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Senate

The Senate met at 11:30 a.m. and was called to order by the President pro tempore (Mr. STEVENS).

The PRESIDENT pro tempore. Our guest Chaplain is the Reverend Penelope Swithinbank of The Falls Church at Falls Church, VA.

PRAYER

The guest Chaplain offered the following prayer:

Let us pray.

O God, You are the Lord of grace and courage, of wisdom and truth. You give these good gifts to those who call on Your name and You promised to give in abundance when we ask.

We ask that You will give these gifts to the Senators today, that they may be free to think and speak only that which is right and true, without embittering or embarrassing others, that they may be united in knowing Your will and may understand the issues which face them. Give them courage to uphold what is right in Your sight, and integrity in all their words and motives. May their service be for the peace and welfare of all.

We ask these things in the name of Him who is both servant and Lord of all, Jesus Christ. Amen.

PLEDGE OF ALLEGIANCE

The PRESIDENT pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RESERVATION OF LEADER TIME

The PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. FRIST. Mr. President, today we will resume executive session to consider Priscilla Owen to be a U.S. circuit judge for the Fifth Circuit. We have a lineup of speakers throughout the afternoon and likely into the evening. As I have stated previously, if Members want to debate the nomination, we will provide them with that opportunity for debate. We have spent about 26 hours over the course of 3 days on the Owen nomination. On Friday, we asked unanimous consent to have an additional 10 hours before the vote, but there was an objection. Because of that objection, we filed a cloture motion on the nomination, and that vote will occur tomorrow. I will be talking to the Democratic leader as to the exact timing of that cloture vote.

At 5:30 this evening, Senators should anticipate a vote on the motion to instruct the Sergeant at Arms to request the presence of Members. This procedural vote is to ensure that Senators are here for this important debate.

RECOGNITION OF THE MINORITY LEADER

The PRESIDENT pro tempore. The Democratic leader is recognized.

ORDER OF PROCEDURE

Mr. REID. Mr. President, through the Chair to the distinguished Republican leader, does the leader have an indication of when you may be in a position to indicate how late we would go tonight?

Mr. FRIST. Mr. President, through the Chair, I expect, because of the large amount of interest, that we will stay here until everybody does have that opportunity to speak. We will have the cloture vote, and you and I can discuss shortly the timing. But likely we will do the cloture vote possibly late tomorrow morning. We do want to give people an opportunity. We have spent

26 hours over the course of 3 days, but in all likelihood it will be a very late night tonight.

Mr. REID. And we would continue dividing the time?

Mr. FRIST. I think for planning purposes, that has worked out well for the last 26 hours. If over the course of the morning and afternoon we jointly agree, we can continue that as late as necessary tonight or into the hours of the morning. As I mentioned, debate has been very orderly and very constructive. We will continue with that constructive debate over the course of today and tonight.

EXECUTIVE SESSION

NOMINATION OF PRISCILLA RICHMAN OWEN TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT—RESUMED

The PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session for consideration of Calendar No. 71, which the clerk will report.

The legislative clerk read the nomination of Priscilla Richman Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit.

Mr. FRIST. Mr. President, over the last 3 days, for 26 hours, the Senate has debated a very simple, straightforward principle. Qualified judicial nominees, with the support of the majority of Senators, deserve a fair up-or-down vote on the Senate floor. A thorough debate is an important step in the judicial nominations process.

Debate should culminate with a decision, and a decision should be expressed through that up-or-down vote, confirm or reject, yes or no. The Constitution grants the Senate the power to confirm or reject the President's judicial nominees. In exercising this duty, the Senate traditionally has followed a careful and deliberative process with three key

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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components: first, we investigate; second, we debate; and third, we decide. We investigate by examining nominees in committee hearings and studying their backgrounds and qualifications. We debate by publicly discussing the nominees in committee and on the floor, and we decide through an up-or-down vote. Investigate, debate, decide—that is how the Senate and the judicial nominations process operated for 214 years.

But in 2003, the Senate stopped short of a decision. A minority of Senators began routinely blocking final votes on judicial nominations. As a result, the nominees have been left in limbo. Courthouses sit empty. Justice is delayed. Political rhetoric has escalated, and political civility has suffered. It is time once again to decide.

The moment draws closer when all 100 Senators must decide a basic question of principle—whether to restore the precedent of a fair up-or-down vote for judicial nominees on this floor or to enshrine a new tyranny of the minority into the Senate rules forever. I favor fairness and an up-or-down vote.

The individual nominee now before this body is Priscilla Owen. Justice Owen is a qualified, mainstream judicial nominee. She is a sitting member of the Texas Supreme Court who has received the highest possible rating by the American Bar Association. She has been reelected by 84 percent of the people in her home State. More than 4 years ago, the President nominated her to be a judge on the U.S. Court of Appeals for the Fifth Circuit. Since then the Senate has thoroughly and exhaustively investigated and debated her nomination. A brief look at the record tells the story.

The Judiciary Committee has held two hearings on her nomination lasting more than 9 hours. During the hearings, Justice Owen answered more than 400 questions from Senators on the committee. After the hearings, Justice Owen submitted 90 pages of responses to an additional 118 written questions. The Judiciary Committee has debated her an additional 5 hours before committee votes. Today marks the 20th day of Senate floor debate on Justice Owen's nomination. We have spent more floor time on Priscilla Owen than on all the sitting Supreme Court Justices combined.

Yes, Justice Owen has not received one single up-or-down vote on the Senate floor—not one. Four years of waiting, 9 hours of committee hearings, more than 500 questions answered, another 5 hours of committee debate, and 20 days of floor debate, but not 1 up-or-down vote to confirm or reject—not 1.

As majority leader, I have tried for 2 years to find a mutually agreeable solution that will resolve this issue without sacrificing the core principle of an up-or-down vote. I have offered to guarantee up to 100 hours of debate for every judicial nominee, far more than has ever been necessary for any nominee in the past. I have offered to guar-

antee that no nominee ever becomes unjustly stalled in the Judiciary Committee, as some colleagues have alleged has occurred in previous Congresses. Thus far these efforts have not been successful. I remain hopeful that the Senate will restore the tradition of fair up-or-down votes without the need for procedural or parliamentary tactics.

Tomorrow, Senators will have another opportunity to diffuse this controversy. A cloture motion is pending before the Senate. If cloture is invoked, it will bring debate to an orderly close. With cloture pending, 60 votes cast in the affirmative tomorrow would yield a fair up-or-down vote on Justice Owen. I look forward to the debate ahead. I look forward to hearing from my colleagues. And I look forward to a decision by all 100 Senators on the nomination of Justice Owen, a decision expressed through a vote, a vote to confirm or reject, a vote up or down.

The American people expect us to act and not just debate. They expect results and not just rhetoric. We may not—in fact, we will not—agree on every judicial nominee, but we can agree on the principle that qualified judicial nominees deserve an up-or-down vote. Tomorrow, we will vote, and all 100 Senators will decide—judicial obstruction or fair up-or-down votes.

I yield the floor.

The PRESIDENT pro tempore. The Democratic leader is recognized.

Mr. REID. Mr. President, I wish to respond briefly to the distinguished Republican leader's comments. Priscilla Owen has had numerous votes. She has had three that I am aware of on the Senate floor. Those votes dealt with whether we should stop debating her. The votes three times have said no.

The Senate reception area is a beautiful part of the Capitol. I can remember coming here in 1974 and Hubert Humphrey coming off the Senate floor. He had to sit down. He couldn't stand to talk to me. I remember the first time I had a conversation in that beautiful hall. I worked here 10 years before that as a policeman. Of course, I recognized the beauty of the building and of that beautiful room.

We have put out there what we refer to as a Hall of Fame of Senators. It is a place where you have photographs of Senators who were extra special Senators, people who the rest of the Senate, after that Senator left the Senate, determined was somebody who deserved to be in the Hall of Fame. One such man is Arthur Vandenberg. I wish I could have known him. He was a wonderful Senator, a very progressive, thoughtful man.

My distinguished colleague, the Senator from Michigan, Mr. LEVIN, read into the RECORD last week, May 20:

What the present Senate rules mean: and for the sake of law and order, shall they be protected in the meaning until changed by the Senate itself in the fashion required by the rules?

He summarized this issue that is before the Senate today and did it about

60 years ago on an occasion similar to this. How prescient are his comments to the situation in which we find ourselves today.

Senator Vandenberg:

. . . [T]he rules of the Senate as they exist at any given time and as they are clinched by precedents should not be changed substantively by the interpretive action of the Senate's Presiding Officer, even with the transient sanction of an equally transient Senate majority. The rules can be safely changed only by the direct and conscious action of the Senate itself, acting in the fashion prescribed by the rules. Otherwise, no rule in the Senate is worth the paper it is written on, and this so-called "greatest deliberative body in the world" is at the mercy of every change in parliamentary authority, which means the Republicans are in power today and the Democrats may be tomorrow, and a simple majority can change anything.

Mr. President, this is the way it should be. You should not be able to come in here and change willy-nilly a rule of the Senate. A rule of the Senate, you change by the rules. This so-called nuclear option has now been stood on its head, and they are now using what I refer to as the Orwellian language, saying that it is the "constitutional option," and that, by all legal scholars, is foolishness.

I served in the Senate with Malcolm Wallop of Wyoming and Jim McClure of Idaho, westerners who are extremely conservative politically. But here is what they said, and they wrote this in the Wall Street Journal:

. . . [I]t is naive to think that what is done to the judicial filibuster will not later be done to its legislative counterpart. . . . [E]ven if a Senator were that naive, he or she should take a broader look at Senate procedure. The very reasons being given for allowing a 51-vote majority to shut off debate on judges apply equally well—in fact, they apply more aptly—to the rest of the Executive Calendar, of which judicial nominations are only one part. That includes all executive branch nominations, even military promotions. Treaties, too, go on the Executive Calendar, and the arguments in favor of a 51-vote cloture on judicial nominations apply to those diplomatic agreements as well. It is little comfort that treaty ratification requires a two-thirds vote. Without the possibility of a filibuster, a future majority leader could bring up objectionable international commitments with only an hour or two for debate, hardly enough time for opponents to inform the public and rally the citizenry against ratification.

What they are attempting to do in this instance is really too bad. It will change this body forever. We will be an extension of the House of Representatives, where a simple majority there can determine everything. Those of us who went to law school—and the Presiding Officer is a Harvard graduate. I went to George Washington. We know the precedent in the law is important. A precedent of the Senate is even more important. There will be a precedent set that will be here forever if the vote we take tomorrow prevails.

I feel there are Republicans of good will who are willing to be profiles in courage and step to this well tomorrow afternoon or evening and say we cannot do that. We believe that conservative Senators such as Malcolm Wallop

and Jim McClure are right. They believe—Malcolm Wallop and Jim McClure—that especially small Western States need protection. The reason we had the Great Compromise of 1787 was to allow the State of Rhode Island to have equal power in the Senate with New York. What is being attempted will take that away, change the Senate forever.

So I am convinced and hopeful and confident that there will be six courageous Republican Senators who will step down here and go against their leader, go against their President, as was done by Thomas Jefferson's Senate when he had a significant majority and tried to play with the courts; and when Franklin Roosevelt, with a tremendous majority—and no President has ever been more popular than he was when elected in 1936—tried to pack the courts. His Democratic Senators said no. Even the Vice President who served under President Roosevelt, James Garner, said no deal. The President called the Democratic leadership to the White House and said this is what we are going to do. He never conferred with them. And they, wanting to go along with what was the most popular President, probably, in many years—when they walked out, they said no, we are not going to do that. Democratic Senators made the difference. We need Republican Senators here to make the difference, stand and be counted when we vote. We only need six courageous people to stop the Senate from becoming an extension of the House of Representatives.

I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mrs. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mrs. DOLE. Mr. President, before I speak to the important principles at stake in this debate, I want to take this opportunity to thank the Majority Leader for doing everything in his power to avoid the impasse we face today.

We have arrived at this moment in the Senate's history not because of a failure of effort, but because of a failure of cooperation.

Over the past two years, Senator FRIST and other members of the Republican leadership have made compromise an important objective.

We have repeatedly offered to extend the period of debate on the President's judicial nominees. Fifty hours, 100 hours, have been offered—even 200 hours of debate on some of these nominees—all in an effort to ensure that our Democrat colleagues have sufficient time to raise and explain their concerns. Without exception, these offers to provide more time have been rejected out-of-hand.

In May of 2003, Senator FRIST and then-Senator Miller of Georgia intro-

duced compromise legislation that would allow the filing of successive cloture motions on judicial nominees, with each motion requiring fewer votes for passage, and ultimately a simple majority. When it came time to consider this sensible legislation in the Rules Committee, my Democrat colleagues boycotted the mark-up.

In April of 2004, the current Chairman of the Senate Judiciary Committee, Senator SPECTER, introduced legislation to help remove politics from the judicial confirmation process and ensure that nominees would be given a hearing, that they would be reported out of committee, and would receive a vote on the Senate floor. The Democrats reacted to this proposal with silence.

Senator FRIST has been in regular communication with Senator REID, and on March 17 of this year, he formally wrote to Senator REID expressing his hope that a compromise could be fashioned, and indicating that the constitutional option would only be exercised if there were no reasonable alternatives.

And, on April 28, Majority Leader formally reached out again to Senator REID, proposing to grant 100 hours of floor debate on each of the filibustered nominees—that's more than twice the time spent by the Senate debating any of the nominations of the current Supreme Court Justices. Senator FRIST also proposed to develop a process to ensure that nominees are not bottled up in the Judiciary Committee, a complaint often made by my Democrat colleagues. Once again, this sincere effort at compromise was immediately rebuffed.

So let the record be clear: The Majority Leader has pursued compromise with vigor, and he should be commended for doing so.

But, of course, when compromise fails, action must take its place. We are here today because there are important principles at stake . . . principles that are worth defending.

Does the President have the right to expect that his nominees to the Federal bench will be fully considered by the United States Senate? Does the Senate have a constitutional obligation to offer "advice and consent" on these nominations? And are judicial nominees entitled to an up-or-down vote on the Senate floor?

The answer, of course, to each of these questions is a resounding "yes."

For more than 214 years, judicial nominees with clear majority support have received an up-or-down vote on the Senate floor, with a majority vote leading to confirmation. Until just two years ago, a 60-vote supermajority was never the standard for confirmation to the Federal bench. Those are the facts.

By blocking not one, but ten, of President Bush's judicial nominees through the inappropriate use of the filibuster, my Democrat colleagues are doing nothing less than setting Senate tradition on its head. They are rewriting the rules of the game while aban-

doning the custom of self-restraint that has enabled the Senate to function so effectively in the past. And three of these nominees have now withdrawn their names from consideration.

To justify their actions, my colleagues on the other side of the aisle would have us believe that filibustering judicial nominees is just business as usual. They specifically cite the nominations of Abe Fortas, Marsha Berzon, and Richard Paez as examples of Republican-led obstruction efforts.

Justice Fortas, of course, lacked majority support when, in 1968, President Johnson withdrew his nomination to be Chief Justice of the Supreme Court. Today's filibuster victims, on the other hand, all have bipartisan, majority support . . . and are being permanently blocked despite this fact. Fortas' nomination was opposed not just by members of one party, as is the case today, but by Democrats and Republicans alike. And let's not forget: Justice Fortas' nomination was debated for just several days before President Johnson took action. Many of President Bush's nominees have been pending before the Senate not for days, but for years.

I am not sure what citing the Berzon and Paez nominations proves, since both individuals were given the courtesy of an up-or-down vote, and both were ultimately confirmed. They are now sitting judges. In fact, the Majority Leader at the time—TRENT LOTT—worked to end debate on both nominations, believing then, as we do now, that judicial nominees deserve a vote on the Senate floor.

So, what we are witnessing today is something wholly different: it is a highly organized obstruction campaign that is partisan in origin, unfair in its application, harmful to this institution, and unprecedented in our Nation's history.

Now, let's take a moment to examine the record of the individual whose nomination is before the Senate today. Justice Priscilla Owen has been called everything from an "extremist" to a "far-right partisan" to someone who is "out of the mainstream."

But the simple fact is that Justice Owen's record is that of a distinguished jurist who enjoys broad support and who understands that her role is to apply the law fairly and impartially.

Twice elected to the Texas Supreme Court after a long career as a litigator in a prominent Texas law firm, Justice Owen earned the highest score on the December 1977 Texas bar exam and ranked near the top of her class at the Baylor University School of Law. She has been endorsed by a bipartisan group of 15 past presidents of the Texas State bar. An advocate for providing pro bono legal services to the poor, Owen also received a unanimous "well-qualified" rating from the American Bar Association, the highest rating given by that organization—I add, the "gold standard" for our Democrat friends. And in her last election to the

Texas supreme court, Justice Owen earned a stunning 84% of the vote and was endorsed by every major newspaper in the Lone Star State.

Justice Owen received her vote in Texas and she deserves her vote on the floor of the United States Senate.

Mr. President, there is another important issue that must be raised beyond that of the rules and procedures of the Senate: It is the impact this episode in the Senate's history will have on the willingness of men and women of talent to serve their country by serving on the Federal bench.

Millions of Americans have watched as the good reputation of Justice Owen has been unfairly tarnished. As have the reputations of Justice Janice Rogers Brown, and Judge Terrence Boyle, Miguel Estrada, and the other nominees. Their lives and careers have been reduced to partisan—and wholly inaccurate—television sound bites with words like right-wing, radical, extremist.

For those of either party contemplating future service on the Federal bench, this spectacle of unfairness must be chilling—chilling—a glowing “proceed with caution” signal, suggesting that other career options should be pursued instead.

For the sake of the Federal courts in our country, we must do better. We can start by restoring the traditional standard for the confirmation of judicial nominees. Guaranteeing every nominee the opportunity of an up-or-down vote on the Senate floor will dramatically reduce the role of outside interest groups who see the filibuster as a way to exert pressure and score political points. It will force us to debate these nominees on the merits, with real arguments, not with politically convenient slogans and labels. And hopefully, it will help make an appointment to the Federal bench an attractive option for those young people out there who may be thinking about a career in service to the public.

I yield the floor.

The PRESIDENT pro tempore. Under the previous agreement, the time is now divided 1 hour on each side with the first hour under the control of the majority leader or his designee.

Does the Senator from Kentucky seek recognition?

Mr. BUNNING. Mr. President, I do.

The PRESIDENT pro tempore. The Senator is recognized.

Mr. BUNNING. Mr. President, what is the current business before the Senate?

The PRESIDENT pro tempore. The nomination of Priscilla Owen.

Mr. BUNNING. I thank the Chair.

Mr. President, it is important for Senators to understand what we are talking about here. We are talking about the nomination of Texas Supreme Court Justice Priscilla Owen to be a Federal circuit judge. We are talking about her qualifications and about fulfilling our constitutional responsibilities to give advice and consent. We are talking about whether each

Senator will vote yes or no in an up-or-down vote on the nomination of Justice Owen. And soon we will be talking about the long-blocked nominations of California Supreme Court Justice Janice Rogers Brown, former Alabama Attorney General Bill Pryor, and others passed by the Judiciary Committee.

As the Presiding Officer said, the Senate's pending business is the nomination of Justice Priscilla Owen. Justice Owen has had a distinguished record as a judge who respects the rule of law. She understands that elected legislators write the law, not judges. As a judge, she has applied the law as it is written, not as she wished it were written.

