consider it justified or not, vote against their nominations, but vote. Take a stand up or down. Show your constituents where you stand. Don't hide behind the arcane procedural maneuvers of the Senate.

What we have here is justice being delayed and being denied. It is beyond me how some Senators can continue to practice blatant political maneuvering at the expense of these well-qualified, respectable nominees, when the administration of justice is so important to our country. They cannot continue to use these machinations and procedural rules to perpetuate this obstructionist agenda. I believe Americans are astute. They can see these arguments being made are to avoid an up-or-down vote. They are not based on reason but rather petty partisan politics.

It is not just the people's work and business that is being made a victim when the other side denies these nominees a fair up-or-down vote. It is justice in our courtrooms that is also a victim to this obstructionism. Justice delayed is justice denied. It means cases that need to be litigated are delayed longer. It means in criminal cases, it may take a longer period of time for cases to be heard and decisions to be made. It affects victims of crime, as caseloads back up. Access to our courts for legal disputes and an expeditious decision making process by the courts are both important.

Let's consider Miguel Estrada. This is a gentleman I feel very passionately about because I got to know him in the midst of his consideration before the Senate. Miguel Estrada now lives in Virginia. He came to this country as a teenager, unable to speak English. He applied himself. He worked hard. He is the modern day Horatio Alger story and exactly the model we tell our children about. If you work hard, apply yourself, do well in school, get a good education, then you can have great opportunities in life. That is what Miguel Estrada did when he came from Honduras as a teenager.

He worked hard, learned English, and ended up going to Ivy League schools. He clerked for a Federal judge. The American Bar Association, after looking at his record when working in the Solicitor General's office and a variety of other positions, gave him their highest unanimous rating. Indeed, he argued 15 cases before the Supreme Court of the United States, winning most of them.

I remember that hearing in the Judiciary Committee, as my good friend and colleague JOHN WARNER and I presented him. His sister was there. His wife was there. His mother was there, so proud of Miguel. I was thinking, this is just a wonderful day in America to see that dream of America, the land of opportunity for people of qualifications and performance, is still there. I remember speaking for all Virginians, congratulating Miguel Estrada.

Then to see what happened to him, the injustice of holding it up, not just for consideration for 3 months, not consideration for 6 months, 1 year, but over 2 years, with repeated efforts to bring it to a fair up-or-down vote on the Senate floor—not once, not twice, not three times, four times, five times or six, but seven times. Finally after 2 years, this wonderful gentleman decided that he had to get on with his life and that this process was too stressful to him and to his family. Undoubtedly you could understand why being held up this way in such an unfair and unjust matter that he finally decided that he had to go on with his life.

To me that was a very sad day in the history of the Senate. It does not reflect on the views of the majority of the Senators because we had a majority of Senators for Miguel Estrada. We just didn't have 60. To me that is an injustice.

Some of my colleagues will talk from time to time about Miguel Estrada. I see that the Senator from New York, Senator SCHUMER, is here. Senator SCHUMER called Mr. Estrada ''a far right stealth nominee, a candidate who will drive the Nation's second most important court out of the mainstream.'' Mr. President, we cannot allow the politics of personal destruction, evident by this statement by the Senator from New York, to continue to infiltrate our judicial nomination process. After 2 years of refusing to vote, that was enough injustice without these gross mischaracterizations.

I will tell you what Virginians across the Commonwealth are saying. The Fredericksburg Free Lance Star said that ''the filibusterers are abusing the Senate's advice and consent role under the Constitution'' and that ''Senate Democrats need to stop snacking on sour grapes and give this President his due.''

The local newspaper in Staunton, Virginia, said: ''Regarding filibustering engaged in by Democrats in the U.S. Senate to block Bush's judicial picks, either vote them up or vote them down, then live with the consequences. Filibustering is one of the least palatable tactics politicians can engage in, one which only serves to bolster the

public's lack of confidence in our elected representatives. It's no accident that the word ''filibuster'' derives from a Spanish term for pirate—''filibustero.'' It's an apt description for a process whereby politicians seek to board and hijack the legislative process.''

The Richmond Times Dispatch said: ''According to the ''gold standard,'' each [of President Bush's] candidate's ability to serve on federal appellate courts is impeccable. Yet [Senator] LEAHY and his calculating cohorts presume the judicial nominees' perceived ideology to be more important than their ability—and have resorted to stall tactics perfected decades ago on the Carolina hardwood.'' That is basketball terminology for those who don't remember the four corners.

From the same newspaper:

> Miguel Estrada did not deserve such shabby treatment. No one does.

The Manassas Journal Messenger argues:

> The worst part about the Democrats' continued stonewalling on Federal judicial nominations is the legacy that it leaves.

The Winchester Star, a newspaper owned by a former Senator who served as a Democrat and an independent, Harry F. Byrd, Jr., predicted that:

> The precedent set here is ghastly. If this threat continues to go unchallenged, advice and consent in the future will be tantamount to obstruct and destroy.

And just last month that same paper said:

> The constitutional prescription of a simple majority for confirmation no longer applies. A 60-vote supermajority . . . is now standard operating procedure in a process held hostage by a liberal minority.

They went on to call the Democrats' actions ''lamentable'' and ''reprehensible.''

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

Mr. ALLEN. I yield to the Senator from Texas.

Mr. CORNYN. The Senator has talked about Miguel Estrada and his admirable qualities, the fact he emigrated here as a young man at 17, barely spoke the English language, and yet rose to the top of his profession and, indeed, represented the United States Government before the highest Court in the land in 15 cases, which is a remarkable professional accomplishment. But you also alluded to the comments made by our colleague from New York, and you gave us some quotes about the nature of President Bush's judicial nominees. I believe at another time he accused the President of loading up the judiciary with rightwingers who want to turn the clock back to the 1890s and warning that America is under attack from the hard right, the mean people. They have the sort of patina of philosophy, but underneath it is meanness, selfishness, and narrowmindedness.

If I may ask the Senator, how in the world can you reconcile the public record of Miguel Estrada and this sort of characterization? Do you have an explanation for what is happening here?

Mr. ALLEN. There is no justifiable explanation. Miguel Estrada is a person of very calm demeanor. He is very mild mannered and soft spoken. He is one who, throughout the entire nomination process, was willing to subject himself to whatever written interrogatories submitted to him by Senators. He was willing to and did meet one on one with Senators. So that characterization is not accurate.

Do you know what that characterization is? It is pure politics. It doesn't matter what the truth is because they have not justified it. What is unfortunate about statements such as that is that it is the politics of personal destruction. We should rise above that.

I say to the Senator that my very first speech on the Senate floor was about judges. I said that I care about treating people as individuals rather than partisans. I spoke about Roger Gregory. President Clinton had appointed him as an recess appointment. This had many Republicans, understandably, infuriated. I examined and talked to Roger Gregory to determine his judicial philosophy. I studied his records of accomplishment, considered his temperament, and all of the attributes judges who are appointed for life should have. You have to be sure you are not going to end up with some judge who is a radical one way or the other, an activist, but rather one who interprets the law and applies the facts of the case, rather than inventing or creating laws. My first speech was to say, ''let's rise above that and to be statesmen.''

I found Roger Gregory to be very qualified. The first thing I said to President Bush when he asked me my thoughts on this nomination was that I had interviewed judges for various positions when I was Governor and that one can never be absolutely sure about a nominee. But I told President Bush that I felt that Roger Gregory truly had the right philosophy and capabilities, and I hoped he would appoint him. And President Bush did.

That is an example of rising above partisanship, rising above this picky, partisan process in the Senate, which denies an opportunity for me, as a Senator, to vote up or down. But it also denies the American people the accountability and responsibility they expect for their Senators.

Mr. CORNYN. Will the Senator yield for one other question?

Mr. ALLEN. Yes.

Mr. CORNYN. The Senator has characterized what he thinks is happening here in terms of these attacks on qualified nominees, such as Miguel Estrada. I just wish to ask the Senator this. We all know, in order to get to the Senate, we have to run for election; and I just ask the Senator what his reaction is, or whether he would include this in the category of petty partisan politics that he just described in terms of the way Miguel Estrada has been attacked.

Most recently, in a fundraising electronic newsletter to potential donors, the chairman of the Democratic Senatorial Campaign Committee, our colleague from New Jersey, recently acknowledged—he boasted that the current blockade of judicial nominees is ''unprecedented.'' But the context in which he used that is to raise money for Democratic candidates to the Senate and the statement we are hearing on the floor regarding the figure 168 to 4, that they have only blocked 4. But at the same time we see they are using these unprecedented filibusters to block the highly qualified nominees of the President. Is that what you would characterize as a political use of this obstructionism of President Bush's nominees?

Mr. ALLEN. It is worse than that. I was not aware of that, I say to the Senator from Texas. That is more than just petty partisan politics. That is disgusting. This will lead to a continual downward spiral of our constitutional responsibilities. You can say you are against a judicial nominee, but to use it to brag and to admit that it is unprecedented in an attempt to raise money—to me, that is the sort of retaliation and retribution that is a real loser, and not just to Republicans or Democrats; the real loser is the justice system of the United States, which has been the pinnacle of the protection of our liberties and freedoms under the Constitution, which was created and designed to protect our God-given rights.

Mr. INHOFE. Will the Senator yield for a question? I know his time is running out.

Mr. ALLEN. Yes.

Mr. INHOFE. I have been observing this all night long and all of these legal scholars. I admire you so much, although I have to admit I have often said that perhaps one of my best qualifications for being a Senator is that I am not a lawyer. When I read the Constitution, I know what it says. It is very clear what it says. It says advise and consent. It is a very important process.

The reason I wanted the Senator to yield is you have been justly talking about the qualities of Miguel Estrada. I have met him, too. He is such a humble man. When you hear the horrible things said about him, it makes you cry inside. There was one thing that all of these nominees the President nominated have in common, and that is they are also eminently qualified. You have talked about his qualifications. Besides that, he worked in both the Bush and Clinton administrations.

Also, look at the rest of the nominees. William Pryor is the youngest attorney general at the time he was appointed and was nominated by the President. He has the highest ranking of the American Bar Association. Priscilla Owen has the highest ranking of the ABA. In 2000, she won 84 percent of the vote. She was supported by three former Democrat judges from the

Texas Supreme Court. Judge Pickering—99.5 percent of his cases were affirmed and not appealed.

I think we are talking about people who the President has done such a great job of singling out and finding, the most highly qualified people. I wanted to ask you that question. Isn't it true that everything you have said about Miguel Estrada and his qualifications is true about all these nominees?

Mr. ALLEN. It is. I very much agree with the Senator from Oklahoma. Miguel Estrada, Priscilla Owen, Judge Pryor, Judge Brown, and Judge Kuhl—they all have impeccable records. They have different experiences but great experience, and they are highly recommended by the people who know them best. This is a great way of judging their capabilities. Nonetheless, the facts don't seem to matter.

I close and say we need to act in accordance with the Constitution. The Constitution is important. Accountability is important. Fairness and justice are important. As a matter of principle, our judicial nominees deserve a fair and simple up-or-down vote. These nominees are individuals who are important for the function of justice in these various courts. And it is not just these three; there are others being obstructed.

I ask my colleagues to show some guts. Stand up and vote yes or vote no. Act responsibly. Since I started off with a Charlie Pride admonition and, unfortunately, we have not been able to ''Kiss an Angel Good Morning'' here on the Senate floor, why don't we follow Aaron Tippin's advice that ''you got to stand for something.'' So why don't you stand. Vote yes or no on these judges but vote.

Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER. The majority's time has expired.

Who yields time?

The Senator from New Mexico is recognized.

Mr. BINGAMAN. Mr. President, let me first compliment my colleague from Virginia for his vast knowledge of western song lyrics. I think he has recited several of his favorite lyrics. I always preferred the famous western song ''Who Drank My Beer While I Was in the Rear.'' That always seemed to be one that isn't played near enough. I am sure that is part of the Senator's repertoire.

Let me comment on a few of the things the Senator said. First, he said that justice delayed is justice denied; there is a terrible burden we are putting on the American people by not filling these judgeships.

Let me call to the attention of my colleagues what has happened as far as judicial vacancies during the last 8 years. You can see from this chart that, in January of 1995, there were 63 judicial vacancies. That was when the Republican majority was here in the Senate. That number increased to 110 judicial vacancies by January of 2002.

At that time, the Democrats took the majority in the Senate and the number came down precipitously, down to 60 vacancies by the time the Republicans gained control in the Senate and, at that point, of course, it has continued to go down. So now, in January of 2004, the expectation is that we will have 40 judicial vacancies.

This is the best record as far as filling judicial positions, vacancies, of the Senate in many years. We have fewer vacancies today and will have fewer by the end of this year than we have had for a very long time. So we do not have this problem that the public is being denied judges, judgeships.

I am very proud of the record of accomplishment that we have achieved so far in this Congress. I think we have approved a great many judges. We have approved a great many of this President's judges. This other chart, which has been up several times during last night's discussion says the whole thing. It basically makes the point that we have approved 98 percent of the judicial nominees who have been sent to us.

In my State, we have approved several very good nominees for Federal judicial positions. I have supported those. As I indicated earlier, those nominations were brought forward, in my view, in the way the system is supposed to work. That is a system whereby the President and the White House—the President's legal counsel—essentially contacted me, as well as, of course, Senator DOMENICI, my colleague, and assessed our views with regard to people they were intending to nominate. That is the way the system is supposed to work. That is what advice and consent has come to mean and should mean in our system. The President seeks advice, the Senate gives its consent, or withholds its consent.

I have been very pleased to give my consent to the nominations that the President has chosen to send forward with regard to nominees for judicial positions in New Mexico. I also know and would like to say that I have assumed—and I continue to assume—that after my advice is requested and after my consent is sought, that if I had strenuously objected to some of those nominees and had stated so, the President at that point would decide to go ahead and choose someone else.

In my State, we have a great many people who are practicing attorneys, who have held key positions in our State in various capacities, who are qualified to serve as Federal judges. That is one of the great strengths of our legal system. I am sure that is true of every State in the Union. If one of those individuals, for some reason, is not the appropriate choice and Senators from the State involved determine that, then the President should take that into consideration.

My colleague from Virginia talked about being consulted by the President about Roger Gregory before the President made a decision on that appointment. That is entirely appropriate. That is the way the system ought to work. The President and his legal counsel should be consulting Senators about the appropriateness of various candidates for judicial office before the nominations are sent to the Senate for consideration.

I think the reason we are here tonight, the reason there is angst about this issue about these four judges who have not been confirmed, the 2 percent, is because as to those 2 percent we did not have that consultation. The members of the Judiciary Committee, the ranking member of the Judiciary Committee, Senator LEAHY, the other members of the Judiciary Committee on the Democratic side, did not have that opportunity to be consulted, and nominations were sent forward that, in fact, were not acceptable, were not strongly supported, had no support, and had strong opposition to them. Accordingly, we have agreed not to move forward with those nominations, which I think is entirely appropriate.

The notion that the Senate should have the right to consent—and that is contained in article II, section 2 of our Constitution—implies in it the idea that the Senate should have the right to withhold its consent, and that, in fact, we have exercised that right with regard to 4 of the 172 nominees who have come to the Senate floor so far for consideration. That is a pretty good record for this President. I think this President has done much, much better than the previous President in getting his nominees confirmed.

There was great frustration on the part of many of us in the prior administration, and it has been expressed here on the floor, that very good nominees were being sent forward by President Clinton and were not afforded a hearing. It was not as though there were objections that would be expressed, there were not articulated objections. It is just that they would not be given a hearing because of some view by some Member that the person should not be entitled to a hearing before the committee.

That practice has not been followed with regard to President Bush's nominees. We did not follow that when the Democrats were in the majority in the Senate, since President Bush has been in office, and, of course, it is not being followed at this time.

Let me put this in a larger context, which is something we have tried to do here during the recent hours; that is, the context that we have major issues facing our country today. There is significant work—undone work—still crying out for attention in the Senate before this session of Congress is over. The majority leader tells us we will adjourn on November 21. That is a week from tomorrow. I don't know if we will make that deadline or not. We have had other deadlines that have not been made. But that is the schedule as we now know it. We will adjourn a week from tomorrow, and we are essentially

wasting this week talking about a set of issues that have been talked about and talked about and talked about during recent months.

I hope that before we leave this year, we will not only finish the appropriations bills, which clearly need to be done to keep the Government functioning; I hope we will also conclude work on a Medicare prescription drug bill, which will preserve the Medicare system but which will provide a genuine benefit to Medicare recipients. I am informed that some time—perhaps by the end of the week—we will have some better indication as to what resolution is finally coming out with regard to those issues that have been in conference.

I hope, also, we get a decent Energy bill. I have complained repeatedly about the process that has been followed with regard to the Energy bill because Democrats have been excluded from those conference meetings. But I still hold out hope that the final product, which we have been assured we will be able to see 48 hours before the final meeting of the conference—I am informed—I still hold out hope that final product will be something that will be good for the country and, on balance, will be a step forward. I don't know that that is the case. Until we see the bill, we will not know that is the case. We don't know what is being put in the bill that was not in the Senate-passed bill. We don't know what is being put in the bill that was not in the House-passed bill. But clearly there is important work the Senate needs to be doing.

We have very few days in which to accomplish that work. I regret that we are spending so much time on this single issue. Frankly, in my State, if I go around New Mexico and ask people what do they think we ought to be having all-night sessions to resolve here in the Congress, this would be a very distant item on the list of priorities. I think the first priority would probably be, Why don't you do something significant on the health care crisis? Why don't you do something about the 44 million people who have no health care coverage in this country? That number continues to rise.

I have served in the Senate now for a little over 20 years, and that number has risen during most of that time. We have not acted effectively to deal with that health care crisis and, accordingly, we have a great many people in my State who do not have access to quality health care, do not have access to affordable health care. We need to do something about the cost of health care. We need to do something about the availability of health care.

Of course, we need to do some things to try to maintain our job base, the jobs about which we all are concerned. We have lost over 3 million jobs since this President came into office. I am glad to see we are finally, now, in the last month, beginning to see some jobs created on a net basis. We created more jobs last month than we lost. I hope that will continue. It is going to have to continue for some period before we are at a break-even point. But I hope we are at a break-even point in the near future because, clearly, there are a lot of people looking for jobs, looking for good-paying jobs, and we see too many of those jobs going overseas, too many of our better paying jobs, particularly manufacturing jobs, leaving for other parts of the world.

My colleague from New York is here. He is a member of the Judiciary Committee and has been intimately involved in these issues related to judicial nominations. I know he spoke last night. He is ready to speak again and give his views on this issue, so I will yield the remainder of my time to him.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, I thank my colleague from New Mexico for, as usual, his thoughtful, balanced, and fair remarks.

We have, I guess, now been debating 13 hours 45 minutes here. I don't think too many new arguments have come out. I don't think we have accomplished anything. But let's proceed, although I couldn't agree more with my colleagues that we could have devoted some of this time to speaking about issues we have not debated on the floor at length—jobs, the yearning of the average American to have a secure and good job; health care, and the millions who are not covered and millions more who are covered and cannot afford health care; even a debate on the war in Iraq, where we are going and what we should be doing. It would be far more instructive and illuminating to the American people than what we have done here.

But we are here, and I think we should be talking about the judicial nominations. One point I make, just before getting into the substance: We heard some paeans to Miguel Estrada; Horatio Alger, we heard. He is a bright man of accomplishment, but let's be fair here. His father was a banker in Honduras. He came from a privileged background. America welcomes people of all backgrounds. That is wonderful. But the bottom line is he was not typical of an American immigrant. His father was a banker, they were part of the Honduran elite. The Senator from the other side said he didn't speak English when he came here. We think he probably did.

But Horatio Alger? No. Horatio Alger was somebody who started off poor. There are indeed, I would like to inform my colleague from Virginia, millions of immigrants who came here poor as church mice and struggled and worked their way up. It is sort of interesting that the hero to those on the other side is a wealthy Honduran who became a wealthy American—that is the modern-day Horatio Alger story. So let's be straight here.

Miguel Estrada, to be fair, is a very bright man. But just because he is bright and just because he came from a good background doesn't give him carte blanche to become a judge. He didn't answer any of our questions. How many Americans would get a job if they told the boss: I refuse to fill out the questionnaire. I don't want to answer that question.

These were not esoteric questions; these were not demeaning questions; they were very simple questions: What is your view of the first amendment and how expansive it ought to be? What is your view of the commerce clause? The very things on which he would opine as a judge.

These have been regarded as legitimate questions from the day of the founding of the Republic. Let me say, why are my colleagues so appalled that we would ask such questions? I will tell you why. It is very simple. Because this President, George Bush, despite his wanting his image to be moderate, on the issue of judicial nominations has been the most hard right President we have seen. His nominees are not mainstream, many of them.

People on this side of the aisle have voted for many of them with whom we do not agree. But when some go so far, we believe the Founding Fathers almost importune us to question them thoroughly, and to block them if necessary.

Again, this chart, I would say to the American people, says more than all the words and rhetoric and name calling we have heard from the other side: 168 to 4.

Is the process broken down? No. Is the process so much so that a reasonable judge can't get through? Obviously not, unless you think George Bush is not nominating any reasonable judges.

What has happened here? There is such anger on the hard right that they can't get every single judge they are pushing many on the other side, against their own will, to engage in performances like we have seen over the last 14 hours. We want every single judge approved. That is their goal. That is the goal. And then we come up with the arguments.

So we went through this last night. Filibusters are OK, as long as they fail. That makes no sense. We have had filibusters in the past. We have had six of them, four by the Congresses in the 1990s and 2000. If a filibuster is wrong, it should be wrong whether it passes or it fails.

But then look at the other argument. Over 50 judges were blocked by the other side. We didn't hear any speeches about Constitution in crisis. They weren't even giving hearings.

The logic defies me: It is OK to block judges by not giving them hearings, and it is OK to filibuster as long as you fail; the only thing that is wrong is to have a filibuster succeed and that brings the Constitution in disrepute and brings the Republic to its knees.

My colleagues, that argument does not hold up in first year law school. It

is just totally hypocritical and contradictory. It is saying, I want my results so I am making whatever argument it takes. Sort of like the judges we don't want. A little like Justice Brown's way of arguing—of deciding cases. Blocking is not bad because they blocked 50 of them and there was no outcry. Filibusters aren't bad because they filibustered six of them, or four of them, and that was just fine.

So let's be honest here. For some reason, there is white hot anger among a small, narrow group of people that they can't get every judge. Again, I welcomed—I don't think this serves our time well—but I welcome it, in the sense that all of those talk shows and all of those radio programs and all of those editorial boards leave out the one overwhelming fact, which is 168 to 4.

I will march in parades in conservative parts of my State and once in a blue moon—most people don't care about this issue, to be honest, compared to the things that make their lives better, compared to the relief American families want when they sit down at the dinner table on Friday night to figure out how to pay these bills. But the occasional time somebody called out, ''Why are you blocking the President's judges?'' because they listen to the radio or read a biased article in the editorial pages, I would say: ''We approved 168 to 4,'' whatever the number is, and they say, ''Oh, OK.''

You can do all the sophistic arguments you want, how many angels are on the head of a pin, say this way to block judges is OK.

By the way, I would like one of my colleagues to defend, in the 30 hours we have, was it all right to block the 50 judges of President Clinton? Was that OK? Do we ignore that fact? It is not ancient history; it was in the last decade. Was that OK? I would ask any of my colleagues to answer that.

Then I would ask them to point out to me when Senators on the Republican side of the aisle launched filibusters, who got up and complained and said the Constitution was being violated?

No, no, no. The arguments here, again, are outcome determined. There is no internally consistent logic. It just says: We want all the judges; we will take whatever argument it takes. When they originally put forward Miguel Estrada, they said he was a rags-to-riches case, and then of course the facts came out. Now he is Horatio Alger: Honduran banker's son becomes successful American lawyer. I don't know if that is going to tug at the heartstrings of most Americans. Most, I think, would say Horatio Alger is the person who came here penniless and worked in a factory, who tried to struggle to provide for his family, who started a small business and struggled, the whole family worked in it and then they got a little money, and they got richer and God bless America. That is what is wonderful about this country.

But again, whatever argument fits. Is there a solution to this conundrum? Obviously, there is. There is. It is to follow the Constitution, not to come up with this idea that somehow, buried in the Constitution—by the way, that is not being literalist. When my colleagues say the Constitution says you can't filibuster a judge, they are reading words into the Constitution. I believe in a flexible Constitution. I think most people do in the 21st century. But if you want literal reading of the Constitution, find the word ''filibuster.'' Find me the number 60. Find me the sentence that says everything in the House and Senate, or just the Senate, should be supported by majority rule.

If majority rule were so important, then we should not have committees because when committees block judges, as they did, we don't even know what the majority thinks. The Senate has a very important function in this Republic. It has had for 200-some-odd years. It is to be, as Madison put it, the cooling saucer.

As I mentioned last night, I didn't have qualms about some of my colleagues trying to stop Judges Paez and Berzon. The Ninth Circuit is a very liberal circuit. It is too liberal for my taste. To put more liberal judges on there probably didn't increase the balance. That is why this year I supported the nomination of Judge Bybee, Jay Bybee. I don't agree with him on almost anything, but on the Ninth Circuit to have a hard right conservative is probably a good thing.

My view is there ought to be moderation on the courts. And probably it is great to have one Justice Scalia on the Supreme Court and one Justice Brennan. You should not have five of either. Judges should not be at the extremes because they are the ones who tend to make law.

We have a nominee coming up Friday, Justice Brown, who wants to go back and reratify the Lochner decision that has been in disrepute for 70 years. Is that justice, someone who is interpreting the law? Lochner, which said a State couldn't pass a law that said bakery workers could work only 60 hours a week? We have come a long way since then.

But it is true, there are some in America who say: We don't want the Government doing anything. If I am a businessman, I should be able to do whatever I want. I should be able to pollute the air. I am a self-made person. Or I should be able to take my property and do exactly what I want with it—no zoning.

That is a view, certainly a view that can be argued in this Chamber or anywhere else. It is not the view close to the mainstream of the American people.

So the bottom line is a very simple one. We believe—it may drive some crazy, but we believe we are defending the Constitution. We believe that through whatever sophistry and sophistic arguments we hear that every one of the President's judges should be approved does not do justice to this wonderful document, this living, breathing document, the Constitution. We believe that if the only way you were to reject a judge was because the judge didn't have high enough grades in law school or because they smoked marijuana when they were in college, it would demean the process. We believe that asking questions about a judge's judicial philosophy—that is what is at the core of what makes a good judge. We believe that when a President brings ideology into the nominating process—we didn't, he did, and he said it. To his credit, he was honest. He said he is appointing judges in the mold of Scalia and Thomas. That wasn't about their law school grades or diversity; it was about a philosophy: Let's take the courts and change the way they view things.

We believe that our examination of these nominees and their views, and what they do as judges, is not only appropriate but obligatory.

I say this to the American people, to those of you who may be watching here at 7 in the morning. Judges have a tremendous effect on all of our lives. It is hard to see because it is not like a debate here in the Senate, this wonderful institution, or the President deciding a policy. It is done on a case-by-case basis. That is the beauty of this country. But that can determine, if you are a woman or a minority or disabled, what kind of discrimination might be allowed to exist against you. They can determine, if you are a worker, what kind of structure there is to protect your rights.

The PRESIDING OFFICER. The time of the minority has expired.

Mr. SCHUMER. Thank you, Mr. President.

The PRESIDING OFFICER. Who seeks time?

The Senator from Texas.

Mr. CORNYN. Mr. President, I have to give my colleague from New York credit. He is a determined, articulate advocate of his point of view. The problem is the facts just don't sustain that point of view. This has been refuted time and time again, but we see the same charts being trotted out time and time again that just are proven not true by the facts that we all know. I want to talk a little bit about those facts. I want to talk a little bit about what Democrats in the past have said about filibusters and their conviction that they should never occur and that they are, in fact, unconstitutional. In fact, those are the arguments we are making today, and we will use their own words to prove it.