The American Bar Association unanimously rated Justice Owen “well qualified.” Everyone here knows that the ABA is not exactly a conservative organization, so that rating speaks volumes. She has served on the Supreme Court of Texas for more than 10 years, where she has earned the respect and endorsements of Democratic justices and attorneys, and more impressively than that, in her most recent election, she received 84 percent of the vote. I cannot imagine getting 84 percent.

Just last week, I met with Justice Owen. I was impressed with her intelligence and honesty. I was impressed with her energy and determination to see this through. But most of all, I am satisfied that Justice Owen will interpret the law rather than try to write it, and I am convinced that she will stand up to any other judges on the Fifth Circuit Court of Appeals who try to rewrite the law from the bench.

Why has Justice Owen been denied an up-or-down vote? As best I can tell, it is because they crossed the radical left when she voted not to take away a mother's right to know that her teenage daughter wanted to have an abortion. Justice Owen did not write the Texas law requiring notification. The legislature did. She merely agreed with the two lower courts that the requirement of the exceptions in the law had not been met.

In the time when a teenage girl cannot get her ears pierced at the mall or take an aspirin at school without parental consent, it is not out of the mainstream to enforce a law requiring notice to a parent before that same teenager can get an abortion.

Another nominee we are discussing this week, California Supreme Court Justice Janice Rogers Brown, is also a nominee who will stand up to the activist judges on the Ninth Circuit Court. Justice Brown has been on the California Supreme Court for 9 years, and she received 76 percent of the vote in her last election, the most of any justice on that year's ballot.

Justice Brown has earned a reputation as a judge who respects the law and the California Legislature's decisions. She has consistently deferred to the legislature's judgment and not substituted her own political views. In other words, she knows the role of a

judge is not to write the law but to apply the law.

Justice Brown has also earned the respect of her California colleagues. In recent years, she has been chosen by the court to write the majority opinions more times than any of her fellow justices. She has the endorsement of both the Republicans and Democratic judges, lawyers, and law professors in California.

Critics point to the statements that Justice Brown made about her policy views outside—outside, I say—of the courtroom. While some may not agree with her personal opinions on issues, outside the courtroom is the place where she should feel free to make her policy views known.

Some of her political views may conflict with the laws of the State of California, but Justice Brown has had no problem applying those laws to the cases before her. That is exactly what a judge is supposed to do—apply the law to the facts of the case regardless of whether the judge would have voted for that law if she or he had been in the legislature.

Mr. President, 5 years ago, a discussion like this about nominees would have been overlooked by most Members of this body. A few Senators would give a statement on the Senate floor in support of a nominee to a circuit court. A few more Senators would insert a statement into the RECORD. And then the Senate would confirm the nominee by a rollcall vote or even a voice vote. That was the ordinary course of business in this body for 214 years. But that is not the case anymore.

Ever since President Bush was elected, his nominees to the circuit court have been denied an up-or-down vote. During the 107th Congress, many of his nominees did not advance when the Senate was under Democratic control. During the 108th Congress, Democrats instituted the first partisan filibuster of judicial nominees, all of whom have majority support in this body.

We hear a lot from the other side about minority rights. No one on this side of the aisle wants to restrict the opposition's ability to speak their objections and vote against these nominees. I invite Senators who oppose these nominees to come to this floor and speak their objections. I encourage them to try to convince me why I should vote against these nominees.

Instead, this is about a minority of Senators trying to take for themselves a power that the Constitution gives only to the President of the United States. This is about a minority of Senators thwarting 214 years of Senate tradition. This is about the obligation and fairness of giving a nominee a vote. This is all about whether elections in this country mean anything.

We are currently engaged in a war against terrorism. We have helped the Iraqi people conduct peaceful democratic elections; also the people of Afghanistan. We have seen the power of the democratic process in the Ukraine,

and we have seen the strength of the voice of the people longing for freedom in Lebanon. Even Kuwait is taking steps to allow women to vote for the first time. How can we as a nation speak of the power of the people, the validity of the democratic process and the strength of the vote, if we let a minority in this body thwart the will of the democratically elected President and majority of this body?

Last fall, the American people spoke clearly. In the highest numbers in history, the American people went to the polls and voiced their opinion with their votes. The American people chose George W. Bush as their President, and the American people created a 55-vote majority for the Republicans in this Senate by electing 7 new Republican Senators. The message the American people sent is clear. They support President Bush and Republican policies and values more than what the other side of the aisle had to offer.

The Constitution gives the President, and only the President, the power to make nominations. It is up to him to pick a nominee. We in the Senate are only empowered to speak for or against and to vote for or against a nominee.

The nominees' records have been examined. Senators have come forth with their objections, and there is still time for objections to be spoken. We have offered to debate the nominations for as much time as the minority wants, to be followed by an up-or-down vote. But the time has come for us to set that vote. The President deserves to have that vote, the majority of the Senate deserves to have that vote, but particularly the nominees deserve to have that vote, and the American people deserve to have that vote. The American people deserve to see how their elected representatives vote on these nominations and to see what kind of judges their Senators support.

We have a crisis in the Federal judiciary. We have too many judges who act like they are in Congress, not on the bench. Those judges are imposing their values on the American people through their decisions. That is why we must confirm nominees like the ones before the Senate, to stand up to activist judges and uphold the law and the Constitution and not write new laws from the bench. Liberal special interests have taken over the Democratic Party and are fighting to stop these nominees, and therefore a minority of Senators is thwarting more than 200 years of Senate tradition to block votes on these nominees.

The other side has no other way to advance its ultraliberal agenda. They cannot pass their laws through this Congress or through State legislatures. They cannot even get elected by running on these issues. So they must turn to the courts, the last holdout of active liberal power to impose their agenda.

What is that agenda? It is unlimited abortion on demand, without even notice to the parents of a minor child or the father of that child. It is about al-

lowing partial-birth abortions. That liberal agenda is about rewriting the definition of marriage. It is about stripping down the pledge of allegiance because it recognizes God. That agenda is about banishing the Ten Commandments from public buildings. That agenda is allowing pornographic photos and other things into our libraries and across the Internet.

That ultraliberal agenda does not sell in the heartland around the dinner table. It does not even sell here in the Congress. So the last great hope for the liberals is the judicial bench, and that is why they fight these judicial nominees who do not give in to their liberal, activist agenda. The only thing that can stop the rewriting of our Constitution and laws is judges who will stand up to that activism and fight for the rule of law. President Bush has nominated such individuals. Now the Senate must allow an up-or-down vote on those nominees.

There are other consequences to this debate as well. The confirmation process has become quite a burden on the nominees and their families. In the last Congress, one of the most qualified judicial nominees ever, Miguel Estrada, asked for his nomination to be withdrawn because of the strains on his personal life and family. Several more nominees asked not to be renominated in the 109th Congress because of those same burdens. There are also practical consequences for the American people who rely on a functioning court system.

Because of the vacant seats, our appeals courts are experiencing huge delays that are unfair to the parties and put added strain on sitting judges. Nowhere is that more pronounced than in the Sixth Circuit, which encompasses my State. One-quarter of the seats of that court sit empty because the nominees from one State, Michigan, are being denied an up-or-down vote. Those vacancies have a real effect on the lives of 30 million people who live in the Sixth Circuit. The people of Kentucky, Ohio, Tennessee, and Michigan, the people of the Sixth Circuit, are being denied justice in a timely manner.

This issue is far too important to leave unresolved any longer. We must move to a vote. The record is clear. The nominees before the Senate are qualified to serve on the Federal bench and deserve to be confirmed by the Senate. They have the proper understanding of the role of each branch of Government under our Constitution. They will stand up to those who wish to use the court as an unelected legislature. They deserve an up-or-down vote.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. ALEXANDER). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. GRASSLEY. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

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

Mr. GRASSLEY. Mr. President, I am going to speak on the judge issue that is before the Senate. I was wondering what the time constraints are.

The PRESIDING OFFICER. The time until 1 o'clock is controlled by the majority.

Mr. GRASSLEY. That means I can speak until 1 o'clock; is that right?

The PRESIDING OFFICER. The Senator is correct.

Mr. GRASSLEY. Mr. President, for several days now, the Senate has been debating two nominees for the Federal bench, Priscilla Owen and Janice Rogers Brown. I come to the floor to express my support for these two highly qualified women, and I also do it to urge my colleagues to support an up-or-down vote so that these folks know whether a majority of the Senate is consenting to their nomination by the President of the United States, in other words, confirm these two highly qualified judges.

One of the most important roles that we Senators have is the responsibility of advising and consenting to individuals that the President has nominated to fill positions on the three levels of the Federal judiciary. But this responsibility has been threatened by actions of Democratic leadership. Of course, that has brought us to this extended debate, over several days now, about the role of the Senate as expressed in the Constitution about the handling of Federal judges nominated by the President.

It seems to me the Constitution is very clear on the role of the Senate in this judicial confirmation process. Judicial nominees are chosen by the President with the advice and consent of this body. Until President Bush was elected, no one ever interpreted this requirement to mean anything but a simple majority vote of those present and voting in the Senate. For over 200 years, no judicial nomination, with a clear majority support in the Senate, had ever been denied an up-or-down vote on the Senate floor. This was the case regardless of whether a Republican or Democratic President was in office. This was the case, regardless of whether the Senate was controlled by Democrats or Republicans.

Recently, in the last Congress, the Democratic leadership decided it was going to change the ground rules. The Senate Democrats rejected a 200-year-old Senate tradition of giving judicial nominees an up-or-down vote. By doing this, the Democratic leadership has rejected the Constitution, rejected the traditions of the Senate, and it seems to me as a result of the last election, when approving judges was very much an issue to the American electorate, they are now rejecting the will of the American people.

The Democratic leadership targeted 16 of President Bush's 52 court of appeal nominees. They actually filibustered 10 and threatened to filibuster 6

more, a full 31 percent of President Bush's appellate court nominees being stymied. Because of this, President Bush has had the lowest percentage of his court nominees confirmed by any President in recent memory.

What is this debate all about? It is basically a debate about what the Constitution requires of the Senate. It is a debate about fairness to the individuals who do not have an opportunity to see whether a majority of the Senate supports them and approves their appointment.

And in the case of fairness to the individual nominees, they have been waiting for years to be confirmed. They have majority support in the Senate, but a minority of Senators is opposed to President Bush's appellate court nominees and, as a consequence, will not allow the Senate to give these individuals an up-or-down vote. The Democratic leadership will not allow the Senate to exercise its constitutional duty of advice and consent.

The Democratic leadership will not allow even this one Senator to exercise my constitutional responsibilities. In a sense, this Senator from Iowa and 99 others are being denied an opportunity to carry out their constitutional responsibility. That is simply not right. The Constitution demands an up-or-down vote. Fairness demands an up-or-down vote.

Some have claimed a rule change on this matter is a violation of Senators' free speech and minority rights. Let me make it very clear, we are not talking about changing rules in this process, we are talking about abiding by the practice of the Senate, until 2 years ago, over the 214-year history of the Senate. So no rule change, just doing what the Senate has always been doing, and no one has raised the issue before about a Senator's free speech and minority rights being violated. There is not anything out of the ordinary then about a majority wanting to exercise its right to keep Senate procedures the same as they have always been.

For example, we were faced with problems in 1977, 1979, 1980, and 1987, problems that were visualized by the Senate majority leader at that time as stopping the Senate from doing what is constitutionally necessary for the Senate to do. In those years, Senator BYRD led a Democratic Senate majority in setting precedents to restrict minority rights. The Republicans, who were the minority party, did not respond by threatening the shutdown of the Senate or the stalling of legislation.

On the other hand, the actions of the Senate Democrats now are an unprecedented obstruction, plain and simple. The Democratic leadership is not interested in additional debate on the nominees. This is not about minorities wanting to exercise speech and debate on the nomination as long as they might want. The Republican majority leader has offered the Democrats time and again as much time as they want

for debate. Yet the Democratic leader indicated in so many words that the Democrats would not agree to any time agreement.

The Democratic leadership has taken the position that it will not even allow an up-or-down vote on these nominees. The minority leader has indicated there is no time long enough for Democrats to debate these nominations.

I clearly understand the importance of filibusters and would not want to see them done away with completely. However, it is also important to make a distinction between filibustering legislation and filibustering judicial nominations. The interests of the minority party are protected in the Senate. It is the only segment of our Government where minority points of view are protected. It has served a very good purpose over 200 years bringing about compromise. Filibusters are meant to allow insurance that the minority has a voice in crafting legislation.

When working on a bill, it is possible to make changes in compromises to legislative language until you get the 60 votes needed under Senate rules to bring debate to a close.

In the tradition of the filibuster on legislation, unlimited debate ensures that compromise can take place, protecting some of the desires of the minority. That minority might not be a partisan minority; that minority could be a bipartisan minority that wants to make sure certain changes are made in legislation.

Judicial nominees, however, are very different than legislation. An individual such as Judge Brown or Judge Owen cannot be compromised some way so the filibuster, the way it is used in legislation, can be used to bring about compromise of an individual because you cannot redraft a person like you can redraft legislation to get over a filibuster, to get to finality so a majority can rule. In a sense, the minority is saying it is possible to use the filibuster to cut off the left arm of one of these nominees and put on a new arm so they are compromised to get to finality. That is ridiculous. It just does not work.

But it also illustrates the rationale behind a filibuster applicable to legislation, not applicable to an individual.

For judicial nominations, it is the Senate's responsibility to determine whether nominees are qualified for a position they are nominated to, and to say so through an up-or-down vote. Let a majority of the Senate decide if they are qualified.

Throughout our Nation's history, it has only taken a majority of Senators to determine a nominee's qualification for the judge position they are appointed to. It seems to me after a 214-year history, that is history worth continuing.

The reality about the Democratic leadership's filibuster is that the minority wants to block filling appellate court judgeships by requiring 60 votes to proceed to the nomination. But no

other President has been required to get 60 votes for his judicial nominees. No other judicial nominee needed to pass the 60-vote hurdle of a supermajority.

Many Federal judges on the bench today would have never made it, not with that sort of requirement. In fact, all Senators here got elected by a simple majority, 50 percent of the vote. If we had requirements for supermajority rule for Senators to be elected, a lot of Senators who are my colleagues might not be here today. Why are Senators now wanting to approve judges only if they get a 60-percent vote? The reality is no other Senate majority has been excluded from judicial confirmation process in 214 years. We need to restore tradition and the law of judicial process. We need to give these nominees the up-or-down vote the Constitution requires. We need to stop a systematic denial of our advice and consent responsibilities which have been shuttered by the use of the filibuster.

I have been a Member of the Senate since 1981. Before I got to the Senate I served in the other body since 1974. I love the Senate. I have worked hard to be a very productive Senator. I want to do what is best for the Senate, for my constituents, and for my country. That is not different than the other 99 Senators most of the time. That is what we were all elected to do. The Republican majority leader is also trying to do what he thinks is the best thing for this country by moving to reestablish the over 200-year Senate tradition by giving judicial nominees the up-or-down vote.

This is not going to destroy the Senate. It is in the tradition of the Senate and it is within the tradition of the Constitution. The 214-year history of this Senate speaks louder than just the last 2 years, but the last 2 years will trump the first 214 years if we do not take action to keep the advice and consent confirmation process within the tradition of the Senate.

It is just plain hogwash to say that moving to make sure the rule is to give judicial nominees an up-or-down vote will hurt our ability to reestablish fairness in the judicial nominating process. It is not going to hurt minority rights. It establishes what we call regular order as it has been for 214 years. It will be fair both to Republicans and Democrats alike. All the majority leader wants to do is to have a chance to vote these nominees up or down. If these individuals do not have 51 votes, they will be rejected and should be rejected. But if these individuals do have 51 votes, then they should be confirmed. That is according to the Constitution.

If a Senator disapproves of any one of these individuals, vote against the nomination. I have done that in the past. But do not deprive the people the right to support a nominee through their elected Senator.

Some claim many judicial nominees were filibustered by Republicans, particularly when President Clinton was in office. That isn't accurate and that is a nice way for me to say it. Very few people either inside or outside this Chamber have been as involved in the issue of judicial nominations and the use of the filibuster as I have. As a long-time chairman of the Judiciary Subcommittee on the Federal Courts, I have a unique perspective on the debate and the use of filibusters.

First, when the Democrats were in a majority in the Senate under President Reagan—and this goes back to my starting in the Senate in 1981—they blocked 30 of President Reagan's nominees and 58 of President Bush Senior's nominees. They did that in the Judiciary Committee.

Now, that is not equivalent to a filibuster. I do not want to mislead anybody. Then, in the last few years of President Clinton's administration, many Republicans became disillusioned with the number of nominees the administration had sent to the Senate, and we felt our own Republican leadership was allowing out-of-the-mainstream nominees to be confirmed. This all came to a head with the nominations of Ninth Circuit Judges Paez and Berzon. Now, understand these people are serving as judges now. They were nominated to that position by President Clinton.

Going back to this time of Judges Paez and Berzon, at that time we had a Democratic President and a Republican-controlled Senate. There was serious talk of filibustering these nominees. I have heard some Democrats and ill-informed pundits try to make the case that Paez and Berzon were filibustered. Well, they were not.

The reality is, the Republican leadership, including the chairman of the Judiciary Committee at the time, argued that there had never been a filibuster of an appellate court nominee. The Republican leadership argued Republicans should not cross that Rubicon and set the precedent because then it would be used against Republicans in the future when we had a Republican administration. So it was decided at that time there would not be a filibuster and we would not set that precedent. There would be a cloture vote, yes, but everyone knew that cloture vote would prevail and the nominee would be confirmed by a majority vote.

So the Members who wanted to filibuster decided to go along with the leadership's wise counsel even though these Members never trusted that the Democratic leadership would follow our example. I voted for cloture. I voted to get over 60 votes so we could move on with what we knew should have been done by the Senate. But I want you to know that I voted against these two nominees, Judges Paez and Berzon. And I was not alone. Other Republican Senators did the same thing. But in the end, unfortunately, those Members were right not to trust Demo-

cratic leadership because Democratic leadership has now crossed the filibuster Rubicon.

We are not only being denied the ability to perform our constitutional duty in the judicial selection process, the move to filibuster is upsetting the checks and balances and the separation of powers principle our Nation is founded upon. The Democrats are the ones who are upsetting the checks and balances. They want to grind the judicial process to a halt for appellate court nominees so they can fill the bench with individuals who have been rubberstamped by leftwing extreme groups.

Let me say something about the nominees, then, because these are the folks whom we are debating, these are the folks whose professional future, personal future is at stake by what we do here of allowing 51 votes when they will be approved or 60 votes when they will not be approved.

Priscilla Owen and Janice Rogers Brown are both highly qualified individuals, with exceptional legal abilities. They are talented women, respected women, true pioneers. But they have been drawn into the web of the far leftwing special interest groups. These women have been called outside the mainstream by their opponents. They have been called unworthy for the Federal bench.

They have been labeled, among other things, as "activist," "antivil rights," and "anticonsumer." These claims are not true. And the claims charged against other of President Bush's judicial nominees are just as false. All these outrageous claims have consequences.

The travesty is Priscilla Owen and Janice Rogers Brown have been waiting for years to be confirmed. The travesty is other worthy nominees such as Miguel Estrada got tired of putting up with the antics of the Senate, a Senate untraditional of its first 214-year history, and just said: I am not going to fight it anymore. So Miguel Estrada withdrew his nomination. The travesty is that a nominee like Judge Pickering is trashed. The travesty is that the good name of a nominee like William Pryor is dragged through the mud.

Ripping to shreds the reputation of these individuals with unfounded allegations is unacceptable. This tactic sends a clear message to good people who want to serve their country that they will have to endure outlandish and baseless attacks on their record and character if they ever want to be a Federal judge. The Democrats are doing this because they are using a far left litmus test to satisfy their leftwing—their leftwing that is out of the mainstream—special groups. So when the Democratic leadership says these nominees are outside the mainstream, they are basically saying these individuals have not been approved by their allies, the far left special interest groups.

But judicial nominees should not be subject to a litmus test. They should

not be subject to an ideology litmus test. A nominee should not be opposed, as Priscilla Owen and Janice Rogers Brown are being opposed right now, because they will strictly follow the law, be constitutionalists, rather than legislating from the bench some leftwing agenda.

Moreover, history has proven the wisdom of having the President place judges with the support of the majority, not a supermajority, in the Senate. That process ensures balance on the courts between judges placed on the bench by Republican Presidents and those placed on the bench by Democratic Presidents.

The current obstruction led by Senate Democratic leaders threatens that balance. Priscilla Owen and Janice Rogers Brown deserve an up-or-down vote. It is high time to make sure all judges receive fair up-or-down votes on the Senate floor, up-or-down votes for judicial nominees of both Republican and Democratic Presidents alike in the tradition of the Senate for 214 years, until 2 years ago.

In my town meetings across Iowa, I hear from people all the time, Why aren't the judges being confirmed? If we do not take care of this issue this week, I am going to hear it in my 22 town meetings across northwest Iowa next week when we are not in session. I think most people understand the process is being politicized to the point that good men and women are being demonized and their records distorted at an unprecedented level.

I hear from Iowans all the time that they want to see these nominees treated in a fair manner, and they want to see an up-or-down vote. The Democratic leadership likes to say the Republicans are the ones who are changing the rules. But that is not true. The Democrats are the ones who have engaged in extreme behavior and tactics, pulling out all the stops to defeat well-qualified nominees who would have majority support in the Senate if they were given an up-or-down vote. They are the ones who have distorted the rules to the point that the Senate is being denied its ability to fulfill its constitutional responsibility. And if Senator FRIST has to do it, what he is doing is leaving the rules practiced exactly the way they were for 214 years.

Filibustering judicial nominees may be touted as standing firm on principle. On the contrary, what it boils down to is an obstruction of justice. Let's do the American people a favor. Let's stop the theatrics and get back to the people's business. All the rallies and political spin doctoring are not clearing any court dockets, and they are not impressing the American public either.

Let's debate the nominees and give our advice and consent. It is a simple "yea" or "nay," when called to the altar to vote. Filibustering a nominee into oblivion is misguided warfare and the wrong way for a minority party to leverage influence in the Senate. Threatening to grind legislative activity to a standstill if they do not get

their way is like being a bully on the school yard playground. Let's do our jobs.

Nothing is nuclear about asking the full Senate to take an up-or-down vote on judicial nominees. It is the way the Senate has operated for 214 years. The reality here is the Democrats are the ones who are turning Senate tradition on its head by installing a filibuster against the President's judicial nominees.

The Senate has a choice. We can live up to our constitutional duties to advise and consent to President Bush's judicial nominees or we can surrender our constitutional duty to the leftwing special interest groups who apparently control the Democratic Party. This Senator chooses to follow the Constitution.

We need to return to a respectable and fair process. We need to return to the law and the Constitution. We need to return to the Senate's longstanding tradition. We need an up-or-down vote for these judicial nominees.

In case there are some people sincerely led to believe that somehow appointing certain people with a strict constitutionalism to the courts is something to worry about, I would simply ask them to look at how history works in bringing balance to our judiciary throughout the history of our country. Think in terms of 8 years of a Republican President appointing maybe people who are strict constitutionalists to the judgeships—and not all of them are; but just say that they might all be—then you have 8 years of a Democratic president with people of an opposite point of view being appointed to the judgeships. That brings balance.

But also think in terms of how it is difficult to predict down the road 25 years how judges are going to rule. Think of two of the foremost liberal people on the Supreme Court, Justice Souter and Justice Stevens. Who do you think appointed these most liberal members to the Supreme Court? Republican Presidents did. And then balance that with the two other most liberal members on the Supreme Court, Breyer and Ginsburg. Who appointed them? A Democratic President. You could make an argument that Republican Presidents have brought more balance to the Supreme Court than Democratic Presidents have.

Then the other thing is, look at somewhere you thought they were going to be predictable where they would end up, and you have Justice Kennedy and you have Justice O'Connor, who were supposed to be very strict constructionists when they were appointed to the Supreme Court, but they go back and forth between the conservative wing of the Court and the liberal wing of the Court.

So whatever worries the Democratic Senators of today, I wish they would take a look at history. Time answers a lot of these problems. Elections answer a lot of these problems. And we have a

great constitutional system that has worked for so long over such a long period of time that in the final analysis everything is going to work out OK.

I yield the floor.

The PRESIDING OFFICER (Mr. ROBERTS). The Senator from California.

Mrs. FEINSTEIN. Mr. President, I come to the floor to make a plea to my colleagues and my friends on both sides of the aisle. I have spoken on this issue twice. But within 24 hours, the time will come when the Senate may well be changed. Right now is the time to let political pressures cool, to step back from the brink and to reflect on the long-term consequences rather than the short-term gain. The time has come to walk away from a decision that will turn our governmental system on its head.

The reason this is called the nuclear option is not necessarily what it would do to the body but what it does to our ability to control the rules of the body. Because for the first time in history, a rule will be changed or, as we on this side of the aisle say, broken, by a majority vote, 51 votes, a majority of the Senate, when in fact rule changes require a two-thirds majority vote. There is virtually no rule that I know of in this body that can be changed with 51 votes.

I understand that it is going to be done without consultation of the Parliamentarian. My understanding is that he would say it is not within the Senate rules or precedent to change this rule with only 51 votes. Nonetheless, it is going to be done.

When taken to its logical conclusion, a majority vote in favor of the nuclear option will fundamentally alter our democracy, not only by breaking the rules as I just described but by altering the fundamental balance between this body and the other House and, most particularly, the role that Senators have had representing their constituents for over 200 years.

I recognize we may not agree on the qualifications of the nominees before us. I recognize many of my friends on the other side of the aisle feel very strongly about confirming these candidates to the court. But in the end, regardless of who is right and who is wrong, changing the Senate's rules, throwing out precedent, will profoundly harm this body, the comity we enjoy, the moderation that has defined the Senate, the bipartisanship that is essential, and the balance of power that is needed to maintain any form of a democratic government, particularly this one.

This nuclear option changes the deliberative nature of this body because it, in effect, ipso facto changes the Senate into the House of Representatives so that the Senate will work its will by majority. That has never necessarily been the case before. We all know the Senate is like a huge bicycle wheel. When one of the 100 spokes is out of line, it stops the wheel. So everybody respects that and pulls back from the

brink because of it because we know if we are the one that puts on the hold or stops the wheel from turning, that we also can feel that happen to us with our legislation and our bills.

Former Republican Senator Warren Rudman, whom I greatly respect—he represented New Hampshire from 1980 to 1993—was quoted in the press this weekend. Let me share with you what he said:

I will lament this vote if it succeeds. People tend to look at the history of the Senate and how it functions, and my bottom line is that the Founding Fathers wanted a true balance of power and this would shift the balance of power to the White House. My sense is, thinking back on it, that I don't think you could have gotten 51 votes on this sort of thing in the past. . . I would have clearly voted against it.

That was Warren Rudman this past weekend.

I urge my colleagues on the other side of the aisle to stand up against the political tidal wave pushing this agenda and let the passions of the moment cool. The debate last week was overwhelmed with fiery rhetoric and political posturing. One Republican compared Democrats to Adolf Hitler. Another Senator insinuated that Democratic opposition is based on a nominee's religious faith. Others twisted the history of judicial nominations beyond recognition. And to be fair, some Senators on our side of the aisle also employed fiery language.

Just listening to this debate, we can see what will happen if the majority goes forward on this path. The Senate will most certainly face a loss of civility, a loss of respect for differences. Political message will overwhelm substantive policy, and political potshots will drive our debates rather than the best interests of the American people. Playing to the base rather than playing out the real-life consequences of our acts will rule the day. Regardless of each of our opinions on whether each nominee before the Senate should be appointed to the appellate courts, the aftermath of the nuclear option will not serve the American people well.

On two prior occasions, I have come to the floor to talk about the importance of checks and balances, the intentions of our Founding Fathers, the structure of the Constitution, and the inherent benefits of conflict and compromise. Our forefathers knew, as do our modern counterparts, that essential to a true democracy is the need for a balance of power because who is in the minority has, and will, constantly change. Democrats held the House majority for over 50 years, and now Republicans have been in the majority for over a decade. Democrats held the White House for 8 years. Now Republicans will have occupied the White House for 8 years. The swing back and forth between the majority and the minority applies not just to political parties but to populations and ideas as well. Populations change and the political pendulum swings, but what moderates those swings and the tidal wave

of power is the role and influence of the minority.

While it is true many of us on this side of the aisle were frustrated when Republicans used their rights and the Senate rules to block Clinton's judges and our legislative agenda, we aired our frustration. At that time, I urged my colleagues to allow a vote. However, I did not advocate breaking the rules with 51 votes and employing the nuclear option as a way to force Republicans to their knees. The role of moderation has worked and has been an important balance in our country.

As my colleague, Senator LIEBERMAN, said last week:

In a Senate that is increasingly partisan and polarized and, therefore, unproductive, the institutional requirement for 60 votes is one of the last best hopes for bipartisanship and moderation.

For example, President Clinton understood the strong feelings of our Republican colleagues on judges, and he went to extensive efforts to consult Republicans on judges that would be nominated. In describing these efforts, Senator HATCH wrote in his book that he "had several opportunities to talk privately with President Clinton about a variety of issues, especially judicial nominations."

Senator HATCH described how when the first Supreme Court vacancy arose in 1993, "it was not a surprise when the President called to talk about the appointment and what he was thinking of doing." He went on to describe that the President was thinking of nominating someone who would require a "tough political battle." Senator HATCH recalled that he advised President Clinton to consider other candidates and suggested then-DC Circuit Judge Ruth Bader Ginsburg, as well as then-First Circuit Judge Stephen Breyer.

So there was a defined, informal consultation that showed the power and authority of the Republican chairman of the Judiciary Committee, who actually submitted to the President—at that time Bill Clinton—the names of Ruth Bader Ginsburg and Stephen Breyer for appointment to the Supreme Court. However, today there is not really active consultation by this administration in most cases. Instead, there appears to be a kind of disregard for the opinions of all Democratic Senators, even home State Senators. I know my colleagues from Michigan have been extremely frustrated in their efforts to find a solution to the stalemate over the Sixth Circuit.

I am also concerned that if the nuclear option moves forward, there will no longer really be a need for the Judiciary Committee. I ask my colleagues to think about this. If the President is to be given unlimited power to appoint whomever he chooses, there will be no need for hearings, there will be no need for an examination of a nominee's record. Any dissent or concerns will fall on deaf ears, so long as there are at least 50 Senators willing to confirm the President's choices for the Federal bench.

Checks and balances are not new. Our country's 200-year tradition of working through our differences is not new. The need for consultation is not new. The important role of the Judiciary Committee—and I have served as a member for 12 years now—in examining a nominee's qualifications, is not new. What is new is the majority party's decision that if you win an election, you should have absolute power.

Earlier this week, the Senator from Pennsylvania, Mr. SANTORUM, stated:

I guess elections do not matter. I guess who people vote for President is of no concern to the minority in the Senate. . . . If someone happens to be reported out and a majority defeats, fine, majority rules.

It is this very sentiment that concerns me and many others because this logic ignores that the Democratic Senators won their elections, too, and that while President Bush did win the election, those who did not vote for him still maintain their rights to have their voices represented in Government. Our country is not an autocracy. It is a democracy, where the minority enjoys an active role, particularly in the Senate.

Protecting the minority and ensuring it is not overrun by a strong majority is central to the need for an independent judiciary. In fact, this is a basic lesson taught in elementary civics in schools across the country. One teacher's notes found on the Internet as a model for civic teachers states:

Purpose/Rationale/Goals of the day's lesson:

Students should understand that majority rule does not take precedence over minority rights. The lesson should promote thought, understanding, and acceptance that unpopular ideas are protected under the United States Constitution. Students should also understand that it is the independent judiciary that protects these rights.

So it is a basic lesson we all learn in school from a very early age. Federal judges are meant to be independent. That is one of the reasons why the nuclear option is so dangerous—because it completely quells the arguments, the views, and the votes of the minority and, therefore, eases the way for absolute power to prevail with absolutely partisan appointments. There is nothing the minority can do to stop that.

I have quoted John Adams before on the specific need for an independent judiciary.

He stated in a pamphlet called "Thoughts on Government," which was distributed in 1776, the following:

The judicial power ought to be distinct from both the legislative and the executive, and independent upon both, so that it may be a check upon both, as both should be checked upon.

Today, I also want to quote from Alexander Hamilton, who, in the *Federalist Papers*, No. 78, published in 1788, wrote:

As liberty can have nothing to fear from the judiciary alone, it has everything to fear from its union with either the [executive or legislative] departments.

These statements by Adams and Hamilton clearly set forth the intent of

our forefathers that the judiciary should be and must be independent. The Senate was meant to play an active role in the selection process, and the judiciary was not solely to be determined by the executive branch.

As a matter of fact, I pointed out earlier on that in the early days of the Constitutional Convention, it was proposed that the Senate solely determine who would sit on the federal bench, and then that was changed to give the President a role in the nomination of judges confirmed by the President.

I have also spoken about the history of judicial nominations under the Clinton administration. As I have explained in great detail, during the previous administration, Republicans used the practice of blue slips, or an anonymous hold, to allow a single Senator, not 41, to prevent a nomination from receiving a hearing, a markup, a cloture vote, or an up-or-down vote. This demonstrates that Senate rules have been used throughout our history by both parties to implement a strong Senate role and minority rights, even the right of one Senator to block a nominee. As has been illustrated by my colleagues on the other side of the aisle, both parties have bemoaned the impact of procedural delays on confirming judges.

However, President Clinton's nominees were pocket filibustered by as little as one Senator in secret and, therefore, provided no information about why their nomination was being blocked, let alone an opportunity to address any concerns or criticisms about their record—no up-or-down vote, no cloture vote, no vote in the Judiciary Committee, nothing. There were 23 circuit court nominees handled this way—filibustered by as few as 1 person, 1 Senator—and 38 district court nominees were filibustered by as little as 1 Senator.

In addition, unlike what some have argued, this practice was implemented throughout the Clinton administration when Republicans controlled the Senate, not just in the last years or months.

The question I have posed to this body twice now—and I do it a third time—is whether the public interest is better served by 41 Senators taking an openly declared position, publicly debating an individual's past speeches, temperament, opinions, or a filibuster of 1 or 2 Senators in secret when one does not know why or who? I think the answer is pretty clear.

This weekend, I read the press coverage on the nuclear option with great interest. I was heartened to realize that Democrats are not the only ones who are concerned with the idea of drowning out minority views and turning the Senate into the House.

The New York Times editorialized:

The Republican attack is deeply misguided. There is a centuries-old Senate tradition that a minority can use a filibuster to block legislation or nominees. The Congressional Research Service has declared that

the nuclear option would require that "one or more of the Senate's precedents be overturned or interpreted otherwise than in the past." The American people strongly oppose the nuclear option, according to recent polls, because they see it for what it is: rewriting the rules to trample the minority.

That is the New York Times.

The Associated Press reported on a new poll that asked about judges and the Senate's role. The results found that 78 percent of those polled stated that the Senate should "take an assertive role in examining each nominee." And a Time poll said 59 percent of Americans believe Republicans should not be able to eliminate the filibuster. Whereas, in sharp contrast, a poll released last Thursday by NBC News/Wall Street Journal found that only 33 percent of those surveyed approve of the job being done by the Congress. This is a monumental number. I submit that as partisanship and the polarization of this body increases, the poll numbers will continue to decrease because that is not what the American people want us to do.

In addition, there were more reports of former Republican Senators who are also concerned about the impact of a nuclear option. Former Senator Clifford Hansen, a Wyoming Republican who served from 1967 to 1978, was quoted as stating:

Being a Republican, we were the minority party, and I suspect there are some similarities between our situation then and those that the Democrats find themselves in today. I am sure that it would have concerned me if there were limits on the filibuster. When I was in the Senate, the Democrats were in control, and we made a lot of friends with the Democratic Party, and I realized then that if I were going to get anything done, I had to reach out and establish some real friendships with members on the other side.

That is what this Democrat has tried to do over the past few years as well.

The Los Angeles Times wrote:

If a showdown over President Bush's nominees goes forward as planned next week, it would mark one more significant step in the Senate's transformation from a clubby bastion of bipartisanship into a free-wheeling political arena as raucous as the House of Representatives.

And The Economist wrote:

Amid all this uncertainty, the filibuster debate has almost certainly harmed one institution: the Senate. It was deliberately designed by the Founding Fathers to be the deliberative branch of the American Government. Senators who sit for 6 years rather than the 2 years of the populist House, have long prided themselves on their independence. The politics of partisanship has now arrived in the upper Chamber with a vengeance. The Senate has long stood as a barrier to government activism on either side.

As all these accounts acknowledge, the nuclear option will turn the Senate into a body that could have its rules broken at any time—and this is significant—not by 60 votes but by a majority of Senators unhappy with any position taken by the minority. It begins with judicial nominations. Next will be executive appointments, and then it will be legislation. If this is allowed to hap-

pen, if the Republican leadership insists on forcing the nuclear option, the Senate becomes the House of Representatives, where the majority rules supreme and the party in power can dominate and control the agenda with absolute power.

This country is based on a balance between majority rule and minority rights. I believe it is important to reflect on what our country is facing while this debate is moving forward.

We had another sharply divided election, where the President was elected by a slight margin. The differences in American beliefs have been highlighted through heated debate over the budget, Social Security, the war in Iraq, increased tax cuts, funding for education, health care, and law enforcement. At times, the level of disagreement can seem overwhelming. Yet, with all this tension, the majority party is attempting to implement a strategy to completely silence the minority. It is no longer acceptable to have differences. The defining theme now seems to be "my way or the highway."

Last week, I said, when 1 party rules all 3 branches, that party rules supreme, but tomorrow, if the nuclear option proceeds, the Republican party will be saying that supreme rule is not enough; total domination is what is required. The nuclear option is the majority's strategy to completely eliminate the ability of the minority to have any voice, any influence, any input. When might makes right, someone is always trampled. Instead, I believe we should be ruled by the philosophy that right makes might.

Thomas Jefferson consistently advocated for our country based on the free flow of ideas and open debate. And maybe up to this point we have taken for granted that a government of the people must be based on reason, on choice, and on open debate. But before our Nation was founded, modern governments were based on authoritarian domination. The people, in general, were considered little more than cattle to be governed and controlled by those possessing wealth, property, education, and power. The Founding Fathers introduced the revolutionary idea that government could rest on the reasoned choice of the people themselves.