My colleague from New York time and time again trots out a chart that claims that a number of judicial nominees have been filibustered by Republicans when in fact, those same nominees have been confirmed and are today sitting on the Federal court. How he can claim that what a Democrat minority is doing to Miguel Estrada or Priscilla Owen, Janice Brown, Carolyn Kuhl, Bill Pryor, and

Charles Pickering is somehow the same thing Republicans did in the past is just disingenuous at best.

He claims that Stephen Breyer was filibustered. The last time I checked, Stephen Breyer sits on the U.S. Supreme Court. You go down his list, and, frankly, the chart is not worth the paper it is printed on.

Don't take my word for it. Listen to the words of TOM DASCHLE on January 30, 1995. The minority leader said:

> The Constitution is straightforward about the few instances in which more than a majority of the Congress must vote: A veto override, a treaty, and a finding of guilt in an impeachment proceeding. Every other action by the Congress is taken by majority vote.

That is our position. They are denying those very words here today.

I just hope the American people are listening, even though the hour is early and even though we have been talking for a long time now.

My question is, should we believe you today or should we believe what you said in 1995, Senator DASCHLE, when you said, other than a veto override, a treaty, or a finding of guilt in an impeachment proceeding, every other action in Congress is taken by majority vote?

I believe he was correct then and because of the politics of the moment he is not correct today.

Senator TOM HARKIN, in 1994, said:

> I really believe that the filibuster rules are unconstitutional. I believe the Constitution sets out five times when you need majority or supermajority votes in the Senate for treaties, impeachment.

We could go down the list:

Lloyd Cutler, White House Counsel under President Carter and President Clinton; Senator BIDEN; Senator BOXER; Senator FEINSTEIN; and Senator KENNEDY. Senator KENNEDY said: ''Nominees deserve a vote.'' He is not saying that here today. He is voting to obstruct a vote where a bipartisan majority of the Senate stands ready to confirm these nominees. Senator KENNEDY said: ''Nominees deserve a vote. If our colleagues do not like them, vote against them.''

I would prefer the Senator KENNEDY of that era because I think he was right then. None of our colleagues on the other side of the aisle have made any explanation for why they have changed their position on what the Constitution means. But yet we have heard from Senator ALLEN and others that the characterization we are hearing from the other side about these fine judicial nominees is nothing more than politics.

The Senator from New Jersey, Mr. CORZINE, in a moment of stark candor, had this to say. This was an e-mail he sent to prospective donors to the Democratic Senatorial Campaign Committee. He said:

> Senate Democrats have launched an unprecedented effort.

How he could call it unprecedented if, in fact, as Senator Schumer and others have said, it hasn't happened in the past? Senator CORZINE, I guess, is guilty of telling the truth here. He said:

> Senate Democrats have launched an unprecedented effort by mounting filibusters against the Bush administration's most radical nominees. Senate Democrats have led the effort to save our courts.

Of course, we understand what is going on. This is about raising money. This is about stirring people up by throwing them some red meat. We all understand what is going on. The American people understand what is going on, that this is about politics. This is not about politics as usual, this is about politics at its worst.

The reason I say that is not because it is unusual for us to disagree in this body. In fact, that is one of the things I love about this body—that any Senator can stand up and talk about what they truly believe to be in the best interests of this country. We know many times there are disagreements. But then ultimately we have a vote because we believe in majority rule in this country. That, in fact, is what distinguishes this form of government from others—that sooner or later, after we have talked—and we have talked about some of these nominees for 2½ years or more—but sooner or later, we vote. Sooner or later, we vote. That is what democracy is about. That is not what is happening with regard to these filibusters, and it is wrong.

The thing that really concerns me—there are a lot of things that concern me about this process. I believe it is not simply in need of tinkering. I think the system is broken down completely and we need a fresh start.

Together, myself along with my colleagues who are new Members of this body who have been here now for just about a year, we sent a letter to the majority leader and the minority leader, the chairman and ranking member of the Judiciary Committee, and said: We are really not interested in this game of tit for tat or recrimination, pointing to the past and saying we were entitled to treat President Bush's nominees today badly because we believe you treated President Clinton's nominees badly. Frankly, I wasn't here then. I don't endorse treating any nominee badly. These are honorable men and women who have been chosen by the President to serve in positions of important public service, and they deserve to be treated better than the nominees we are talking about today have been treated. Perhaps there were excesses in the past. I regret that. Unfortunately, I wasn't here to do anything about it. But I am here today.

What I believe is that we need a fresh start. We need to agree among ourselves that what has happened in the past in terms of the way judicial nominees have been treated does not reflect credit on this institution, and the people we are talking about, people who have risen to the very top of the legal profession and who should be treated with honor, it is wrong to treat them as common criminals. It is wrong to treat them as a caricature of their true selves. It is wrong to call them names. We can disagree with them. We can have a great debate. But ultimately, we need to treat them respectfully.

That doesn't mean a Senator has to vote for them. Every Senator has a clear right to vote their conscience—to vote up or down. That is really all we are asking for today and last night and for the remainder of this day, and as long as it takes to make clear that what is happening is wrong. It is unconstitutional, as Democrat leaders have said in the past—a fact which they have apparently forgotten, to put it charitably.

But I think the thing that really concerns me more than anything else—and as I have said, there is a lot to be concerned about—is the tactics used against some of these nominees, and the way they are treated after they have volunteered to offer their services to the American people on the bench.

We have seen charts that say 168 to 4. As we pointed out before, the real number, if we are being honest, should be zero to 4, zero being the number of filibusters against judicial nominees from 1789 to 2002. That is right. It never happened before—never in the history of the United States of America. It has never happened before, until this year. This year we have seen four filibusters. What has changed? Has the Constitution somehow changed? For those Senators who decried filibusters in the past and who now embrace them, what has changed to cause their change of opinion and change of view? I think we know what has happened.

That is why the number should be zero to 4—zero filibusters since 1789 until 2002 and 2004, in this last year, in an attempt to block President Bush's highly qualified nominees.

But as I was saying, where I come from we don't treat people as statistics. Where I come from, if you are going to attack someone and call them names, you at least give them a chance to meet with you and sit down and talk face to face. Yet obstructionists have time and time again refused to even meet with these nominees. Any Member of the Senate who would like to meet with these nominees and talk about their concerns and to see if they are justified, to listen to the response, has that right, and indeed every Senator has had that opportunity, but many have turned it down rather than take advantage of that opportunity and reach understandings and then vote.

We have even had this process sink to a new low when it comes to embracing the idea that a nominee's personal views on religious issues should play a role in determining whether or not they are fit to serve as a judge.

I strongly disagree with that concept, and I think all of us should reject

it. I believe that when a nominee's personal theological beliefs become a legitimate course of debate before the judiciary and before the Senate, when we insert ourselves somehow between the relationship between an individual and their God, we violate both our conscience and our Constitution.

I have sensed in the Judiciary Committee that some of my colleagues are genuinely alarmed and uncomfortable when a nominee speaks about his or her faith in honest terms in the public arena. Indeed, it is so rare today where people feel free to talk about things that are most important to them.

I would like to read a comment that unnerves some of these folks, who are uncomfortable with such frank and honest discussions.

We are inspired by a faith that goes back through all the years to the first chapter of the Book of Genesis. God created man in his own image. We on our side are striving to be true to that divine heritage. We are fighting, as our fathers have fought, to uphold the doctrine that all men are equal in the eyes of God. There never has been, there never can be, a successful compromise between good and evil. Only total victory can reward the champions of tolerance and decency and freedom and faith.

This was not the comments or the testimony of a nominee to the Federal bench. These were the words of President Franklin Delano Roosevelt. I seriously doubt that anyone in this body at that time took President Roosevelt to task for speaking frankly and honestly about his deeply held personal religious beliefs. President Roosevelt was certainly within his rights to say that in 1942, and it is just as right and proper that our nominees today express their deeply held religious beliefs when they are talking about things that concern them in response to questions, whether it be about abortion or any other issue. I wonder today if, testifying before the Judiciary Committee, President Roosevelt himself would be challenged for these very remarks.

We have most recently witnessed the strident animus directed toward Judge Carolyn Kuhl and Attorney General Bill Pryor who have faced challenges over their religious beliefs, particularly concerning the matter of abortion. Both nominees have, from a legal scholar's point of view, criticized the legal analysis used to support the Roe v. Wade decision. These nominees personally hold beliefs that are absolutely consistent with their faith and the doctrine of their church. Their understanding of religion holds to the doctrine that abortion is wrong. Yet, still, the obstructionists have argued that for both of these nominees—and Bill Pryor, in particular, who is repeatedly challenged over his philosophy and deeply held views above all those arising from his religious beliefs, rendered them simply unqualified to be confirmed.

I would point out that these nominees are hardly alone in criticizing the Roe decision as a legal matter. Numerous legal scholars and jurists across the political spectrum who call themselves pro-choice and pro-life have publicly criticized the legal analysis in Roe, and indeed that is what lawyers do and judge us do. They parse words. They challenge an analysis to try to sharpen legal thinking. But Supreme Court Justice Ruth Bader Ginsberg, who was overwhelmingly approved by the Senate, has described Roe as ''heavy-handed judicial intervention'' that was ''difficult to justify.'' Allan Dershowitz, a law professor from the Harvard Law School, described Roe as a ''case of judicial activism more appropriately left to the political process.'' Edward Lazarus, former law clerk to Justice Blackmun, the author of Roe, said that ''Roe borders on the indefensible as a decision and, at its worst, is disingenuous and results oriented.''

I read these quotes not for any other reason except to show that there has been over time serious scholarly concern about the legal justification for that decision.

But perhaps more to the point, even though Attorney General Pryor and Judge Kuhl have criticized the reasoning of Roe, they recognize that Roe v. Wade is the law of the land. Indeed, one of the things I admire most about Attorney General Bill Pryor, as the Senator from Tennessee noted in his comments last evening, is that he has said: ''No matter what my personal beliefs are, I believe in the morality of enforcing the law.''

Indeed, I believe as a public servant, as attorney general, as a judge, it is the obligation of a judge to interpret the law as written, not as I would have it be. Indeed, some of the problem we have had is judges who have elevated their personal beliefs, their political agenda above the law. I submit that a judge who is a lawmaker is, in fact, a law breaker.

We understand in this country what was settled well over 200 years ago at the Constitutional Convention in Philadelphia; that is, we have three branches of Government. We have the Congress or legislative branch, which everyone understands. That is the reason we run for election, tell people what we believe, and then we are either accepted or rejected by the public because they believe that same way or not. But then we have a President, the executive branch, whose job it is to execute the law that Congress has written. Indeed, they are servants of the law as well because we recognize they, too, must comply with the law and that no President is above the law; that we are a nation of laws, not of men.

Then there is the judicial branch of Government. The Federalist Papers refer to the judicial branch as the ''least dangerous branch.'' I wonder whether James Madison and Alexander Hamilton are spinning in their graves today when they see what the Federal judiciary has become in too many instances, where judges have assumed the role of lawmaker, something that was anathema to the Framers.

My point is simply this: People such as Priscilla Owen, with whom I served for 4 years on the Texas Supreme Court, understand that no matter what their personal beliefs are, when they put their hand on the Bible and they take an oath to uphold the law of their State and of the United States of America, they have a sacred obligation not to elevate their personal views above the law. Indeed, the judicial philosophy we should all embrace is that of a judge who interprets the law and not makes law.

As I said earlier, a judge who is a lawmaker is indeed a law breaker because they violate the fundamental commitment that all of us have made to enforce and uphold the law, including the Constitution that dictates those respective roles for the various branches of Government.

When I see people such as Priscilla Owen, who received 84 percent of the vote in her last election by the people of Texas and who has been twice selected to the Texas Supreme Court; when I see people such as Justice Janice Rogers Brown, who was supported by 76 percent of Californians in the last election in 1998, the highest of four justices on the ballot; these are not out-of-the-mainstream judges, unless words no longer have meaning.

I agree with Senator SANTORUM who has said, to many it appears that their definition of ''mainstream'' is extreme. But these are mainstream judges who have received the support of the people they currently serve, both in Texas and California, because they have faithfully interpreted the law. They have been true to their oath. They have been true to the Constitution.

We live in a pluralistic society. People across this country have a variety of different beliefs on a variety of different matters. Indeed, that is what makes this country so great and so strong because we believe everyone is entitled to believe as they wish, to speak and say what they want, but that ultimately we are all governed by the same rules: the rule of law.

It does my heart great sadness to see that people who have dedicated their life to upholding the law are treated so shabbily in this, the world's greatest deliberative body, and that reputations that have been earned with a lifetime of public service are degraded and denigrated to the point that we would not recognize them; that their families, who listen to these unfair and, in some instances, scurrilous attacks, must certainly suffer when they hear the name calling and the unfair characterization of these good and decent human beings.

Just one example of this, perhaps, has taken us to a new low. This cartoon appeared in the Black Commentator on September 4, 2003. This was displayed at the hearing of Janice Rogers Brown before the Judiciary Committee, someone who currently serves

on the California Supreme Court. I had the honor to introduce her to the committee because her two home State Senators refused to do so. But it was my honor to do so.

This is the kind of scurrilous, mean attack that is embraced by some who oppose these nominees. I know it is not necessarily easy to see, but this depicts a caricature of President Bush, a picture of Janice Rogers Brown in the most extreme sort of racial stereotype you can imagine, Justice Clarence Thomas, Secretary of State Colin Powell, and Condoleezza Rice, National Security Adviser to the President. The President is saying: ''Welcome to the Federal bench, Ms. Clarence . . . I mean, Ms. Rogers Brown. You'll fit right in.''

Our colleagues on the other side would do well to disavow this kind of support for the obstruction of these judicial nominees. Indeed, I would think every fairminded and decent human being would decry and denounce these sort of vial and loathsome tactics. We can disagree. We can have different points of view. Indeed, I think that is what makes this body so unique and so important. But we should agree to maintain a certain minimum level of civility in our discourse and, indeed, when there are those who inject this sort of scurrilous attack on President Bush's nominees, or anyone else for that matter, we ought to stand up and say: Unfair, unjustified, and we repudiate it.

Frankly, I have not heard the kinds of repudiation that I would expect for those who are joining in this obstruction against Janice Rogers Brown and denying her the right to a vote.

That is all we are asking for, an up-or-down vote.

The PRESIDING OFFICER (Mr. BENNETT). The Senator from Florida.

Mr. NELSON of Florida. Mr. President, I have said often what a great privilege it is for me to be here and to represent the State of Florida. Little did I think 3 years ago when I came into the Senate that I would be speaking to an empty Chamber at 7:30 in the morning. But, indeed, it is a privilege to be here and to offer the ideas of this Senator and the perspectives.

It is pretty clear to me that when I vote for 172 judges and only 4 of 172 are rejected, I am doing my duty. It happens to be this Senator from Florida. Of those 4 who were rejected, I voted for 1 of those 4. But the notion that somehow this is not being fair for the Senate to advise and withhold consent on 4 judges out of 172 just seems to me to be something that we in the South would say is ''just beyond me.''

Mr. President, 172 judges have come in front of this Chamber. I have voted for 169. I have voted against 3 of those judges. Now why? Why did I?

Well, because what I want is a judge, particularly at the level of the appellate court, but for that matter any Federal judge because they are there for a lifetime appointment, they are there beyond any kind of influences that would remove them from the bench save for skulduggery and unethical behavior, they are there to be free to exercise their judgment—in so doing that, I want a judge who is open-minded, who approaches the bench in a fairminded way. I don't want a judge who comes to the bench and his mind already made up.

In the South we have a phrase for that. It is a ''know-it-all.'' I don't want a know-it-all as a judge. I want a judge who has an open mind, who is going to listen to the facts, and apply the law. That is what the security and sanctity of this judicial system is based on: Fair and equal justice for all.

That means that a judge ought to have judicial temperament to open their mind and not have all the answers as they approach the bench.

So for this Senator, it is pretty clear, when I vote on 172 judges, and 3 of those 172 don't meet my test, and in the will of this body, 4 of those 172 don't meet the test, it seems to me that is a fairly reasonable point of view. That is inserting the check and balance of the constitutional system that is so unique to our system of government, where a legislative branch offsets, and checks and balances the executive branch, and so, too, a judicial branch offsets and checks and balances the other two branches.

I am delighted to be here with my colleague from Oregon today and to share the floor as we give some of our ideas about this all-night session. It was quite a challenge getting here. There is a real wind storm in Washington today. Fortunately, since the power went out at my residence, my stopwatch and also alarm clock wristwatch went off, and I had to stumble around in the dark with a flashlight and race over here. But I am delighted to be here and to join with my colleague from Oregon.

Mr. WYDEN. I thank my friend. I think he has made a number of important points about judges. The fact is, there is an alternative path. I think about how I have had a chance to work with my colleague in the Oregon delegation, Senator SMITH. We have gotten judge after judge confirmed because we have felt, while some consider it quaint, that you ought to try to work in a bipartisan way. We have not applied an ideological litmus test. I think what the Senator from Florida is saying is that is the kind of approach we ought to be pursuing, to try to find common ground to get the Senate together.

As I begin my comments this morning, I will say that I think a lot of Americans look at what is going on now on the floor of the Senate and say that it is sort of like the great wall of China, an almost impenetrable barrier surrounding a forbidden community where their voices just go unheard.

I know what I hear from my constituents—I have open community meetings in all of Oregon's counties—is awfully different than essentially what the Senate has been doing through the night.

For example, what I hear about is how medical costs are just gobbling up everything in sight. I hear, for example, about how the crushing small businesses, scores of them dying to cover their people, have been unable to do it. I hear about providers, physicians, and others leaving the system because of inadequate reimbursement. I hear about so many who are not poor enough for Medicaid, they are not old enough for Medicare, and they fall between the cracks. Again, there is an alternative approach to all of the partisanship.

The senior Senator from Utah, ORRIN HATCH, has worked with me for a number of years now on the Health Care for All Americans Act. It is absolutely critical that the Senate get moving on this issue because we all understand that there is a demographic tsunami coming. Millions of baby boomers are about to retire in a few years. All of the problems we are seeing today are going to be multiplied three or fourfold.

Yet the Senate isn't tackling that kind of issue because, in effect, things have ground to a halt over exactly the kind of polarization the Senator from Florida has talked about.

I would hope that as we wrap this up, we understand that nothing important is going to get accomplished in the Senate unless there is an effort to work in a bipartisan kind of fashion.

Mr. NELSON of Florida. Will the Senator yield?

Mr. WYDEN. I am happy to yield.

Mr. NELSON of Florida. On that point, we have been fortunate to have a bipartisan approach in Florida with regard to the confirmation of judges as well. My senior colleague, Senator GRAHAM, as Governor back in 1978 to 1986, was able to get the legislature to pass a series of panels called the Judicial Nominating Commission. This would be composed of lay people and members of the bar, leaders of the community who would receive applications for a vacant judgeship, and then that committee would screen them, interview them, look at their credentials, and nominate three, and then the Governor would select. That is still law today.

When Governor GRAHAM was elected to the Senate in 1986, he started to institute a similar situation, but rather by custom instead of law, in the confirmation of nominees to the Federal bench. It has worked well, while there have been two Senators of the same party and, indeed, while Florida has had two Senators of both parties. Indeed, the judicial nominating commissions formed back in Florida nominate three for the vacancy. The Senators sit down and interview all three of those. Now we are operating under a system that we have worked out with the existing Governor of Florida that it will be six nominees for the vacancy.

Senator GRAHAM and I sit down and interview all six, and we make a recommendation to the White House if we have an objection.

Otherwise, the White House then goes about and selects which one they want. It is a way of working this in a bipartisan fashion, with a bipartisan commission; and all of our judges have gotten through without controversy.

The fact is exactly what the Senator from Oregon says. If you put your mind to it and you want to be bipartisan, you can have this process work, work efficiently, work effectively, and work timely in order to have good, fair, and open-minded judges.

Mr. WYDEN. The Senator from Florida is being logical. Heaven forbid that logic break out sometimes in this area that is often called the ''logic-free zone''—this area surrounding the Capitol. It just seems that in so many of these areas, the institution just takes leave of its senses because both of us have described a bipartisan way to deal with the issue of judges—an approach that works in Florida and has worked for Senator SMITH and I in Oregon. I do not think the Senate has the time or luxury for a lot of this pettiness.

I mentioned the health care issue with Senator HATCH that I have felt strongly about since my days as co-director of the Oregon Gray Panthers. This demographic revolution is coming on us, and the prescription drug issue we are tackling now is vitally important. But if there is one thing the Senate has learned, health care is like an ecosystem. What you do in one area affects all other areas. Senator HATCH and I have pulled together an approach that has now gotten the support of the Chamber of Commerce and the AFL–CIO to get back on track for what, regrettably, was not finished back in the early 1990s. In the health care area, you see an alternative path.

I see my good friend from Virginia here, Senator ALLEN. He and I are working on at least five major technology issues right now on the question of Internet access, and we are working in a bipartisan way with the States and localities to ensure that the Internet medium is allowed to grow and prosper. We have come together on nanotechnology, and we are working together.

I want to give some additional time to the Senator from Florida because I know his schedule is short. If you look at the big issues of our day, including the health care question, where I have outlined what Senator HATCH and I are talking about on so many issues that are social and ethical; and the technology question, where it just seems fitting that the Senator from Virginia is here, Senator ALLEN, my friend and partner on so many of these technology issues, the Senate has a choice either to listen to our constituents and take the bipartisan approach that will lead to real solutions or continue what is seen by most Americans as just small food-fight-like exercises.

I want to give additional time to my friend from Florida because of his schedule. I appreciate, particularly, his outlining, as we have tried to do in Oregon—Senator SMITH and I working together—the kind of bipartisan approach that the Senator from Florida has described in his State for choosing judges.

Mr. NELSON of Florida. Mr. President, I will pick up on that theme the Senator from Oregon has mentioned. I must say this has been one of the greatest experiences, and most enjoyable, to get to know all of these Senators. I must say there is not one Senator here I do not personally like. I must also say that my degree of frustration—and usually if I am frustrated, it is with a smile because of enjoying my colleagues here so much; but my one frustration is that this place is way too partisan. And, from time to time, this place is way too ideologically extreme. When you have a country as big and as broad and as complex and as diverse as ours, it is very difficult to govern this country when it becomes highly partisan and ideologically extreme. It makes it very difficult for the people who are in the political center trying to reach out and bring people together to build consensus when there is sharp, highly charged partisanship and ideological extremism. It is very hard to build that consensus.

Mr. ALLEN. Will the Senator from Florida yield?

Mr. NELSON of Florida. I would love to yield to my colleague, but it is my understanding that, under the rules, we are given, in each hour, one-half hour for the Senator from Oregon and me to make a presentation, and one-half hour is given to the Senator's colleagues to make their presentation. It would be my intention for Senator WYDEN and I to continue our remarks, since we only have about 12 minutes left.

Mr. ALLEN. Mr. President, I thought it had been agreed that any speaking or questioning I may do would get charged against our time in the next hour.

Mr. NELSON of Florida. Mr. President, it is my understanding that I have the floor. I have some thoughts I want to express. Rather than have those interrupted, I prefer to just continue on.

The PRESIDING OFFICER. The Senator from Florida has the floor.

Mr. ALLEN. Thank you, Mr. President.

Mr. NELSON of Florida. Mr. President, I thank the Senator from Virginia, who is one of my favorites here. I have the privilege of serving with him on a number of committees.

Back to what I was saying, if we would stop this excessive partisanship—you cannot get things done with this excessive partisanship. Especially, you cannot get it done in a Senate that is basically split down the middle, 50–50. I think it is 51–49 now. So if you are going to get anything done, we ought to be Americans first, not partisans first. That is what part of all this fight is. That is what part of this all-night session has been.

Do you know what. The folks out there in America—and I think all of you know this—don't like these partisan food fights.

I would like the perspective of the Senator from Oregon on that.

Mr. WYDEN. Mr. President, I think the Senator from Florida and I have tried to spend our half hour talking about specific ways in which the Senate, on a bipartisan basis, can come together to find common ground. Let me repeat them as we move to the end of our half hour. The Senator from Florida and I have talked about an alternative approach on judges, which works in the State of Florida and in the State of Oregon. I have talked about the health care issue, the issue that I feel the most passionate about, going back to my days when I worked with the elderly, and the wonderful help I have gotten from ORRIN HATCH, trying to focus on getting the country ready for this huge set of population changes that is coming. I thought it was very fitting that the Senator from Virginia was here, Mr. ALLEN, who has worked with me on technology issues.

A fourth area—something that is fresh in the Senate's mind—is that just a few days ago, we got 80 Senators—far more than anyone could have imagined—to support a major natural resources bill dealing with the forest fire issue. This is something of enormous concern in my part of the country and, obviously, all Americans. Our hearts go out to the people in California where they have had this terrible tragedy. Senator FEINSTEIN and Senator COCHRAN—I always wanted to work with Senator COCHRAN on an issue as chairman of the Agriculture Committee. I haven't had the opportunity until now. He could not have been more constructive and helpful. I think that is why the Senate got 80 votes for that forest rebuild.

So I think the Senator from Florida is setting the right tone and certainly, in our 20 minutes, on the question of judges, health care, technology, and on the question of forestry, the two of us have shown that there is an alternative to a lot of the smallness, a lot of the harshness that we are seeing dominate this debate.

I thank my colleague for all of this extra time, and I believe the tone he is setting is one that will respond to what I hear the country talking about, and certainly what I hear people of Oregon talking about at our 36 town meetings in every part of the State.

Mr. NELSON of Florida. If the Senator will yield, I want to discuss another subject where partisanship gets in the way, and that is putting our fiscal house in order.

The Senator will remember about 2½ years ago, the wonderful optimistic view that we had of the Federal budget,

where we were sitting on a budget surplus in the year 2001—something in excess of $250 billion in that 1 year, with a projected surplus over the next decade that was going to allow us to pay down and almost pay off the entire national debt, and still have enough left over in order to enact a substantial tax cut, and still have enough left over to start new programs that were needed, such as the adequate funding of the bill that we ultimately passed but did not adequately fund—the No Child Left Behind Act—and modernizing Medicare with a substantial prescription drug benefit. We had the opportunity to do all of that and still be fiscally conservative and fiscally responsible in not invading the Social Security trust fund, letting that Social Security trust fund surplus pay off the national debt over the next decade.

Instead, 2½ years later, we are looking in this fiscal year at a budget deficit—not a surplus but a deficit—of a half trillion dollars. That means we are spending $500 billion more than we have coming in in tax revenue. What do we do? We go out and borrow it. Who do we borrow it from? We borrow it in part from the average American citizen when we buy Treasury bonds. Do you know what surprises people? We end up borrowing it from countries such as China and Saudi Arabia.

If we are going to get out of this fiscal briar patch, it is going to take bipartisanship. The excessive partisanship gets in the way, just like it has gotten in the way of having us in session all night for that side of the aisle to make their point of view, and our side of the aisle to say that we have taken up 172 judges and approved 168 of them.

This country has its challenges and we have not even talked about Iraq and Afghanistan and the war on terror. But it certainly has its challenges with this fiscal mess that we are in of bleeding to the tune of deficit financing of $500 billion in this fiscal year.

Again, I thank my colleague. What he represents, my colleague from Oregon, and our colleague from Louisiana, who is with us—what they represent is the bipartisanship of reaching out and trying to bring people together and build consensus. That is what we need to do when we are dealing with Iraq and Afghanistan, the budget deficit, the environment, education, prescription drug benefits, and the approval of judges.

Mr. WYDEN. Will my colleague yield?

Mr. NELSON of Florida. Yes.

Mr. WYDEN. I think you have given us an ideal way to wrap up our half hour. I want to tick off yet another area where we have outlined an opportunity for an alternative path. We have spent our half hour describing a way in Florida and Oregon where you can deal with judges in a bipartisan fashion. We have talked about health care issues. Orrin Hatch and others have helped me, as have other Democrats. I think that has been constructive and a real path to try to deal with what is coming in 2010 and 2011.

Senator ALLEN was here and we talked about technology and the fact that the Senate got 80 votes a few days ago for forestry legislation—an unprecedented bipartisan vote. Finally, the Senator from Florida puts us on this question of fiscal responsibility, another avenue for cooperation between the parties.