In a free society, with a government based on reason, it is inevitable that there will be strong disagreements about important issues. But a government of the people requires difference of opinion in order to discover truth.

As I said at the beginning of this statement, I am deeply troubled that legitimate disagreements over a nominee's qualifications to be elevated to a lifetime appointment have been turned into a strategy to unravel our constitutional checks and balances.

Unfortunately, while the Department of Defense authorization bill sat on the calendar for the past week, we have wasted time on a clear stalemate. There are many urgent problems the Senate needs to be focused on and

Americans want us to focus on: the war in Iraq, protecting our homeland, addressing the high cost of prescription drugs, alleviating rising gas prices, ensuring our Social Security system is stable and working, and reducing the Federal deficit. I am fairly certain we will not all agree on the best means to address these issues.

I very much regret what we are in today. To give you just a small example—and I think the Presiding Officer knows this—I sit on three committees. These three committees, for markups of critical bills, are meeting simultaneously. They are Intelligence, marking up the Patriot Act; Judiciary, marking up the asbestos bill; and the Energy Committee, marking up the Energy bill at the same time. This is not the way to do the people's business—constrained by time limits artificially imposed because of this present situation.

I very much agree with the sentiment expressed by my colleague, Senator SPECTER, when he said:

If [during the cold war] the United States and the Soviet Union could avoid nuclear confrontation . . . so should the United States Senate.

I hope Republicans will choose to honor the tradition of our democracy and walk away from this confrontation. I know if the shoe were on the other foot, I would not advocate breaking Senate rules and precedent.

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

THE PRESIDING OFFICER. The distinguished Senator from Hawaii is recognized.

MR. AKAKA. Mr. President, I rise today in opposition to the nomination of Texas Supreme Court Justice Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit. After being rejected by the Senate Judiciary Committee in 2002, and after being renominated and successfully filibustered by the full Senate in the 108th Congress, Justice Owen has been nominated yet again to the U.S. Court of Appeals for the Fifth Circuit.

In my opinion, Justice Owen has not demonstrated an appropriate judicial temperament for a lifetime appointment to the Federal bench. More importantly, her own colleagues on the conservative Texas State Supreme Court have described her dissents as "nothing more than inflammatory rhetoric." In another case, the majority stated that Justice Owen's dissenting opinion, ". . . not only disregards the procedural limitations in the statute but takes a position even more extreme." However, I will not dwell too long on Justice Owen's record. It speaks for itself, and as I mentioned earlier, we have given much time and thought to this nomination. Much has already been said in opposition to her nomination. Instead, I will spend some time on the majority's plan in this Chamber to subvert the minority's right to extended debate.

I have spent the past few weeks listening to the debate over seven nominees who were not confirmed in the 108th Congress and have been renominated to the Federal bench by President Bush. We are nearing the end of a debate that may forever change the very nature of how this great institution operates: by a delicate balance of the majority's ability to set the agenda and the protection of the minority's rights. One thing is clear to me, this discussion about the minority's right to extended debate is not getting us any closer to enacting much-needed legislation to assist our constituents.

Outside of Washington, DC, on a day-to-day basis our constituents face many challenges: escalating health care costs, record high gas prices, and mounting debt that will be handed down to our children and grandchildren. Despite these day-to-day challenges, the majority party continues to put seven judicial nominations at the top of its agenda.

Let it be clear to those following this debate. This discussion is over the fact that the Senate has passed only 95 percent of President Bush's nominees, not 100 percent. I take my responsibilities as a Senator very seriously. I am to provide the President with my advice and consent regarding the individuals he nominates for a lifetime position to the Federal judiciary. Let me say that again: a lifetime position on the Federal judiciary. Many have asked why the Democrats are so vigorously defending the rights of the minority in this case? Why do we need to preserve the tradition of extended debate with regard to judicial nominations?

The reason why we are taking a stand against these nominees is because once they gain the Senate's advice and consent, nominees are free to decide thousands of key cases that affect millions of Americans on a day-to-day basis. If there are any objections we may have to a judicial nominee's lifetime appointment to the Federal judiciary, this is the time for each Senator to voice that opposition. Unlike legislation, which may be amended and refined over time, judges on the Federal bench sit for a lifetime appointment with little recourse for correction or change. The only chance we as Senators have to voice our positions on their appointments is now.

From civil rights to personal privacy, from environmental protections to a corporation's financial matters; these nominees will affect public policy for decades to come. In fact, I dare say that we would be remiss in our Constitutional duties if we did not object to those nominees with whom we find unfit for a lifetime appointment to the Federal bench. It troubles me that the Senate has focused so much in the past few weeks discussing the fact that we have not acted on 7 of 218 of the President's nominees to the Federal judiciary.

We are talking about seven individuals, seven individuals who have jobs,

while 1.2 million people are without jobs since President Bush took office, seven individuals who most likely have health insurance, while 45 million Americans do not have health insurance. We should be talking about jobs and access to health care. We should be focusing on the need to increase funding to ensure that veterans, especially those returning from the global war on terror, have access to quality health care and benefits. We should be looking at energy legislation that will address the vital energy needs of our Nation. In short, we should be doing what the American people sent us to Washington to do; to govern, not engage in an effort to ensure that this President has a 100 percent success rate for his judicial nominations.

If we want to start talking about legislation that is important to us as individual Senators, we could be talking about Federal recognition for Hawaii's indigenous peoples, Native Hawaiians, an issue of extreme importance to my constituents in Hawaii. We could be talking about ending mutual fund abuses for investors or promoting financial and economic literacy for our youth and adults alike. We could be talking about how to fund the promises we extended when we passed the No Child Left Behind Act which has been severely underfunded since its enactment.

Instead, over these past few weeks out of 218 judicial nominations approved we focus on the seven that Democrats have opposed. Despite confirming 208 nominations for a lifetime appointment on the Federal bench, there are those in this body who seek to subvert the rights of the minority for the sole purpose of ensuring that instead of a 95-percent success rate, the President has a 100-percent success rate with respect to his judicial nominations. This action will serve to deny me my ability to truly provide my advice and consent on individuals nominated to serve in the judiciary that our predecessors have preserved. It is sad that we have come to this point. During my tenure in the Senate, we have been able to work in a bipartisan manner to achieve our goals.

Some of my colleagues from the other side of the aisle argue that this is the first time a filibuster has been used for a judicial nominee. Republicans have openly filibustered a number of nominees on the floor of the Senate, five of whom were circuit court nominees. As we have heard multiple times during this debate, during President Clinton's two terms, close to 60 of his nominees were held in the Senate Committee on the Judiciary and never brought to the Senate floor, never given the same up-or-down vote Republicans today say every Republican nominated judge deserves.

My colleagues on the other side of the aisle say they have never engaged in efforts to block a judicial nomination. I want to share with my colleagues a situation I encountered dur-

ing the 104th and 105th Congresses. An individual from Hawaii was nominated to serve on the U.S. District Court, District of Hawaii. This was a nominee strongly supported by both Senators from Hawaii. This nominee had a hearing before the Senate Judiciary Committee and was reported favorably. However, this is where the process stopped for a period of 2½ years.

A colleague from another State placed a hold on this nominee for over 30 months before allowing us to confirm this nomination. In effect, a Senator from a State thousands of miles from Hawaii blocked a district court nominee that the senior Senator from Hawaii and I supported. This colleague is a former Attorney General of the United States and happens to be a good friend of mine. I found this situation to be so unusual, that a colleague from another State would place a hold on a district court nominee from my State when both Hawaii Senators strongly supported the nomination. I raise this issue to dispute the notion that this is the first time a nomination has been blocked, after the Senate Judiciary Committee favorably reported the nomination to the Senate for consideration.

I could also speak about the nomination of Justice James Duffy to the U.S. Court of Appeals for the Ninth Circuit. A fine nominee, described by his peers as the "best of the best," he had strong support from Senator INOUE and me to fill Hawaii's slot on the Ninth Circuit. Yet, Justice Duffy never received a hearing in the Senate, which had a Republican majority at the time. He went 791 days without a hearing, Mr. President. I should mention that Hawaii now benefits from James Duffy's service on the Hawaii State Supreme Court, who was appointed with bipartisan support.

Justice Duffy is one of the well-qualified and talented men and women nominated during the Clinton administration, individuals with bipartisan and home-State support, whose nominations were never acted on by the Senate. My colleagues on the other side of the aisle refused to hold hearings for nominees they did not agree with, effectively blocking the Senate's consideration of President Clinton's nominees. Let's look at the substance and not the rhetoric.

The last person I will mention is Richard Clifton, who is now serving on the U.S. Court of Appeals for the Ninth Circuit. Mr. Clifton was nominated after President Bush withdrew Justice Duffy's nomination. Richard Clifton served as the Hawaii State Republican Party Counsel. While I do not necessarily agree with all of his views, I supported his nomination, because I have confidence in his ability to appropriately apply the law. He was confirmed within a year of his nomination.

Since President Bush took office, we have been working in a bipartisan manner with our colleagues on the other side of the aisle to fill the vacancies on

the Federal judiciary, creating the lowest vacancy rate in 13 years. According to the Administrative Office of the United States Courts, there are 45 vacancies on the Federal bench. This is a decrease in total vacancies from 97 when this President first took office. Let's return to urgent legislation which will truly help our constituents—jobs, access to health care, education, the minimum wage, and helping the poor.

In a Senate where the divide between the majority and minority is held by a handful of votes, and that division reflects the viewpoint of the American body politic at-large, it is imperative that we work together to resolve the many issues that are important to our constituents. When it comes to judicial nominations, the confirmation of 208 judges clearly shows that we in the minority are doing what we can to work with the majority in upholding our constitutional obligation to provide advice and consent to the President on judicial nominations. I can only hope we achieve a success rate of 95 percent in enacting legislation addressing funding for education, access to health care, increases to the minimum wage, benefits and services for our veterans, business and economic development, and financial literacy to enable individuals and families to make sound decisions in their lives.

Mr. President, I ask unanimous consent that the remainder of my time be provided to the Senator from New York.

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

Mr. SCHUMER. Mr. President, how much time do I have until the time of the Senator from South Dakota begins?

The PRESIDING OFFICER. There has been no time allocated among Senators. There is a total time of 17 minutes 3 seconds and counting.

Mr. SCHUMER. I ask that I be yielded 2 minutes so that the remaining 15 minutes be provided to the Senator from South Dakota.

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

Mr. SCHUMER. Mr. President, I thank my colleague from Hawaii for his kind remarks and for his graciousness in yielding. I just want to make a point that we have not heard enough. It is these numbers: 2,703 to 1. This is the number of times Republican Senators have voted for court of appeals nominees either by direct vote or cloture versus the number of times they voted against them—2,703 yes, 1 no. The one "no" vote was TRENT LOTT who voted against Mr. Gregory to the Fourth Circuit who Jesse Helms would never allow to go on the bench. So when we are talking about up-or-down votes, we are really not. We do not have any diversity of opinion on the other side. Nominees who are way off the deep end, every member of the other side votes for them. So there is no great deliberation here. In fact, what 2,703 to 1 means is a rubberstamp.

The reason we are standing for what we believe in is very simple. There should be some input. But when it comes to the other side, the White House says, This is the nominee, and everyone votes for that nominee no matter how extreme.

If there were 40 or 50 or 60 negative votes compared to, say, 2,600, you might say up-or-down votes might mean something. But they do not because, unfortunately, for every single nominee on every single cloture vote, the Members on the other side just do whatever the President wants and vote for whoever the President sends us. That is not deliberation. In my judgment, that is not what the cries for an up-or-down vote call for. They call for honest deliberation. I will have more to say about that later.

I yield the floor.

The PRESIDING OFFICER. The time of the Senator has expired.

The distinguished Senator from South Dakota is recognized.

Mr. JOHNSON. Mr. President, I thank my colleague from New York for his excellent point.

Mr. President, tomorrow we may be casting a historic vote in this Chamber. It has to do with a fundamental decision that we, as Senators, must make as to the very nature of government in our democracy, as to the fundamental values of this body, the Senate. We must choose between whether we will remain with the 200-year-old parliamentary rules of this body, which assure that at least there will be some modicum of bipartisanship on virtually all issues of import, or whether, in unprecedented fashion, we will wind up stripping away that fundamental rule, that 60-vote rule, the filibuster rule which for over 200 years has brought both parties together whether they liked it or not. We must choose whether we should discard that and, in effect, create an environment where it is very clear that the Senate, as has happened all too often to our colleagues in the House, will collapse into a spirit of partisan vituperation that will undo efforts at bringing the parties together, will undo our efforts to build bridges between Republicans and Democrats, and will push governance in this body to the far extremes, far outside the political centrism that is the genius of the American people.

In my State of South Dakota, we have a heavy party registration on the side of the Republican Party. I respect that. I am proud of the support over the years that a great many South Dakotans have cast for me. But whether they are Republicans or Democrats, I think the overwhelming view across my State is one of common sense. It recognizes that neither one of the political parties has all the answers, that both parties have their share of bad ideas, and that governance from the far left or the far right is equally unacceptable. Wisdom in America, more often than not, is found in the political center. That is what the filibuster rule,

that is what the filibuster margin has forced upon the Senate and is what makes the Senate unique, different from the House of Representatives.

I served 10 years in the House. It was an honor to serve there. But I know the nature of the rules there and what happens. One party can run roughshod over the other. All too often, bipartisanship is viewed by the current leadership on the House side with contempt. The thought that there ought to be governance from the center, and bipartisanship, is viewed by some in the other party as "girly-man" politics, unworthy of their radical agenda. It is here in the Senate that the Founders, 200 years ago, understood that this body's orientation would be to take the longer view. This body was to be the more deliberative body. This body would not march lockstep to any ideological drummer.

More than any other factor in the Senate, what has enforced that different character on the Senate, a character which has served the American people so well, has been the 60-vote margin rule. Both parties know that in order to make much of anything happen here, they must reach across the aisle. Not a lot. It doesn't require a huge number of members of the opposing political party, but it requires some. That has had a wonderful beneficial consequence for the wisdom of legislation in America, and certainly for the selection of judges.

There is no judicial crisis. We all know. One doesn't have to be a cynic to understand that the judicial crisis, if you will, is a fabricated political vehicle. President Bush has had 208 of his judges approved by broad, bipartisan margins. Essentially each and every one of them was a conservative Republican judge. That is the President's prerogative. The Senate has not reacted negatively to that.

Put this in contrast with what we saw only a few years ago during the Clinton administration. President Bush has had all of his nominees receive hearings. All of his nominees, who were so chosen, received a vote up or down—a 60-vote margin vote but a vote nonetheless. Every Senator has been required to stand up and be counted and reflect back to his or her constituencies where they stood on that judge.

In the case of President Clinton, however, over 60 of his nominees received no hearing or no vote. Where was the clamor then? Where was the cry of unfairness then? I think, to Senator REID's great good credit, as well as Senator LEAHY, we have agreed that what was done to President Clinton should never be done to President Bush. That was unfair from either political angle. In fact, all of President Bush's nominees should get hearings. If their nomination stands, they should be voted on, publicly, on the record. That is exactly what has happened.

But now there are some who suggest that 208 to 10 is unsatisfactory and, for that reason, they are going to upend

these historic rules of the Senate. They are going to discard the Senate as the one body of the two that forces bipartisanship and political centrism.

Senator REID deserves great credit for his efforts to try to reach some compromise with the majority leader. Unfortunately, those effort have—to this point, in any event—been futile. One can only come to the conclusion that the majority leadership has reached such an impasse because of a certain amount of pandering to the radical right that now no compromise of any kind is acceptable. So here we stand with the very likely, very clear possibility that the fundamental checks and balances of American government—the requirement that there be moderation, the requirement that we govern from the center and not from the far left or far right—is about to be discarded.

Let no one believe that this has to do only with judges. The political tactic here once used is then available. The precedent is available for all issues, whether they have to do with education, environment, health care, the budget, war—all of these issues will henceforth be susceptible to a partisan party-line vote from one side of the political spectrum or the other. That is a tragic change after 200-some years of the Senate being the body of deliberation, being the body of political moderation.

We ought to be dealing, rather than with this issue, with the core issues that my constituents—and I think all Americans—care about. We have great undone business relative to the deficit, relative to job creation, relative to trying to make sure all Americans have access to affordable health care. We have changes that are needed in our educational system, both under No Child Left Behind as well as reauthorization of the Higher Education Act. We have a transportation bill. We have an energy bill before us. Yet here we are, arguing about a parliamentary step which—while many people will view as “inside baseball,” as something of no great consequence, this issue, this vote we will take soon—is of monumental consequence to the nature of the institution that will be deciding all these other matters in the years to come.

I wish there were no need for any of us to be rising on this occasion for such an extraordinary, such a potentially tragic step that this body may be taking. The Founders of our country understood, over 200 years ago, that the House of Representatives would be the hot house, the people's House. It would be immediately responsive to whatever wind is blowing through Washington. Their rules, which give virtually no rights to the minority, and their 2-year terms, assure the nature of that House.

But the Founders also understood that Senators representing entire States would be more moderate in their outlook, and the 6-year terms would give them a longer view of what

is right or not in legislation pending before us. Within the rules of the Senate, the filibuster rule, the 60-vote margin rule, has served America well. It has pushed the political debate to a commonsense point—common sense being a value that my constituents would tell me is all too rare in Washington, DC, but which does occur as often as it does in no small measure because of the filibuster rule and its insistence, grabbing both political parties by the collars, pushing them together, and saying, You must work together or otherwise neither of you will have your way.

This is an effort to radicalize the Senate, to radicalize government in America in a way that many Americans will never understand. They will never recognize how this could have happened.

It is my hope as we come down to these final hours that my colleagues on both sides of the aisle will pause and take a long view of the role of this institution, of the importance of centrism, cooperation, of bipartisanship and all that means, if we truly are to reflect the values and priorities of the American people here in the Senate. If we allow this institution to veer off sharply to either ideological end of the spectrum, we will have done a horrible disservice to the American people, to future generations of Americans, and, frankly, to the world. This issue is that fundamental. It goes to the very nature of governance in America.

It is my hope all our colleagues will rise to stand as statesmen at a time when political pressures are great for what is right and will cast a loud vote to be counted by the American people on behalf of what is right rather than what is politically convenient at this particular time in our history. It is my hope that in these intervening hours we will have a significant number of people who will understand what is at stake and, in fact, uphold the values and priorities of the American people by retaining the parliamentary rules of this body that have prevailed for well over 200 years, will understand there is no judicial crisis, will understand when it comes to giving lifetime appointments to the bench it would be very easy for President Bush to have 100 percent of his judges approved simply by nominating judges who can be approved by 60 Members of this body. That is a modest request. That is the kind of consultative role the Founders envisioned under their constitutional provision of advice and consent.

The goal was not to create a lockstep ideological opportunity. The goal was for both parties to work together and in good faith evaluate the qualities of people who will serve our judiciary for lifetime appointments. It is my hope we will not abuse that opportunity and that we will cast that vote to preserve that orientation, preserve the very values of the Senate.

Mr. President, I yield my time.

The PRESIDING OFFICER (Mr. BURR). The majority controls the next 60 minutes.

The Senator from Kansas.

Mr. ROBERTS. Mr. President, our former Senate majority leader, Howard Baker, reportedly tells the story about his late father-in-law, Senator Everett Dirksen, who admonished him to occasionally allow himself the luxury of an unexpressed thought. After listening to the current debate on judicial nominations, there is a temptation to say, after all is said and done, pretty much all that can be said has been said.