I think about the outstanding work done by the Senator from Maine, Ms. COLLINS, who chairs the committee overseeing the operations of Government. She and I have been very concerned about the lack of openness in competition in the contracting process for these reconstruction contracts. It looks, given the events of this week, as though you are going to get more information out of Baghdad than you are going to get out of Government agencies in Washington, DC. There wasn't a shred of partisanship with respect to how we tackle this issue. So I think what we wanted to do in our half hour of time—the Senator from Florida and I—is not just talk about everything that has gone wrong, but to outline on specific issues an alternative path—a path that shows that we are listening; that the notion that somehow Washington, DC, is like a great wall of China, an unpenetrable community for the American people doesn't have to be that way. Whether it is judges, health care, technology, forestry, or the fiscal morass that the Senator from Florida has talked about, we want people who are listening this morning to know that we do think there is another way for the Senate to do its business.

I say to my friend from Florida, we came to Congress essentially together in the other body and then here. I have really enjoyed this and particularly the tone that I think he set out when we began—that the Senate needs to do better, and if you want to get anything important done—which is why we are sent here—it has to be bipartisan. I thank my colleague.

Mr. NELSON of Florida. Mr. President, has the half hour expired?

The PRESIDING OFFICER. The minority has an additional 1 minute 50 seconds.

Mr. NELSON of Florida. Mr. President, I thank my colleague from Oregon, and I thank the Senator from New York, who has already shared his comments. I am looking forward to the comments of the Senator from Louisiana and also the Senator from Iowa.

Bottom line: What is this about? This is about fair and equal treatment for the American people and producing a Federal judiciary that will be open minded. Over two centuries ago, a group of political geniuses got together and crafted a written document called the Constitution, which would not allow power to be concentrated in the hands of any one person or any one institution but, rather, that an arrangement of sharing of power would occur. Each institution would have a check and balance against the other.

You are seeing that check and balance play out now in the nomination and confirmation, and/or the advice or nonconfirmation of this body, the Senate. So it is a great privilege for me to participate in it, along with the Senator from Oregon.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. NICKLES). The Senator from Virginia.

Mr. ALLEN. Mr. President, I listened to the words of the Senator from Florida and the Senator from Oregon. As the Senator from Oregon said, we have worked together on things from cybersecurity to nanotechnology, important initiatives for the competitiveness of our country. We have worked together to prevent access taxes on the Internet and other matters, particularly in the technology area.

I listened to the Senator from Florida. This is why I wanted to pose a question to him. I realize both sides were out of time so I bring up the issue now.

In the way he was speaking earlier, I would say, the Senator from Florida, Mr. NELSON, said we approved all these judges and there were four we have not approved. Indeed, on one of them he actually voted for; that was Miguel Estrada. Miguel Estrada received 55 votes for cloture to actually go to a vote.

In the case of Miguel Estrada, the majority of Senators were in favor of Miguel Estrada. I commend Senator NELSON as one of the four or five Democrats who, on Miguel Estrada's nomination, thoroughly examined his qualifications and decided that he should be accorded a vote. But we now have a supermajority requirement for judicial nominations, a 60-vote margin.

However, to look at a cloture motion as a vote up or down is not correct. The Constitution does not require a 60-vote margin. The Constitution requires advice and consent in a simple majority, one way or the other, with a simple, fair, and equitable vote. Miguel Estrada had 55 votes. Senator NELSON was one who voted to end cloture. Clearly, with a fair vote, he would now be on the DC Court of Appeals. Instead we had to go through seven cloture votes.

The same with Attorney General Pryor, Judge Pickering, and Justice Owen—all have had majority votes to end cloture. So the reality is, and why there is frustration and aggravation and why we are trying to get justice and equity done, is that in fact there has not been a simple up or down vote on this nominees.

In the event that one of these cloture votes had only resulted in 47 or 48, I expect the writing would be on the wall and we would recognize the President would have to renominate. That happened years ago with Justice Fortas.

In this situation, it is clear, with Miguel Estrada, Mr. PRYOR, Judge

Pickering, and Justice Owen, the majority are in favor. It there will probably be a majority in favor of Judge Kuhl and Judge Rogers Brown.

I have been talking about country music songs through the night and through the morning. This reminds me of an analogy to ''Rawhide,'' except the opposite, instead of ''movin', movin', movin','' we have ''stallin', stallin', stallin'.''

What we want is people to decide in the Senate, yes or no, whether you are going to move them up or move them down; yet, nevertheless, move and decide. That is the responsible thing to do, consistent with the Constitution, consistent with the accountability of the Senators to the Constitution and to their constituents as well as fairness to these nominees, to give them the fairness of an up-or-down vote. Simply decide.

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

Mr. ALLEN. Yes, I will.

Mr. BENNETT. I am interested to hear the Senator make the point that an up-or-down vote is what we are asking for. The Senator was in the Chamber when the cartoon was displayed with highly offensive racial characteristics attributed to the judge from California. I ask the Senator if he is aware that this African-American woman, who in my opinion has been slandered, has been the subject of comment by Al Sharpton, one of the candidates for President. Al Sharpton said he disagrees with the woman and believes she is not qualified to sit on the bench but that she is entitled to an up-or-down vote. Is the Senator aware of Mr. Sharpton's comment on that?

Mr. ALLEN. No, I was not aware of that. I thank the Senator from Utah, Mr. BENNETT, for bringing that up. I hope some of our colleagues on the other side of the aisle will look back on some of their own statements from 3 years ago and 4 years ago when they were saying judges deserve up-or-down votes, and at those contemporaneous times, from Reverend Sharpton. I may not always agree with Reverend Sharpton, but he seems to be a man of fairness and I hope our colleagues on the other side of the aisle will heed his advice.

Mr. BENNETT. I would say I almost never agree with Reverend Sharpton, but I have seen the diligence with which he and other civil rights leaders have pounced upon any politician who has ever dared hint at any kind of racial slur or attack on an African American. At least he has shown this degree of consistency, that he has now spoken up against those who are Democrats who may have been guilty of a racial slur, and come to the defense of an African American, even though he disagrees with her.

I think it appropriate for us to note that. I appreciate the Senator's yielding to me for the opportunity to make that comment.

Ms. LANDRIEU. Will the Senator from Virginia yield for a question?

Mr. ALLEN. I thank the Senator from Utah for bringing up, not only the Sun, but that enlightening view.

Ms. LANDRIEU. Will the Senator yield?

Mr. ALLEN. I yield at the sufferance of the Senator from Tennessee. I will yield, but it will be on your time.

Ms. LANDRIEU. Just a question. I am sorry the Senator from Utah left the floor. Perhaps if he hears this question, he might come back to respond.

I am wondering, since he raised the name of Al Sharpton, Rev. Al Sharpton, who asked for a vote on one nominee, supposedly. If Al Sharpton—I am sure he did, and others—asked for a vote on 60 of President Clinton's nominees, which represented 20 percent of the nominees sent up by a former President, would the Senator from Utah have agreed to a vote, if Rev. Al Sharpton had called him? I don't think so. He could come back to the floor and respond to that.

The issue is not single votes. The issue is whether the Senate of the United States, the Democrats, have a right to give advice and consent to the President. The facts speak for themselves. The Senator from Virginia knows them well. The numbers are 168 of President Bush's nominees have been approved with bipartisan support and cooperation from the Democrats in the Senate. Only 4—only 4—have been stopped—only 2 percent. That is in contrast to the thousands—this is my question.

The PRESIDING OFFICER. The Senator may ask a question.

Ms. LANDRIEU. Did the Senator from Utah or the Senator from Virginia know that when President Clinton was in the White House, thousands and thousands of individuals—did you know—called to ask for votes on the 60 percent?

The PRESIDING OFFICER. The Senator is entitled to ask a question. She is not entitled to make a speech.

Ms. LANDRIEU. I am asking a question: Did you know? That is my question. Did they know that when the former President sent hundreds of nominees and asked for a vote—and I am sure Reverend Sharpton and others—did they know, some of the members and groups involved and interested Americans involved—did they know that 55 nominees were not given a right to have their vote called?

Mr. BENNETT. May I respond?

The PRESIDING OFFICER. The Senator from Virginia has control of the time.

Mr. ALLEN. The question was propounded to the Senator from Utah, and I yield to the Senator from Utah. But before I do, the point is here and now. The four you are talking about is already six. The Senator from Florida was talking about these so-called cloture votes as being votes. They are not fair up-or-down votes. That is the point here. Don't try to shirk responsibility or shirk accountability. Are you going to vote for or against these individuals based upon their merits? If you are against them, that is fine. But have the equity and fairness of a vote.

I was not here in those days. All I know is, since President Bush has come into office, he has put forward individuals, including Roger Gregory, whom I mentioned earlier, who was a recess appointee of President Clinton, and it was really difficult for a lot of Republicans to act on statements of Judge Roger Gregory based on his qualifications and merits, but we did. We think you on the other side ought to accord these nominees the same fairness and equity of a fair vote.

But I will yield to Senator BENNETT, responding on the Al Sharpton question.

Mr. BENNETT. Mr. President, I will answer the Senator from Louisiana.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. I am unaware of how many nominees did not get out of committee. I am unaware of what may have happened prior to a nomination coming to the floor. But I do know I would allow a vote on every nominee who comes to the floor, regardless of which party it may be or regardless of which President might put that nominee forward. And I would agree with Al Sharpton or anyone else who called for an up-or-down vote, without a filibuster, on any nominee, any judicial nominee who has come forward.

There is no question but nominees get lost in committees. There is no question nominees get held up by holds and other activities. But once a nominee has been cleared by a majority vote of the committee and placed on the floor, that nominee is entitled to an up-or-down vote. I have always held that position. I always will hold that position. It is for that reason I will support the Frist-Miller rule change that will make that position very clear.

I do not care who the President is, under the Constitution he or she has the right to make nominations. The Senate handles those nominations. I understand sometimes those nominations will be stopped in committee. But once the committee has voted by a majority vote to put the nomination on the floor, whether it is my President or someone else's President, I will always support and always have supported the notion that that individual is entitled to an up-or-down vote.

Mrs. LANDRIEU. Will the Senator from Virginia yield?

Mr. ALLEN. I will yield to the Senator from Tennessee.

The PRESIDING OFFICER. Who seeks recognition?

The Senator from Arizona.

Mr. KYL. Will the Chair advise me when I have spoken for 90 seconds? I simply want to make one point. That is, the chart that is before us on the other side is more than misleading; it is absolutely false. There are always judges who are not confirmed at the end of a Presidential term. There were

at the end of the Clinton term. There were at the end of the first Bush term. So it is wrong to say that, because there were judges who continue be confirmed because they were nominated late, they were rejected.

What is correct is to say is there have been four nominees rejected by filibuster without a fair trial, without an up-or-down vote. I have been trying to think of an analogy, watching people say: Look, it's 168 to 4; we have only filibustered 4. Of course, there are a lot more in the wings.

But here is an analogy that deals with the law: We only hanged 4 people without a trial. We gave the other 168 a fair trial. We had a vote in the jury.

That is what is going on here. It is not a matter of defeating the judges. Judges are defeated by both parties very seldom, and there are some at the end of a President's term who can't be voted on just because of time constraints, and it is about the same number in every party, if I go back in time.

What is unprecedented is the filibuster where you don't even allow them a vote. The analogy I came up with is the one I just mentioned—I think it is very apt—to say, Look, we only hanged four people without a fair trial; the others got a fair up-or-down vote.

That to me is wrong. That is what we are talking about here.

Mrs. LANDRIEU. Will the Senator yield for a clarification?

The PRESIDING OFFICER. Who seeks time?

Ms. LANDRIEU. Will the Senator yield for a clarification?

The PRESIDING OFFICER. Who seeks time?

Ms. LANDRIEU. The Senator from Arizona.

The PRESIDING OFFICER. Is the Senator from Louisiana in control of time?

Ms. LANDRIEU. I think I——

The PRESIDING OFFICER. The Senator from Tennessee is in control of the time. The Senator from Tennessee.

Mr. ALEXANDER. How much time does the majority have?

The PRESIDING OFFICER. The majority has 17 and a half minutes.

Ms. LANDRIEU. Parliamentary inquiry: How much time do the minority and majority have at this hour to be allocated?

The PRESIDING OFFICER. The majority has 17 minutes, the minority has 28 minutes.

Ms. LANDRIEU. Thank you.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. ALEXANDER. Mr. President, insofar as the Senator from Arizona's comments are concerned, he said we gave 168 a fair trial and hanged 4 without a trial. He might have also said we had never done that before this year. That is the point.

Let me step back from this and try to put it in a little different framework. I am new to the Senate. I came here in January for the first time even though I worked here before, 35 years ago, for Senator Howard Baker.

A lot of people ask me, knowing I was a Governor for a while: What do you think of it? How do you like the U.S. Senate?

I suspect the reason they ask that is that some former Governors who have come here have not liked it. It is a very different sort of job. But this has been a great privilege for me. It is hard for me to think of a thing that has not been good about the last 10 or 11 months.

The Senator from Louisiana is here. One of the good things is she and I have worked together on issues that have to do with the environment and energy. So the opportunity to speak, the people with whom I work, the issues I deal with, all those things make serving in the Senate a great privilege.

The only real disappointment I have had is this issue of judges, of the treatment the Democratic side has given to President Bush's appointment of judges. I have been puzzled by that. I have even said to some of my friends on the other side: Before this year, before I got here, the Republicans must have done something awfully bad to you to produce this kind of reaction because I really don't understand it.

I know something about the appointment of judges. As Governor of Tennessee, I appointed about 50 judges. In fact, the other day, I went back to Nashville for the retirement ceremony for Chancellor Irwin Kilcrease. I appointed him in 1980. He was the first African American ever to serve as a chancellor in our State. He served with dignity. I didn't ask him his political party before he was appointed. It turned out he was a Democrat. I didn't ask him his view on abortion. I still don't know what it is. I didn't ask him how he was going to decide the cases before I appointed him. I thought it would be totally inappropriate.

I checked to see if he was intelligent, fair, had good character, if he would respect people who came before him, and I appointed him and he has served with great distinction, as did the others.

I also worked for a great judge. The Senator from Louisiana certainly knows him well, or knew him well. His name was John Minor Wisdom. He lived in New Orleans. When I graduated from law school in the mid-1960s, he was already considered to be one of the great Federal judges of the country.

He and Judge Elbert Tuttle of Atlanta, Judge Richard Rives of Florida, and Judge John R. Brown of Texas, all appointed by President Eisenhower, Republican judges, presided over the peaceful desegregation of the South in the 1960s and into the 1970s. In 1962, they ordered Ole Miss to admit James Meredith. They are regarded as heroes in the South.

Judge Wisdom was a great judge. I am sure, before he was appointed, no one in the Senate asked him how he would decide the cases he was about to decide.

What is going on in the Senate today reminds me of the old mountain story about the lawyer who came up to the judge at the beginning of the case and said: Judge, may I make a few arguments on the law? May I tell you about the case?

The judge said: You don't need to tell me about the case. I got a phone call last night. I pretty well know the facts. Just give me a few points on the law.

The importance of judgeships in America is that when we go before them, we expect to be treated fairly. We don't believe it is a political exercise. And we accept the results. That is why it is so inappropriate, it seems to me, for us suddenly to be rejecting President Bush's appointments because of their permanent views when it is established by their long records that they are able to apply the law.

Let me especially speak about a couple of cases from the part of the country I know the best, the South. I want to mention first the attorney general of Alabama, Bill Pryor. I want to mention, second, the Federal judge from Mississippi, Charles Pickering.

Let's talk about Bill Pryor. He is a young attorney general, I just learned the other day. I had not really focused on him enough to know exactly who he is. He also was a law clerk to Judge Wisdom. He was editor in chief of the Tulane Law Review. I am certain the Senator from Louisiana would agree that would qualify someone, at least on paper for good starters, to be a good judge. I know Judge Wisdom hired extraordinary people. I know he never hired anyone who wasn't fair. I know he would never tolerate anyone in his office who wasn't committed to civil rights because he was one of the leading civil rights judges in the country. Yet on the other side of the aisle, the argument against Bill Pryor—this is no more than a racial smear—is that he is not sensitive to civil rights, he is a white conservative from Alabama and, therefore, can't be trusted, that is what the point is. But there is nothing in his background that would suggest that. That is made up out of whole cloth. That is not the reason the other side will not give Mr. Pryor an up-or-down vote, something that has never been done in the history of our country until this year with Federal nominees.

Let me just speak about what Mr. Pryor's career has included. When he was appointed attorney general of Alabama, he voluntarily said in his ceremonial remarks he criticized the State constitution for banning interracial marriage. He didn't have to do that. He volunteered that.

What is he doing today? He is trying to oust the chief judge of the Alabama Supreme Court because the judge insists on keeping a copy of the Ten Commandments in the courthouse in violation of a Federal court order. It is not because Mr. Pryor doesn't believe in the Ten Commandments. He believes in the law. He is able to put the law ahead of his own views.

He is a Republican. He took to the Supreme Court of the United States a reapportionment case that worked against the Republican Party in Alabama. He didn't do it because he wanted to hurt the Republican Party, he did it because he was able to put the law above his own political beliefs.

What else did he do? This may be the most serious and difficult act that an Alabama attorney general could do. I am surprised that he is still in office having done it. He wrote a letter to every school district in Alabama—to every superintendent in every school—telling them the football coach couldn't lead a prayer before the football game—not because he doesn't pray, not because he is not religious, but because he believes the law doesn't permit it. He is a Roman Catholic. He said so in the hearing. He is pro-life. But on the issue of abortion, he wrote all of the district attorneys in Alabama and told them they could not enforce an anti-abortion law passed by the State of Alabama because parts of it were unconstitutional. He put the law before his religious beliefs.

Here is someone who was the editor in chief of the Tulane Law Review, a law clerk to the greatest civil rights judge of the last 30 years in the South, who has consistently put the law ahead of his own beliefs, and the other side won't bring him up for a vote. Why would that be?

Let us go to Judge Pickering for a moment, another example in the South.

The suggestion has been made that he is not racially sensitive. Those are code words. That is to suggest that somehow Mr. Pickering is a bigot and is not fair to African Americans. We all know what the slur is, what the slander is, what the implication is. We all know what that means. But what do the facts show?

The facts show that Mr. Pickering was not on the sidelines, that he was not in the background, that he was out front during the great civil rights struggle of the 1960s and the 1970s. He lives in Laurel, MS. He lived at the center of the problems of racial desegregation. He lived in the same town as the head of the White Knights of the Ku Klux Klan, Sam Bowers. The White Knights were organized because they didn't think the Klan was mean enough. The White Knights and Sam Bowers, according to the Baton Rouge Advocate, was the most dangerous, the most violent racists living in the 1960s.

We hear a lot about terrorists today. The terrorists of the 1960s in the United States were the Klan members in Laurel, MS.

What did Charles Pickering do? He testified in public against Sam Bowers, in the courthouse, against the most violent living racist in America, according to the Baton Rouge Advocate. That was 1967. He has had a whole lifetime of commitment to racial progress. It seems as if almost everybody in Mississippi supports him, including most of the Democratic leaders.

William Winter, my friend with whom I served, former Democratic Governor, a beacon for racial progress in Mississippi, strongly supports Judge Pickering. Frank Hunger, who was a law clerk on the Fifth Circuit Court of Appeals where I was—Frank Hunger was President Clinton's Deputy Attorney General, he is Al Gore's brother-in-law, and he strongly supports Judge Pickering.

Why in the world would the other side slur Judge Pickering and suggest that he is guilty of racial insensitivity when he stood up for desegregation? He might have been on the other side that opposed segregation, but he wouldn't. He was out front risking his life, literally, and putting his own children in public schools when others were running off to segregated academies. When we bring him up before the Senate—after sticking his neck out and sticking up, in Mississippi, for desegregation—we cut his neck off in Washington, DC? Why is that being done? I am not sure. I know it is not right constitutionally.

The President nominates the judges. That has always been the way it was. Despite the rhetoric on the other side, until this year, this Senate has never used the filibuster to deny an up-or-down vote to a Presidential nominee who has a clear majority in the Senate. The filibuster has been used for other purposes by the other side.

I was hearing a lot of talk last night about protecting the rights of the minorities. There were not a lot of African Americans in the South in the 1960s who felt really protected when a filibuster was being used by Senators to stop the most important piece of civil rights legislation that was offered here. So it is not that great a device to have.

Why are they doing this? I don't know. One clue is to change the rules, which we may have to do, but the other is the election, which I guess is what I prefer.

In Senate races in Florida, in North Carolina, in South Carolina, in Arkansas, in Georgia, and all across this country, I hope this is an issue. I hope people say: Why was President Bush, for the first time in our history, not given a chance to have up-and-down votes on men such as Charles Pickering and Bill Pryor who were extraordinarily qualified, had the majority vote and were courageous leaders in the South? Is it because they are southerners? I don't know what it is. But the other side is so captured by narrow interests that they are digging a hole so deep that I hope it has an important political result next year.

I would prefer to see us operate differently, and I will pledge to do what the Senator from Utah pledged to do. While I am a United States Senator, if a nominee comes to the floor for a judgeship by any President, Democrat or Republican, I will not participate in a filibuster. I will vote to cast an up-or-down vote on any nominee of any President. I think that is the right thing to do. The sooner those of us on both sides do that, the more we will get back to appointing judges in the way Judge Wisdom was appointed, and the way Judge Kilcrease was appointed. And we would appoint judges we would respect. We would not be asking them how they will decide cases before they come in, and we would not be submitting them to an ideological litmus test before they are appointed.

I yield the floor.

The PRESIDING OFFICER. The Senator from Louisiana.

Ms. LANDRIEU. Mr. President, I would like to answer a couple of points that the Senator from Tennessee raised. My colleague from Iowa is here to join me for a few moments to speak on the floor about this subject.

Let me say there really isn't a Member I respect more in the Senate than the new Senator from Tennessee. He and I served together on the Energy Committee. I am well aware of his very progressive views on civil rights. I am aware of his history as a clerk for one of the finest justices who has served in the country. I am aware of his connection to Louisiana and as a southern leader. As a Democrat, I respect the work he did in Tennessee as a Republican Governor of that State. I look forward to many wonderful years working with him.

But I would like to answer the question of why many people in the South are upset and concerned about what the Republican majority is calling on us to do today.

I want to start with the charge that the Senator from Virginia said—stalling, stalling, stalling. The Senator from Tennessee knows very well the Democrats did not ask for this 30 hours. The Republican leadership is stalling the veterans bill, the Energy bill, and the housing bill, which people in our State—as the Senator from Tennessee knows, I have 400,000 veterans in Louisiana. He must have 500,000 veterans in Tennessee. Their bills are pending while we debate whether or not it is fair to block 4 of 168 nominees—4 of 168.

The second point I want to make is that the Senator from Arizona took 90 seconds to come to the floor and refer to the people who are listening—and we do believe the country is interested in the debate here in the Senate—that these four individuals were ''not given a trial.'' I think the words were ''hung without a jury,'' or some such inflammatory language.

Please let me say for the RECORD that these 4 judges out of 168, only 2 percent of President Bush's nominees, were given hearings. The nominee from Texas, Priscilla Owen, 1 full day of hearing; the nominee from Alabama, Judge Pickering, 2 days of hearings, and 1 day was given after the anthrax attack. The Capitol was literally under attack and we felt so strongly about providing a hearing the day after the attack that the nominee was given a hearing.

Mr. Estrada was given 1 day of hearing, and Mr. Pryor was given 1 day of hearing.

So the notion that these nominees have not been given their day in court, time to express their views and to answer questions, is absolutely false. That is in contrast to the 57 nominees of 63 of President Clinton's nominees. Let me repeat: 57 out of 63 who didn't get 1 minute of a hearing, not 1 minute.

These 4 we have blocked for reasons that I and my colleagues will go into—and Senator HARKIN will speak about in a minute—have been blocked for very good reasons. All of them got a hearing. I just wanted to make that clear.

I know the Senator from Tennessee will remember those hearings in those committees.

The third point I want to clarify is the Senator from Utah said he would never not give a nominee the opportunity for a vote. The RECORD will reflect that the Senator from Utah has voted seven times against cloture for giving a nominee—not a judicial nominee but appointee—a vote on the Senate floor.

I urge Senators to not use words such as ''never'' or ''every'' because the fact is, filibusters have been attempted before over the course of our history: In 1968, in 1980, in 1994, and in the year 2000, but they haven't been successful.

This filibuster is successful for one reason and one reason only: The American people do not want these four judges on the bench. They just do not want them on the bench, and they are expressing that through the Democrats here in the Senate. I will tell you why.

Let me talk about Mr. Pryor for just 1 second. I want my colleague from Tennessee to know, and my colleague from Alabama will know this. I know I am going to aggravate some Democrats when I say this. But I was willing to vote for Judge Pryor, and I had basically told that to the Senator from Alabama, who is a good friend of mine, someone with whom I really enjoy working, who is much more conservative than I am on some issues. But I really do like him and I really do trust him in many ways. I talked with him and we talked about it. I was prepared to vote for Mr. Pryor until this ad appeared. Let me read it to you. Judicial Chambers:

> While some in the Senate are playing with religion, Catholics need not apply.

I am a Catholic. When these ads appear, by right-wing groups that want to divide this country, Catholic against Protestant, Gentile against Jew, man against woman, straight against gay, it is something inside me that just boils up.

When the Republican leadership tells me I have a problem with Catholic judges—my father is a Catholic judge, and my sister is a Catholic judge. I don't have problems with Catholic judges. I don't have problems with William Pryor. I have problems with this red meat rhetoric that is anti-American, anti-constitutional, and defies every principle that this country and the men who are dying today and women in Iraq fight for. It is not a matter of whether you are Catholic, whether you are Jewish, whether you are Protestant. You should be judged on qualifications. But the right wing—and I told the Senator from Alabama until the National Republican Party repudiates this ad, the chairman of the party stands up and says these ads have no place, and the Republican Party repudiates these ads, the nominee will not get my vote—not because he is pro-life and I am pro-choice, not because of this or that, but because of this ad.

That is what this election is about. I will tell you the people in my State are tired of it. I have Catholics and Protestants who want to be united, to be together, who want to create jobs, who want to help veterans, want to figure out the problem in Iraq, and they are so tired of the Republican leadership just using every little wedge issue, religion or race to wedge everybody apart. I know Democrats aren't completely innocent of these tactics, but it has gotten to the point where it has basically shut down the work here.

I want to be clear. My dad is a Catholic judge; my sister is a Catholic judge. I am not against Catholic judges. But we are against ads like that, and until they are repudiated we will not allow this nominee to go forward.

I don't even know if I want to go into Judge Pickering from Mississippi because I know he is from a fine family. But I will say this about that. I know his son well. He is a wonderful man. He is in Congress. I know he has beautiful grandchildren, and he has a wonderful family. But I will tell you this: The Senator from Tennessee should know this better than anyone because I think he is part of the new South. I think his whole life has been spent helping us in the South deal with the terrible issue of discrimination, to the point where it breaks your heart to think about what the laws did to people, crushed their spirits, crushed their lives, robbed them of the opportunity for anything. I grew up in that kind of place. I spent my whole life trying to change it, and I know he has, too.

One of the reasons we have stopped the Pickering nomination is that many of us—and I don't think it is just Democrats, it is Republicans and Independents in the South—want the nominees on that Fifth Circuit to be about the new South, not the old South. To many of us, many of the moderate, middle, mainstream civil rights organizations, this Pickering nomination is about the old South. He was not one of the strongest civil rights leaders in Mississippi. There are hundreds of qualified judges, White and Black, who really sacrificed for civil rights. Why couldn't we have somebody like that on our bench? They don't have to be liberal. They could be moderate or conservative. Why do we have to reach back and find someone from the past? Why not reach forward?