I rise today because I do have something to say. What I want to talk about is of very crucial importance not only with regard to the judicial nominations but, perhaps more important, how we are meeting our obligations in the Senate—or better put, how we are not meeting them.

This weekend, an elderly gentleman spotted my Senator's car tag on my car in a parking lot. He wandered up to me and asked: Are you a Senator?

And I responded: Yes, sir, I am.

Well, he has some rather succinct advice for all of us who ask for and gain the public trust.

He said: You know, you fellows up there ought to get busy and quit talking past one another.

I think probably no matter the issue, most would agree he was right.

I am concerned, and so are a lot of other people—people who care, people who have given much to this country and whose advice we should be taking. One of those people is Dr. David Abshire who is president of the Center for the Study of the Presidency and whose credentials for public service are well-known and admired. Dr. Abshire recently authored a treatise, “The Grace and Power of Civility” and the necessity for renewed commitment and tolerance. He quoted John Witherspoon and Samuel Cooper during the days of our Founding Fathers and highlighted what they called “the consonance of faith and reason,” if we are to cross the bridge of united purpose.

We are not doing what our Founding Fathers did so well. As a matter of fact, we are in pretty sad shape with the shape we are in. Across the bridge? Well, today, the bridge is washed out. We can't swim. And the judges are simply on the other side.

I am going to paraphrase from Dr. Abshire. Today, as our Nation and the world confront new and great perils, there are paralyzing forces of incivility and intolerance that threaten our country. Divisions in Congress also reflect the divisions in the country. The so-called wedge issues seem and appear endless. These challenges, if allowed to divide the Nation, might well deny the next generation the prosperity and civic culture that we have inherited.

It was Benjamin Franklin who stated that Congress should be a mirror image of the American people. In the sense that there are divisions in the country, the sad fact is, as evidenced by this debate, we seemingly cannot transcend

these divisions. We keep talking past one another, saying the same things, but basically being in disagreement.

Dr. Abshire quoted the poet William Yeats, who said this, a dire prediction: Things fall apart; the center cannot hold; Mere anarchy is loosed upon the world, The blood—dimmed tide is loosed, and Everywhere the ceremony of innocence is drowned; The best lack all convictions, while the worst are full of passionate intensity. Surely some revelation is at hand.

My colleagues, on this issue and so many others, we seem to be locked into an era of partisanship that echoes a mindset of absolutism that can close off dialogue and also mutual respect.

In that vein, let me take up the matter of judicial nominations, obviously, the issue at hand that currently has us tied up in partisan knots.

First, I understand the opposition on the part of my colleagues to many of the President's nominations. I understand some of my colleagues do not support certain nominees. Their opposition is well within their rights and their belief that they are reflecting the will of their constituents.

I have a very simple solution. If you believe that your constituency does not approve of certain nominees, then simply vote against them. I have done that, but I have never denied any Member of this body the right to an up-or-down vote, knowing full well that 214-year tradition of the Senate ensures that a majority vote would confirm or deny a confirmation. Contrary to the great majority of statements made by some of my friends across the aisle, the practice of filibustering judicial nominations is not steeped in Senate history or precedent.

This is a brandnew application, quite frankly, of an obstruction tool that the minority has suddenly seized, collapsed to their breast. We are seeing the reinterpretation of history and the claiming of precedent when there is none. Again, the minority is asking the American people to ignore the obvious tradition of a simple majority vote for judicial nominations that has been honored in the Senate for 214 years.

Serving in public office for over 25 years in both the House and Senate, I am familiar with the broader points of our Constitution. What I gather from all the lather from my friends across the aisle is that President Bush should just stop nominating these "out of the mainstream judges," for approval.

In fact, the President should consult with the minority party to find a judicial nominee that is more appropriate and more mainstream or more in line with their thinking.

By this logic, the minority party—not the elected majority, the minority party—would have the determining role in choosing who is acceptable and who is not. Yet article II, Section 2 of the Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors and other

Public Ministers and Counsels, Judges of the Supreme Court, and all other Officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law."

Here's the rub: The power to choose nominations is not vested in the Senate's advice and consent role. The Senate's constitutional responsibility is to ratify or to reject.

Let's talk about this new higher standard that was put into place only 2 years ago and advocated so eloquently today by my friends across the aisle. Since 2003, two short years ago, 60 votes have been the new minority criteria forced upon the Senate in order to confirm judicial nominations. The Framers of the Constitution identified seven circumstances in which a supermajority vote is warranted by one or both chambers of commerce. Here are some examples: Impeachment—we have done that; overriding a Presidential veto—haven't done that for a while; amending the Constitution—and there are quite a few bills in the hopper that would do that.

However, Senate approval of judicial nominations is not among the seven instances identified by the Constitution. Here is the heart of the matter. We do not propose to change anything. We propose to return to the tradition that governed the Senate for 214 years and an up-or-down majority vote on pending nominations.

Then there is the charge that somehow restoring Senate precedent is reactionary. I have heard a lot of people compare the Senate to the House. I served in both bodies. Intuitively then, blocking judicial nominations is, therefore, a hallowed and sacred tradition of the Senate Chamber. But history does not support that assumption. In fact, for over 200 years, judicial nominations required a simple majority vote. And again, a simple fact that I seldom read or hear within the national media, paragraph after paragraph after paragraph about the majority trying to change the rules, we are just trying to go back to the rules that were in evidence prior to the last 2 years.

This new 2003 standard through the unprecedented use of the judicial filibuster is the result of the minority not making the case against the nominees as demanded by special interest group ideology. Why? They are not able to convince the majority of Senators that these nominees are radical and wrong. It has been pointed out that during this debate, for 58 percent of the last 50 Congresses—well over half, almost 60 percent—the same party did control the Senate, the House, and the White House. Now, in all that time, the minority, whether it was the Democrat or the Republican Party, never, ever resorted to this systematic filibustering of judicial nominations.

So if the contention is that returning to a simple majority standard for judicial nominations would abridge minor-

ity rights, my question is, then why in the last 100 years has that bridge never been built until 2003?

Our official Senate majority leader, Bob Dole, summed it up when he said:

When I was the leader in the Senate, a judicial filibuster was not part of my procedural playbook. Asking a Senator to filibuster a judicial nomination was considered an abrogation of some 200 years of Senate tradition.

And there is the related issue that has been talked about in the Senate. Unfortunately, the disease of obstruction infected other aspects of our work in the Senate last week. Obviously, the fever will not break until high noon tomorrow. Senate business and the committee hearings and the markup of legislation are in early morning slow-motion. In the afternoon, they come to a grinding halt.

For those not familiar with the Senate business, for business to be conducted off and on the Senate floor, it takes only one Senator, or in this case the minority leadership, to call a halt to the Senate conducting business off of the floor.

I am chairman of the Intelligence Committee. We get hotspot briefings every week, two or three times a week. We are marking up the PATRIOT Act. I asked why this practice was initiated so early; why last week, at a time when our Nation is fighting the global war on terror. I found that obstruction rather appalling. The answer was pretty simple: We wanted to send you a message. That message, as I interpreted it, was whoa, stop the Senate, let me get off until we get our way—something akin to a toddler throwing a temper tantrum in the middle of a grocery store with much of the same rhetoric and name calling.

What is the real problem? Let's fully understand where the real controversy lies. Too many in the Senate and too many pundits have been masking the real issue, in this Senator's opinion. It is not about preserving great Senate traditions such as minority rights. It is not about lengthy debate and cooling passions of the day. That is an oxymoron in regard to the Judiciary Committee. It is not about doing away with the filibuster. By the way, it is not about Jimmy Stewart and "Mr. Smith Goes to Washington." That was a classic movie, but it is the wrong plot unless we are talking about other Jimmy Stewart movies. The movies "Vertigo" and the "Supreme Court" come to mind. Or perhaps the minority is hoping they can have the Glenn Miller Band play "Pennsylvania 65000" within Pennsylvania 1600 in 2008.

And it is not about unqualified or unacceptable judicial nominees. It is about a brandnew 2-year-old procedure that will deny—is denying—a majority of Senators their right and constitutional duty to vote on judicial nominees. In my view, we are riding into a box canyon here, where incivility and partisanship and absolutism and further division await. There is going to

be a lot of milling around. We do not have to go there. Let us restore the 214-year-old precedent of an up-or-down majority vote and see if we cannot reach accord and ride to a higher—a higher—common ground.

I yield back.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Mr. President, we turn on the television these days and get bombarded with advertisements saying: "Write your Senator." "Call your Senator and preserve the filibuster." "Get ahold of your Senator and make sure this tool that provides rights and protections of the minority gets preserved."

I have been associated with the Senate now since I was a 19-year-old intern sitting in the family gallery in the 1950s, falling in love with the debate that was going on, on the Senate floor. I must say there were usually more Senators here in the 1950s than there are now, but I understand, with television, the Senators stay in their offices and watch, and I am happy to accept that. But I understand the traditions of this body have great roots in history that many times get ignored. That is, these roots get ignored by people writing columns and stories today.

I want to go on record very firmly as being on the same side as those people who are buying the ads saying: "Preserve the filibuster." I have watched the filibuster be used to help shape legislation. I watched the filibuster be used as a tool of compromise. I think the filibuster is a very worthwhile thing to hang on to in order to preserve the rights of the minority.

Now, that position of saying "let's save the filibuster" has not always been popular. If you go back 10 years ago, when a proposal was made on the Senate floor to abolish the filibuster, the New York Times editorialized in favor of that position. The New York Times told us

... the filibuster has become the tool of the sore loser.

The Times was anxious to have the whole thing wiped away. There were only 19 Senators who voted to abolish the filibuster, 9 of whom are still serving today. The rest of us all voted to preserve the filibuster. So I am on record as saying: We must preserve the filibuster. I value it. I believe it has a place in the Senate. However, I also believe we have the right to shape the filibuster, to focus the filibuster, to reform the filibuster, so it can be used in a more effective way.

There are those now who, when they say "save the filibuster," mean "save the filibuster the way we like it," not "save the filibuster in its historic form, because its historic form has changed over the years.

The first point, as far as history is concerned, is this: The filibuster did not come into existence with the Constitution. I had a phone call over the weekend from a very dear friend who said: This is a constitutional issue that

goes back all the way to the Founding Fathers. However, the filibuster, Rule XXII, came into the Senate history in 1917. That is a long time after the Founding Fathers. And it has been changed several times since that time, some times by formal Senate rule. It was changed in 1949. It was changed again in 1959. And it was changed again in 1975. So for those who run the ads saying "save the filibuster," maybe the first question is, which filibuster do you have in mind that you want us to save?

But there is another aspect of the filibuster. I turn again to the New York Times. It is amazing how much they have changed their minds in the intervening 10 years. After the New York Times said the filibuster was a tool of the sore loser, now in this debate they decide that

... the filibuster [is] a time-honored Senate procedure ...

They editorialize: "Keep it just the way it is." Well, I want to talk a little bit about time-honored Senate procedures, and particularly time-honored Senate procedures with respect to the filibuster. It is a time-honored Senate procedure that the filibuster can be changed by majority vote. There are a number of Senators who have served here and are still serving here who, at least at one time in their careers, agreed with that.

Senator KENNEDY had this to say in 1975, when there was a debate on what kind of filibuster we could have and what the time-honored Senate procedures would say about the filibuster. Senator KENNEDY said:

A majority may adopt the rules in the first place. It is preposterous to assert they may deny future majorities the right to change them.

Senator KENNEDY was enunciating a time-honored Senate procedure that said a majority had the right to change the rules. This was in 1975.

Senator Mondale served in 1975. Senator Mondale had this to say about what was done in 1975. For those who are talking about time-honored Senate procedures, this was the Senate procedure 30 years ago. And for 30 years it has stood the test of time. Senator Mondale said:

... the President of the Senate ... and the membership of the Senate ... have both clearly, unequivocally, and unmistakably accepted and upheld the proposition that the U.S. Senate may ... establish its rules by majority vote, uninhibited by rules adopted by previous Congresses.

Somehow this happened. Senator Mondale said it happened "clearly, unequivocally, and unmistakably," and the place did not blow up. There were no threats to shut everything down, to object to every unanimous consent request, to cause a "nuclear bomb" to go off in this Chamber if this policy were to happen. This is a time-honored Senate procedure and it happened with both the membership of the Senate and the President of the Senate in 1975, according to Senator Mondale.

I picked Senator Mondale because in 1976 he was elected Vice President, which meant he became the Presiding Officer of the Senate. And something happened while he was the Presiding Officer of the Senate in this same time-honored Senate procedure.

The majority leader at the time was Senator BYRD of West Virginia. And he has described what happened while Vice President Mondale was presiding over this body. Here is what Senator BYRD had to say in 1995, as a bit of historic information for the rest of us who may not have been present back in the time when Mr. Mondale was the Vice President.

Senator BYRD explained:

I have seen filibusters. I have helped to break them. There are few Senators in this body who were here when I broke the filibuster on the natural gas bill. . . . I asked Mr. Mondale, the Vice President, to go please sit in the chair; I wanted to make some points of order and create some new precedents that would break these filibusters.

Interesting choice of words, because that is what we are talking about here under the name "nuclear option," making a point of order and setting a new precedent. Senator BYRD, the majority leader, asked Vice President Mondale to "please sit in the chair," to be there when Senator BYRD made "some points of order" and created "some new precedents" to "break these filibusters." He goes on to describe what happened:

And the filibuster was broken—back, neck, legs, and arms. It went away in 12 hours.

So I know something about filibusters. I helped to set a great many of the precedents that are in the books here.

A time-honored Senate procedure.

Senator BYRD did it again. Going ahead to 1980, Senator BYRD led 54 Senators, all but one of whom were Democrats, in overturning the Chair and eliminating all debate on motions to proceed to nominations. The point here is an important one. He did not abolish the filibuster. He did not say: Get rid of the filibuster. He did not abide by the advice of the New York Times that said it was a tool of sore losers. But he helped shape it. He helped focus it. He said the filibuster should not be quite as broad as it may have been in the past. And using the time-honored Senate procedure of making a point of order, and getting the Senate to vote, he helped shape it, and the Senate Democrats set this precedent before the Senate had even begun to debate the motion, so that the filibuster that used to apply to motions to proceed to nominations no longer does.

And how was the rule changed? It was changed by a time-honored Senate procedure.

Now, there is one other time-honored Senate procedure that Senator LEAHY has spoken of. This goes to a floor statement Senator LEAHY made in 1997, as he was talking about nominations for the Federal bench. Senator LEAHY,

who at the time was the ranking minority member of the Judiciary Committee—he went on later to become the chairman—said:

I cannot recall a judicial nomination being successfully filibustered.

I find that interesting because many of our Democratic friends are now saying: “Oh, filibusters of judicial nominations are normal. They have happened before.” Well, at least in 1997, Senator LEAHY said:

I cannot recall a judicial nomination being successfully filibustered. I do recall earlier this year when the Republican chairman of the Judiciary Committee and I noted how improper it would be to filibuster a judicial nomination.

I have the same recollection. I remember in our conference when the issue of filibustering some of President Clinton’s judges came up, it was the Republican chairman of the Judiciary Committee, my senior colleague, Senator HATCH, who stood before the conference and said: “Do not do it. It would be improper to filibuster a judicial nominee. Having judicial nominees get a vote is a time-honored Senate precedent.” Senator LOTT was the majority leader. He took the floor, after Senator HATCH had spoken, and said: “Senator HATCH is right.” We should not cross the line and start to filibuster judicial nominations because the Senate tradition has said no.

So that is where we are now. The Senate tradition has been changed. The Members of the minority have exercised their right, which has always been on the books, to change the precedent which had held for so long that even Senator LEAHY could not recall an exception to it. What we are talking about doing now is using the time-honored Senate procedure of changing the rule by majority vote to see to it that the prior precedent remains—or, rather, returns because it was broken in the 108th Congress.

So I value the filibuster. I am in favor of the filibuster. But I think the filibuster has been and still can be shaped and changed so it is more focused than simply an across-the-board procedure.

I want to close by putting something of a human face on this whole issue because we are talking about this filibuster of judicial nominees almost as if the judicial nominees were not people, almost as if the judicial nominees were spectators in this activity. They are not spectators. They are seeing their reputations smeared. They are seeing their history attacked. It is time we spent a little time thinking about them.

I know the nomination on the floor is Priscilla Owen, but over the weekend I had called to my attention an article that appeared in the Sacramento Bee by one Ginger Rutland that I would like to close with. It is entitled: “Worrying about the right things.” Ginger Rutland identifies herself as “a journalist of generally liberal leanings,” and she talks about the nomination of Janice Rogers Brown.

Both Ms. Rutland and Ms. Brown live in California. Ms. Rutland says:

I’ve been trying to get a fix on Brown since President Bush nominated her for the influential U.S. Circuit Court of Appeals for the District of Columbia.

It talks about the experience. And then she makes this comment:

Championed by conservatives, Brown terrifies my liberal friends. They worry she will end up on the U.S. Supreme Court. I don’t. I find myself rooting for Brown. I hope she survives the storm and eventually becomes the first black woman on the nation’s highest court. I want her there because I believe she worries about the things that most worry me about our justice system: bigotry, unequal treatment and laws and police practices that discriminate against people who are black and brown and weak and poor.

She was born and raised poor, a sharecropper’s daughter in segregated Alabama. She was a single mother for a time, raising a black child, a male child. I don’t think you can raise a black man in this country without being sensitive to the issues of discrimination and police harassment.

She goes on in the article. I ask unanimous consent that the entire article be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. BENNETT. She concludes with this comment:

I don’t pretend to know how Brown will rule on other important issues likely to reach the Federal courts. I only know that I want judges on those courts who will defend the rights of the poor and the disenfranchised in our country.

She believes Janice Rogers Brown is one of those jurists.

I am not sure whether she is right or wrong. But I do know Janice Rogers Brown deserves the opportunity to have her nomination voted on. And if one use of the filibuster has been to prevent Priscilla Owen and Janice Rogers Brown and others like them from getting this vote, a time-honored procedure of the Senate can be used with equal justification to see to it that the filibuster gets tweaked a little bit to make sure we go back to the practice that existed here for decades.

For that reason, I will support the motion of the majority leader if it becomes necessary to make sure that we have an opportunity to a vote on Priscilla Owen. I hope as a result of this debate, our friends on the Democratic side of the aisle will step back a little from their position of saying no to a vote on Priscilla Owen and allow us to have a vote. If they do, they are acting in accordance with the history of the Senate for past decades, the history of the Senate going back so far that even PATRICK LEAHY cannot remember an exception to it. If they do and we have an up-or-down vote on Priscilla Owen, it may well be that all of this talk about changing the rules will go away.

The outcome lies in their hands. If they allow us to vote on Priscilla Owen, we will not have the lack of civility, the shutting down of the Senate, the collapse of Government, all of the

other things that have been predicted. If, on the other hand, they say no, we will not allow this woman who has been unanimously rated as well qualified by the American Bar Association to even get a vote, then we will see the majority leader follow the practice, follow the precedent, follow the example set by Senator BYRD, the example endorsed by Senator KENNEDY, endorsed by Senator Mondale, and use the time-honored Senate procedure to change the rule by majority vote. If the majority leader so moves, I will support it.