When Judge Pickering got out of law school, he asked his law partner to join him. His law partner belonged to the Mississippi Sovereignty Commission. My father got out of law school a few years before he did, in 1954. Judge Pickering got out in 1961. My father never, in 100 years, would have asked a member of the Mississippi Sovereignty Commission to be his law partner. It just wouldn't have happened, because our family was a civil rights family. We rejected everything the Mississippi Sovereignty Commission or the Louisiana Sovereignty Commission or the Alabama Sovereignty Commission did, which was to basically intimidate African Americans. No matter how good they were, no matter how hard they worked, no matter how talented they were, no matter how many times they went to church or loved their children, because they were Black, they couldn't get a job, they couldn't live in the neighborhoods. That is what the sovereignty commissions did.

So you are asking me, after spending 40 years of my life fighting against this, to stand here and say it is OK to appoint someone like this to the bench? And then get upset when I say I have a problem with that?

Well, I am sorry about it. I do have a problem with it. Most of the people in my State have problems with it because, believe me, there are lots of people in Mississippi who were in the civil rights movement on the right side of the movement, not the wrong side; the forward side, not the back side. And I will tell this President or any President, we are looking for people in the future, not the past. We are looking for a new South. We reject the old South.

In conclusion, let me just say that my time has expired. Senator HARKIN is in the Chamber. I thank him for his great patience. I am sorry I got a little exercised. But I guess coming from the part of the country I do and being Catholic, it has been very hard, especially for us, to have to hear some of the rhetoric that is thrown around on the Senate floor.

Again, to my friend from Tennessee, I have the utmost respect for him. He has been a real leader in this effort.

I yield the floor and acknowledge Senator HARKIN who is here to speak.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. HARKIN. Parliamentary inquiry: How much time do I have?

The PRESIDING OFFICER. The Senator from Iowa has 14 minutes.

Mr. HARKIN. Is that under a unanimous consent agreement?

The PRESIDING OFFICER. The Senator has 14 minutes under the consent arrangement and 2 minutes remaining under this hour segment.

Mr. HARKIN. Mr. President, I was driving in this morning and listening to NPR. I couldn't turn on the television this morning because our house

didn't have electricity. The wind knocked out the electricity. So I was listening to the radio driving in. They had a little snippets of the debate last night: Some people talking about this as being theater, whether it was real theater or false theater. I don't know that I want to even venture a guess as to whether this is real or false, but I will tell you this: It is hypocritical theater. This is hypocritical theater going on right now.

The arguments of my friends on the other side, the Republican side, are so filled with hypocrisy, so filled with double standards. These arguments reek with pure, unadulterated partisan politics.

I have listened to this, and it is hard to know where to begin. This morning I was listening to some of my friends on the other side talk about a moral obligation to have a vote on the Senate floor on judges. However, I was listening to the words carefully. Evidently, it is not morally correct or morally right for Democrats to hold up judicial nominees on the Senate floor with extended debate or filibuster, whatever you call it. That is morally unacceptable. But it is morally acceptable for Republicans to hold up judicial nominees in committee.

Here is where the words get kind of funny. I have heard the Republicans talk about this, and they say: That is not a filibuster in committee; that is a hold. Here on the floor it is a filibuster. One is morally acceptable; one is not.

Please tell me where the moral demarcation line is on this. How absurd. How reeking of hypocrisy. I remember 15 times more judicial nominees were blocked by Republicans. But they did it in committee.

When this all started last night, I thought, this is so appropriate that this theater, this hypocritical theater we are engaged in, is happening at nighttime. It is so appropriate for this event to take place at night because under cover of darkness is where this majority likes to operate, in committee, not open on the floor. No, block the nominees in committee. That is not a filibuster. That is a block. That is a hold. That is OK. Morally, that is acceptable. It doesn't count. But don't dare block them out in the open, on the Senate floor.

Three years ago, Bonnie Campbell, former attorney general of the State of Iowa, head of the Violence against Women Office at the U.S. attorneys office here in Washington, did a great job, came before the committee. President Clinton had nominated her for judicial appointment to the Eighth Circuit. Both blue slips were turned in by the two Senators from Iowa. She had a hearing, a great hearing. Not one issue was raised in public against Bonnie Campbell, no one said she was unfit to be a judge, that there was something bad in her background, that she had made bad judgments or decisions as attorney general. Not one thing came out against Bonnie Campbell, but she never got on the floor for a vote. She was held hostage in Committee never to be seen again.

Now I say to my friends on the other side: I stood here, asked numerous times unanimous consent to bring Bonnie Campbell out on the floor to have a debate. Every time, it was objected to. Where were my friends who are so sanctimonious now? Where were they 3 years ago when I asked unanimous consent to bring Bonnie Campbell out of committee?

Now I see clearly. The scales have fallen from my eyes. I see clearly. It is morally OK to stop them in committee. Don't give a vote in committee, under cover of darkness. You pull the cloak over it and you don't allow them out of committee. That's OK because no one really knows what's going on outside the Beltway.

It is hypocrisy—sheer hypocrisy.

The Senator from Arizona earlier said he had an analogy, something about, we are going to hang them without a trial. I kind of missed a little bit of that. How about this analogy—about Bonnie Campbell's analogy? How about all of these judges who were held in committee and blocked? They were held in prison forever with no charges, no trial, no vote, just lock them up and don't ever let them out.

Sanctimonious arguments on the other side. My, my, my. Notice the nuance of the words. How many times have I now heard Republicans on the other side say: I will never, never vote to block a nominee on the floor? I hear it all the time. That seems to be a common refrain from the other side: I will never vote to block a nominee using a filibuster.

My good friend from Utah said that. But check the record. The Senator from Utah, who was recently in the Chamber saying he would never vote against cloture, voted against cloture 8 times in the Clinton administration, against 8 nominees, Janet Napolitano to be U.S. attorney, Ambassador Flynn, Walter Dellinger, Rick Taggert, Sam Brown, Edmund DeJarnette, Henry Foster, Derrick Shearer. My friend from Utah voted against cloture eight times. Again, where is the moral demarcation line?

I guess it is morally all right for my Republican friends to vote against cloture on nominees for attorney general, ambassadors, et cetera. It is morally OK to do that. But it is not morally OK to vote against cloture on a lifetime appointment to the judiciary.

Please, someone tell me about the moral demarcation line. You can vote against cloture for nominees eight times and come out on the floor and say, I will never vote against cloture on a judicial nominee.

Again, notice the nuance of the words. This is a filibuster. But if they're held up in Committee with a hold for no apparent reason, well that doesn't count. There's nothing morally wrong about that. I heard that from my Republican friends: We didn't filibuster all of these judges in committee; they just had a hold put on them. Apparently, there's an obvious moral difference that I just have failed to see.

It is at times such as this I am reminded of one of my favorite refrains from one of my favorite plays, ''Finian's Rainbow.'' It goes like this: For life is like cricket. We play by the rules. But the secret which few people know, that keeps men of class far apart from the fools, is to make up the rules as you go. It is a little refrain from a song in ''Finian's Rainbow.''

Republicans just want to make up the rules as they go, change them to fit the times and circumstances, change their arguments—these actions represent sanctimonious hypocrisy, partisan politics, double standards.

Well, we have had 30 hours here, I guess. I want to just say, I thank all of the staff and the pages, the reporters, the police, all who had to stay and work overtime.

Speaking of overtime, while we are wasting time with this theater of hypocrisy, guess what is happening in other parts of this building. Guess what is happening under the cover of darkness. The Republicans want to take away your overtime pay protection. That is what is happening.

The administration, earlier this year, came out with a new proposed rule that will effectively take away overtime pay protection for 8 million Americans. Not one hearing was held on it. Cover of darkness. Not one public hearing was held on that. The Senate voted on an appropriations bill to stop the administration from enacting that rule. The House of Representatives joined in and voted.

Yet the administration, the President, says he is going to veto it. He is going to veto funding for education, health care, medical research at NIH, funding for job training programs, all because they want to take away your overtime pay protection. All these people who worked here overnight—police, reporters, staff, so many people who worked overtime—while they are playing this little shell game.

It reminds me of that carnival shell game. You watch this hand, but with the other hand they are picking your pockets. Let's waste 30 hours of time talking about 4 judges to hide the fact that we don't want to vote on the issues that really matter to the American people—like raising the minimum wage, protecting overtime, extending unemployment insurance assistance, passing a real medicare prescription drug benefit and responsible energy bill and passing our appropriations bills.

It is a shell game. Look at these 4 judges that the Democrats are blocking. Don't look a the 168 judges this Senate has confirmed under President Bush. Hype this up. We will have this theater to hide what's really going on.

The other side may think the American people don't know what is going on. But I believe the American people

haven't been fooled. They know this is a waste of time to hide what the Majority can't or don't want to get done.

The PRESIDING OFFICER. The Senator's time has expired. For the information of our colleague, his time has expired.

The Senator from Tennessee has 2 minutes.

Mr. ALEXANDER. Mr. President, I have been listening to my friend from Iowa. One thing he said that I agree with: The quote from ''Finian's Rainbow'' about making up the rules as they go a long.

The issue before us is a pretty simple one. I think a lot of other Americans think President Bush ought to appoint judges with conservative principles who will not make up the rules as they go along, who will not make up the law as they go along, who will enforce the law as they find it, as Attorney General Bill Pryor does in Alabama, as Judge Pickering does in Mississippi.

The issue here, after all the charts are taken down and all the rhetoric is put aside, is very simply this: For the first time in our Nation's history, the Democrats are using the filibuster to keep us from having an up-or-down vote on President Bush's nominees after they have gotten out of committee, after they have gotten to the floor, and after it is clear they have a majority of votes. That is the first time in our Nation's history.

Second, they are doing it to extraordinarily well qualified women and men. I don't know whether that is grounds to change the rules of the Senate or not. But it surely is grounds for the people of the South and this country to address in the next election. Should a President have the right to appoint judges with conservative principles who will enforce the law rather than make it up as they go along? We believe that a President of whatever party should have that right. The other side, for the first time in 200 years, says: We are going to stop you from having an up-or-down vote on people who have the majority vote.

The PRESIDING OFFICER. The time of the Senator from Tennessee has expired.

The Senator from Iowa is recognized.

UNANIMOUS CONSENT REQUEST—S. 224

Mr. HARKIN. Mr. President, I ask unanimous consent that the Senate return to legislative session and proceed to the consideration of Calendar No. 3, S. 224, the bill to increase the minimum wage, that the bill be read the third time and passed, and the motion to reconsider be laid upon the table.

Mr. MCCONNELL. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. MCCONNELL. Mr. President, parliamentary inquiry: The time is controlled how?

The PRESIDING OFFICER. Under the previous order, beginning at 9 a.m., the minority and majority each control 30 minutes.

Who yields time?

The Senator from Kentucky is recognized.

Mr. MCCONNELL. Mr. President, I rise today on behalf of my constituents in the Sixth Judicial Circuit to discuss the plight we confront in that circuit. That circuit is made up of Michigan, Ohio, Kentucky, and Tennessee. As you can see by this chart, the Sixth Circuit is currently 25 percent vacant. If you are a litigant in the Sixth Circuit of Kentucky, it takes you 6 months or longer to get your case decided than in any other circuit in America.

Why are we in this situation? We are in this situation because the two Michigan Senators won't allow the Senate to go forward on four nominees from their own State—the Michigan Four. So we languish with a 25 percent vacancy rate. Litigants have a 6-month or longer wait than anywhere in America, while the two Michigan Senators hold up nominees from their own State, presumably because President Bush will not nominate people the Democratic Senators from Michigan are recommending that he nominate to the Sixth Circuit.

It may have been a close election, but President Bush won. He gets to make the nominations. I can tell you as a Senator from the Sixth Circuit, I am not interested in seeing Democratic nominees to our circuit court. So what they have done here is set up a standard that cannot be met and will not be met, and they are punishing the litigants of the Sixth Circuit because of this pique they have that the Republican President won't nominate recommendations of Democratic Senators from Michigan to the circuit court.

My recollection—and I have been here a couple of terms myself—is that Senators don't get to pick circuit judges. We may have a lot of influence on the selection of district judges, but Senators typically don't get to pick circuit judges. Maybe we get to make a recommendation, but we certainly don't get to pick them under Presidents of either party. So what is being asked in this situation is that Democratic Senators get to select circuit judges in a Republican administration.

I can tell you if, as Republican Senators from the Sixth Circuit, we don't even get to pick Republican judges for the Sixth Circuit, there is no chance the Democratic Senators are going to get to pick Democratic judges in a Republican administration.

The National Judicial Conference has designated all four of these seats as judicial emergencies. Not surprising. Twenty-five percent are vacant. It is a judicial emergency. The President nominated four superior jurists to fill these seats. Each of these nominees—all languishing in committee because the Michigan Senators object to them going forward—has gotten an ABA rating of qualified or well qualified. That used to be the Democrats' coveted gold standard.

But despite the President doing his job and trying to fill these seats, the Senate has fallen down on the job. These nominees are from Michigan, and the Senate delegation from that State, as I said, has objected to the Senate considering them, even though the Sixth Circuit is in crisis. It is even rumored that if the nominees were to be reported out of committee, they would join the ranks of the filibustered nominees we have been talking about since yesterday at 6 p.m.

Our friends and colleagues on the other side keep talking about the four they filibustered. There are seven more who we understand are going to get the same treatment. So maybe we ought to be talking about 11 who are going to be subjected to a supermajority.

The wheels of justice in my State and the other States of the Sixth Circuit are turning very slowly. Sometimes they are not turning at all. Cases are going unheard and grievances unredressed because the Sixth Circuit bench is one-fourth empty. Each judge has to handle a much larger caseload.

According to AOC—Administrative Office of the Courts—in 1996, each judge on the Sixth Circuit had to decide an average of 364 cases. That was just 7 years ago. On the Sixth Circuit, each judge had to decide about 364 cases. Last year—in 2002—each judge on the Sixth Circuit had to decide 643 cases—from 364 cases up to 643 cases between 1996 and 2002. That is a 77 percent increase from just 6 years ago. By overworking judges on the Sixth Circuit, the Senate is causing great delays for litigants. It now takes an excruciatingly long time for citizens of the Sixth Circuit to get their appeals decided.

As this chart shows, the national average for the time to decide an appeal is 10.7 months. This is the national average in the circuit courts of a delay in getting your decision made—10.7 months. In the Sixth Circuit, however, it is 6 months longer than that, 50 percent more.

So if you happen to be a litigant in the Sixth Circuit, because of the demand of the Michigan Senators that the Republican President of the United States select Democratic nominees of their choosing to the Sixth Circuit, if you are unfortunate enough to be a litigant in the Sixth Circuit, you are out of luck. I hope your case is not too important because it will take 50 percent longer than the national average to get a decision. It is all because the Michigan Senators believe they should be able to pick one or more circuit judges for a Republican President.

The Sixth Circuit has the dubious honor of being the slowest circuit in the Nation—dead last. The blame for that resides not with the President of the United States, who has had four well-qualified nominees pending before the Judiciary Committee for quite some time; the reason for that is the Michigan Senators' refusal to sign off on any of them, unless they get to tell the President whom to nominate.

Looking at it another way, if you are lucky to have to be in one of the other

circuits, if you file your appeal by the beginning of the year, you may get a decision by Halloween. If you file at the same time in the Sixth Circuit, you will wait until Easter of the following year to get a decision. We have all heard the old saying that justice delayed is justice denied. So let's put a human face on those statistics.

In the area of criminal justice, Ohio Attorney General Betty Montgomery has said that numerous death penalty appeals are experiencing prolonged delays. In the area of civil rights, attorney Elizabeth McCord had been waiting 15 months just to have an oral argument scheduled for her client's appeal in a job discrimination suit—15 months to get an oral argument in a job discrimination suit because the Michigan Senators won't allow any of the President's nominees to go forward. In the interim, her client died. He waited so long, he simply passed away.

According to the Cincinnati Post, delays such as this have become commonplace because vacancies have left the court at half strength and created a serious backlog.

Commenting on this sorry state, Mary Jane Trapp, president of the Ohio Bar Association, said:

> Colleagues of mine who do a lot of Federal work are continuing to complain. When you don't have judges appointed to hear cases, you really are back to the old adage, ''justice delayed is justice denied.''

Mr. President, this situation is completely and totally unacceptable. I am astonished that our Democratic colleagues want to filibuster qualified judicial nominees who could address the problem.

My Democratic colleagues try to justify their obstructionism based on a grievance they believe they have suffered with respect to two of these seats. Bear in mind, there are four vacancies. This grievance goes back two Congresses and involves an intradelegation spat. The ''you started it'' excuse is more than just a little wanting in light of these troubling statistics and unfortunate stories.

As I said earlier, let's get back to the first principle: Democratic Senators don't get to pick circuit judges in Republican administrations. In fact, Republican Senators don't get to pick them in a Republican administration. We get to make recommendations. Presidents of both parties have long believed circuit court appointments were their prerogative.

So I say to my friend from Idaho, who has joined us on the floor, here you have a situation where the Democratic Senators in Michigan, with a Republican administration, are demanding that the Republican President appoint someone of their choice to the circuit courts when even we as Republican Senators don't get to make such selections. I think it is safe to say that that is never going to happen. That is never going to happen.

So in the meantime, four nominees the President has made—all from the State of Michigan—which would solve this 25 percent vacancy problem on the Sixth Circuit, languish because of this desire on the part of Democratic Senators to pick circuit court nominations in a Republican administration.

It is important to remember that Michigan doesn't own these seats. They don't belong to any particular State. Certainly, historically, at least in recent history, these four seats have belonged to Michigan. They belong to the people of the United States. If anybody has a particular claim, it is the people of the Sixth Circuit, all of whom are suffering because of this obstructionism. I know the people of Ohio, Kentucky, or Tennessee would be more than happy to have these judges if Michigan doesn't want them. If the Michigan Senators don't want Michigan judges on the Sixth Circuit, goodness, we would be happy to have a good Ohio, Kentucky, or Tennessee lawyer fill the vacancies. My people in Kentucky didn't have anything to do with this spat up in Michigan. They are having to pay for it, as are the people of Ohio, Tennessee, and Michigan.

I said there are four vacancies in Michigan. Two of the four seats the Michigan Senators are blocking don't have any connection to any prior intradelegation dispute. There were two of the four judges who were involved in all of this dispute during the Clinton years, but there are four vacancies. All four of them are being held up. President Clinton did not even nominate anyone. Let me repeat, President Clinton didn't even nominate anyone for the seat to which Henry Saud has been nominated. Henry Saud, if confirmed, would be the first Arab American to sit on a circuit court in U.S. history. That is one of the nominations they are holding up. President Clinton didn't even nominate anyone for the seat to which Henry Saud has been nominated. The seat to which David Mackey has been nominated didn't even become vacant until the first year of the current President's term. Two seats are being held up by the Michigan Senators, one of whom President Clinton nominated, and one didn't become vacant until President Bush took office. These two vacancies had nothing to do with whatever the spat was that went on earlier, and all four seats remain vacant.

This is simply an unacceptable situation. The American people should be aware of what is going on. They should demand that this obstructionism cease. This outrage that is occurring in the sixth judicial circuit puts a human face on what has been going on around here this year.

Real litigants, real people, are paying the price for senatorial pique, for senatorial demands for something that is totally unreasonable—where Democratic Senators, in a Republican administration, get to pick circuit judges. In the meantime, the lawyers and litigants of the Sixth Circuit continue to suffer under this 25 percent vacancy crisis, this judicial crisis of the highest order, as a result of Senate obstructionism.

Let me also add, just a month ago, both houses of the Michigan Legislature passed resolutions that noted the negative effects of the vacancy crisis and urged the U.S. Senate in general, and Michigan Senators in particular, to act on the Michigan nominees. The Michigan Legislature is passing resolutions asking the Michigan Senators to let the nominations go forward.

Mr. President, I thank the Chair for the opportunity to address the crisis in the Sixth Circuit. It is a very serious crisis confronting my State. I see the Senator from Oklahoma here.

I yield the floor.

The PRESIDING OFFICER (Mr. SUNUNU). The Senator from Oklahoma is recognized.

Mr. MCCONNELL. Mr. President, how much time remains?

The PRESIDING OFFICER. The majority controls 12 and a half minutes.

Mr. MCCONNELL. Mr. President, I reserve the remainder of our time.

The PRESIDING OFFICER. Who yields time?

The Senator from Oklahoma is recognized.

Mr. NICKLES. Mr. President, I will also be speaking later. I want to make a couple of comments after presiding and listening to some of the speeches made a moment ago. I think it is important to maybe give a couple of viewpoints about the positions of the Senate.

I have had the pleasure of being in the Senate for 23 years. I plan on serving 1 more year in the Senate. I have had a lot of great experiences, a lot of high points and low points. One of the lower points is the way judges have been treated in the last 2 years. In my previous 21 years, we never had a filibuster on a judge, and I never heard colleagues say, Wait a minute, President Clinton had nominees and they weren't considered. Most of those who were on the list he nominated very late in the last year of his term of office. One of them was from Oklahoma, and the two Senators from Oklahoma were never even consulted. That name was on the list.

So there is a difference between being nominated, going through the process—particularly with district court judges—consulting the home State Senators. That is the tradition of the Senate.

One of the things that bothers me is we are breaking the tradition of the Senate by saying now you have to have a supermajority, particularly on the appellate court level. I don't know that that has happened on district court, and I am glad. We have confirmed a lot of district court judges and I am glad. But when it comes to circuit court, the next higher level, it may be a higher standard and all of a sudden now, the standard for those judges appears to be 60 votes. That is evident by the fact of four having been filibustered and there

are another two who will be filibustered in the process. We will find out tomorrow.

Another of the traditions that has been trampled upon is what people are saying and how they are saying it. We had a speaker just recently who mentioned two Senators by name and kept using the words ''sanctimonious hypocrisy.'' That is in violation, in the opinion of this Senator, of rule XIX of the Senate.

We have rules. And we have rules for a purpose. Those rules should be adhered to. When Senators violate the rules, I think they undermine maybe to some extent the dignity and esteem of the Senate.

These rules have a purpose. Rule XIX says:

> No Senator in debate shall directly or indirectly by any form of words impute to another Senator or other Senators any conduct or motive unworthy or unbecoming of a Senator.

That rule is there for a purpose. It is gradually being ignored in debate, time and time again, by some Members—not by most Members, by an occasional Member.

I am giving a warning to Members, if they violate this rule, I am going to call it on them and I am going to ask the Parliamentarian if their comments are a violation of rule XIX. And if they are in violation, they will be seated. It will take an actual vote for them to be allowed to participate in debate again.

It is not right to be coming down mentioning Senators by name and using words such as ''sanctimonious hypocrisy'' and impugning a Senator's motives. That is in violation of the rules. People ought to know the rules. Maybe if we would abide by the rules, we would have a higher level of debate, greater civility, and maybe greater understanding of some of the challenges we have before us today.

Let me just make one other comment about there were some judges who are maybe left in the queue. President Clinton had a bunch of judges left in the queue. I had a judge who was left in the queue at the end of Bush 1's administration. His name was Frank Keating and he ran out of time. That is one of the traditions of the Senate. When people are nominated in the last year or the last few months of an administration, a lot of times they don't get confirmed. That is not a filibuster. Some people were equating that to a filibuster. It is not. There has not been a filibuster of a judge in my term—actually in the history of the Senate—until this year, on four individuals, and now we are going to find it on a couple of additional judges.

One other comment. My very good friend from Louisiana said her father was a Catholic judge, and God bless him. I am concerned that there is a religious litmus test coming. Maybe we can confirm Catholics, but if they happen to be pro-life Catholics—I don't know if her dad is a pro-life Catholic or not. I hope he is. I don't know. That is his business. I usually don't ask the nominees I am recommending or the President is considering—I usually don't ask them their position on that issue. But my guess is if someone is known to be a pro-life Catholic, they cannot get through this litmus test for appellate court judges that many are using today, and I think that is very regrettable. Maybe if they happen to be pro-life Southern Baptists or pro-life Mormons or pro-life Jews, I am not sure they can get through this new litmus test now being put on us by the Judiciary Committee and, unfortunately, by the minority in the Senate. I think that is very regrettable and we need to change that.

Our colleagues on the other side need to realize at some point, someday, they will regain the majority. They need to be thinking about what that means for the long term. I cannot imagine they assume we are going to have a 60-vote litmus test or a 60-vote margin or hurdle for confirmation of judges during Republicans but that is not going to happen at some point when Democrats might occupy the White House.

I think this raising the bar to 60 votes—I happen to believe it probably is unconstitutional, but I also happen to believe they are setting a precedent that they likewise will regret.

So I hope maybe more mature minds will be thinking about this on the Democrat side and say, wait a minute, shouldn't we really give somebody such as Miguel Estrada a vote?

Mr. MCCONNELL. Will the Senator from Oklahoma yield for just a moment? The Senator from Kentucky is here. I don't know how much time we have remaining.

The PRESIDING OFFICER. The majority holds an additional 6 minutes on this side.

Mr. NICKLES. I will be happy to yield to my very good friend from Kentucky.

Mr. MCCONNELL. Thank you. I yield the remaining time on this side, during this hour, to the Senator from Kentucky.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. BUNNING. I thank for yielding my good friend from Kentucky and my good friend from Oklahoma. I have a question for the senior Senator from Kentucky.

I ask my friend from Kentucky: The Michigan Senators argue that they have not been properly consulted on these, the Michigan nominees. Yet I understand the White House Counsel's Office consulted extensively with the Michigan Senators. This chart reproduces a letter from the White House Counsel that shows from April to November 2001, the White House consulted with the Michigan Senators no fewer than 13 times. So I ask my friend from Kentucky, in light of the record, does it not seem that the Michigan Senators are defining consultation as picking the nominees, rather than the President picking them?

Mr. MCCONNELL. I would say to my friend from Kentucky, he is exactly right. I think what is clearly happening here is the Michigan Senators want to pick circuit judges in a Republican administration.

I remind everyone, the two Michigan Senators are Democrats. My recollection is that the Senator from Kentucky and I may get to recommend judges for the circuit court but we don't get to pick them in a Republican administration, so why should any Democrat Senator expect they would get to pick circuit judges in a Republican administration?

Mr. BUNNING. On the Sixth Circuit Court of Appeals, where these Michigan circuit judges are needed so desperately, isn't it true right now that Federal district judges are having to go to the Sixth Circuit and be seated because of the judicial crisis we have on the Sixth Circuit?

Mr. MCCONNELL. My friend from Kentucky is absolutely right. We have a 25 percent—25 percent of the Sixth Circuit is vacant. Not because of the President of the United States. Four Michigan nominees were sent up here some time ago. They have been in the Judiciary Committee. They are having to draft district judges. It is the slowest circuit in America because it is 25 percent vacant.

Mr. BUNNING. I only say to my good friend, the senior Senator, that even some of the newer judges with whom you and I are familiar are now having to do 2-week tours of duty over at the Sixth Circuit Court of Appeals—they have only been on the district bench for 2 years—to try to catch up the backlog we have at the Sixth Circuit Court. If we could only get a little better cooperation out of certain Senators from Michigan, maybe we could fill those four vacant seats in a rational and reasonable way.

Mr. MCCONNELL. I thank my friend from Kentucky for pointing this out. It is an outrageous situation.

Mr. BUNNING. Mr. President, we have heard from many on this side of the aisle this morning and last night. They have made great points about President Bush's judicial nominees and the bad situation they are in.

We started this year talking about Miguel Estrada. His nomination is no longer before the Senate because of the opposition party's tactics and for the sale of his family.

Today marks 918 days after Miguel Estrada's nomination. He has never received an up-or-down vote. That is unfair to him. President Bush, and the American people.

Miguel Estrada is a respected attorney here in Washington. He received a unanimous ''well qualified'' rating from the ABA which is the rating our Democrat colleagues call the gold standard for judges.

He would have been the first Hispanic to sit on the prestigious DC circuit. He was a clerk at the Supreme Court. He graduated with distinction from Harvard Law School and argued many

cases before the Supreme Court. He even served in the Clinton administration.

But that is not the most impressive part of Miguel Estrada's story. He was born in Honduras and came to America at age 17 speaking little English. He overcame that hurdle and graduated from one of our most exclusive colleges and law schools.

He also overcame a speech disability. And this is no small hurdle to clear when your career depends on making successful oral arguments in court.

Miguel Estrada became a victim of politics in the Senate when some here said his views were unknown. They made unprecedented demands for documents every legal office in the country would object to releasing. They asked questions that countless Clinton nominees also declined to answer. And opponents said that was unacceptable.

The real issue here is what is known about Miguel Estrada.

He is a bright young Hispanic lawyer who follows the law and would make a great Supreme Court nominee.

The idea of the first Hispanic on the Supreme Court being a conservative is unacceptable to them. I hope his nomination comes before the Senate again some day and we can vote to confirm him.

And then there is Priscilla Owen.

Her nomination has been pending for 918 days. She has been a supreme court justice in Texas since 1995.

In her last election she received 84 percent of the vote. I'm not sure many here know what it feels like to receive that kind of percentage. But I bet we would all like to.

And just like Miguel Estrada, the ABA gave her a unanimous ''well qualified'' rating.

She graduated with honors from Baylor Law School where she was on the law review and she earned the highest score in Texas when she took the bar exam. Having suffered through several children taking the bar exam, I've heard what kind of challenge that can be.

But most telling is what her colleagues in Texas say about her.

Justice Owen has the support of three former Democrat justices on the Texas Supreme Court. Fifteen bipartisan past presidents of the Texas bar endorsed her.

And running for re-election she was supported by every major Texas newspaper. We should all be so lucky to even get our hometown newspaper's endorsement.

We've had three cloture votes on her and we will vote again on Friday.

Each time a majority signaled we should give her an up-or-down vote. But again the minority is preventing her from having her day in court.

What is her crime? Twice in the Texas Supreme Court, Justice Owens said the court was wrong and that under Texas law the parents of a pregnant child had the right to be informed before their daughter had an abortion.

Several lower courts had already upheld these parental rights and that Texas law does not give parents the right to stop the abortion, but they did have the right to be informed.

But that precedent apparently doesn't matter and she is being obstructed by a radical minority in this Senate that believes children have unlimited rights to abortions and parents should not be able to talk to their pregnant child first.

I know the vast majority of Americans do not believe that. And it is well past time we give Justice Owen an up-or-down vote.

Alabama attorney general Pryor was the next judge to fall victim to special interest politics.

Bill Pryor was appointed Alabama attorney general in 1997 and re-elected twice, most recently with 59 percent of the vote.

He has argued before the U.S. Supreme Court, practiced at two law firms, and taught law school.

In law school he was on the law review and graduated with honors. After law school he was a clerk at the fifth circuit where he worked for a judge who spent years working to desegregate schools in the South.

Attorney General Pryor is supported by Republicans and Democrats in Alabama.

Newspapers praise the lack of partisanship in his office. He is known in Alabama for following the law. Ironically that is what his detractors say he won't do.

Bill Pryor is an outspoken man who does not hide his beliefs but he has proven that his personal beliefs do not get in the way of following the law. He does not support abortion and has never apologized for it.

But he made sure his office followed Supreme Court precedent in enforcing the State's partial birth abortion statute even though he disagreed with the decision, and most recently he acted against overwhelming public opinion in Alabama to enforce Federal court rulings ordering the Ten Commandments display in the Alabama Supreme Court to be removed.

Again a majority of this body has kept Attorney General Pryor from getting the up-or-down vote he deserves. He has proven without a doubt that he will follow the law even when he disagrees with it.

Twice a majority of the Senate has said he should get a vote. Next time I hope we give him an up-or-down vote.

Next up on the honor roll of filibustered judges is Judge Charles Pickering.

Judge Pickering was unanimously confirmed by the Senate in 1990 to be a Federal district judge in Mississippi.

He graduated first in his law school class at the University of Mississippi. He practiced in a law firm and was both a city and county prosecutor. He was a municipal court judge and elected to the Mississippi State Senate.

Judge Pickering has spent his career as a leader in race relations in Mississippi.

His career has been dedicated to tearing down racial barriers against minorities in the South, and he was not very popular for it in Mississippi in the 1960s and 1970s, but it was the right thing to do.

I remember traveling around the South in the 1950s and 1960s and remember race relations there.

I remember signs at cafes saying ''whites only'' and then bringing food outside with my white teammates and sitting down with our black teammates on the bus and eating with them.

I remember what it was like as professional baseball gradually embraced minorities. Judge Pickering helped break down these racial barriers and he risked his career and reputation to do it.

In recent years Judge Pickering served on race relations committees in Mississippi. He spent time working with at-risk minority children.

In 1967 Judge Pickering was a prosecuting attorney in Jones County, MS.

He took the witness stand to testify against a Klan leader in a trial for killing a Black civil rights activist.

By standing up for equality and justice, Judge Pickering put himself and his family in danger and lost his reelection. You can never really judge the character of a man until standing up for his beliefs costs him something.

Judge Pickering's willingness to stand up against racial violence cost him his job as a prosecutor. But that did not keep him from continuing to fight for racial justice.

Probably the most heated race issue in the 1960s and 1970s was integration of public schools. Integration came to Judge Pickering's town in 1973. The Black and White communities in Laurel were split and Charles Pickering worked to bring them together.

He created a plan to integrate schools. In the end many Whites still moved their kids to private schools to avoid integration. And Judge Pickering could have done the same. But instead, he believed in integration and kept his children in public school.

Many have said he has been soft on civil rights. But that does not sound like the story of a man who is soft on racial justice to me.

Again the special interests that have kept the Senate from voting on Miguel Estrada, Priscilla Owen, and Bill Pryor are preventing a vote on Judge Pickering.

A majority of the Senate again has said we should have a vote on Judge Pickering and the Senate must fulfill its constitutional responsibility and do so.

Now we come to the nominees who will soon be victims of special interest politics—Judge Carolyn Kuhl and Justice Janice Rogers Brown.

Judge Kuhl is a superior court judge in Los Angeles where she has worked on civil and criminal cases. Currently, she is the supervising judge of the civil division.

Judge Kuhl graduated from Duke Law School and clerked for the same

court she was nominated to. In the 1980's she worked at DOJ and the Solicitor General's Office where she argued before the Supreme Court.

The ABA says Judge Kuhl is ''well qualified.'' Republicans and Democrats in California have spoken about her fairness and competence. Fellow judges and attorneys who appear before her strongly support her nomination and urge an up-or-down vote.

Judge Kuhl's crime is that she represented her government while working for the Reagan administration. One instance our colleagues on the other side of the aisle like to point to is when she helped prepare a document supporting President Reagan's views in an abortion case.

In other words, she was doing her job and representing her client.

One thing they forget to mention is the case was the first major abortion case to follow Roe v. Wade when the new law was quite uncertain.

They also forget to mention that it was her job to represent the position of the President and not her own views.

They also forget to mention that three other attorneys who worked on that case were Senate confirmed to positions after the case. Judge Kuhl has said she will follow the law regardless of her views. Her record proves it.

Finally, we get to Judge Janice Rogers Brown of the California Supreme Court. Judge Brown, who a minority of the Senate says is out of the mainstream, was recently re-elected with 76 percent of the vote.

She was born in rural Alabama to a family of sharecroppers. She grew up in segregated schools. She lived in an era where laws were written to prevent racial equality in the South. Yet Justice Brown succeeded in school and became the first black woman to sit on the California Supreme Court.

What do my colleagues say about Justice Brown is out of the mainstream?

Justice Brown voted to uphold a law saying parents have a right to consent before their daughter can get an abortion. How far is that out of the mainstream? Recent polls tell us well over three quarters of Americans think parents should be involved in the abortion decisions of their children.

What else do opponents say she has done that is out of the mainstream?

Her detractors say she wants to undo decades of Supreme Court precedent in property rights and government involvement in the economy. But none of them can point to any court opinions where she disregarded the law and substituted her personal views.

However, she is supported by a bipartisan mix of professors, judges, attorneys, and civil rights activists.

That does not sound out of the mainstream to me.

I am convinced these nominees are each qualified and would serve this Nation well on the courts they have been nominated to.

The Senate has a constitutional responsibility to advise and consent on nominations made by the President. But so far a minority of the Senate has prevented us from fulfilling that responsibility.

I am not asking my Democrat colleagues to vote for and support these nominees. I just ask that they give them the courtesy and right to an up-or-down vote.

If they do not believe the nominee is qualified then they should vote no. But by preventing a vote they are ignoring their constitutional duty. We should vote on these nominees and we vote on them soon.

The opponents of these nominees are not just playing around with these nominees' lives—they are also toying with the Constitution.

The PRESIDING OFFICER. The time for the majority has expired. The Senator from West Virginia.

Mr. ROCKEFELLER. I thank the distinguished Presiding Officer.

Mr. President, I recognize my colleagues on the other side of the aisle would like to use this debate time to focus on the employment status of four people, all of whom are employed. I would like to talk about a different subject, and that is the millions of people who are not working. I think we owe it to the American people to discuss the millions of Americans who have lost their jobs under the economic plans of the sitting President.

In particular, I would like to focus on the millions of Americans who have lost good manufacturing jobs, and that is the subject of my discourse. I ask the Presiding Officer to cut me off in precisely 15 minutes if I have not finished. Since I will be back at 9 o'clock, I will finish at that point.

Let me draw your attention to a few very troubling statistics. Manufacturing employment in the United States has now fallen to the lowest level in 41 years. In the last 5 years, we have lost 16 percent of all of our factory jobs. In the last 2 years alone, we have lost more than 2.5 million manufacturing jobs. In my own State of West Virginia, we have lost 14,000 factory jobs since January 2001.

To me, these are frightening statistics. They ought to jolt every Member of the Senate and prompt an urgent call for action. A vibrant manufacturing base, in this Senator's opinion, is essential to our standard of living. For generations, factory jobs have been the path to the middle class, providing good wages, health insurance, and pension benefits. Advances in manufacturing technology account for most of our economy's increased productivity. Every dollar we spend on a finished manufactured good is estimated to produce about $2.43 increased economic activity.

Simply put, we cannot become a service-only economy, in the judgment of this Senator, and at the same time expect to maintain our high standard of living. We ought to act swiftly to ensure Americans will produce steel and computers and cars and pharmaceuticals and many of the other products which we generally refer to as manufacturing.

We ought not to be timid in the face of the devastating statistics I have cited. We can do something about them. In the Senate, that is what we are meant to be doing. And we certainly should not ignore these statistics and focus, instead, on the jobs of four judges who already have work. We would better serve Americans if we used our time today to debate ways to revive the manufacturing sector of our economy, and I am going to talk about it. People may not want to hear about it, but I am going to talk about it because it affects all the people of the country, and my people in West Virginia very much.

At the end of September, I introduced legislation to provide some relief for American manufacturers on several fronts. I am disappointed the Senate has not yet debated that legislation. I am not surprised, but I am disappointed. The bill I introduced is called the SAFE Act, which stands for Securing America's Factory Employment.

I wish that topic were all we were discussing this morning, today, this week, this month. Saving our Nation's factory jobs is crucial. I will take a moment to discuss what my legislation does.

The SAFE Act would offer relief to American manufacturers in several ways.

First, the legislation would provide a tax deduction to any company that has manufacturing jobs in the United States.

Second, this bill would help companies cover the cost of providing health care for retirees—a huge subject. It is a crippling obligation for many of our once-proud industries.

Third, I propose we strengthen our trade laws to ensure they offer the protections that in fact our domestic industries deserve from unfair and illegal trade practices practiced by others.

Let me take a moment to explain in greater detail how these proposals can help our domestic manufacturing base. Congress is compelled to repeal the Foreign Sales Corporation Extraterritorial Income provisions of the U.S. Tax Code in order to avoid $4 billion in trade sanctions authorized by something called the World Trade Organization. Regardless of my opinion of the WTO decision in this matter, I recognize that to protect our economy from a trade war, we may need to update our Tax Code. We can do so and still encourage manufacturing by reducing the overall effective corporate income tax rate on domestic manufacturing.

The SAFE Act provides a 9 percent deduction for profits derived from the manufacturing activities in the United States. This is the equivalent, I would say, of lowering the corporate income tax rate from the current 35 percent to 32 percent of the portion of profits that can be directly linked to U.S. factories; also mining operations and the like.

This is a very straightforward tax break. It will lower the cost of doing business in the United States and will help companies that employ Americans to compete in the global marketplace.

In addition, my bill includes a tax credit to employers to encourage them to retain their retiree health insurance coverage—a huge problem nationwide. As my colleagues well know, employers know their health plan sponsors continue to restructure how they provide health care benefits for both workers and retirees. The economy is in a tough situation and it makes it difficult for them.

Interestingly, the percentage of employers who offer retiree health benefits has declined substantially over the past 15 years, to wit: Two-thirds of all firms with 200 or more workers sponsored retiree coverage 15 years ago. According to the most recent data, a little bit more than one-third do that today. Despite these reductions, the employer-sponsored health system is the largest source of health care coverage in the country today, even with that diminution of the percentage.

The SAFE Act would provide employers with a tax credit to cover 75 percent of the costs associated with providing health care coverage to their retirees in order to protect existing coverage and reverse the current trend.

Finally, my legislation would strengthen our trade protections, our antidumping and countervailing duties. So-called AD/CVD trade laws are often the first and last line of defense for U.S. industries injured by unfair labor or illegally traded imports.

These laws are absolutely essential for the survival of our manufacturing sector in an increasingly global market. But some of these provisions have become antiquated by recent changes in our global economy and the new structure of international trade. The American steel crisis has made it very clear that these trade laws need to be strengthened. Companies, workers, families, and communities rely heavily on fair trade laws to prevent the ill-effects of unfair trade. Antidumping and countervailing duty laws need to be updated and amended so they work both as intended and as permitted under the rules of international trade.

For example, the SAFE Act includes a provision that allows us to consider whether or not an industry is vulnerable to the effects of imports in making antidumping and countervailing duty determinations. Another provision of this bill will make it tough for our trading partners to circumvent antidumping or countervailing duties. I have a variety of examples I could give of that, but I will not for the moment.

They could do so by clarifying that such orders include products that have been changed in only a very minor respect. What do I mean by that? Sometimes companies will make a product in another country, send it to a third country, and they will adjust a little tiny piece of something. Then that third country will export it into the United States and it will count as an export from the third country—not from the first country or the second country which actually produced the greatest mass of it—thus allowing them to have their trade surplus increased.

This will help prevent foreign nations from making slight alterations to products they are exporting to us in order to skirt existing antidumping or countervailing duty orders.

Another clear problem under our current trade law is that foreign producers and exporters of such merchandise may avoid AD/CVD duties by using complex schemes that mask payment of countervailing duties resulting in the underpayment of duty rates.

My legislation would restrict such practices by requiring the importer, if affiliated with the foreign producers or exporters, to demonstrate that the importer was in no way reimbursed for any AC/CVD duties that were paid.

There are certainly other changes we should consider to update our trade remedy laws. These provisions are by no means an exhaustive list, but we do need to get the debate started. I have offered this bill as a way to reenergize the debate. I have 15 minutes and I am using it to discuss something I think is useful.

Steel is a prime example of the need for strong trade laws, strong enforcement of the laws on the books, and strong considerations to toughen existing statutes.

As the Presiding Officer well knows, I have long been involved in the fight for the American steel industry. Currently, the industry, its workers, and steel communities around the country await a decision from the President of the United States on section 20 tariffs he imposed on steel imports in the face of an unprecedented flood of steel imports from foreign countries below price and below the cost of production in the home country.

Some of our foreign trading partners are lobbying the White House very hard to lift these tariffs. In fact, the European Union was in town just last week making irresponsible and illegal trade threats to try to sway the President's decision. I hope they fail. The administration has a very clear choice between preserving good-paying and hard-earned American jobs or caving in to the threats of our foreign trading partners.

All of the arguments made prior to the imposition of the tariffs about the potential damage and consequences of the 201 tariffs have been debunked.

This is important. We have something called the International Trade Commission. It is a nonpartisan quasi-judicial body. They found that the tariffs have done what they were meant to do—the tariffs on steel: give the American steel industry breathing room it needs to restructure. The International Trade Commission also found that the tariffs have not significantly impacted the U.S. economy in any other way.

If this administration is truly committed to the steel industry and, importantly, the communities built around it, the President will leave the tariffs just as they are and fulfill his promise to American workers. If not, we are facing very hard times indeed, and it may be the death knell for steel manufacturing in America—something I don't think we want to see.

I am extremely disappointed that rather than engaging in a serious debate, we are spending 30 hours talking about judicial nominees because some Senators believe it is an effective way to do whatever.

Instead of scoring political points, the SAFE Act addresses several very dire needs of our manufacturing companies. It improves our trade laws, helps with the burden of retiree health care costs, and effectively lowers the corporate tax rate on manufacturing activities. This package of reforms is an effective plan to stem the flow of manufacturing goods from overseas.

I will conclude by simply saying this: The fact that almost 9 million Americans are out of work, that is urgent; the fact that employment insurance is set to run out for many Americans who have been unemployed for a long time, that is very urgent; the fact that 43.6 million Americans lack health insurance and manufacturers and other employees are dropping health coverage to make ends meet, that is urgent; the fact that America has lost more than 3 million private sector jobs since our current President took office, that is urgent; the fact that the number of Americans living in poverty has increased by 3 million in 2 years, that is urgent; and the fact that 4.5 million Americans work part time because they cannot find full-time jobs, that is urgent.

I would simply like to suggest that the Senate return to the urgent business facing our Nation. We have appropriations bills to consider and pass. We have a comprehensive Energy bill to pass. We have a highway bill to pass. We have much to do.

I thank the Presiding Officer, and I yield the floor.

The PRESIDING OFFICER. The assistant minority leader.

UNANIMOUS CONSENT REQUEST—S. 1584

Mr. REID. Mr. President, yesterday at 6 o'clock we were working on S. 1584, a bill that funds the Departments of Veterans Affairs, Housing and Urban Development, and other agencies. It is a bill that has $122.7 billion. It includes $612 billion for the Department of Veterans Affairs, veterans benefits, all the health facilities, EPA, and NASA. It is an extremely important piece of legislation.

Therefore, for the veterans of America, I ask unanimous consent that at 6 o'clock tonight we move off this and go back to the VA–HUD bill and complete it within 2 hours. The two managers of the bill, Senators BOND and MIKULSKI, said they could do that. It would be an

important part of our legislative agenda. I ask unanimous consent that that be the case.

The PRESIDING OFFICER. Is there objection?

Mr. MCCONNELL. Mr. President, reserving the right to object, and I will object, we hope to complete that bill, in the next few days. Therefore, for the moment, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. MCCONNELL. Mr. President, let me suggest another consent agreement that might make more sense. I ask unanimous consent that the Senator modify his previous request so that just prior to proceeding as requested, the three cloture votes would be vitiated and then the Senate immediately proceed to three consecutive votes on the confirmation of the nominations with no intervening action or debate.

Mr. REID. I object.

The PRESIDING OFFICER. Objection is heard.

Who yields time?

The Senator from Florida.

Mr. GRAHAM of Florida. Mr. President, the two unanimous consent requests that have just been made I am afraid might have come out of my 15 minutes. I would like to ask unanimous consent if I could have an additional 3 minutes so that I will have my full 15 minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. GRAHAM of Florida. Mr. President, I thank my colleague from Kentucky for his generosity. I intend to use much of my time talking about the issue that was discussed by my friend and colleague from West Virginia. But I would like to start with some comments on the subject which has been before us since 6 p.m. yesterday; that is, the issue of judicial confirmation.

This is a fundamental issue in our democracy. One of the great figures in the development of the structure of our Nation's Government stands over us every day we are in session in this Chamber; that is, the first Vice President of the United States, John Adams.

Concerned about the structure of government, preceding the War for Independence and anticipating there would soon be a new nation which would be striving to develop the appropriate structures to maintain its democracy, John Adams wrote a series of his thoughts on government. These became the essential ideas first for the constitutions of the newly independent Colonies and State constitutions, and then in Philadelphia the development of the U.S. Constitution.

One of the central points of John Adams's thoughts on government was the essential role which was played by an independent judiciary. He said, as quoted in the Pulitzer Prize-winning biography of John Adams by David McCollough:

Essential to the stability of government and to ''enable an impartial administration of justice,'' Adams stressed the separation of judicial power from both the legislative and the executive. There must be an independent judiciary. ''Men of experience in laws of exemplary morals, invincible patience, unrivaled comments and indefatigable application should be subservient to none and appointed for life.''

There were a number of provisions placed in the U.S. Constitution in order to carry out that essential independence of the judiciary. Many of those occur after an individual assumes his or her judicial position, including lifetime appointments, and the fact that Congress cannot reduce the salaries of a member of the Federal judiciary. Those are designed to protect Federal judges, both politically and economically, from undue interference.

But the issue of how do you maintain impartiality in the selection of judges was one of the most contentious issues of the Constitutional Convention. Up until the very end of the Convention, the provision that was in the draft Constitution was for the Senate to appoint Federal judges. But there was concern that would put too much authority in the legislative branch, and thus the final compromise was to have the President make the nominations for judges but the Senate to confirm those nominations.

There was not intended to be a subservient position for the Senate. Rather, it was to be a position of equality as a fundamental part, as John Adams said, of maintenance of the independence of the judiciary.

What we are debating to date is the fundamental question of how should the Senate exercise its equal role in the designation of those persons who will become lifetime appointments to the Federal judiciary.

I believe that in this most serious of responsibilities we have, it is appropriate that the rules which apply to the general conduct of the Senate, rules which were largely written by John Adams's successor, Thomas Jefferson, who also looks down upon us this morning—that those rules should apply in order to protect the interests of the minority. That is not just a political minority; it might also be an economic or a regional minority.

It has been the practice in this body that there be the provision for extended debate and that the termination of that extended debate require more than a majority of the Senate. Why should that procedure which applies to all other activities not apply to one of the most important, if not the most important, activities of the Senate, which is to play its equal role in the determination of who will be the judges of the Federal system in our Nation?

Let me suggest that maybe we need to look beyond the confines that have dominated much of this debate and ask how can we, within a system that is balanced between the President and the Senate, do a better job of selecting judges and avoid the kind of contention and delay we are currently experiencing.

Let me make three suggestions. Excuse my egocentric discussion of this first suggestion. But for 12 years, the two Senators from Florida were one Republican and one Democrat. Over that 12-year period, for one period of time the President was a Republican and then later a Democrat. During that 12-year period, Senator Connie Mack and I established a process. The process was to have a nonpartisan panel of citizens roughly divided between lawyers and lay people review the applications of persons who were seeking Federal judicial appointments. We refused to allow on any of the documentation an indication, direct or indirect, of what the party affiliation of the applicant was. Senator Mack and I refused in our interviews with those who were selected through this process to raise any questions of their partisan affiliation. This process proceeded with interviews of the applicants and a recommendation of generally three persons to Senator Mack and myself. We would select one of the three jointly and then submit that to the President.

Virtually, if not totally, without exception, the President approved the person selected through that process, nominated that person, and this Senate confirmed that person generally in an expeditious manner—I hope because of the confidence of my colleagues in the impartiality and the merit orientation of the process we had used.

I suggest to my colleagues and to the President that maybe a system analogous to this could be more broadly utilized at both the district court and the circuit court level in order to reduce the instances of the impasse in which we currently find ourselves.

A second recommendation: There are some scholars who are now looking at the issue of the judiciary and its relationship to the executive and legislative branches, and they are beginning to suggest that possibly we should move away from a lifetime appointment of Federal judges at the district and circuit court levels—not at the Supreme Court level—and to establish a fixed term such as 12 years rather than the current lifetime appointments. That 12-year term would be nonrenewable. This would have the benefit of persons knowing that the person appointed, nominated, and confirmed to the Federal judiciary at other than the Supreme Court level would serve an extended term but would not be permanently in office. Therefore, some of the concerns particularly about the philosophical views would be reduced.

Finally, I think the President should be encouraged to reexamine what has become I think an unfortunate pattern and which has elevated the importance of the circuit courts, and it has elevated the attention given to the nominees for the circuit court, and that is the practice that almost all of the recent nominees to the U.S. Supreme Court were nominated directly from their service in a circuit court. In fact, every U.S. Supreme Court Justice since

1990 came out of the circuit court. I think serving on the Federal circuit court is a perfectly appropriate preparation for the Supreme Court. What I disagree with is that the entire Supreme Court should be made up of persons with that background.

This Nation has been well served with Supreme Court Justices who had a variety of backgrounds, including people such as Hugo Black who had been a member of the Senate before he was appointed to the Supreme Court; Earl Warren, who was Governor of California before being appointed to the Supreme Court; persons who came from an academic background, such as Felix Frankfurt, or from the active practice of law, Louie Brandeis.

I encourage the President, when there is another opportunity to appoint a Supreme Court Justice, to look more broadly than has become the pattern at least since 1990.

With those comments I turn briefly to a discussion of the issue of the loss of manufacturing jobs and what we might do to put a tourniquet, to a degree, on that loss.

A very fundamental question facing our Nation is, How can America maintain its standard of living substantially higher than the rest of the world, during a period of globalization of the economy where so much emphasis is going to what parts of the world can produce a product at the lowest unit cost. There are some things that we need to do in order to revise our trade policy. Many of them were discussed by the Senator from West Virginia. I particularly emphasize the importance of having the context of trade, issues such as labor, human rights, and environmental protection, become part of the trade negotiation. I am not suggesting the way to do this is by writing all those provisions into each trade agreement; rather, that we look to organizations such as the International Labor Organization, if not the oldest international organization in the world, an organization to which most countries belong and have accepted the labor protocols of, the International Labor Organization, to determine which of those protocols are appropriate to a specific trade agreement; include that, and then either through enhanced enforcement by the protocol itself, which I think is the preferable approach, but failing that, through mechanisms of the trade agreements, to see those standards become reality.

Beyond changes in our trade law, we need to look at what is going to be required in America to make us as competitive as possible. I particularly reference two things: One, we have to have the best educated, the most productive workforce in the world if we are going to be able to compete globally and maintain our standards of living. John Adams was instructive on this point as well. John Adams urged the widest possible support for education: Laws for the liberal education of youth, especially for the lower classes of people, are so extremely wise and useful that to a humane and generous mind, no expense for this purpose would be thought extravagant.

I agree with that assessment of John Adams and add to it the importance of training for adults who are finding their current skills are less in demand and need to either enhance those skills or to add new skills to their capabilities.

Finally, before I conclude, we need to make a greater investment in our infrastructure. Our roads, bridges, water and sewer systems are critical to our economic productivity. They are deteriorating. This Congress will have an opportunity soon to deal both with adequate funding of education, particularly for retraining of adults and to enhance our capability to provide a modern set of support systems for our economy.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from Kansas.

Mr. BROWNBACK. Thank you, Madam President. I am being joined by my colleague from Kansas, Senator ROBERTS, my colleague from Illinois, Senator FITZGERALD, and Senator NICKLES will join us in our time period to talk about the judicial crisis we have in this country and the difficulties that have been created now by an unprecedented act of the filibustering of circuit court judges. I will take a narrow look at this as an issue that has been building for the last 40 years, and what has happened during that 40-year time period that the crisis in the court has developed.

We stand on the shoulders of greatness. It was with courage and honor and convictions and convictions in religious beliefs that our forefathers formed this union of States we now call the United States of America. Indeed, the foundation of our country was formed with an understanding that there is a recognition of a higher moral authority. It is over our mantle, the one right here that I look at which says, ''In God We Trust.''

Yet if we are to continue down the precedent set in 1962—and I will go into that—it will be likely that in the near future we will have to take these words down and remove them as being illegal. This body itself committed a criminal act under a determination made by the Ninth Circuit Court of Appeals when we opened up and said the Pledge of Allegiance; a criminal activity because in 1954 President Eisenhower, the great Kansan, with a legislative body inserted, the unbelievable words, ''one Nation, under God.''

The Ninth Circuit Court of Appeals, to which two of the nominees would go, has declared that unconstitutional. It would be one thing if we said this is just an unusual aberration, but what we have to say and see is that this is a continuation of a 40-year march that the court has been on to purge any recognition or acknowledgment of God in the public square.