EXHIBIT 1

[May 8, 2005]

GINGER RUTLAND: WORRYING ABOUT THE RIGHT THINGS

(By Ginger Rutland)

I know Janice Rogers Brown, and she knows me, but we’re not friends. The associate justice of the California Supreme Court has never been to my house, and I’ve never been to hers. Ours is a wary relationship, one that befits a journalist of generally liberal leanings and a public official with a hard-right reputation fiercely targeted by the left.

I’ve been trying to get a fix on Brown since President Bush nominated her for the influential U.S. Circuit Court of Appeals for the District of Columbia. She won’t talk to the press. Friends, associates, even a former teacher, say the same things about her: She’s “brilliant,” “hardworking,” “stoic” and “kind.”

Her opponents on the left tell me she’s a fundamentalist Christian who will bring her religious values into the courtroom. But I’ve never been frightened by people of faith. Brown is Church of Christ. So is my mother-in-law, a good, gentle woman and lifelong Democrat who voted for John Kerry for president and opposed the war in Iraq because, as she told me when it started, “I’ve never understood how killin’ other folks’ children ever solved anything.”

I’m almost embarrassed to admit it, but desperate for deeper insight, I visited Brown’s church last Sunday, the Cordova Church of Christ. The judge wasn’t there, but her mother, Doris Holland, was. She was polite but understandably guarded. She told me that as a young girl Brown liked to read and had an imaginary friend; that was about it.

The congregation is integrated and friendly. Church members know Brown and her husband, jazz musician Dewey Parker, and like them. The church itself is conservative, allowing no instrumental music in its services, no robes, no bishops or hierarchy of any kind. The religious right may have taken up Brown’s cause in Congress, but the sermon at Cordova that day contained no political content.

Championed by conservatives, Brown terrifies my liberal friends. They worry she will end up on the U.S. Supreme Court. I don’t.

I find myself rooting for Brown. I hope she survives the storm and eventually becomes the first black woman on the nation’s highest court.

I want her there because I believe she worries about the things that most worry me about our justice system: bigotry, unequal treatment and laws and police practices that discriminate against people who are black and brown and weak and poor.

She was born and raised poor, a sharecropper’s daughter in segregated Alabama. She was a single mother for a time, raising a black child, a male child. I don’t think you can raise a black man in this country without being sensitive to the issues of discrimination and police harassment.

And yes I know. People said that Clarence Thomas would be sensitive to those issues, too, and he's been a disappointment.

But in Brown's case, I have something more concrete on which to base my hopes—her passionate dissent in *People v. Conrad Richard McKay*.

The case outlines a single, unremarkable instance of police harassment, the kind of petty tyranny that plays out on the streets of big cities and small towns across America every day.

In 1999 a Los Angeles sheriff's deputy stopped Conrad Richard McKay for riding his bicycle in the wrong direction on a residential street, a minor traffic infraction. The deputy asked McKay for a driver's license. McKay had none. Instead, he provided his name, address and date of birth.

The officer arrested him for failing to have a driver's license. Then he searched him, finding a baggie of what turned out to be methamphetamine in his left sock. McKay was charged with illegal drug possession, convicted and sentenced to 32 months in prison.

He appealed, arguing that the arrest and the search were unreasonable, a violation of his Fourth Amendment rights to be protected from unreasonable searches. The officer searched him, he said, because he didn't have a driver's license, a document he was not required to carry to ride a bicycle.

Six members of the California Supreme Court rejected that argument, ruling that McKay's arrest was within the officer's discretion and therefore constitutional.

Brown was the lone dissenter. What she wrote should give pause to all my friends who dismiss her as an arch conservative bent on rolling back constitutional rights. In the circumstances surrounding McKay's arrest, the only black judge on the state's high court saw an obvious and grave injustice that her fellow jurists did not.

"Mr. McKay was sentenced to a prison term for the trivial public offense of riding a bicycle the wrong way on a residential street," Brown wrote.

"Anecdotal evidence and empirical studies confirm that what most people suspect and what many people of color know from experience is a reality: There is an undeniable correlation between law enforcement stop-and-search practices and the racial characteristics of the driver. . . . The practice is so prevalent, it has a name: 'Driving while Black.'"

After a scholarly discussion on the origin of the Fourth Amendment and an exhaustive review of the case law on unlawful searches, Brown used plain words to get to the heart of what really bothered her about what happened to Conrad McKay on that Los Angeles street. It's what bothers me, too.

"I do not know McKay's ethnic background. One thing I would bet on: He was not riding his bike a few doors down from his home in Bel Air, or Brentwood, or Rancho Palos Verdes—places where no resident would be arrested for riding the 'wrong way' on a bicycle whether he had his driver's license or not. Well . . . it would not get anyone arrested unless he looked like he did not belong in the neighborhood. That is the problem. And it matters. . . . If we are committed to a rule of law that applies equally to 'minorities as well as majorities, to the poor as well as the rich,' we cannot countenance standards that permit and encourage discriminatory enforcement."

In her dissent, Brown even lashed out at the U.S. Supreme Court and—pay close attention, my liberal friends—criticized an opinion written by its most conservative member, Justice Antonin Scalia, for allowing police to use traffic stops to obliterate the expectation of privacy the Fourth Amendment bestows.

"Due to the widespread violation of minor traffic laws, an officer's discretion is still as wide as the driving population is large," she wrote. In her view, court decisions have freed police to search beyond reason not just drivers of cars but "those who walk, bicycle, rollerblade, skateboard or propel a scooter."

She reserved special scorn for judges who permit police to discriminate while advising the targets of discrimination to sue to challenge their oppressors. "Such a suggestion overlooks the fact that most victims . . . will barely have enough money to pay the traffic citation, much less be able to afford an attorney. . . . To dismiss people who have suffered real constitutional harms with remedies that are illusory or nonexistent allows courts to be complacent about bigotry while claiming compassion for its victims," she wrote.

"Judges go along with questionable police conduct, proclaiming that their hands are tied. If our hands really are tied, it behooves us to gnaw through the ropes."

With that last pronouncement, Brown confirms what many of her enemies have said—that she's an "activist judge." Judges who "gnaw through ropes" to protect people being hassled by cops represent the kind of judicial activism I can support.

Liberals prefer to overlook Brown's strong dissent in McKay. Conservatives mention it only in passing, as if embarrassed that one of their own might have qualms about law enforcement bias or a creeping police state.

I don't pretend to know how Brown will rule on other important issues likely to reach the federal courts. I only know that I want judges on those Courts who will defend the rights of the poor and the disenfranchised in our country against the rich and the powerful when the rich and the powerful are wrong. I want someone who will defend people like Conrad McKay.

Mr. BENNETT. I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mrs. HUTCHISON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mrs. HUTCHISON. Mr. President, I rise to talk about Priscilla Owen, a woman who serves on the Texas Supreme Court, a woman of the highest moral character, and a woman whose confirmation has been held up by the Senate for over 4 years—Justice Owen was first nominated on May 9, 2001, by President Bush. Her nomination has actually been voted on four times by the Senate: May 1, 2003, a cloture vote, she won 52 votes; May 8, 2003, she won 52 votes; July 29, 2003, she won 53 votes; November 14, 2003, she won 53 votes.

If one looks back on a 200-year Senate tradition, the Constitution's requirement for simple majority votes on judicial nominations—as well as the specific instances where the Constitution does, in fact, specify super-majority votes, one would presume that Priscilla Owen would be sitting on the Fifth Circuit Court of Appeals and the majority in the Senate would not have to be restoring precedent. My goodness, why isn't she sitting on the Fifth Circuit Court of Appeals bench?

Priscilla Owen is not sitting on the Fifth Circuit Court of Appeals, even

though she received a majority of the votes in the Senate four times, because a new standard is now being required, a new standard of 60 votes. Did we have a constitutional amendment that would require 60 votes? No. Did we have a new rule that required 60 votes? No. We just have the use of a filibuster by the minority in the Senate in the last session of Congress—the first time in the history of our country when a majority of the Senate has been thwarted by the minority on Federal judicial appointments.

There have, from time to time, been filibusters when the person did not have 51 votes in the Senate; never when a majority of the Senate voted to support that nominee. Yet that is exactly what has happened to Priscilla Owen.

There has been a change in the balance of power that was envisioned in the Constitution without a constitutional amendment. Last Friday on the Senate floor, some Democratic Members of the Senate actually said: We should have a 60-vote requirement for Federal judges to be confirmed by the Senate. That is worthy of discussion. It is worthy for us to have that debate. But the debate should be in the context of a constitutional amendment—going through the process our Founding Fathers said would be required for a constitutional amendment. Let's put it to a test. Let's determine if that is the right thing and do it the right way. But that is not what is happening here today.

In fact, it is significant that we look at the historical comparison of the first term of a Presidency and the confirmation of appeals court nominees. President George W. Bush has the lowest percentage of confirmations of any President in the history of the United States. President Clinton had 77 percent of his appellate court nominees confirmed. President George H.W. Bush had 79 percent. President Reagan had 87 percent. President Carter had 93 percent. President Ford had 73 percent. President Nixon had 93 percent. President Johnson had 95 percent. President Kennedy had 81 percent. President Eisenhower had 88 percent. President Truman had 91 percent. But President Bush today has 69 percent, the lowest of any President in the history of our country. Almost 30 percent of his circuit court nominees were filibustered and let die by the Senate.

The balance of power is delicate—founded in a Constitution that is not easily changed. It is important that those who are sworn to uphold the Constitution, not tread on it without going through the proper procedures of a constitutional amendment. Thwarting the majority by requiring 60 votes on qualified judicial nominees, as the minority did last session, undermines the delicate balance of power.

I hope the Senate will come to its senses. There has been a lot written lately about the Senate, about the process in the Senate being broken. Last week, I talked to a well-known

journalist to discuss his views of what is happening in Washington. I asked him a number of questions, but the most difficult was the one that he posed to me: What in the world is the Senate thinking about in the confirmation process? Don't you realize that this is impeding the President's ability to recruit quality people for Government service?

Mr. President, my colleagues on the Democratic side of the aisle are correct. We are heading for a crisis, but it is not a crisis over minority rights. No one on our side of the aisle has even suggested that minority rights should be overrun. The filibuster will remain intact. What we are trying to do is get the constitutional process for confirmation of Federal judges back to what has been the tradition in the Senate and what the Constitution envisioned, and that is a 51-vote majority.

Never, until the last session of Congress, was the majority will thwarted in Federal judge nominees and circuit court most particularly. So the crisis is not over the Senate process; the crisis is how group influence is turning the Senate into a permanent political battleground. It is unseemly, it is wrong, and it is going to harm the quality of our judiciary because we are going to start seeing nominees who are not the best and the brightest, who don't have clear opinions, and who are not well-published and renown constitutional experts.

I think it was pretty well brought out in an article in the Washington Post yesterday, titled "The Wreck of the U.S. Senate." It quoted John Breaux, our former Democratic colleague. He said:

Today, unfortunately, outside groups, public relations firms, and the political consultants who are dedicated to one thing, a perpetual campaign to make one party a winner and the other a loser, has snatched the political process.

Some years ago, we started on a road downward toward a low common denominator, and I think we are continuing that descent. In the article, I think it mentioned that the point of embarkation for this descent was the nomination process of John Tower, a former Senator who had an incredible record on national defense, who was perhaps the most knowledgeable Senator in the Senate on that subject, who was turned down for his Secretary of Defense with innuendo, things that were totally untrue being said about him. Many of my colleagues who are in this body today say it was unconscionable what was done to Senator John Tower.

Mr. President, I am sorry to say I think it has happened again and again. I look at Priscilla Owen, who is one of the best and brightest, who is a judge with judicial temperament, who has shown her brilliance from the days she graduated from Baylor Law School cum laude, top of her class, Baylor Law Review, to making the highest score on the Texas bar exam the year she took

it. The distortions of this fine judge's record have been incredible. She has been meticulous in following the law, in not trying to make law but interpret the law; and I am really concerned that if someone like Priscilla Owen, who is a judge who has the backing of 15 former State bar Presidents—probably most of the ones who are still alive—Republicans and Democrats, the support of 3 Democrats with whom she served on the Supreme Court, as well as every Republican, the support of the Attorney General of the United States, with whom she served, who actually sought her out for appointment because he was so impressed with her judicial standards. If someone like that has to take "brick baths" for 4 years, how are we going to recruit the very top legal minds in our country, people who have shown themselves time and time again to be excellent at what they do? How are we going to recruit them to submit themselves to this kind of process?

The National Abortion Rights Action League was reported by columnist Bob Novak to have hired an opposition research team not just for Priscilla Owen—and they have certainly been active against her—but to look at the records of 30 sitting judges, including Judge Edith Jones from Houston, and why would they be doing that? Why would the National Abortion Rights Action League start looking at sitting judges in our country today to try to find some way to harm them or distort their records? Why would they do that? Interestingly, it looks as if the people chosen to be investigated are people who might be potential appointees to the United States Supreme Court.

Mr. President, we are in a downward spiral in this country. Prior to holding federally-elected office, I remember watching the Senate debate over Clarence Thomas. I thought the Senate did an excellent job of debating Clarence Thomas, bringing out the major points. But the hearings on Justice Thomas' nomination were brutal. They were brutal. They were personal. It was something which I am sure was very difficult for him to overcome. I don't think we have to be personal to make points. I don't think we have to distort records. I don't think we should employ innuendo in looking at nominees for our Federal bench.

I think the Senate needs to take a very hard look at the processes we are using, at the outside influences and the motivations of these groups. When I turn on my television in Washington, I see ads for and against Priscilla Owen. Priscilla has been silent for four years, unwilling to lash out at her opponents and too respectful of Senate procedure to defend herself against empty criticisms. But I am glad she has been defended. I visited with her last week when she was here, and there is a personal toll on the people in this process. She will be a fine judge, but was she prepared for the four years of "brick baths" to which she could not respond?

You know, she had several very nice opportunities to do something else in these four years, but she is such a fine person, with such a strong backbone, that she did not want to withdraw her name from consideration so it could be used in the Presidential election. She didn't want to leave President Bush vulnerable to an attack that her nomination was a mistake and that there was something hidden in her record. She is proud of her record, and she knows President Bush is proud of his appointment of her. She has nothing—nothing—upon which she can base any kind of decision to leave this nomination process. She is sticking with President Bush because he made a good decision, and he is sticking with her.

But these judges are not people who have put themselves in the arena in the same way that partisan politicians do. I don't think she was prepared to be attacked on a weekly or monthly basis and have her record distorted when she submitted herself for this important nomination. She was rated unanimously by the American Bar Association committee that gives its recommendations on judges to the Judiciary Committee as "well qualified," the highest rating that can be given by the ABA. It was unanimous. Yet, this fine person has been raked over the coals, has had misrepresentations and distortions made about her. I recently spoke about Priscilla Owen, the person—I shared what kind of person she is. I talked about her service as a Sunday school teacher and that she lost her father when she was 10 months old. I talked about what a lovely person she is.

One of my colleagues came to the floor and said, yes, she is a lovely person, but that is not enough; we should not be talking about whether she is lovely or not. Well, I wanted people to see that in addition to a stellar record, an even-handed disposition, a great legal mind, and impeccable integrity, Priscilla Owen is also a lovely person. An honest person who has even gone against the prevailing view of the Republican Party in Texas by suggesting we not elect Supreme Court justices in Texas. She has actually written on that subject, saying we should not taint the judiciary with partisan politics. So, I want the record to reflect that she is a lovely person—but also a person of principle, of strength, and of profound wisdom. She is as excellent a nominee, with as excellent a record as we have ever seen come before the United States Senate.

Mr. President, I think the Senate, as a body, should think about how we treat the people who come to submit themselves for public service. Many of them do so because they believe this is their calling and they do so with every good intention, including taking large salary cuts. Priscilla Owen chose to take a huge salary cut to run for the Supreme Court of Texas instead of continuing as a partner in a major law firm in Texas.

She has shown in every way that she is qualified for this position, and I hope we will give her what she deserves after four years of waiting, and that is an up-or-down vote. When we do, she will be confirmed and she will be one of the finest judges sitting on the Federal circuit court of appeals today.

I yield the floor.

The PRESIDING OFFICER. The Senator's time has expired. The next hour will be controlled by the minority.

The senior Senator from West Virginia.

Mr. BYRD. Mr. President, how much time do I have?

The PRESIDING OFFICER. The minority controls the next 60 minutes.

Mr. BYRD. Mr. President, I rise today to speak sadly. I have been a Member of Congress—now I am in my 53rd year. Two other members have served longer than I. Only 11,752 men and women have served in the Congress of the United States since the Republic began in 1789. That is 217 years. Those two Members were the late Senator Carl Hayden of Arizona, who was chairman of the Appropriations Committee when I came to this body, and Representative Jamie Whitten of Mississippi, who was a member of the House Appropriations Committee, a man with whom I served. So only two others have served longer in the Congress, meaning the House of Representatives or the Senate or both—only two.

I say to Senators and you, Mr. President, can you imagine my feelings as I stand now to speak in this Senate, which tomorrow—24 to 36 to 48 hours from now—may be changed from what it was when it began, when it first met in April of 1789 and from what it was when I came here to the Senate now going on 47 years ago.

I can see Everett Dirksen as he stood at that desk. He was the then-minority leader. Lyndon B. Johnson of Texas was the majority leader. Yes, I can see Norris Cotton. I can see George Aiken. I can see Jack Javits. I can see Margaret Chase Smith of Maine, the only woman in the Senate at that time, as she sat on the front row of the Republican side of the aisle. I can see others, yes.

How would they have voted? How would they have voted on this question which will confront us tomorrow? How would they have voted? I have no doubt as to how they would have voted. I have no doubt as to how they would vote were they here tomorrow. And so my heart is sad that we would even come to a moment such as this. Sad, sad, sad, sad it is.

I rise today to make a request of my fellow Senators. In so doing, I reach out to all Senators on both sides of the aisle, respectful of the institution of the Senate and of the opinions of all Senators, respectful of the institution of the Presidency as well. I ask each Senator to pause for a moment and reflect seriously on the role of the Senate as it has existed now for 217 years, and on the role that it will play in the fu-

ture if the so-called nuclear option or the so-called constitutional option—one in the same—is invoked.

I implore Senators to step back—step back, step back, step back—from the precipice. Step back away from the cameras and the commentators and contemplate the circumstances in which we find ourselves. Things are not right, and the American people know that things are not right. The political discourse in our country has become so distorted, so unpleasant, so strident, so unbelievable, it is no wonder, then, that people are turning to a place of serenity, a place that they trust to seek the truth. They are turning to their religious faith in a time of ever-quickening contradictory messages transmitted by e-mail, by BlackBerry, by Palm Pilots, answering machines, Tivo, voice mail, satellite TV, cell phones, Fox News, and so many other media outlets. America is suffering sensory overload.

We hear a lot of talk, but we do not know what to make of it. So some are turning to a place of quiet, a secure place, a place where they can find peace. They are turning to their faith, their religious faith.

Our Nation seems to be at a crossroads. People are seeking answers to legitimate questions about the future of our country, the future of our judiciary, and what role religions play in public lives. But it is difficult to find the quiet time to contemplate or to build a consensus in response to these profound questions when the venues for serious discussion of these issues often amount to little more than "shoutfests," "hardball," and "Cross-fire."