We are on 40 years of judicial activism in this regard. I will go through that. The Ninth Circuit is applying the endorsement test, first articulated in the 1985 school prayer case of Wallace v. Jaffree. Let's be honest about the logic behind the test. It is an absolute demand that religious ideas and language be thoroughly eliminated and cleansed from government activities. If consistently applied, the endorsement test basically drives God out of public school and out of our public life.

For too long we in this body have been silent and stood by while the courts have slowly chipped away at our responsibility to this Nation. And today we see the effects of our apathy.

At this critical time in our Nation's history, the Senate stands locked in a controversy surrounding the confirmation of judges. But this stalemate also underscores the large issues at stake and the serious choices we face as a nation. If we look at the judicial trends for the past 40 years, the courts have increasingly veered off course. As far as religion is concerned, the courts have been on a relentless drive to remove God from the public square. It started in 1962 in Engel v. Vitale when 39 million students were forbidden to do what they and their predecessors have been doing since the founding of our Nation, publicly calling upon the name of the Lord at the beginning of each school day as we do in this body.

The following year in the School District of Abington Township v. Schempp, the Court held that Bible readings in public schools also violate the first amendment. In 1992, in Lee v. Wiseman, prayer was removed from graduation exercises. And in 2000, in the Santa Fe Independent School District v. Doe, prayer was removed from being said at football games.

None of these restrictions were affirmatively adopted by any legislative body. The legislative bodies, either at the Federal or State level did the opposite. The Congress added the phrase ''under God'' in 1954 to the Pledge of Allegiance, and did so with the explicit intention of fostering reverential patriotism—nothing more, nothing less. It was done to reflect the values of the American people that were as valid in 1954 as they are today. Yet this year, the Court will continue to decide these issues, irrespective of what the American people believe in and want.

Along the way during this 40-year time period, the Court also discovered the constitutional right to abortion and more recently struck down State anti-sodomy laws.

As the Court has sought to remove God from the public square, we should examine the impact it has had on our culture, that amorphous atmosphere that helps form our souls and our identities. The culture, the following charts demonstrate, has clearly deteriorated. More and more Americans are slipping into depression, alcoholism, and suicide. Our Nation's schools are plagued with students who not only fall behind in educational standards but who are suffering from societal

problems that we have allowed to take place in this country.

Prior to the two major cases outlawing prayer in 1962 and 1963, our students enjoyed more stability. Since then, there has been more violence, sexual activities in schools, which have had corrosive effects on our culture.

For example, look at this chart showing suicides increased dramatically for teenagers between 1960 and today, nearly tripling the age bracket of suicide for children in our schools. Similarly, drug use has gone up significantly since the 1960s. Alcohol use also went up among those between the ages of 12 and 17, as this chart shows.

Here are examples of societal consequences since the 1960s. Since the passage of Roe v. Wade, legalizing abortions, abortions have increased dramatically. By the 1990s, abortions, private sources show, have more than doubled during that period of time. We are at 1.5 million a year. Bill Clinton called for abortion to be safe, legal, and rare. It is none of the three.

We see a dramatic increase in divorces that have taken place in this country since 1960.

This chart goes back to 1940, but from 1960 forward we are at a point in the 1990s where one in every two marriages end in divorce in America. Is that a healthy culture? We have seen same trends in violent crimes taking place. From 1960 to where we are today, we have seen more than a doubling, tripling of violent crimes taking place.

I ask the simple questions of my colleagues: Is there a direct correlation? Did the removal of prayer in the classroom or prohibitions on other public displays of religious convictions lead to the kind of moral decay reflected in the charts? Did the removal of honor and recognition of a higher moral authority impact our children? Or is it mere coincidence that our culture has declined as the courts deliberately and quietly shifted this country away from our motto, ''In God we trust.''

However one may interpret the empirical data and whatever conclusions one may draw of the cause and effect, we cannot ignore the key principles in the Constitution and under the establishment clause. While it may seem like inherent contradiction, Americans believe it both appropriate and necessary for government to limit abuses of religious liberty while at the same time making the effort to support sound religious convictions.

I am joined by several of my colleagues in the Senate who want to go further in making points about the judges who are being appointed. One thing is consistent with the judges, and that is they are people who have, in many cases, strong convictions, strong religious convictions, and they are being tested and tested out because of their faith. Is that where we are going with this removal of God from the public square? This is a dangerous precedent and dangerous way we are going.

I yield the floor to my colleague from Kansas, Senator ROBERTS.

Mr. ROBERTS. Madam President, I thank my distinguished friend and colleague for yielding. This is one of those times where perhaps everything has been said but not everyone has said it. I am not sure what I can add to this debate, but I will give it a try.

Our citizens of Kansas have watched the Senate's action, or rather inaction, on the President's nominees. I would like to quote from the Wichita Eagle, one of our fine newspapers in Kansas which simply editorialized:

> The party that does not control the White House is trying to control the ideological makeup of the federal courts, by misusing the Senate's advice-and-consent function to stall votes on the president's judicial nominees.

The Topeka Capital Journal also observed:

> The federal judiciary is heading to a train wreck.

I suspect by the time we get to the end of this and these kind of delay tactics, people will crawl out of train wrecks faster than we get this solved. I hope that is not the case.

It is not just the local newspapers that are expressing their views on these issues. Many constituents have written and called my office. They are expressing their frustration on the Senate's treatment of this process. This is a time that the process of the Senate, normally not a very high profile issue, has become a high profile issue.

Kansans are pragmatic and understanding people. They understand that some Senators oppose the President's nominees on ideological grounds. They also understand that those Senators are entitled to that position and answer to their own constituents for their actions. However, they do not appreciate the abuse of the Senate's procedural tools to allow the minority to dominate the majority. They want us to give these nominees a simple up-or-down vote. That is the whole issue. They want these nominations decided on the merits, not blocked by some procedural maneuver.

That is what this all comes down to. All of the rhetoric and support of these delaying tactics would have you believe the four nominees are ''out of touch,'' or ''out of the mainstream.'' Those opposing the nominees would have us believe they have not had a sufficient opportunity to question the nominees or have not received enough information to form an opinion. The facts are that through hearings that have been held, and in one case over 2 years have passed and the nomination simply remained blocked.

Additionally, if my colleagues truly believe they do not have enough information despite these hearings and despite the answers that are provided by the nominees, the answer is simple. They do not have to vote for the nominee. They can simply vote no, if we could just have a vote. So despite all of these protestations to the contrary, this comes down to ideological obstructionism.

Now, intuitively the logic that a judicial selection should be based or influenced by a nominee's ideology leads one to believe that judges should or will rely on their own personal beliefs rather than on the law when rendering their decisions. I find this remarkable and completely off the mark. I am certain that if each of these nominees receive an up-or-down vote, each would be approved by a majority vote and they would vote according to the law. They said that over and over again.

My question is, How is justice served when justice is delayed? If you deliver solid and qualified judges to our court system, that is more important than litmus test politics. We are just simply not doing our job.

Let me talk about trust. This continued delay does not foster the public's trust in our government's process to simply get the job done.

Let me talk about cost. Taxpayers spend $5.1 billion for the Federal judiciary every year. The American people are paying for fully staffed courts and are getting obstructionism and vacant benches. Reckless behavior such as this is irresponsible and a waste of taxpayer dollars.

Let's talk about delay. Let's really talk about delay. Court delays are becoming the norm. We all know that. We read about something egregious in the newspaper and wonder why you cannot get a court decision or at least some justice out of the situation. All of the court circuits facing these judicial emergencies are averaging 4- to 5-month—4- to 5-month—delays. And these delays are on top of a process that, from the original filing in district court to the final decision on appeal, takes 24 to 28 months—over 2 years.

OK, let us talk about results. What does an overtaxed judiciary really mean to Americans? It means that cases take longer to resolve, lives are disrupted and inconvenienced further, and real people must wait indefinitely in limbo as justice in their cases remains undetermined.

In over two centuries of Senate history, why, judicial nominations have been both approved or refused. No filibuster was necessary to defeat a nomination. The reliance by those who oppose these nominations of this procedural tool to handicap the process is simply unprecedented. The use of the filibuster essentially grants the minority veto power, hence controlling which nominees will even be given the chance—just the chance—for an up-or-down vote, much less confirmed.

Now the Constitution explicitly states seven circumstances in which a supermajority vote is warranted by one or both Chambers of Congress. The advice and consent of Presidential nominations by the Senate is not one of these special circumstances. In fact, Alexander Hamilton states in Federalist 76 that the Senate's role is to refuse nominations only for ''special and strong reasons'' having to do with unfit characters. At some point, after

the issues and merits of the nominee have been debated, we have an obligation to render a decision, whether it is yea or nay, and not let the matter hang in the balance unresolved and unfinished.

These competent, well-qualified judicial nominees deserve an up-or-down vote. The people of Kansas and the United States deserve a full—a full—judicial bench.

I thank my colleague for yielding the time.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. I thank the Chair.

I now yield to the Senator from Illinois for 7 minutes.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. FITZGERALD. Madam President, I thank both my colleagues from Kansas. I appreciate the remarks that were just made by the chairman of the Intelligence Committee.

I would like to go back to some of the statistics that have been cited in this debate. I guess I have been very troubled to hear on the radio this morning, on call-in radio, the figures being cited over and over again that were offered last night on the other side of the aisle.

We kept hearing that they had only blocked four judges. Well, that is simply not true, and I think it is very important that the American people know that is not true.

I have in my hands a chart that was prepared by the nonpartisan Congressional Research Service that shows that of the Presidents going back to Carter, in 1977, through August 1, 2003, the Senate has blocked a higher percentage and a higher number of judges who were nominated by President Bush than any other President in the Nation's history—or at least going back to 1977. And I am sure nothing was going on prior to 1977 like what is going on today.

The fact is, according to this survey, President Bush has nominated a total of 264 people to serve on the district and appellate courts in this country. As of August 1, 2003, only 144 of them have been confirmed. That is only 54 percent of the number of nominations made by President Bush.

Now we need to break that down. Of district court nominees, President Bush, as of August 1, has nominated 185 nominees to the district court. Only 117 of them have been confirmed. That means the Senate had rejected or not acted on 68 of those district court nominees.

With respect to the appellate courts, as of August 1, the President had nominated 79 appellate court judges and the Senate, as of August 1, only confirmed 27 of them. That is only 34 percent of the total. So that means 52 of President Bush's nominees to the appellate courts have been blocked by the Senate.

My friends on the other side of the aisle have done something very clever. They have just arbitrarily decided they are only going to talk about judicial nominees who have been filibustered and blocked on the floor of the Senate and they are not going to talk about those whose nominations have been blocked in other ways, such as in committee. Thus, the American people have been given a misleading impression overnight. They have been misled into thinking the Senate has only blocked four nominees for the appellate courts. Well, it has been far more than that.

As of August 1, it had been 52. I do not know what the figure would be right as of today, but I would have to tell you, if you compare it to the previous Presidents, the treatment of President Bush's nominees has been deplorable.

Going back to President Carter, he nominated 61 appellate judges; 56 of them were confirmed. In other words, Carter, in 4 years, only had five appellate court nominees who did not make confirmation; 91 percent of his nominees were confirmed. President Reagan, who was a Republican President, served while there was a Democratic Congress. He had 81 percent of his appellate nominees confirmed. The first President Bush had 77.8 percent of his appellate court nominees confirmed. President Clinton had 56 percent of his appellate court nominees confirmed.

If you get down to this President, George Bush, he only has had, as of August 1, 34 percent of his appellate court nominees confirmed. I am very concerned about what this means for our country. It could mean that a minority in the Senate is usurping for itself the power to control the Federal judiciary.

Under our Constitution, the President is supposed to appoint the judges with the advice and consent of the Senate. We have some idea what the Constitution meant by that because Alexander Hamilton addressed the issue in Federalist Paper No. 76. He said the Senate's role is to refuse nominations only for ''special and strong reasons'' having to do with ''unfit characters.''

I do not even think anyone has made the argument that the nominees who have been blocked in the Senate in this Congress have been unfit. I think the arguments against their nominations have been more ideological; simply the other side does not agree with these people, suspects they may be conservative.

Many of President Bush's nominees have been pro-life. I am concerned there may be a litmus test that is being applied on the other side, that they are simply not going to allow pro-life judges on our appellate courts. That is very troubling because that is upsetting our constitutional order that our Founding Fathers have made.

The key point here is, I do not want the American people to come away with the impression that only four of President Bush's nominees have been blocked. The number is far higher. It is probably a total of over 100. Probably about 120 have been blocked. As of August 1, 68 district court judges have been blocked and 52 appellate court judges. So this whole thing about just four judges having been blocked is really nonsense, and we ought to set the record straight.

The PRESIDING OFFICER. The Senator has used 7 minutes.

Mr. FITZGERALD. Thank you, Madam President. Having used up my time, I will now yield the floor to my distinguished colleague, Senator BROWNBACK from Kansas.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. Thank you, Madam President. I thank the Senator from Illinois.

Madam President, how much time remains on this side?

The PRESIDING OFFICER. Five minutes remain on the majority side.

Mr. BROWNBACK. Thank you very much.

I thank my colleague from Kansas and my colleague from Illinois for the comments they have made in this debate in which we have been engaged for some period of time and I think make both cogent and important points to put forward.

I want to double back around and finish on the comments I started on about this being a 40-year debate. For some of us who might have been up for a while, it may seem like 40 years already since last night.

But this has been a 40-year debate, and we have engaged and embarked on a great debate about which these judges are front and center, and it is potentially a collision course, some may say, between those who believe in God and that He has a role to play in the cultural and moral fabric of this Nation and those who prefer to sanitize our public institutions of any reference to God.

We should at least allow the vast majority of Americans who believe in God to honor Him in public, as our Founders did, and not be forced to conceal Him from the public square.

The four nominees currently being filibustered all believe in God, as do 90 percent of the American public. Should they be excluded from the appellate courts because of their faith? Their deeply held convictions just happen to mirror those of George Washington, most of the Founding Fathers, as well as some of the greatest Americans in our history—Abraham Lincoln, Susan B. Anthony, Dwight Eisenhower, and Martin Luther King, Jr. Would any of them be able to get on this court today through this litmus test? I doubt it.

If the issue here is this body has not had sufficient opportunity to debate the merits of the candidates, then let's go ahead and debate and move to a final vote.

Those who wrote the Constitution, which is the oldest working constitution in the world, remain the best guide to its clear meaning. America's

Founding Fathers, by and large, did not believe government must be neutral toward religion. George Washington, in his Farewell Address, often quoted, gave the clear view, ''Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.''

The Founders supported the public recognition of religion because religion and morality are, in Washington's words, the ''firmest props of the duties of men and citizens.'' When Washington addressed the new Nation for the first time as President, he led the country in public prayer, something we have never failed to do since, and yet removed 40 years ago from our public classrooms.

Therefore, I submit to you today that we should not stand idly on issues of judicial nominations. The Framers of the Constitution feared tyranny from the judiciary more than from the other two branches. They placed deliberate limitations on the judiciary in order to ensure the integrity of the judicial system. As a result, the Federalist Papers reported that under their plan, ''the Judiciary is beyond comparison the weakest of the three departments of power. . . . [and] the general liberty of the people can never be endangered from that quarter.''

Would that be an agreed-to statement today? I think not.

It is our duty to ensure the legislative integrity of our culture. Indeed, it is written in the Constitution that to do anything less is to walk away from our responsibility to this Nation, a responsibility that was recognized and affirmed by our Founding Fathers.

Madam President, as we conclude on this side of the aisle for this 30-minute section, I would just note to my colleagues on the other side of the aisle that this is going to continue to be an issue. We will get these judges through at some point in time, whether it is this session or we have to go back to the public and have another vote in the 2004 election cycle.

This will be a front and center issue. As the courts and the culture are becoming increasingly tied together with the difficulties we have had in this society, this will be taken to the public. I do not doubt that this will be, if not the top issue, one of the top three issues. They are going to be out in the public. I think this is a bad idea policywise, what is taking place in the blockage of these judges. I think it is bad politics.

But this is going to take place and this fight will continue. If we do not get it done now, we will continue to press forward, and it will be taken into the election cycle, and we will let the American public look and see: Do they think this is the way judges should be handled by the Senate? As these calamities of judicial blockage keep mounting up, it will become clearer and clearer to the public what is taking place here.

This is a very important fight. It is one about which a lot of people care deeply. It is one that a lot of my—when people come up to me in Kansas and talk about issues, these are front and center issues they talk about. They are concerned about these issues and have been for some period of time. And they are wondering: What are you doing? What about this activist court? Why are you not getting these judges on through?

This is something that does touch the public. We can do it the way it should be done; we can get a clear vote up or down or we can take it back out to the public in the next election cycle. One way or the other, this is going to occur. And I would suggest that the best way for this society, the best way for this Government, the best way for this culture is for these to come forward here, be vigorously debated, and then voted on up or down. I think the public is now coming to a very strong point on this.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. BROWNBACK. Thank you very much. I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Nevada.

UNANIMOUS CONSENT REQUEST

Mr. REID. Madam President, I ask unanimous consent that the Senate stand in recess from 4:15 to 5:15 today. This is so that all Senators can attend a closed briefing in secure room No. S–407, the briefing to be by Ambassador Bremer, the American administrator in Iraq.

Another American was killed today, along with 25 Italian peacekeepers in Iraq. The Senate Intelligence Committee is no longer functioning, so it is more important than ever for this body to review the direction of the American war in Iraq, especially in that we have appropriated in special funding this year some $163 billion. I so move.

The PRESIDING OFFICER. Is there objection?

Mr. BROWNBACK. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. REID. Madam President, the Senator from Vermont is going to take 1 minute of the time of the two Senators from Washington. I would ask unanimous consent that following his statement, which would be 1 minute, the two Senators from Washington divide their time, and the first to be recognized is the junior Senator from Washington, followed by the senior Senator from Washington.

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

The Senator from Vermont.

Mr. LEAHY. Madam President, I agree, this can be an issue and probably should be an issue in the election, but let's make sure it is an issue on the facts. There is this discussion we heard on the floor this last hour or so of the great vacancies. That is balderdash.

The fact is, there are more Federal judges sitting right now than at any time in history. We have been told that we are blocking 130. There are only 40 vacancies, approximately 40 vacancies in the whole country. Let's get our numbers right. This number is right. We have confirmed 168; we have blocked 4. We confirmed 168; we blocked 4. That is the fact.

It is hard on the other side to hear that, after they blocked over 60 of President Clinton's nominees by one-person filibusters, but it is a fact. We confirmed 168; we stopped 4. They stopped 61.

Thank you.

The PRESIDING OFFICER. The Senator from Washington.

Ms. CANTWELL. Madam President, thank you.

I rise to join my colleagues in what has been for now some many hours a very robust debate on our judicial nominees and the process by which this body should follow their advice and consent process for the President.

I think it is clear to the other side of the aisle—and it is very interesting that the two Senators from Washington are here with the two Senators from Kansas. I can imagine that we would rather talk about many other issues, particularly high unemployment in our states and how to get America moving again, and particularly in the aerospace manufacturing area. But the bottom line is, this body does have a role on advice and consent. And since the 1940s, the Senate rules have allowed cloture votes on nominations, and we have exercised that. So that is what this debate has been about.

My colleagues have continued to point out that these numbers reflect what that debate has produced as far as our working together in our constitutional role. I do want to say, though, that there is a very worthwhile point to this debate, and I would say to my colleagues on both sides of the aisle that perhaps if we wanted to even extend this debate beyond the 30 hours, we should do so because what is really at question here is the nominees the President is putting before us and whether our country, at a critical time, is going to stand up and continue to protect the privacy rights of individuals who are being threatened, those privacy rights that exist in our Constitution and are actually being challenged by our own Government.

I believe that we are at a critical time in our country's history, and that is why it is so important for the Senate to do its job. That job is to give the American people a judiciary that represents the mainstream views of America, that protects their constitutional rights, and that does not represent a clear threat to 30 years of settled law protecting a woman's right to choose.

I believe the real issue that we should debate, because it is critical to the American people, is not the fact that we have confirmed 168 Bush judges; the issue is that this Administration has nominated 4 individuals

who Senators believe fail the test. Over 40 Senators believe that they will not act to protect our constitutional rights and to uphold our Constitution.

Each of these nominees—Priscilla Owen, Charles Pickering, Miguel Estrada, and William Pryor have records that indicate a determination to interpret the law not as it is but as they want it to be.

Over the next decade, Federal judges will be making critical decisions about the right to privacy and how both Government and business should respect that right to privacy. We are at the tip of the iceberg of an information age where businesses may have access to your most personal information and exploit that; where the health care industry has access to your most personal information; where Government has established a process of eavesdropping and tracking U.S. citizens without probable cause. Government has even used and developed software that can track one's use of Web sites and information on their personal computer without their consent or knowledge.

And of course, a woman's right to privacy in her choices about her body, even after 30 years of established, settled law, continues to be threatened.

I voted against these four individuals, and I will continue to oppose them. I oppose them because I believe ensuring that our judiciary is independent and committed to protecting our constitutional rights is increasing in importance and that these four cannot fill that role. It is increasing in importance because with one party in control of both the Congress and the Executive branch, and an independent and balanced judiciary is the only remaining check to ensure that our core constitutional protections are upheld.

America is a great democracy, but it is an even brighter beacon to the rest of the world because our citizens trust our judiciary to protect their rights!

Now that as a result of the Patriot Act, Government can obtain a warrant to search your home without your knowledge; can obtain a subpoena to track your use of the Internet without showing probable cause; and can obtain a secret wiretap to eavesdrop, the judiciary must serve as a check on that power.

I know some of my colleagues want to try to address some of these issues, and we will have many opportunities in the future to correct some of this overstepping by those in our Federal Government. But in a September 2003 report, the Justice Department clearly acknowledged that new powers granted under the PATRIOT Act were not simply being used to fight terrorism and espionage.

The report ''cites more than a dozen cases that are not directly related to terrorism in which Federal authorities have used expanded power [under the PATRIOT Act] to investigate individuals, initiate wiretaps and other surveillance and seize millions in tainted assets.''

The Government has already deprived two U.S. citizens of their constitutional rights and held them as enemy combatants subject to secret trial, and they can basically deprive legal immigrants protected by the Constitution from this arrest and detain them without charges.

Just yesterday, the New York Times reported that even in our intelligence reauthorization bill, there is language significantly expanding the role of the FBI to get information from car dealers, travel agents, post offices, casinos, and others without going before a Federal judge.

I know it is easy to want to believe that these issues are all about fighting terrorism and are not hurting people.

Madam President, I can tell you, I believe strongly in the war on terrorism. In my State, we have seen three important cases that have been successfully prosecuted. In 2000, agents apprehended Ahmad Ressam, an individual who had plans to blow up landmarks on the west coast. Last year, the FBI in my region was also successful in tracking down individuals who wanted to build a terrorist training camp in Oregon. The lead individual in that case, James Ujaama, will be providing information that I hope will lead to the extradition of an extremists cleric based in London. And a group of men in Portland actually pleaded guilty to traveling to Afghanistan to fight against Americans after September 11.

I firmly believe it is possible to fight the war on terrorism and prosecute terrorists and still uphold the constitutional rights of Americans. But to make sure that balance is right, the Senate must do its job to ensure that nominees to the federal court will interpret the law, and not use their personal views to rewrite it.

Americans are genuinely concerned about the erosion of their rights. Earlier this year in the Senate, we hosted a forum in which two individuals from my State, Nadin Hamoui and Mako Nakagawa, both testified about their experiences. Both described being awakened in the dead of night in their family homes by armed law enforcement who pointed guns at their parents, herded sisters and brothers into waiting vehicles and took them away for a long detention with no access to due process. The eerie part was that their stories occurred sixty years apart, in 1941 and 2001.

In Washington State, the echo of internment of Japanese Americans during World War II and the damage that it did is still very real, and hearing these two stories makes us aware of just how much our respect for liberty in this country can be overcome by fear.

It has never been more important to have a judiciary that vigorously protects our constitutional rights and particularly our rights to privacy. As a perfect example, just this past week, the Supreme Court agreed to hear arguments on whether prisoners at the United States Naval Base at Guantanamo Bay are entitled to access to civilian courts to challenge their open-ended detention. An independent judiciary has the courage to review Government assertions of power, and that is what we are talking about here: whether these nominees would live up to the demands of that independent judiciary.

These are good individuals. They are earnest. They are hard working. But there have been fundamental questions raised about their records and about whether they have impartially judged their cases.

Charles Pickering, we all know, has been involved in a case where he picked up the phone and intervened with the Department of Justice in an attempt to reduce a sentence mandated by Federal guidelines.

Priscilla Owen has been repeatedly had her opinions chastised by members of her own court who have called them ''nothing more than inflammatory rhetoric'' and ''an unconscionable act of judicial activism.'' The San Antonio Express News actually called the nomination—or the renomination, I should say—of these two individuals, Owen and Pickering, a ''misguided'' and ''major disappointment.''

Mr. Pryor, again, I am sure a well-meaning individual, sought to limit the Violence Against Women Act—and a fellow Republican attorney general had this to say about him:

> I have great questions about whether Mr. Pryor has the ability to be nonpartisan. I would say he was probably the most doctrinaire and most partisan of any attorney general I dealt with in 8 years.

Are these the individuals we want to trust with lifetime appointments to protect our constitutional rights and to uphold those rights?

The PRESIDING OFFICER. The Senator's time has expired.

Ms. CANTWELL. Madam President, how much time have I used?

The PRESIDING OFFICER. The Senator has used 11 minutes. There are less than 10 minutes remaining.

Ms. CANTWELL. If my colleague from Washington would allow, I would like to continue.

Mrs. MURRAY. How much more time does the Senator need?

Ms. CANTWELL. Three minutes.

Mrs. MURRAY. I yield 1 more minute to my colleague from Washington.

Ms. CANTWELL. I thank my colleague. Madam President, in voting against these individuals, the Senate is doing the job the American people expected us to do.

In order to continue to have this great democracy, we must ensure we have vital checks on this administration's power. The American people are expecting their judiciary to be independent, to respect precedent, and not to prejudge the issues before them. The American people think we need a fair and balanced judiciary to counterbalance the executive and legislative branch, and we need to give them that.

These four individuals have demonstrated records of reaching beyond the law in order to reach their preferred ideological outcome. The Federal judiciary will not rise or fall on the fate of these four individuals, but in order to be a great democracy, in order to continue shining as the world's brightest beacon for individual rights, we need to have an independent judiciary, Without the important check that this Senate provides by doing our job in advising and consenting with the President on these issues, that will not be possible.

I yield the floor.

The PRESIDING OFFICER. The Senator from Washington.

Mrs. MURRAY. Madam President, how much time do I have?

The PRESIDING OFFICER. Eight minutes.

Mrs. MURRAY. Madam President, the majority believes that the Senate should spend 30 hours discussing what the New York Times calls a manufactured crisis on judges. While I believe our time would be better spent helping laid-off workers by extending unemployment benefits, I am happy to talk about the confirmation of judges. I am happy to talk about how these lifetime appointments affect the rights and freedoms of every American, and I am happy to talk about our impressive record of confirming 98 percent of the judges this majority has brought to the Senate floor.

I want to be clear that by spending 30 hours talking about four judges who already have jobs, we are not helping the 3 million Americans who do not have jobs. This marathon is the type of political grandstanding that, frankly, makes Americans scratch their heads and conclude that politicians just don't get it. We should be spending our time on the urgent needs facing our citizens in employment, health care, transportation, and completing our work on putting this Federal budget together. But the majority has decided that this is the most important issue we can discuss for 2 days, and they control the floor.

I wish to talk about four things: The importance of the Senate in confirming judges, the progress we have made in the past 3 years, the success we have had in confirming judges in Washington State, and the job crisis that the majority doesn't want us to discuss.

First, I want to put this discussion in context because the judges who serve on the Federal bench affect the lives and liberties of every American. These are lifetime appointments. This is not just a nomination to a commission or to an ambassadorship. This is a lifetime appointment for a Federal judge whose rulings over the next 30, 40, maybe more years, will have ramifications for every single American.