Mr. President, what is next, "Slash and Burn" "Your faith or mine?" Perhaps because so few traditional channels of communication even now in the Senate provide a venue for thoughtful discussion, Americans are seeking answers to political and legal questions not in Congress or in the courts but through a higher power, through their religious faith.

In fact, it is the reaction of some to recent court decisions that has fueled the drive by a sincere minority, perhaps, in this country, the drive, where it might be a majority in this country, the drive toward the pillars of faith.

Many American citizens since the early religious people are angered and alienated by a belief that their views are not respected in the political process. They are deeply frustrated, and I am in sympathy with such feelings. I do not agree with many of the decisions that have come from the courts concerning prayer in school or concerning prohibitions on the display of religious items in public places.

For example, concerning freedom of religion, the establishment clause of the first amendment to the Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

In my humble opinion, too many have not given equal weight to both of these clauses but have focused only on the first clause which prohibits the establishment of religion, with too little attention and at the expense of the second clause, which protects the right of Americans to worship as they please. I have always believed that this country was founded by men and women of strong faith whose intent was never to suppress religion but to ensure that our Government favors no single religion over another. This is reflected in Thomas Jefferson's insistence on religious liberty in the founding of our Republic. In his Virginia Act for Establishing Religion Freedom, Jefferson wrote that no man shall be compelled to frequent or support any religious worship or shall otherwise suffer on account of his religious opinion or belief, but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and that shall in no wise diminish, enlarge, or affect their civil capacities.

In 1962, the U.S. Supreme Court decided a case called *Engel v. Vitale*. In that case, a group of politically appointed State officials drafted a prayer to be recited every day in the New York public schools, but the Supreme Court struck down the law, holding that the practice violated the establishment clause of the U.S. Constitution. While I strongly support voluntary prayer in schools, I can understand how the Supreme Court refused to require schoolchildren to recite a prayer that was drafted by government bureaucrats to be force-fed to every child. That decision rested on a principle that makes a lot of sense to me—namely, that government itself may not seek either to discourage or to promote religion.

In response to a question about the role of religion in society, President Bush recently stated that he believes religion is a personal matter—and it is a personal matter. It is a personal matter, something that must be revered but not imposed by the Government. The Federal Government must not prevent us from praying, but it should not tell us how to pray, either. That is a personal matter. That is a personal decision.

On May 5, our National Day of Prayer, the President reminded us that this special day was an annual event established in 1952 by an act of Congress. Yet, as said, it is part of a broader tradition that reaches back to the beginnings of America. So the President reminded us that from the landing of the Pilgrims at Plymouth Rock to the launch of the American Revolution, the men and women who founded this Nation in freedom relied on prayer to protect and to preserve it. And, of course, the President was right.

Thus, we can all understand the outrage of many good people of faith who decry the nature of our popular culture with its overt emphasis on sex, violence, profanity, and materialism.

They have every reason to seek some sort of remedy, but these frustrations, great as they are, must not be allowed to destroy crucial institutional mechanisms in the Senate that have protected minority rights for over 200 years and, when necessary, must be available to curtail the power of a power-hungry Executive. Yet this is the outcome sought by those who propose to attack the filibuster.

At such times as these, the character of the leaders of this country is sorely tested. Our best leaders search for ways to avert such crises, not ways to accelerate the plunge toward the brink. Overheated partisan rhetoric is always available, of course, but the majority of Americans want a healthy two-party system built on mutual respect, and they want leaders who know how to work together. In fact, Americans admire most leaders who seek to do right, even when doing so does not prove politically advantageous in the short term.

The so-called nuclear option has been around for a long time. It didn't require a genius to figure that one out. Any cabbagehead who fell off of a turnip truck could have done that. That is easy to figure out. It has been around since the cloture rule was adopted in 1917—yes, I call it the turnip truck option, not the nuclear option, not the constitutional option. I call it the turnip truck option. It could have been talked about and suggested by someone who fell off a turnip truck and got up and dusted himself off and got back on the truck and fell off the turnip truck again—so turnip truck No. 2. Let it be that.

The nuclear option, as I say, has been around for a long time, but previous leaders of the Senate and previous Presidents, previous White Houses, did not seek to foist this turnip truck option upon the Senate and upon the right of the American people to have freedom of speech on the part of their representatives in the Senate.

So the nuclear option—yes, it has been around for a long time. Nobody wanted to resort to such a suicidal weapon. But until today, wisdom and cooler heads prevailed. In 1841, for example, a Democratic minority tried to block a bank bill supported by Henry Clay. Clay threatened to change the Senate's rules to allow the majority—have you heard that before?—to allow the majority to stop debate, just like our current majority leader. I say this respectfully. But Thomas Hart Benton angrily rebuked his colleague, Henry Clay, accusing Clay of trying to stifle the Senate's right to unlimited debate.

There is no need to tamper with the Senate's right of extended debate. It has been around for a long time. In 1806, the Senate left it out of the Senate's rules. In the 1806 version of the Senate's rules, "the previous question," as it now is still being used in the House, "the previous question" was left out, left behind. It had only been used a few times prior to 1806. It was in

the 1789 rules of the Senate, yes. It was in the rules of the Continental Congress, "the previous question." It is in the rules of the British Parliament, yes. But the Senate, in 1806, decided, on the basis and upon the advisement of the Vice President of the United States, Aaron Burr, to discard it.

The text of the actual cloture rule, rule XXII, was not adopted by the Senate until 1917, the year in which I was born. Today, rule XXII allows the Senate to end a debate with 60 votes, what we call invoking cloture. I offered that resolution, to provide for a supermajority of 60 votes to invoke cloture. I believe it was 1975. That was a resolution which I introduced. So that is what we have today. But from 1919 to 1962, the Senate voted on cloture petitions only 27 times and invoked cloture only 5 times.

Political invective and efforts to divide America along religious lines may distract the electorate for the moment, but if, heaven forbid, there should be a true crisis or calamity in our country, the American people will stand shoulder to shoulder to support our country. Why can't we, then, their Senators, their leaders, find the courage to come together and solve this problem?

Nearly 4 years ago, our Nation was attacked by al-Qaida. In a Herculean effort, we came together to help the good people of New York and the patriotic citizens who worked at the Pentagon. Why can't we find some of that spirit today in the Senate? The time-honored role of the Senate as protector of minority views is at risk, and those who are in the majority today may be in the minority tomorrow. Don't forget that—the worm turns.

Our country has serious problems. Baby boomers are facing retirement with sorely diminished savings, savings hard to accrue in the face of exploding prices for gasoline, prescription drugs, housing, fuel, medicine and shelter—not frivolous purchases, all essential to survival. Alarmingly, all are becoming less affordable, even for affluent Americans. But beyond them, what is happening to America's poor today? Has anybody noticed? Has anybody noticed?

The point is that the current uproar over the filibuster serves only to underscore the mounting number of real problems—real problems—not being addressed by this Government of ours. Over 45 million persons in our country, some 15 percent of our population, cannot afford health insurance. Is your father included? Is your mother included in that number? Is your grandfather included? Is your grandmother included in that number?

Our veterans lack adequate medical care after they have risked life and limb for all of us. Our education system produces 8th graders ranked 19 out of 38 countries in the world in mathematics and 12th graders ranked 19 out of 21 countries in both math and science. Poverty in these United States is rising, with 34 million people or 12.4

percent of the population living below the poverty level. Think of it. Our infant mortality rate is the second highest of the major industrialized countries of the world.

Yet we debate and we seek solutions to none—none—none of these critical problems. Instead, what do we focus on? We focus all energy—we sweat, we perspire, we weaken ourselves, we focus all energy on the frenzy over whether to confirm seven previously considered nominees who were not confirmed by the Senate in the 108th Congress. Doesn't that seem kind of odd? Isn't that kind of odd? That seems a bit irrational, doesn't it, I say. Hear me. Maybe it sounds crazy. If I wanted to go crazy, I would do it in Washington because nobody would take notice, at least, so said Irvin S. Cobb. Would anyone apply such thinking to their own lives? My colleagues, would you insist on resubmitting the same lottery ticket if you knew it was not a winner?

Unfortunately, many Americans seek as an anecdote to their frustrations with our current system a confrontation—yes, we have to have it—a confrontation over these seven nominees and the preposterous solution of permanently crippling freedom of speech and debate and the right of a minority to dissent in the Senate.

I ask the Senate, please, I ask the Senate majority leader, please, I ask the Senator minority leader, please, I ask the White House.

I noticed the other day, I believe last Thursday, in the Washington Post—I will bring it with me tomorrow—I noticed that the White House did not want to compromise on this matter. The White House did not want to compromise. Here we have the executive branch talking to the legislative branch, two of the three branches, two of the three equal coordinate branches of Government, talking through the newspapers that it does not want to compromise.

I ask the Senate to take a moment today to reflect on the potentially disastrous consequences that could flow from invoking the so-called nuclear option. Anger will erupt. It may not be the next day or immediately. One may not see these things come about immediately, but in time they will come. They will come, they will come, they will come. Anger will erupt in the Chamber and it will be difficult to address real problems.

I implore, I beseech, I importune, I beg the Senate to consider how posterity will review such a significant occurrence, destroying 217 years of checks and balances established so carefully by the Founding Fathers 219 years ago. Will the light of posterity shine favorably on the shattering of Senate precedent solely to confirm these seven nominees, nominees whose names have been before the Senate for consideration in the previous administration? Won't this maneuver be viewed for what it really is, a misguided attempt to strong-arm the Senate for a political purpose driven by

anger and raw ambition and lust for power? Will that be remembered as a profile in courage?

What has happened to the quality of leadership in this country that will allow us even to consider provoking a constitutional crisis of such magnitude?

I tell you, I am deeply, deeply troubled. I am almost sick about it, the frustration that I have had over thinking about this, this awful thing that is about to happen, unless we draw back.

Have we lost our ability to look toward the larger good? Even a child is known by his doings, whether his work be pure and whether it be right. That is according to Proverbs, 20th chapter, 11th verse.

I ask the Senate to come together and to work toward a compromise. Yes, the Washington Post last Thursday said the White House doesn't want a compromise. But I beg the Senate, I beg those on the other side of the aisle and those on my side of the aisle to reach a compromise, work toward a compromise.

What the current majority seeks to employ against the minority today can be turned against the majority tomorrow.

John Adams once said:

Even mankind will, in time, discover that unbridled majorities are as tyrannical and cruel as unlimited despots.

Does not history prove as much? I ask the Senate to seek a compromise. Where is the gentle art of compromise? Edmund Burke once stated:

All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter.

Let the Senate step away from this abyss and see the wisdom of coming together to preserve the checks and balances. May we stop and draw back and remember that we are all Americans before we permanently damage this institution, the Senate of the United States, and in doing so, permanently damage the Constitution as we permanently damage this institution, the Senate of the United States, and the country we love.

I yield the floor.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, how much time remains on the minority?

The PRESIDING OFFICER. The minority controls 23 additional minutes.

Mr. BIDEN. Mr. President, my friends and colleagues, I have not been here as long as Senator BYRD, and no one fully understands the Senate as well as Senator BYRD, but I have been here for over three decades. This is the single most significant vote any one of us will cast in my 32 years in the Senate. I suspect the Senator would agree with that.

We should make no mistake. This nuclear option is ultimately an example of the arrogance of power. It is a fundamental power grab by the majority party, propelled by its extreme right

and designed to change the reading of the Constitution, particularly as it relates to individual rights and property rights. It is nothing more or nothing less. Let me take a few moments to explain that.

Folks who want to see this change want to eliminate one of the procedural mechanisms designed for the express purpose of guaranteeing individual rights, and they also have a consequence, and would undermine the protections of a minority point of view in the heat of majority excess. We have been through these periods before in American history but never, to the best of my knowledge, has any party been so bold as to fundamentally attempt to change the structure of this body.

Why else would the majority party attempt one of the most fundamental changes in the 216-year history of this Senate on the grounds that they are being denied ten of 218 Federal judges, three of whom have stepped down? What shortsightedness, and what a price history will exact on those who support this radical move.

It is important we state frankly, if for no other reason than the historical record, why this is being done. The extreme right of the Republican Party is attempting to hijack the Federal courts by emasculating the courts' independence and changing one of the unique foundations of the Senate; that is, the requirement for the protection of the right of individual Senators to guarantee the independence of the Federal Judiciary.

This is being done in the name of fairness? Quite frankly, it is the ultimate act of unfairness to alter the unique responsibility of the Senate and to do so by breaking the very rules of the Senate.

Mark my words, what is at stake here is not the politics of 2005, but the Federal Judiciary in the country in the year 2025. This is the single most significant vote, as I said earlier, that I will have cast in my 32 years in the Senate. The extreme Republican right has made Federal appellate Judge Douglas Ginsburg's "Constitution in Exile" framework their top priority.

It is their purpose to reshape the Federal courts so as to guarantee a reading of the Constitution consistent with Judge Ginsburg's radical views of the fifth amendment's taking clause, the nondelegation doctrine, the 11th amendment, and the 10th amendment. I suspect some listening to me and some of the press will think I am exaggerating. I respectfully suggest they read Judge Ginsburg's ideas about the "Constitution in Exile." Read it and understand what is at work here.

If anyone doubts what I am saying, I suggest you ask yourself the rhetorical question, Why, for the first time since 1789, is the Republican-controlled Senate attempting to change the rule of unlimited debate, eliminate it, as it relates to Federal judges for the circuit court or the Supreme Court?

If you doubt what I said, please read what Judge Ginsburg has written and listen to what Michael Greve of the American Enterprise Institute has said:

I think what is really needed here is a fundamental intellectual assault on the entire New Deal edifice. We want to withdraw judicial support for the entire modern welfare state.

Read: Social Security, workmen's comp. Read: National Labor Relations Board. Read: FDA. Read: What all the byproduct of that shift in constitutional philosophy that took place in the 1930s meant.

We are going to hear more about what I characterize as radical view—maybe it is unfair to say radical—a fundamental view and what, at the least, must be characterized as a stark departure from current constitutional jurisprudence. Click on to American Enterprise Institute Web site www.aei.org. Read what they say. Read what the purpose is. It is not about seeking a conservative court or placing conservative Justices on the bench. The courts are already conservative.

Seven of the nine Supreme Court Justices appointed by Republican Presidents Nixon, Ford, Reagan, and Bush 1—seven of nine. Ten of 13 Federal circuit courts of appeal dominated by Republican appointees, appointed by Presidents Nixon, Ford, Reagan, Bush 1, and Bush 2; 58 percent of the circuit court judges appointed by Presidents Nixon, Ford, Reagan, Bush 1, or Bush 2. No, my friends and colleagues, this is not about building a conservative court. We already have a conservative court. This is about guaranteeing a Supreme Court made up of men and women such as those who sat on the Court in 1910 and 1920. Those who believe, as Justice Janice Rogers Brown of California does, that the Constitution has been in exile since the New Deal.

My friends and colleagues, the nuclear option is not an isolated instance. It is part of a broader plan to pack the court with fundamentalist judges and to cower existing conservative judges to toe the extreme party line.

You all heard what TOM DELAY said after the Federal courts refused to bend to the whip of the radical right in the Schiavo case. Mr. DELAY declared: "The time will come for men responsible for this to answer for their behavior."

Even current conservative Supreme Court Justices are looking over their shoulder, with one extremist recalling the despicable slogan of Joseph Stalin—and I am not making this up—in reference to a Reagan Republican appointee, Justice Kennedy, when he said: "No man, no problem"—absent his presence, we have no problem.

Let me remind you, as I said, Justice Kennedy was appointed by President Reagan.

Have they never heard of the independence of the judiciary—as fundamental a part of our constitutional

system of checks and balances as there is today; which is literally the envy of the entire world, and the fear of the extremist part of the world? An independent judiciary is their greatest fear.

Why are radicals focusing on the court? Well, first of all, it is their time to be in absolute political control. It is like, why did Willy Sutton rob banks? He said: Because that is where the money is. Why try it now—for the first time in history—to eliminate extended debate? Well, because they control every lever of the Federal Government. That is the very reason why we have the filibuster rule. So when one party, when one interest controls all levers of Government, one man or one woman can stand on the floor of the Senate and resist, if need be, the passions of the moment.

But there is a second reason why they are focusing on the courts. That is because they have been unable to get their agenda passed through the legislative bodies. Think about it. With all the talk about how they represent the majority of the American people, none of their agenda has passed as it relates to the fifth amendment, as it relates to zoning laws, as it relates to the ability of Federal agencies, such as the Food and Drug Administration, the Environmental Protection Agency, to do their jobs.

Read what they write when they write about the nondelegation doctrine. That simply means, we in the Congress, as they read the Constitution, cannot delegate to the Environmental Protection Agency the authority to set limits on how much of a percentage of carcinogens can be admitted into the air or admitted into the water. They insist that we, the Senate, have to vote on every one of those rules, that we, the Senate and the House, with the ability of the President to veto, would have to vote on any and all drugs that are approved or not approved.

If you think I am exaggerating, look at these Web sites. These are not a bunch of wackos. These are a bunch of very bright, very smart, very well-educated intellectuals who see these Federal restraints as a restraint upon competition, a restraint upon growth, a restraint upon the powerful.

The American people see what is going on. They are too smart, and they are too practical. They might not know the meaning of the nondelegation doctrine, they might not know the clause of the fifth amendment relating to property, they may not know the meaning of the tenth and eleventh amendments as interpreted by Judge Ginsburg and others, but they know that the strength of our country lies in common sense and our common pragmatism, which is antithetical to the poisons of the extremes on either side.

The American people will soon learn that Justice Janice Rogers Brown—one of the nominees who we are not allowing to be confirmed, one of the ostensible reasons for this nuclear option

being employed—has decried the Supreme Court's "socialist revolution of 1937." Read Social Security. Read what they write and listen to what they say. The very year that a 5-to-4 Court upheld the constitutionality of Social Security against a strong challenge—1937—Social Security almost failed by one vote.

It was challenged in the Supreme Court as being confiscatory. People argued then that a Government has no right to demand that everyone pay into the system, no right to demand that every employer pay into the system. Some of you may agree with that. It is a legitimate argument, but one rejected by the Supreme Court in 1937, that Justice Brown refers to as the "socialist revolution of 1937."

If it had not been for some of the things they had already done, nobody would believe what I am saying here. These guys mean what they say. The American people are going to soon learn that one of the leaders of the constitutional exile school, the group that wants to reinstate the Constitution as it existed in 1920, said of another filibustered judge, William Pryor that "Pryor is the key to this puzzle. There's nobody like him. I think he's sensational. He gets almost all of it."

That is the reason why I oppose him. He gets all of it. And you are about to get all of it if they prevail. We will not have to debate about Social Security on this floor.

So the radical right makes its power play now when they control all political centers of power, however temporary. The radical push through the nuclear option and then pack the courts with unimpeded judges who, by current estimations, will serve an average of 25 years. The right is focused on packing the courts because their agenda is so radical that they are unwilling to come directly to you, the American people, and tell you what they intend.

Without the filibuster, President Bush will send over more and more judges of this nature, with perhaps three or four Supreme Court nominations. And there will be nothing—nothing—that any moderate Republican friends and I will be able to do about it.

Judges who will influence the rights of average Americans: The ability to sue your HMO that denies you your rights; the ability to keep strip clubs out of your neighborhood—because they make zoning laws unconstitutional—without you paying to keep the person from building; the ability to protect the land your kids play on, the water they drink, the air they breathe, and the privacy of your family in your own home.