As Senators, we are elected to serve our constituents. We are asked to confirm judges whose decisions can change U.S. history. They can shape the lives of Americans for generations to come. In addition, we expect Federal judges to provide the proper checks in our system of checks and balances that was outlined in the Constitution. Without it, our system does not function properly. It is our job to ensure that each nominee has sufficient experience to sit in judgment of our fellow citizens; that they will be fair to all of those who come before the court; that they will be evenhanded in administering judges; and that they will protect the rights and the liberties of all Americans.

To determine if a nominee meets those standards, we have to explore their record, ask them questions, and weigh their responses. That is a tremendous responsibility and one that I take very seriously.

In the Senate, we have made great progress in confirming the judges President Bush has nominated. Look at these figures. The Senate has confirmed 168 judicial nominees of President Bush to have come before the Senate. In 3 years, we have only stopped 4—4 people whose records raise the highest questions about their abilities to meet the standards of fairness that all Americans expect.

Let me repeat that: 168 judicial nominees. That is a confirmation rate of 97.7 percent. We have confirmed 168 judges. That is more confirmations than during President Reagan's entire first term. So for this year, we have confirmed 168 judges.

Today, 95 percent of the Federal judicial seats are filled. That is the lowest number of vacancies in 13 years. There are now more Federal judges than ever before.

When it comes to circuit court judges, we have confirmed 29. That is more appeals judges than Clinton, the first President Bush, or Reagan had by this point in their administrations.

I have to point out that while the majority is complaining today about our 98-percent confirmation rate, it was a different story during the Clinton administration. Back then, Republicans used many different roadblocks to stop the confirmation of judges nominated by President Clinton.

During Clinton's second term, 175 of his nominees were confirmed and 55 were blocked from ever getting votes. During those years, the majority used the committee process to ensure nominees they disagreed with never came to a vote. Fifty-five nominations sent over by President Clinton never received consideration. So I think the Senate has a pretty impressive record at this time of confirming judges. That is clear in a 98-percent confirmation rate, and 95 percent of the Federal judicial seats are filled today. It is the lowest number of vacancies in 13 years.

I wish to talk for a minute about the process we use in Washington State to confirm judges. We have worked out a system to ensure Washington judges are nominated and confirmed even when different political parties hold Senate seats or control the White House. For many years, I have worked with a Republican Senator and a Democratic President to nominate and confirm Federal judges. Today, with a Republican President, I am working with my Democratic colleague from Washington State on a bipartisan process to recommend judicial candidates. We developed a bipartisan commission process to forward names to the White House, and it has worked very well. Both sides have equal representation on the commission, and the commission interviews and vets those candidates.

It worked for Senator Gorton—a Republican—and I when we were forwarding names to President Clinton, and it is working for Senator CANTWELL and I as we both recommend names to President Bush.

I am proud that during President Bush's first 3 years, we have confirmed two excellent judges through this bipartisan commission process. We confirmed Ron Leighton, a distinguished trial lawyer in Tacoma who is now a U.S. district court judge for the Western District of Washington in Tacoma.

We have confirmed Lonny Suko as a district court judge for the Eastern District of Washington State. He is a distinguished lawyer and U.S. magistrate judge who has earned the respect of so many in his work on some of eastern Washington's most difficult cases.

Currently, we are in the process of getting a nomination hearing and confirmation of Magistrate Judge Ricardo Martinez for a vacancy on the U.S. District Court for the Western District of Washington.

For over 5 years, he has served as a magistrate judge for the United States. Before that, he was a superior court judge for 8 years, and he was also a King County prosecutor for 10 years.

Judge Martinez has the impressive credential of being named the first drug court judge in Washington State and worked tirelessly to ensure the success of this program which uses treatment services as an alternative to incarceration.

I am looking forward to his hearing and confirmation fairly quickly.

I am here to tell you that in Washington State, we are making real bipartisan progress in confirming judges. It is a process that I believe serves the people of Washington State well.

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

Mrs. MURRAY. I have very little time left, and I want to finish my statement. I thank my colleague.

The time we are spending discussing our 98-percent confirmation rate could be used to address much more pressing issues. The majority is spending 30 hours to talk about four people who already have jobs. I think we should spend that time talking about the 3 million Americans who cannot find jobs.

The PRESIDING OFFICER (Mr. ENSIGN). The Senator's time has expired.

Mrs. MURRAY. Mr. President, I conclude by saying in my home State of Washington, 70,000 people have been laid off. They want this Senate to deal with unemployment insurance extension, which we need to do before we adjourn.

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from Colorado.

Mr. ALLARD. I wonder if the Senator from Washington would yield for a question and we would divide the time against each of us; time would go against her in responding to the question and my asking the question would go against the Republicans.

Mr. REID. At this stage I would object.

The PRESIDING OFFICER. The objection is heard.

Mr. REID. If the Senator wants to ask a question, use it on his time. We have people who have prepared all-night speeches and have been cut too short.

Mr. ALLARD. That was just a suggestion, but obviously she does not want to respond to the question.

Mr. President, today my colleagues and I are trying to put an end to the nomination logjam. All we are asking is for a simple up-or-down vote on these highly qualified nominees now. Carolyn Kuhl, Priscilla Owen, and Charles Pickering must receive a vote. Today, our Nation is facing a judicial crisis. Currently, there are 22 emergency judicial vacancies and 12 of these are on the court of appeals. It is simply irresponsible for us to ignore this growing crisis.

Sticking our heads in the sand like an ostrich and ignoring it, as some of my colleagues would like us to do, will not diminish the seriousness of this crisis and make it go away.

I have an article from the Washington Post written by George F. Will on February 28, 2003, entitled ''Coup Against the Constitution.'' I ask unanimous consent that that article be printed in the RECORD.

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

[From the Washington Post, Feb. 28, 2003]

COUP AGAINST THE CONSTITUTION

(By George F. Will)

The president, preoccupied with regime change elsewhere, will occupy a substantially diminished presidency unless he defeats the current attempt to alter the constitutional regime here. If at least 41 Senate democrats succeed in blocking a vote on the confirmation of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit, the Constitution effectively will be amended.

If Senate rules, exploited by an anti-constitutional minority, are allowed to trump the Constitution's text and two centuries of practice, the Senate's power to consent to judicial nominations will have become a Senate right to require a 60-vote supermajority for confirmations. By thus nullifying the president's power to shape the judiciary, the Democratic Party will wield a presidential power without having won a presidential election.

Senate Democrats cite Estrada's lack of judicial experience. But 15 of the 18 nominees to the D.C. court since President Carter have lacked such experience, as did 26 Clinton circuit judge nominees who were confirmed. And 43 of the 108 Supreme Court justices (most recently Byron White, Thurgood Marshall and Lewis Powell), including eight of the 18 chief justices (most recently Earl Warren), had no prior judicial experience.

Sen. Charles Schumer opposes Estrada because his mind is, Schumer says, a mystery. And because the Justice Department refuses to release papers Estrada wrote during his five years (four of them in the Clinton administration) in the solicitor general's office. The department, emphatically supported by all seven living former solicitors general (four of them Democrats), says that violating the confidentiality of department deliberations would have a deleterious effect on those deliberations. Anyway, the papers Schumer seeks contain not Estrada's personal views but legal arguments supporting the litigation positions of the U.S. government.

Estrada, whose nomination has been pending for almost two years and who has met privately with any senator who has asked to meet with him, answered more than 100 questions from the Judiciary Committee, and unusually large number. Only two of 10 Judiciary Committee democrats exercised their right to submit written questions to Estrada for written answers. Schumer did not.

Schumer says, ''No judicial nominee that I'm aware of, for such a high court, has ever had so little of a record.'' Actually, he is aware of at least two nominees to a yet higher court—Gov. Warren and Sen. Hugo Black—who had no record comparable to Estrada's 15 briefs and oral arguments (10 of them victorious) in cases he argued before the Supreme Court.

Schumer says Estrada would not cite ''three supreme Court cases in the past you disagree with.'' Actually, he was asked to cite three ''from the last 40 years,'' a transparent attempt to force him to discuss Roe v. Wade. But because abortion-related cases still come before courts, Estrada could not discuss Roe without violating the American Bar Association's Code of Judicial Conduct, which says prospective judges ''shall not . . . make statements that commit or appear to commit the nominee with respect to cases, controversies or issues that are likely to come before the courts.'' Which is why Justice Ruth Bader Ginsburg, declining to answer certain questions at her confirmation hearing, said, ''It would be wrong for me to say or preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide'' (emphasis added).

When Boyden Gray was White House counsel for the first President Bush, Sens. Edward Kennedy and Joseph Biden—both now former chairman of the Judiciary Committee, and both still on it—warned him that any nominee would be rejected if the White House asked the nominee questions about specific cases. And a Judiciary Committee questionnaire, which every nominee must complete, sternly asks: ''Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such a case, issue or question?'' (emphasis added).

Alexander Hamilton wrote in Federalist Paper 76 that the Senate's role is to refuse nominations only for ''special and strong reasons'' having to do with ''unfit characters.'' The American Bar Association unanimously gave Estrada its highest rating, and Estrada's supervisors in the solicitor general's office gave him the highest possible rating in every category, in every rating period.

Given the cynicism and intellectual poverty of the opposition to Estrada, if the Republican Senate leadership cannot bring his nomination to a vote, Republican ''control'' of the Senate will be risible. And if the president does not wage a fierce, protracted and very public fight for his nominee, he will display insufficient seriousness about the oath he swore to defend the Constitution.

Mr. ALLARD. Now some of my colleagues have proudly said they have acted on 98 percent of the judicial nominations sent to the Senate for confirmation. I would just simply like to point out that if we would only accept a 98 percent success rate, say, on flight safety, there would be 1,740 flights a day that would not land safely. Five hundred major organ transplants would be performed incorrectly and more than 4 billion letters would be mishandled by the U.S. Postal Service this year. Ninety-eight percent, when we are talking about district as well as circuit court, simply is not good enough.

On a personal note, I ask my colleagues, what would they want from their veterinarian performing a 98 percent success rate on their pet? My colleague is a veterinarian from Nevada. I am a veterinarian. That would not be acceptable to my colleagues. At that particular rate, I do not think we would be in business very long. Some in this body may believe 98 percent is good enough, but clearly it is not good enough.

I point out one example of the new judicial nomination double standard in the Senate that resulted in an outstanding nominee, Miguel Estrada, not being given a fair up-or-down vote.

In March of 1995, President Clinton nominated Carlos Lucero to be the first Hispanic judge to be on the Tenth Circuit Court of Appeals. Carlos Lucero was a Coloradan, the State I represent. After only 3 months, Mr. Lucero was nominated, confirmed, and was seated on the bench of the Tenth Circuit.

Prior to his confirmation, Mr. Lucero had no judicial experience yet enjoyed a well qualified rating from the American Bar Association.

Miguel Estrada was considered well qualified. He was to be the first Hispanic ever to sit on the U.S. Court of Appeals for the DC Court. He argued 15 cases before the U.S. Supreme Court, was a law clerk for Justice Anthony Kennedy, and graduated magna cum laude from Harvard Law School.

Let us compare Carlos Lucero's nomination to Miguel Estrada's nomination. President Bush nominated Miguel Estrada to be the first Hispanic judge to be on the District Circuit Court of Appeals in May of 2001. He received a highly qualified rating from the American Bar Association, yet he waited more than a year for a hearing. After waiting for more than 2 years for a vote, he finally asked that his name be withdrawn.

The point I am making is, how can we expect well qualified judges to be

willing to serve on the Federal court if they have to go through a 2-year process and they have to put their careers on hold at the time?

Now tell me that this is not a double standard. Tell me that in a case where there are two nominees equally qualified, with the same rating by the ABA, there was not a double standard being imposed by Democrats on Miguel Estrada.

This double standard has been recognized in my home State of Colorado. On a chart beside me, I have two editorials, one from the Denver Post, a newspaper that endorsed Al Gore for President, and the other from the Rocky Mountain News. The Denver Post said:

The key point—

Talking about Miguel Estrada—

is that there should be a vote. . . . A filibuster should play no part in the process.

The Rocky Mountain News says:

The Democrats have no excuse. . . . Keeping others from voting their consciences on this particular matter is simply out of line.

I also have an editorial from the Chicago Tribune entitled ''Squandering Miguel Estrada,'' on September 7, 2004. I ask unanimous consent that it be printed in the RECORD.

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

[From the Chicago Tribune, Sep. 7, 2003]

SQUANDERING MIGUEL ESTRADA

Presidents tend to nominate to important federal judgeships candidates who share their philosophical views, and those of the voters who elected them. So it comes as no surprise that many of President Bush's judicial nominees have conservative backgrounds. Those nominees are evaluated by the Senate, which is supposed to approve or reject them.

Last week, though, Democratic senators who are slavishly devoted to a clutch of liberal interest groups succeeded in driving away a superb nominee, Miguel Estrada, a brilliant lawyer and native of Honduras who would have been the first Hispanic jurist on the most important appellate court in the country, the one based in Washington, D.C.

Faced with a Democratic filibuster that kept the Senate form voting yea or nay on his nomination, Estrada graciously asked the president to withdraw his name. Estrada has a family to raise and a career to manage. He can no longer wait for elemental fairness to suffuse the United States Senate.

Estrada had received the highest possible rating from the American Bar Association. But he also is a conservative. The knowledge that he someday would make a superb candidate for a Supreme Court vacancy marked him as a nominee the liberal interest groups and their puppets in the Senate had to eliminate by any means necessary. And so, for the first time in the history of the nation, a president's nominee to a federal appellate court has been defeated not by a straightforward vote of senators, but by a filibuster.

Never mind that 55 senators stood ready to confirm Estrada. Republicans couldn't muster 60 votes to break the Democrats' filibuster. The confirmation vote never occurred.

Partisans will note that, during Bill Clinton's presidency, GOP senators played games with some of his nominees. That was no less scurrilous than this year's chicanery. As the Tribune argued during Clinton's tenure, the only fair way to treat a controversial choice for a judgeship is ''to debate the nomination fully and then vote to confirm or reject'' the nominee.

By failing to do that in Estrada's case, Democratic senators have squandered a promising judicial career before it could begin. They also have rewritten the Constitution, which says a simple majority of the Senate is enough to confirm a judicial nominee. If it takes 60 votes to break a filibuster, that is the number presidents now will need whenever the party out of power decides to throw a hissy fit over a nominee.

With their fundamentally unjust treatment of a good man, Senate Democrats have handed Republican candidates, from the White House down, an excellent issue for voters to consider during the 2004 election cycle.

As the Tribune reported Friday, the emboldened Democrats are filibustering two more of Bush's nominees and have indicated the will employ the tactic against others as well. All to deny still more nominees the up-or-down votes they deserve. Miguel Estrada was denied that simple justice by the United States Senate.

Mr. ALLARD. Mr. President, the time has come for the Senate to vote on these four highly qualified nominees.

I now yield to the esteemed Senator from Idaho to make a few comments.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAPO. Mr. President, I appreciate the opportunity our majority leader has given us to debate the issue of judicial nominations and the question of whether it is appropriate under our Constitution to have a filibuster of a judicial nomination by the President.

I believe we face a constitutional crisis. There are a lot of numbers that have been bandied back and forth between the various sides in this debate. I am going to try to make a little sense out of those in a few minutes, but I want to start with the Constitution of the United States, which in article II says that the President shall nominate, and by and with the advice of the Senate, shall appoint judges.

This Constitution does not provide a supermajority vote for the nomination, for the advice and consent process in the Senate. Our Founding Fathers were very capable and very good at pointing out those circumstances where they believed more than a majority vote was required for this interaction between the Senate and the President established in our Constitution.

In a number of different places in the Constitution, whether it is ratification of treaties or impeachment or Presidential veto overrides or the other occasions where our Founding Fathers believed the Constitution required more than a majority vote and instead a supermajority vote, they were very specific about laying that out.

With regard to judges, they did not lay out a supermajority requirement. Instead, it was stated—and until this Congress—that our Founding Fathers and the Constitution intended the advise and consent process in the Senate to require a majority vote and not to be ''filibusterable.''

We have seen a lot of debate on a lot of different numbers and I want to try to clarify some of these. One of the very common responses to us is: Well, we have stopped only 4 judges by filibuster this Congress and yet under the last Presidency, under Bill Clinton, over 60—I have heard different numbers, 55, 60, but whatever it is—judges were stopped by the Republicans.

It is critical for people to understand that we are talking about two very different things. All judges nominated by any President must go to the Judiciary Committee and must make it through the Judiciary Committee. In that process, under every President, a number of the judges do not make it.

In fact, we have a chart that shows under President Bush No. 1, 54 of his nominations did not make it through the committee or were voted down by the Senate.

Under President Clinton, our number, as we analyze it, is 41. Now I have heard the number 55 and the number 60, but somewhere between 41 and 60 or some other number in that category did not make it through the committee.

Actually, one of these nominees was voted down on the floor. The others did not make it through the committee. They do not make it through the committee often for a number of reasons. The point is that in the committee, there is a majority vote. It is the majority rule, as the Constitution requires, for these judges to make it through the process. Even if the committee does not act on these nominees, if the majority of the Senate wants to bring them forward, there is a discharge petition that can bring them forward.

The point is, it is important to understand the distinction between judges who are stopped in the normal course of the majority voting process of the Senate as they work through the committee and then on to the floor, and what we are debating today.

Let us go to the next chart. Today we are debating whether we should change what has never been done before. This number is the number of years in which the Senate, Republicans and Democrats, refused to uphold a filibuster against a judge. For the last 214 years, both Republicans and Democrats in the Senate have refused to uphold filibusters against judges.

Now, we are going to hear and have heard over the last number of hours a lot of debate about that as well. The Republicans have been accused of filibustering Democrat judges and Democrats have been accused of filibustering Republican judges over the years, and they would have everyone believe it is a common practice for the Senate to accept the filibustering of judges.

The reality is that although there have been efforts to try to filibuster judges in the past, until this Congress neither party has tolerated it because both parties recognized the intent of the Constitution that once a President's nomination gets to the floor, the

President is entitled to a vote. Whether the Republicans or the Democrats tried to filibuster a judge, both parties in the past have ultimately come together to stop that filibuster from preventing the intent of the Constitution from being accomplished.

Let us get a little bit of history on this. The cloture rule in the Senate has been applicable to nominations since 1949. Since that time, cloture has been filed on only 35 nominations, meaning all the rest of the nominations basically made it through, once they got to the floor of the Senate, to a final vote. Of those 35 times that cloture had to be filed, 17 of them were judicial nominations, 18 were other executive nominations.

Of those 17 times since 1949, when we have had cloture on judicial nominations, cloture has been defeated on the first try in 11 of the 17 tries. Of all the other cases, cloture was defeated by the second try.

Now, people need to understand what cloture is. Every time there is a cloture vote, it does not necessarily mean there is a filibustering. It simply means that at that point, the Senate is not ready to vote. It may mean they want to wait a little longer before a vote is taken. But when we see a cloture tried again and again and the announcement that as many times as it wants to be tried it is going to be stopped, that is a filibuster. We are seeing that now on four judges, with a threat of it on seven more.

Let us put up the other two charts. There has been a lot of talk about how the Republicans stopped more of President Clinton's judges than the Democrats did of President Bush's judges. This number is the number of President Clinton's judicial nominations that reached the floor that were voted on and confirmed and the number that were filibustered. None of President Clinton's nominations was filibustered. There were some cloture votes. We can argue among ourselves whether or not that was a filibuster, but the point is that none of the efforts in the Senate against President Clinton was allowed to proceed to stop his judges from getting a vote. They all got a vote.

Let us look at the next chart. The next chart is the number of nominations of Presidents in the last 11 Presidencies where, when the candidate got to the floor, they were denied an up-or-down vote. Out of 2,372 nominations that have come to the floor during the last 11 Presidents, zero were filibustered. Zero were stopped from having a vote once they got to the floor of the Senate.

In this Congress, we have seen that happen four times, and it is now being threatened on seven more judges. A new trend, a new precedent, in American history is being set in the Senate and the American people need to pay attention to it because regardless of how one passes the numbers back and forth, the fact is that the precedent is now being set to require that not only does a nominee have to make it past the committee but they have to be subjected to the filibuster rule in contravention of the clear intent of the U.S. Constitution.

This is all leading up to a battle over a potential Supreme Court nomination. It will be very unfortunate for this country if the Senate, in this Congress, changes the history of our treatment of this critically important provision of our Constitution as we move forward in the analysis and handling of our responsibility on the advice and consent on judicial nominations.

Mr. ALLARD. Mr. President, I thank the Senator from Idaho for his comments.

I yield 10 minutes to the Senator from Oklahoma.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. INHOFE. I thank the Senator from Colorado for yielding to me.

Mr. President, I want to share an experience I had at 5:30 this morning. One has lots of experiences at 5:30 in the morning on the Senate floor and in observing what went on during the night. There was something that occurred to me that I want to share, and I hope I can do it in this period of time.

There are two reasons this has been taking place, that they do not want to confirm these judges. One is ideology, philosophy. I hate to say it but unless one is pro-abortion and unless they are anti-gun, they do not want that person on the bench. But there is another reason we have not talked about, and that reason is just a reason of obstruction. We have been watching obstruction in all forms, but I want to share something and I hope people understand that this directly relates to the nominees for the judicial vacancies. I want to get the point across that it is happening to other nominees as well.

I chair the Environment and Public Works Committee. We had a person who was a nominee of this President, Gov. Michael Leavitt from Utah, one of the most highly regarded individuals in this country and certainly one of the most highly qualified ever to be nominated to a position of Administrator of the EPA.

We sat there and recognized how everybody loved this guy and yet they dragged it on and obstructed for days and weeks, just to drag it on out. So it is happening with many of the nominees.

Now, Governor Leavitt is a very kind and decent person and I really believe the most qualified nominee to be Administrator of the EPA we have ever been able to act upon. The way he was treated was just absolutely shameful. It took 56 days to finally get the nomination, five times longer than those who preceded him as Administrator, even though he had overwhelming bipartisan support.

I do not think anyone has questioned that the motivation of the delay was partisan Presidential politics. They set a new standard, new precedent, for an EPA Administrator. They really were not talking so much about him as they were trying to talk about the environmental policies of this President.

If my colleagues will look at some of the people who supported him, we had many people, including my ranking member, Senator JEFFORDS. He said it has nothing to do with qualifications of the Governor. At this time, I would say that qualifications really do not seem to be an issue on judicial nominations. It has been said over and over again, and later if I have time within my timeframe I am going to get into that, but this goes on and talks about various Democrats praising Governor Leavitt for this nomination and yet they would not confirm him.

Senator NELSON, who is a former Governor of Nebraska, served with him as Governor. He said: I believe nearly everyone, if not everyone, with whom Governor Leavitt worked in the NGA—that is the National Governors Association—would state that they had a favorable impression of him. I wholeheartedly support Mike Leavitt to serve as EPA Administrator.

We heard the same thing from our old friend Bill Richardson with whom many of us served in the House of Representatives. He is currently Governor of New Mexico. He praises his virtues. He has worked effectively with other Governors regardless of party, and he went on to say he is probably the best nominee who has ever been put forth to be Administrator of the EPA.

So he is highly qualified and nobody would deny that, and yet they turn this thing into trying to attack the President on his environmental record.

I have to quote from one person, Gregg Easterbrook. I have not quoted him on this floor before. He is a liberal Democrat. He is a senior editor of the liberal New Republic. He says in an op-ed piece in the Los Angeles Times: The Democrats are not as interested in Bush's environmental record as they are attacking President Bush personally. He says: Most of the charges made against the White House are baloney—these are his words—and made for the purposes of partisan political bashing and fundraising. He also contends that environmental lobbyists raise money better in an atmosphere of panic. He goes on to explain the real reason this issue was going on. This man was subjected to a lot of things, including 100 prehearing questions, and later 400 questions prior to the hearing. This has never been done before.

Then we had an experience that has never happened in the history of this Senate. We went back as far as Jennings Randolph in the middle sixties. It never happened in the history of this committee. The Democrats boycotted the committee. They did not show up. We have 10 Republicans and Democrats. We have to have a majority there and two members of each party, at a minimum. So they boycotted and did not show up.

Time went on and we started looking at how long it took from the time of

the nomination, to the hearing, to the confirmation. In the case of William Riley, it was 13 days; the case of Carol Browner, 10 days; in the case of Governor Whitman, it was 13 days. Yet it took 56 days for this person to be confirmed. Finally, they did confirm and the vote was 88 to 8.

I suggest today if we had the vote on Priscilla Owen, she would be sitting in the Fifth Circuit right now; and Miguel Estrada, the DC Court; William Pryor, the Eleventh Circuit; and Charles Pickering, the Fifth Circuit.

For a minute I will dwell, if the manager will give me a couple extra minutes, on Miguel Estrada. I saw something happening that I thought was significant. I will refer to something that happened to me February 26, 2003, a year ago, when we were talking about the confirmation process.

Mr. ALLARD. I am happy to extend an additional 2 minutes to the Senator from Oklahoma.

Mr. INHOFE. We had a group in Oklahoma at that time that was there from San Luis Potosi, a sister city in Mexico. We have a sizable Hispanic community in Oklahoma. I was mayor of Tulsa, and I recall how excited the people were each year when they saw people striving to achieve, Hispanics in this country.

I was standing before the crowd and said:

Como acalde de la cuidad de Tulsa, yo quiero decir, ''Bien venidos, bien venidos a la cuidad. Creemos que la cuidad de San Luis Potosi es la cuidad mas hermosa de todas las cuidades del mundo.''

(Translation)

As the mayor of the city of Tulsa, I want to say, ''Welcome, welcome to the city. We believe the city of San Luis Potosi is the most beautiful city of all the cities in the world.''

I saw the looks on their faces, realizing we were participating in their culture. They are looking at Miguel Estrada saying, Why won't they give him a chance to reach the top? Why is it that he does not get a chance for high office, he or any other Hispanic?

I tried to answer. I believed there might be a way of garnering support to make this reality. I said:

Muchos Hispános estan escuchando ahora . . . y yo quiero decir.

Por descrácia, hay personas en el senádo que no quieren escuchar a ni una palabra de la verdad.

Yo invito a la communidad hispána para llama a sus senadores para insistir en los derechos de Miguel Estrada y en la confirmación de juéces de los Estados Unidos.

(Translation)

Many Hispanic Americans are listening right now . . . and I want to say:

Disgracefully, there are people in the Senate that don't want to listen to even one word of the truth.

I invite the Hispanic community to call their senators to insist on the rights of Miguel Estrada and on the confirmation of the judges of the United States.

People were calling in but it did not get the message across to the people on that side of the aisle that there must be some other reason that they do not want Miguel Estrada to be confirmed.

Congress is a powerful institution and it is necessary to have the ability to collect and challenge much of what the President does, but when it comes to the courts and to interpreting laws and regulations, politics needs to get out of the way. Justice delayed is justice denied. I believe we are in a position to do some things and turn this around and get some of these people confirmed.

My guess is residents of California, who had their constitution gutted by a three-judge panel in the Ninth Circuit, only to have a larger panel of the same circuit reinstate their constitutionally authorized gubernatorial recall election, think it is pretty important who sits on the Ninth Circuit.

I had an experience this morning debating one of our fine Senators, Mr. LAUTENBERG. I said at that time this is about ideology. I don't think anyone—after listening to all the debate that has gone on overnight—does not realize if you are not pro-abortion, if you are not anti-gun, you will be in opposition, and we will not get confirmation. It is wrong. All we want is an up-or-down vote on these fine nominees.

Mr. ALLARD. Mr. President, I will wrap things up on our side. Before I do that, there are a couple of questions I would like to pose to my colleagues who are now in the Senate. I understand they are going to take some time to speak on their side of the aisle.

First, I pose a question to Senator DORGAN, who is the Senator from North Dakota. Senator DORGAN stated there would be no foot dragging on President Bush's nominees.

The PRESIDING OFFICER. The Senator needs consent to pose questions to other Senators.

Mr. ALLARD. I am speaking under my own time.

The PRESIDING OFFICER. It still requires consent to pose a question to other Senators.

Mr. ALLARD. I have a question I would like to ask of Senator DORGAN, if I might.

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

Mr. ALLARD. That is, he quoted that we are moving expeditiously on the President's nominees, refusing to return in kind the foot dragging delay of so many of President Clinton's nominees.

I ask him to respond to that question under his own time.

I also have a question to pose to the Senator from Iowa and give him an opportunity to respond on his own time. That question is, What has happened to change your view, when he wanted a vote regardless of the outcome?

I quote:

If you want to vote against them, let them vote against us. That is their prerogative. But at least have a vote.

This was made September 14, 2000. I ask both Members to respond to those statements. I ask them what has changed since those comments were made.

When they get their time, they can respond to those questions.

Let me wrap this up. I had a press conference this morning at 3:30, maybe 4 a.m., with the small business interests of this country. The point was made that delay in the judicial process is a problem for small business. How the courts function does have an impact on our economy. Lawsuits have an impact on our economy and how rapidly the courts respond.

We have a crisis in the circuit courts, the courts of appeal. We need to fill the vacancies so cases that go before the circuit courts such as civil rights cases dealing with racial discrimination, sex discrimination, age discrimination, religious discrimination, and the Americans With Disabilities Act can be handled in an expeditious way. These are cases impacting small businessmen in this country. We need to have our commercial disputes resolved in the circuit courts. There are contract disputes, insurance coverage disputes and trademark infringement issues in those courts. There are a lot of regulatory cases, for example, in the DC Courts, on environment, health, and safety standards, labor court enforcement, challenges to the Federal rules.

In the DC Court, the crisis we have on the DC Circuit Court is especially important as it applied to the small business community in this country. We do have a crisis. We have a crisis in the DC Circuit Court, which is 25 percent slower than 2001, another 58,000 days more than 2001, a crisis in the Ninth Circuit, the Sixth, and the Fifth Circuit.

The point is we need to get these nominees to the circuit courts passed through the Senate. It is unprecedented. Never in the history of the Senate have we not moved forward on judicial nominees when we had the majority of the Senators supporting that nominee.

I yield the floor.

The PRESIDING OFFICER. The Senator from Iowa.

UNANIMOUS CONSENT REQUEST—S. 224

Mr. HARKIN. I ask unanimous consent the Senate proceed to legislative session and proceed to consider the bill to increase the minimum wage, Calender No. 3, S. 224; that the bill be read a third time and passed; and the motion to reconsider be laid upon the table.

Mr. ALLARD. I ask unanimous consent that the Senator modify his request so that just prior to proceeding as requested, the three cloture votes would be vitiated, and the Senate would then immediately proceed to three consecutive votes on the confirmation of the nomination with no intervening action or debate.

The PRESIDING OFFICER. Does the Senator so modify his request?

Mr. HARKIN. No, I do not modify my request.

Mr. ALLARD. Then I object to his request.

The PRESIDING OFFICER. The objection is heard to the original request.

Mr. HARKIN. There again, I think we see what this is all about. We want to respond to the real needs of our people in America. We want to increase the minimum wage and the Republicans keep objecting to it. They will not let us bring it up for a vote. But they want to bring up four judges for lifetime appointments for a vote. So we see the difference.

We are trying to work on behalf of the American people to meet the real needs of people unemployed and people who need an increase in the minimum wage. The Republicans will not bring it up. That is the difference here.

Obviously, what we have, I called it the theater of the absurd earlier. There has been a play running for several years at the Kennedy Center called ''Shear Madness.'' It has now come to the Senate floor and is playing here now, ''Shear Madness.'' You can watch it free here. You do not have to pay to go to the Kennedy Center to see it.

First of all, I thank the police, the court reporters, other Capitol employees, who have had to spend long hours here through the night so that we can waste time, waste taxpayers' money, engaging in this ridiculous charade. I am told that the police out here are putting in 16-hour shifts, 16-hour shifts just so we can come out here for this ridiculous charade.

I am told our court reporters have to do 20-minute increments rather than the 10-minute increments they normally do. I am not a court reporter, but I think having that thing strapped around your shoulders and working for 20 minutes gets pretty tiring.

Does anyone on the other side think about these people? They have families. They have other things they need to do. How about our police working 16-hour shifts out there? Anyone on the other side of the aisle ever think about what is happening to them because of this charade we are putting on? We think about them.

I might say to the police and other people putting in all the overtime, while we are here with all this charade, do you know what is going on in the other part of the Capitol, downtown with the administration? They are trying to take away your overtime pay protection. Watch the little shell game with this hand on the judges, and with the other hand they are trying to take away your overtime pay protection. That is what this is all about. Tune in and watch this charade.

But do you know what else is going on in the other part of the Capitol? They are trying to take away your Social Security. They are trying to do away with your Medicare provisions. That is what is going on in another part of the Capitol.

Don't take my word for it. Here is something out of Congress Daily this morning: Enlisting the support of health care industry, House Republicans accelerated efforts Wednesday to build outside support for the emerging Medicare prescription drug bill, and quotes a Republican from Virginia who said this new business coalition is absolutely critical in whipping Members just before a vote.

They have been critical all along. It works from the groundwork. It is all about winning elections at home. Everyone understands this is a political process.

This is on the Medicare prescription drug bill. He said the coalition that they are putting together is broader than the drug companies, and it includes representatives ranging from construction companies to Caterpillar.

This is the coalition the Republicans are putting together to destroy Medicare as we know it. They are putting together a coalition of business, drug companies, construction companies, et cetera. Where are the seniors? Where are the elderly in their coalition? Not to be heard from. And they are going to do away with Medicare as we know it. They are going to privatize it.

Here is another one from November 6, Newhouse News Services, talking about Social Security. It quotes a Josh Bolton, Director of Bush's Office of Management and Budget: In the long run, Social Security cannot meet its commitments. Bolton would switch the system from government-guaranteed benefits to private investment accounts that would probably, but not positively, generate as good a benefit as Social Security now promises but can't deliver.

Now, the administration is saying that Social Security cannot survive. It is a fact that the tax cuts passed by this Congress and signed by this President, most of which went to the wealthy in our society, if those amounts of money that go out to those tax cuts had instead been used for the Social Security system, Social Security would be solvent for the next 75 years. But now they are saying we do not have enough money for Social Security; we cannot meet our obligations. Of course not. They opened the gates through the Treasury and let all the money go to the wealthy in our country with that tax program they had.

That is what this is about. Get your mind off of that and look at this charade we are putting on today.

I will respond to my friend from Colorado, and he is my friend. He is a great Senator who just quoted me a little while ago, remarks I made on the Senate floor a couple years ago about bringing up Bonnie Campbell. Here is a list of 63 judges who were blocked at that time, Clinton nominees, one of those being Bonnie Campbell from Iowa. I point out 63 here and only 4 we have blocked.

Here is the difference. The Republicans say they were stopped in committee. Yes, the Senator from Colorado quoted me accurately. I did ask unanimous consent to bring Bonnie Campbell out of committee to the floor. They objected. The Republicans objected. Now, Bonnie Campbell had a hearing. Nothing was raised about her. Nothing that was bad or anything in her background—nothing. She was absolutely qualified to serve as a circuit court judge, but Republicans would not even let her out of committee.

Here is what the Republicans say. It is wrong to stop someone in the Senate with a filibuster or an extended debate. That is wrong. But it is all right if we stop them in committee, which is exactly what they did.

So, yes, I asked unanimous consent to bring it out of committee, bring it to the floor. You bet I did. They objected.

Now, they are trying to say, why don't we do now what they were unwilling to do? Why should we change the rules, I ask my friend from Colorado? We will play by the same rules you played by. But, no, now you on the other side want to change the rules.

As I said this morning, my favorite line, a refrain from Finian's Rainbow that I bring up at times like this. It goes like this: Life is like cricket. We play by the rules. But the secret which few people know that keep men of class far apart from the fools is to make up the rules as you go.

That is what they are trying to do. Of course, I tried to bring it up. They objected. But now they want to change the rules and have a different playing field.

Mr. ALLARD. Will the Senator yield?

Mr. HARKIN. Or someone mentioned January 5, 1995, I offered an amendment on the floor of the Senate that would have set up a procedure to close cloture. We would have had a vote, then a couple weeks would have to go by, have another vote, a couple weeks go by, and have another vote. Finally, you get down to 51 votes.

I still believe in that, that after a month's period of time, after extended debate, there ought to be 51 votes and move legislation.

Mr. ALLARD. Will the Senator yield?

Mr. HARKIN. I will in a second.

Guess what happened. I offered that amendment. Guess how many Republicans supported it. Zero. Zero. Not one Republican supported it.

Now what I hear they want to do is they want to change the rules to prevent cloture on judges, lifetime appointments. But on legislation—on legislation—no. They want to continue to be able to filibuster legislation. Well, come on. Give me a break. If you want to stop filibusters, stop it for everything, not just for judges.

Now, my friend from Colorado, I know wants to ask me a question, and I do not know how much time I have, but I will be glad to yield for a question.

Mr. ALLARD. I will make it short. The question I have for the Senator from Iowa, my good friend—and we have worked together on many issues—is, Will you now support the Frist-Miller proposal? It is a bipartisan proposal, a step in the direction that you proposed several years back.

Mr. HARKIN. I say to my friend, if they would modify it to look like what

we did in 1995. My amendment in 1995 covered everything. It covered legislation. It covered judges. It covered everything.

If you put that forward, you have got my vote. But, no, what you want to do on that side is only have it pertain to judges, and not to legislation.

No. I am sorry. If you want to end the filibuster, do it for everything, not just for what you think is right. Let's do it for everything.

So I say to my friend—and he is my friend; he is a great Senator—I know we have a disagreement about this, but I am just saying, what I hear from the other side is they want to pick and choose. They want to be able to say, if you stop a judge in committee, that is fine, but you cannot stop him on the floor. And that is what they did. They stopped the judges in committee.

So when you hear Republicans come out here today or last night or however long this charade is going to go on—when they beat their breasts and say, oh, my goodness, I have never or I will never vote to filibuster a judge on the floor, check the record on that person and see what they did when they were held up in committee. Oh, it was all right. That was a hold. That was not a filibuster. That was a hold. Fancy words, different words—same result.

So what the rules have been in the past, the game, the rules we have played by in the Senate are good enough for today, and if you want to change the rules, change them for everything. Do not just pick and choose one little thing at a time. That is my point to my friend from Colorado.

I know the Senator from North Dakota wants to speak, and I am going to yield to him. But I just again point out that while this charade is going on here, the administration is at work trying to cut Social Security benefits. They are at work trying to come up with a Medicare prescription drug bill that benefits our drug companies and not our seniors. They are at work trying to take away overtime pay protection for 8 million working Americans. They are at work stopping an increase in the minimum wage. They are at work stopping any increase in an unemployment insurance extension. That is the game that is being played here.

I yield the floor to my esteemed colleague and friend from North Dakota.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Mr. President, I have not had the opportunity to listen to all of this debate.

Mr. HARKIN. An opportunity?

Mr. DORGAN. I am not sure I would consider it an opportunity, had I had the time. I know people watching this, perhaps on C-SPAN, would take a look at all this and say: Well, this is a bunch of windbags in blue suits. They talk and they talk and they seem to disagree, and when they are done talking, they have not said very much.

There is some truth to the fact that much of what goes on in this Chamber is without great merit and without great consequence. There are times when we do things—and often when we do things together—that have significant impact on the future of this country and on the direction of this country. This is not one of those moments, I might say.

This 30 hours is 30 hours that are designed to make a point, a point without much validity. And I will explain why that is the case. But it is, in my judgment, of very little consequence.

My dad used to say, never buy something from somebody who is out of breath. Do you know something? There is a kind of breathless quality to my colleagues. My colleague from Colorado just asked me a question kind of breathlessly, and I have watched others sort of out of breath here coming to the floor of the Senate talking about how unfair this process has been, how we are blocking judges.

Look, maybe it is time for just a few facts—just a few. You have seen them before. This is not a memory test, but it will take very little time to commit to memory. Mr. President, 168 judges confirmed—168 confirmed—and 4 have been blocked. We do not apologize for blocking four judges we don't want to be on the Federal bench.

The Constitution says there are two steps to giving someone a lifetime appointment: One, the President shall nominate; and, two, the Senate shall approve. It is called advise and consent. The roles are equal. This is not a circumstance where the President has certain prerogatives that we do not have. The roles are equal. To put someone on the Federal bench for an entire lifetime, the President nominates and then we give our advice and consent. Mr. President, 168 times this Senate has said yes, and on 4 occasions it has said no.

Why are we here for 30 hours? Because the majority party is apoplectic. They are having apoplectic seizures about these four.

Do you know something? When my son was about 10 years old, he ordered from a magazine an ant farm. When he did it, I described it on the floor of the Senate one day. I had no idea what an ant farm was, but it was two pieces of glass hooked together on the ends, very narrowly, and then you put sand in it. They also sent you a little vial with ants. And they said in the instructions that you put the ants in the refrigerator to slow them down a little bit, and then you take the cap off and you throw those things in that little glass container with sand. And then it said: Just watch, and you will be entertained by this ant farm.

So we slowed them down. We put these old ants in the refrigerator. Then we poured them in this little glass with the sand, and then we watched—a day, a week, 2 weeks. It was fascinating. Every morning you would wake up, and those old ants had been working. They took the sand from this side, and they would move it to this side. The next day you would wake up, and they moved the sand back. Do that about 2, 3 weeks and you realize there was a lot of activity going on but they were not going anyplace. Nothing was happening.

It was all an empty exercise. And do you know what? At times the Senate reminds me of that, and especially in this 30-hour period it reminds me of that. We can move things back and forth, we can vent and breeze and wheeze, and it does not change the facts.

The facts about judgeships are these: 168 we have supported, which means we have the lowest vacancy rate since the mid-1980s. Why do we have the lowest vacancy rate since the mid-1980s? Because we—yes, we—have approved 168 judges, at a far higher rate than happened under the Clinton administration when the Republicans controlled this body. I am not and will not be apologetic to anyone under any circumstance for this record.

Now, with respect to these four, do we have a right to decide there are four people whom we do not want on the Federal bench? You bet your life we do—not only a right, but we have an obligation. If we decide this candidate or that candidate is not worthy of a lifetime appointment, we, in my judgment, have an obligation, and that obligation, under advise and consent, is to weigh in with our opinion.

Mr. ALLARD. Will the Senator from North Dakota yield?

Mr. DORGAN. I will not yield, and I will not do so because the Senator from Colorado asked a question on his time and said he would not allow me to answer on his time, so I will not allow him to ask questions on our time.

I would be very happy, however, by consent, to spend a full hour with the Senator from Colorado or any other Senator, for that matter, just back and forth with two or three of us asking and answering questions. I would enjoy that opportunity.

But having said all that, let me explain that this 168 to 4 is, in my judgment, a lot of shadow boxing. It might be fun for some. I am sure it is not fun for those who have to spend their time for the next 30 hours—the doorkeepers and the members of the police, and others, the security, and the folks at the desk, and the folks who do the service that is performed here to keep the records of the Senate—they have to be here 30 hours. If it makes people feel better doing this, they have a right to do it. I will not complain about it. They have a perfect right to do this.

But let me tell you what I have a right to do as well. I have a right, at least as one Member of this Senate, to wish—to wish—just for a moment that I were in control of this agenda. And I will tell you what I would do today if I were in control of this agenda. I would bring something to the floor of the Senate that deals with the subject of jobs.

I know what I would want to talk about today. I would want to have

some legislation on the floor, and I will tell you what it would be about. Huffy bicycles.

Let me tell you about Huffy bicycles. Huffy bicycles have 20 percent of the market in this country for bicycles—20 percent. They used to be made in America. They were made in Celina, OH, made by 850 good workers, 850 union members in a plant in Ohio. They made $11 an hour in wages plus benefits. And they made a great bicycle, sold at Wal-Mart, Sears, Kmart.

Do you know what this bicycle had on the front, right underneath the handlebar? It had a picture of an American flag on a decal, a decal for the Huffy bicycle—an American flag, American made. God bless them.

But then it became too expensive to make Huffy bicycles in America. Mr. President, $11 an hour was too much to pay workers. So do you know where these Huffy bicycles are made now? In China. Do you know why? Because they get paid 33 cents an hour. And do you know what they did when they moved the Huffy bicycles to China? They laid off all those workers in Ohio—850 of them—who now work 2 jobs, 3 jobs to make ends meet, and some do not work at all.

What they did, when they went to China and started producing these bicycles, was they took off that American flag decal right underneath the handlebar and they changed that American flag to a picture of the globe—the globe. Well, God bless the globe. But I happen to care a great deal about jobs in Ohio—American workers who get up in the morning and say goodbye to their family because they are going to a job that they love: I make Huffy bicycles. No, I don't make a fortune; I make $11 an hour, but I work hard, and I do a good job. And then I am told one day my last job will be to replace the decal on the front of the bicycle from a flag to a globe before they fire me and move the jobs to China.

I want to talk about that. If I were running this place, we would be talking about legislation to address this question of whether American workers ought to be told: You must compete with 33-cent-an-hour labor. And if you can't, tough luck; you lose your job.

We are talking about four jobs this morning that my colleagues on the other side of the aisle are upset they were not advanced to the Federal bench. I am talking about 850 people in Ohio who used to make Huffy bicycles, and proud to do so, who discovered they were too expensive at $11 an hour. Huffy wanted to make bicycles for 33 cents an hour.

I would like to talk about that on the floor of the Senate and have policies dealing with international trade on the floor of the Senate. And that relates to jobs, not just relating to 850 people, but it relates to millions of jobs.

Three million people had to tell somebody in their family they lost a job in the last few years. These are people at the bottom of the economic ladder. These are people who know about secondhand, second-shift, second jobs. They are the ones who lose their jobs. We ought to talk about joblessness in this country and the fact that our economy is expanding but the job base is not.

Last month we had good news, and good for us, good economic growth. Do you know what happened? We lost manufacturing jobs again last month, 50,000 of them. I suppose if you wear a suit, it does not matter much, and if you serve in the Senate, you will not notice it much. But I guarantee you, if you were one of those last month who had a good manufacturing job, who had to come home and tell your spouse and your family, ''I have just lost my job; no, not because I am a bad worker but because I can't compete with 12-year-olds working 12 hours a day being paid 12 cents an hour''—and yes, that happens. Yes, that happens. And I can show you where and tell you when. So I would talk about that. That is what I would have on the agenda.

While I am at it, while I am halfway irritated about what we are not doing, let me also talk, just for a moment, about something I discussed yesterday. At 11 o'clock last night in a conference committee in the basement of this Capitol, I lost this issue, and I am a little irritated about that this morning.

This is a picture of a young woman, a young Christian woman from this country, and her name is Joni Scott. She came to see me 2 days ago. Do you know why? Because her Government has levied a $10,000 fine against her. Do you know why? Because the Government discovered she went to Cuba, and she went to Cuba in order to deliver free Bibles to the Cuban people with her church group.

So this young woman, named Joni Scott, took Bibles with her church group, went to Cuba, and distributed free Bibles in the country of Cuba. And when she came back to this country, do you know what her country said to her? We have got the Department of the Treasury, with an organization called OFAC, Office of Foreign Asset Control, and they sent her a notice and said: You are fined $10,000. You must pay a $10,000 fine. Why? Because you went to Cuba.

Mr. President, we ought to talk about that today. I had an amendment on the conference committee last night. The amendment passed the Senate. The amendment passed the House of Representatives. It was bipartisan. Republicans and Democrats voted for it in the Senate and the House, to say: Let's not enforce this travel ban against Cuba. It is not fair to the American people. That is an attempt to slap around Fidel Castro, and by doing that, we are injuring American people's right to travel.

Well, we went to conference last night, and this bipartisan approach—in both the Senate and the House—was kicked out. Why? Because the White House threatened to veto the bill if it was in it. This bill still stands. This young lady has a $10,000 fine. I have written to the Treasury Department saying: How dare you? How dare you?

But it is not just her. It is farmers from my State who want to sell farm products into Cuba. The Farm Bureau is denied a license to travel to Cuba to promote farm exports. It is about using food as a weapon. That is what the administration wants to do with Cuba; it is about embargoes. This does not make any sense.

So if I were running this place today—and I am not, unfortunately—I would be talking about that. I would be talking about the ability of our farmers to sell into that marketplace and, why on Earth will you not give a license to a farm group to go to Cuba to promote agricultural sales while you penalize a young lady who goes to Cuba to hand out free Bibles?

Is there anybody here who thinks this makes any sense? Have we lost all bases of common sense? Or will someone at some point stand up and say, let's do the right thing here?

So instead, we are here 30 hours. It started with Fox News and the majority party combining so that at 6 o'clock they could do a live news shot. They are excited about it. They want the people to talk in the Chamber. It is all in a memorandum: We need to do this. And they are very excited. Britt Hume is very excited to have on his show a live shot of the Republicans walking into the Chamber. And for 30 hours we talk about judges.

It is fine. They have a perfect right to do that. I do not disparage that right at all. I say, however, it certainly is not the topic that is on the minds of most of the American people. There is so much misinformation about this subject that ricochets around this Chamber.

We are told by our colleagues: You are filibustering; that has never been done. I don't know where they get that. Do they just not do the basic research? I do not understand that. Do they just not do basic research at all?

Tell me about Abe Fortas. Many years ago, was there a filibuster? Of course there was. Tell me about Richard Paez. Tell me about all the cloture votes we have had to cast around here because Republicans forced us to have cloture votes.

Why do you have a cloture vote? Because there is a filibuster, in order to break a filibuster. And I could go through, but my colleagues already have, name after name after name where there has been a filibuster by the Republicans.

Then let me just indicate, finally, that my colleague from Iowa indicated there are many men and women who never even got a hearing. That is a filibuster by one person demanding the Judiciary Committee refuse to even give a hearing to candidates. Yes, for the Ninth Circuit, but for judgeships all around this country.

So I know we are going to vent out here for, I suppose, another 12—I guess 12 hours. And it will amount to nothing. We ought to be talking about jobs and a range of things that are very important to the future of this country.

The PRESIDING OFFICER. The Senator's time has expired.

PRAYER

The PRESIDING OFFICER. The hour of 12 o'clock noon having arrived, the Senate, having been in continuous session since yesterday, pursuant to the order of the Senate of February 29, 1960, will suspend while the Chaplain offers a prayer.

Today's prayer will be offered by our guest Chaplain, RADM Robert F. Burt, Chaplain of the U.S. Marine Corps and Deputy Chief of Navy Chaplains.

Mr. REID. Mr. President, I ask that the time be equally charged against both sides during the prayer.

The PRESIDING OFFICER (Mr. GRAHAM of South Carolina.) Without objection, it is so ordered.

The guest Chaplain, RADM Robert Burt, offered the following prayer:

Let us pray.

Almighty God, Lord of our universe, creator, sustainer, protector, and comforter, source of our hope, bless us with Your divine presence and fill us with Your joy.

Lord, thank You for these servants of our great Nation. Help them today to sense the support and prayers that go out on their behalf, not just here in this room, but all over our Nation as citizens lift them up before You and sincerely pray for them every day. Answer those prayers, O God, and fill these Senators with Your spirit and power.

Lord, we lift together this Nation up before You and pray that You would continue to pour out Your rich blessing upon us. Bless our citizens spiritually, financially, physically, and emotionally. Bless our military personnel and their families. Lord, continue to use these Senators as instruments and channels of Your blessing.

May they remember ''never to become weary in doing good, for in proper time they will reap the harvest.'' Bless each Senator, bless their families, bless the States they represent, and, most of all, bless our Nation and its commitment to the pursuit of freedom and liberty not only within our own borders, but also to so many nations that desperately need our help.

We ask these things in Your awesome and holy name. Amen.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. GREGG. Mr. President, I believe the regular order is that we now have half an hour on our side.

The PRESIDING OFFICER. The time until 1 o'clock will be evenly divided.

Mr. GREGG. Mr. President, first, I thank the guest Chaplain for that very fine prayer which brings us back to reality in a way that is appropriate.

There has been a tremendous amount of excellent discussion today about the issue of the process of approving those four judges who have been nominated to the circuit courts of appeals, and the whole issue of the filibuster and how filibusters work into the process of the Constitution and the management of this Senate. It has been appropriate. It has been good. It has been enlightening, I hope, to those who have taken the time to listen at whatever hour they happened to listen.

I heard some extraordinary discussions which have been historical and legal and factual and informative. The question of whether or not a filibuster is appropriate is critical, and the constitutionality of using a filibuster relative to the Executive Calendar and the approval of judges is a very legitimate question in my mind.

I think when you look at the Constitution and the language of the Founders, they were fairly precise people in how they designed this Senate when they decided to be precise. And on the issue of advise and consent, they were precise. They said it would take a supermajority to approve treaties, but they were silent on the issue of supermajority relative to justices, and, therefore, in my opinion, I think it is fairly evident that, as far as they were concerned, they expected a majority for the purposes of approving justices and, therefore, a filibuster is inconsistent with that.

Really the filibuster, and the issue of the filibuster which has received so much appropriate attention today and which is obviously why we haven't been able to get to a vote, is systematic of the bigger issue, which is why is the opposition evolving relative to these justices?

We have to remember—and I think it is important for people to focus on this because there have been a lot of charts and signs up talking about the number of judges approved—that we are dealing with the circuit court of appeals level of the judiciary. We are not dealing with district judges. The vast majority of the judges who are approved by this body, who are nominated by any President, are district court judges. They are the trial judges. What we are dealing with, however, is the people who take a look at what happened in the trial and decided whether law has been adequately applied to the trial and who basically interpret the Constitution and the laws of the land and have, therefore, a huge impact, obviously, on how our society functions.

Fewer and fewer cases make it to the Supreme Court. More and more cases are decided on the issue of the question of their constitutionality, the implications of the broader law involved by the appeals level of our justice system. Therefore, when we look at the circuit court of appeals appointments, we are looking at an extraordinarily important position within the structure of our governance as a nation, a governance which is based on the issue of the protection of law. You can't have a democracy unless you have a structure of jurisprudence which is fair, honest, and applied consistently with principles developed over years.

Therefore, to look at all the judges out there and say 168 or 200 or 5,000 have been approved is irrelevant to the question. The question is, what is the circuit court issue; what has happened with the circuit court? We know in the circuit court area there have only been 29 approved, and there are presently 4 pending who are subject to a filibuster right now, which means they can't get a majority vote. There are going to be two more, it looks like, who are going to be subject to that same filibuster, who won't get a majority vote, and that will be followed by, it appears, another six subject to a filibuster and, therefore, cannot get a majority vote. So we have 12 compared to 29.

Twenty-nine have been approved. That is a very high percentage of the circuit court justices who have been basically blocked from getting an up-or-down vote as should apply under our form of structure, our Constitution, in my opinion.

There has been a lot of discussion about that point. But what is the real implication? What is this fight over getting to a vote really about? It is about who these justices are and what they represent, because this is a new radicalization of the issue of judges and their appointment to the circuit court.

The use of the filibuster at this time is symptomatic of that radicalization, and it is the radicalization of the nominating process which is the real issue at hand and on which the American people should be willing to focus.

It appears—not appears—it has occurred now that a litmus test has been put in place for the purposes of approving members to the circuit court, a litmus test that really has no relationship to the judicial temperament, experience, fairness, or expertise of the nominee who has been brought forward. It is a litmus test totally outside the bounds of what has traditionally been the way in which we evaluate a justice nominated to the circuit court. It is a litmus test based on the justice's personal and religious views, not the justice's judicial actions.

This is a huge departure from what has been the traditional method by which we have evaluated and confirmed judges in this country.

First off, the litmus test as an approach is wrong. I was a Governor. I appointed judges. I never asked one judge what his or her view was on any issue. What I wanted to know about a justice I was going to appoint was: One, were they honest beyond a question of a doubt; two, were they smart; three, were they fair; and four, have they life experience that is going to give them some sensitivity toward the people who would be coming before their court.

What their views were, I believed, was inappropriate to ask, but that was my position. Clearly, it is not the position of the minority in this body. The minority in this body decided there