Remember, many of my colleagues say there is no such thing as a right to privacy in any iteration under the Constitution of the United States of America. Fortunately, we have had a majority of judges who disagreed with that over the past 70 years. But hang on, folks. The fight over judges, at bottom, is not about abortion and not about

God, it is about giving greater power to the already powerful. The fight is about maintaining our civil rights protections, about workplace safety and worker protections, about effective oversight of financial markets, and protecting against insider trading. It is about Social Security. What is really at stake in this debate is, point blank, the shape of our constitutional system for the next generation.

The nuclear option is a twofer. It excises, friends, our courts and, at the same time, emasculates the Senate. Put simply, the nuclear option would transform the Senate from the so-called cooling saucer our Founding Fathers talked about to cool the passions of the day to a pure majoritarian body like a Parliament. We have heard a lot in recent weeks about the rights of the majority and obstructionism. But the Senate is not meant to be a place of pure majoritarianism.

Is majority rule what you really want? Do my Republican colleagues really want majority rule in this Senate? Let me remind you, 44 of us Democrats represent 161 million people. One hundred sixty-one million Americans voted for these 44 Democrats. Do you know how many Americans voted for the 55 of you? One hundred thirty-one million. If this were about pure majorities, my party represents more people in America than the Republican Party does. But that is not what it is about. Wyoming, the home State of the Vice President, the President of this body, gets one Senator for every 246,000 citizens; California, gets one Senator for 17 million Americans. More Americans voted for Vice President Gore than they did Governor Bush. By majoritarian logic, Vice President Gore won the election.

Republicans control the Senate, and they have decided they are going to change the rule. At its core, the filibuster is not about stopping a nominee or a bill, it is about compromise and moderation. That is why the Founders put unlimited debate in. When you have to—and I have never conducted a filibuster—but if I did, the purpose would be that you have to deal with me as one Senator. It does not mean I get my way. It means you may have to compromise. You may have to see my side of the argument. That is what it is about, engendering compromise and moderation.

Ladies and gentlemen, the nuclear option extinguishes the power of Independents and moderates in this Senate. That is it. They are done. Moderates are important only if you need to get 60 votes to satisfy cloture. They are much less important if you need only 50 votes. I understand the frustration of our Republican colleagues. I have been here 32 years, most of the time in the majority. Whenever you are in the majority, it is frustrating to see the other side block a bill or a nominee you support. I have walked in your shoes, and I get it.

I get it so much that what brought me to the Senate was the fight for civil

rights. My State, to its great shame, was segregated by law, was a slave State. I came here to fight it. But even I understood, with all the passion I felt as a 29-year-old kid running for the Senate, the purpose—the purpose—of extended debate. Getting rid of the filibuster has long-term consequences. If there is one thing I have learned in my years here, once you change the rules and surrender the Senate's institutional power, you never get it back. And we are about to break the rules to change the rules.

I do not want to hear about "fair play" from my friends. Under our rules, you are required to get 2/3 of the votes to change the rules. Watch what happens when the majority leader stands up and says to the Vice President—if we go forward with this—he calls the question. One of us, I expect our leader, on the Democratic side will stand up and say: Parliamentary inquiry, Mr. President. Is this parliamentarily appropriate? In every other case since I have been here, for 32 years, the Presiding Officer leans down to the Parliamentarian and says: What is the rule, Mr. Parliamentarian? The Parliamentarian turns and tells them.

Hold your breath, Parliamentarian. He is not going to look to you because he knows what you would say. He would say: This is not parliamentarily appropriate. You cannot change the Senate rules by a pure majority vote.

So if any of you think I am exaggerating, watch on television, watch when this happens, and watch the Vice President ignore—he is not required to look to an unelected officer, but that has been the practice for 218 years. He will not look down and say: What is the ruling? He will make the ruling, which is a lie, a lie about the rule.

Isn't what is really going on here that the majority does not want to hear what others have to say, even if it is the truth? Senator Moynihan, my good friend who I served with for years, said: You are entitled to your own opinion but not your own facts.

The nuclear option abandons America's sense of fair play. It is the one thing this country stands for: Not tilting the playing field on the side of those who control and own the field.

I say to my friends on the Republican side: You may own the field right now, but you won't own it forever. I pray God when the Democrats take back control, we don't make the kind of naked power grab you are doing. But I am afraid you will teach my new colleagues the wrong lessons.

We are the only Senate in the Senate as temporary custodians of the Senate. The Senate will go on. Mark my words, history will judge this Republican majority harshly, if it makes this catastrophic move.

Mr. President, I ask unanimous consent that the full text of my statement as written be printed in the RECORD.

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

THE FIGHT FOR OUR FUTURE: THE COURTS, THE UNITED STATES SENATE, AND THE AMERICAN PEOPLE

INTRODUCTION

Make no mistake, my friends and colleagues, the "nuclear option" is the ultimate example of the arrogance of power. It is a fundamental power grab by the Republican Party propelled by its extreme right and designed to change the reading of the Constitution, particularly as it relates to individual rights and property rights

Nothing more, nothing less.

It is the elimination of one of the procedural mechanisms designed for the express purpose of guaranteeing individual rights and the protections of a minority point of view in the heat of majority excess.

Why else would the majority party attempt such a fundamental change in the 216 year history of this Senate on the grounds that they are being denied seven of 218 federal judges?

What shortsightedness and what a price history will exact on those who support this radical move.

Mr. President, we should state frankly, if for no other reason than an historical record, why this is being done. The extreme right of the Republican Party is attempting to hijack the federal courts by emasculating the courts' independence and changing one of the unique foundations of the United States Senate—the requirement for the protection of the right of individual Senators to guarantee the independence of the federal judiciary.

This is being done in the name of fairness. But it is the ultimate act of unfairness to alter the unique responsibility of the United States Senate and to do so by breaking the very rules of the United States Senate.

Mark my words. What is at stake here is not the politics of 2005, but the federal judiciary and the United States Senate of 2025.

This is the single most significant vote that will be cast in my 32-year tenure in the United States Senate.

THE FUTURE OF OUR COURTS

The extreme Republican Right has made Judge Douglas Ginsberg's "Constitution in Exile" framework their top priority. It is their extreme purpose to reshape the federal courts so as to guarantee a reading of the Constitution consistent with Judge Ginsberg's radical views of the 5th Amendment Takings Clause, the non-delegation doctrine, the 11th Amendment, and the 10th Amendment.

If you doubt what I say then ask yourself the following rhetorical question: Why for the first time since 1789 is the Republican controlled United States Senate attempting to do this?

If you doubt what I say, please read what Judge Ginsberg has written. And listen to what Michael Greve, of the American Enterprise Institute has said: "what is really needed here is a fundamental intellectual assault on the entire New Deal edifice. We want to withdraw judicial support for the entire modern welfare state."

If you want to hear more about what I am characterizing as the radical view and what must certainly be characterized as a stark departure from current constitutional law, click on the American Enterprise Institute's website www.aei.org.

This is not about seeking a conservative court and placing conservative judges on the bench.

The courts are already conservative: 7 of 9 current Supreme Court Justices, appointed by Republican Presidents Nixon, Ford, Reagan, Bush I; 10 of 13 federal circuit courts dominated by Republican appointees, appointed by Presidents Nixon, Ford, Reagan, Bush I, and Bush II; and 58 percent of all cir-

cuit court judges, appointed by Presidents Nixon, Ford, Reagan, Bush I and Bush II.

No, friends and colleagues, this is not about building conservative courts. We already have them. This is about a Supreme Court made up of men and women like those who sat on the Court in 1910, 1920.

My friends and colleagues, the nuclear option is not an isolated instance. It's part of a broader plan to pack the courts with fundamentalist judges and to cower existing conservative judges to toe the party line.

You all heard what Tom DeLay said after the federal courts refused to bend to the whip of the Radical Right in the Schiavo Case. DeLay declared:

The time will come for the men responsible for this to answer for their behavior.

Even current conservative Supreme Court Justices are looking over their shoulders. One extremist has referred to Justice Kennedy by recalling a despicable slogan attributed to Joseph Stalin. When Stalin encountered a problem with an individual, he would simply say "no man, no problem." The extreme right is adapting Stalin's adage in their efforts to remove sitting judges: "no judge, no problem."

And let me remind you, Kennedy was appointed by President Reagan.

Have these people never heard of the independence of the judiciary—as fundamental a part our constitutional system of checks and balances as there is; the envy of the world; the system that emerging democracies are clamoring to copy?

You must ask yourself why the fundamentalist Republican right is focusing so clearly on the federal courts? I'll tell you why.

Because they are unable to seek their agenda through the political branches of our government.

That's why they are trying to move their agenda by fundamentally changing the courts.

I believe that the American people already intuitively know what's going on; they're too smart; they're too practical. The strength of our country lies in our common sense and our pragmatism, which is antithetical to the ideological purity of the fundamentalist Republican Right.

The American people will soon learn that Janice Rogers Brown has decried the Supreme Court's "socialist revolution of 1937," the very year that a 5-4 Court upheld the constitutionality of Social Security against strong challenges.

The American people will soon learn that one of the leaders of the "Constitution in Exile" school—the group that wants to reinstate the Constitution as it existed in the 1920s—said that another of the filibustered judges—William Pryor—was "key to this puzzle; there's nobody like him. I think he's sensational. He gets almost all of it."

These are judges who will serve on the federal circuit courts of appeal for a quarter of a century. And no general election of Congress and the President will be able to change it.

And you may ask yourself why the focus on the circuit courts? I'll tell you why.

Today, it is more than four times as difficult to get an opportunity to argue your appeal before the Supreme Court as it was 20 years ago. Today, the Supreme Court reviews less than two tenths of one percent of the caseload of the appeals courts.

Without the filibuster, President Bush will be able to put on the bench judges who would reinstitute the "Constitution in Exile." I suggest that it is these judges who are the ones who should be exiled.

And if the actuarial tables comply there is the possibility that President Bush will possibly nominate as many as 3-4 Supreme Court Justices—and there will be little that

my moderate Republican friends and I will be able to do about it.

The consequences for average Americans will be significant. They will include the ability to sue when HMOs deny you your rights; the ability to keep strip clubs out of your family's neighborhood; the ability to protect from environmental degradation the land your kids play on, the purity of the water they drink, the cleanliness of the air they breathe; and the ability to preserve the privacy that you and your family expect the Constitution to provide.

The fight over judges, at bottom, is not about abortion and about God; it is about giving greater power to the already powerful.

THE FUTURE OF THE SENATE

The exercise of the nuclear option also has another fundamental impact on the government—it will transform the Congress from a bifurcated legislature where political parties were never intended to rule supreme into a quasi-parliamentary system where a single party will dominate.

There would have been no Constitution were it not for the Connecticut Compromise—that is the compromise that guaranteed states two U.S. Senators regardless of the state's population.

The Connecticut Compromise was also done expressly to guarantee the right of the small states, as well as less powerful interests, as well as individuals, to be protected from temporary passion and excesses of the moment—whether borne out of a demagogic appeal or the overwhelming supremacy of a political party.

The guarantee of unlimited debate in the United States Senate assured not that the minority would be able to get its way but that the minority would be able to generate a compromise that would keep them from being emasculated. And this included ensuring the independence of the federal judiciary.

We have heard a lot in recent weeks about the rights of the majority. But the Senate was not meant to be a place of pure majoritarianism. Is majority rule what this is about? Do my Republican colleagues really want majority rule?

We 44 Democrats represent 161 million people in the Senate; the 55 Republicans only 131 million. By majoritarian logic, the Democrats would be in the majority in the Senate.

Wyoming, the home state of the President of this Body, gets 1 Senator for every 246,891 citizens. By that measure, California is entitled to 137 U.S. Senators.

More Americans voted for Vice President Gore in 2000 than for George W. Bush. By majoritarian logic, Gore won that election.

But Republicans control the Senate, California only gets 2 Senators, and Vice President Gore lost the 2000 election for the same reason—under our constitutional system, a majority doesn't always get what it wants; that's the system the Founders created.

At its core, the filibuster is not about stopping a nominee or a bill, it's about compromise and moderation.

The nuclear option extinguishes the power of independents and moderates in the Senate. That's it, they're done. Moderates are important if you need to get to 60 votes to satisfy cloture; they are much less so if you only need 50 votes.

Let's set the historical record straight. Never has the Senate provided for a certainty that 51 votes could put someone on the bench or pass legislation.

The facts are these. There was no ability to limit debate until 1917. And then the explicit decision was made to limit debate on legislation if 2/3 of the Senators present and accounted for supported cloture. Even then, the Senate rejected a similar limitation on executive nominations, including nominees

to the federal bench. It wasn't until 1949 that the new cloture rule also applied to nominations.

The question at present is, will the Senate actually aid and abet in the erosion of its Article I power by conceding to another branch greater influence over who ends up on our courts? As Senator Stennis once said to me in the face of a particularly audacious claim by President Nixon: "Are we the President's men or the Senate's?"

My friends on the other side of the aisle like to focus on the text of the Constitution. Tell me: Where does it state that it is necessary for each bill or each nominee that comes before us to receive a simple majority vote? Where does it state that the President should always get his first choice to fill a vacancy?

FUNDAMENTAL FAIRNESS—PLAYING BY THE RULES

The nuclear option makes a mockery of the Senate rules. You'll notice that when the nuclear option is triggered, the Presiding Officer will refuse to seek the advice of the Parliamentarian, his own expert. He won't ask because he doesn't want to hear the answer.

Isn't that what's really going on here? The majority doesn't want to hear what others have to say, even if it's the truth. Well, as Senator Moynihan used to say, "You're entitled to your own opinions, but not your own facts."

The nuclear option abandons our American sense of fair play. If there is one thing this country stands for it's fair play—not tilting the playing field in favor of one side or the other, not changing the rules unilaterally.

We play by the rules, and win or lose by the rules. That is a quintessentially American trait, and it is eviscerated by the "nuclear option."

CONCLUSION

The Senate stands at the precipice of a truly historic mistake. We are about to act on a matter that will influence our country's history for the foreseeable future.

We are only the Senate's temporary custodians—our careers in the Senate will one day end—but the Senate will go on. Over the course of the next hours and days, we must be Senators first, and Republicans and Democrats second.

We must think of the rights and liberties of the American people, not just for today but for the rest of our lives.

Again, ask yourself why is this extreme change being put forward over 7 out of 218 federal judges?

As I said earlier, history will judge this Republican Majority harshly if it succeeds in changing the way the Founders intended the Senate to behave, emasculating it into a parliament governed by a single party's ideology and unable to be thrown out by a vote of no-confidence.

Mr. BIDEN, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. HATCH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. HATCH. Mr. President, over the last several days we have debated some of the most important issues that most of the Members will ever face. Should the same powerful tool, such as the filibuster, that we have long used in the legislative process be part of the con-

firmation process to defeat a President's judicial nominees? That is a big question. Can the Senate's role of advice and consent regarding judicial nominations be exercised equally by either the majority or minority of Senators? The answer to each of these questions is no.

America's Founders designed the Senate without the ability to filibuster anything at all. The filibuster became available later but was restricted to the legislative process which we control. It was not part of the appointment process which the President controls. Allowing a minority of Senators to capture this body's role of advice and consent will allow that minority to hijack the President's power to appoint judges. I admit that we have control of the Executive Calendar, but the President has rights in that calendar, too. We cannot hijack the President's power to appoint judges. Doing so distorts the balance the Constitution establishes and mandates. That situation should not stand.

I urge my friends, Senators from the minority, to abandon their destructive course and return to the tradition we followed for more than two centuries. The Senate, acting through a majority, checks the President's power to appoint by voting on whether to consent to those appointments. You will notice it is the Senate—not the minority—who does that check. Any Senator may vote against any nominee for any reason, but we must vote. We followed that tradition for more than 200 years, and we should recommit ourselves to it now.

If the minority insists on distorting the Constitution's balance and rejecting Senate tradition, then I believe the Senate must firmly reestablish that tradition by exercising our constitutional authority to determine our own rules and procedures. If the minority will not exercise the same self-restraint this body exercised for the last two centuries, then I believe the Senate must vote to return formally to our tradition. It is surely not a sign of our political culture that we have to enforce by majority vote what we once offered by principle and self-restraint. But the Constitution's balance is too important to allow a minority to erode our principles and past practices.

The problem and the solution each have their own frame of reference drawn from the Constitution. The frame of reference for evaluating these judicial filibusters is the separation of powers into three branches. The frame of reference for the solution to this judicial filibuster crisis is the Constitution's grant of authority for us, the Senate, to determine how we want to conduct Senate business.

Let me first address the judicial filibuster crisis through the lens, the frame of reference, of the separation of powers. In Federalist No. 47, James Madison wrote of the separation of powers that "no political truth is certainly of greater intrinsic value or

stamped with the authority of more enlightened patrons of liberty." Two points are particularly important here. First, the separation of powers is exclusive. The powers assigned to one branch are denied to the others.

Like our Federal charter, each State constitution also divides the legislative, executive, and judicial branches into separate branches. More than two-thirds of them, however, go even further and make the exclusive nature of separation explicit. They affirmatively prohibit each branch from exercising the powers assigned to the others. The separation of powers is that important.

While each branch may not exercise the powers given to the others, we can check the powers given to the others. A check on another branch's power is a safeguard. It is not a separate coequal power. It is neither separate from nor as significant as the power being checked. Nomination and appointment of judges is described in article II which outlines the President's power. Not a word is found in article I which describes our powers.

The second point about the separation of powers is equally important. Just as the powers belong to the branches, checks and balances are exercised by the branches. The President, to whom the Constitution gives executive power, can check Congress's legislative power through the veto that he has a right to exercise. He cannot delegate it to someone else in the executive branch. Similarly, the Constitution assigns the role of advice and consent to the Senate, not just to the minority, to the Senate.

The question raised by the current filibuster campaign, however, is this: What is the Senate, the minority or the majority? I do not want to get too technical, but these are basic civics principles that apply to legislative bodies everywhere that you can find in most high school textbooks. We must have what we call a quorum, a minimum number of Senators present to be open for business. Senate rule VI defines a quorum as a "majority of Senators duly chosen and sworn." Today that means 51 Senators. Unless the Constitution that created this body says otherwise, when a majority of those Senators acts, it is the Senate itself that acts.

This is no different from the Supreme Court. When a majority of its members votes the same way, we say it is the Court that has decided the case.

Only the Senate itself can exercise its constitutional role of advice and consent on the President's judicial nominations. That is, only a majority of Senators can exercise that role. I make this point so strongly because the minority is claiming the right to exercise this body's role of advice and consent strictly by the minority.

Last Thursday, the Senator from Massachusetts, Mr. KERRY, on the Senate floor, charged that "the Republican leadership is determined to deny the minority the right to hold the executive responsible for lifetime appointments to the judiciary."

He was not the first to make this argument. We have heard for a long time now from many Senators who support these filibusters that the Senate rejects a nomination not when the majority has voted it down but when the minority has prevented a final confirmation vote, even though there is a bipartisan majority for the nominee. I should say in this case nominees.

The minority does not check the President's power. The Senate itself does. And that means a majority of Senators checks the President's power. When the minority has prevented a confirmation vote, the minority has prevented the Senate from exercising its role of advice and consent altogether. I do not speak primarily of the majority or minority party. I speak of the numerical majority that is required in order for the Senate to act at all. The vast majority of judicial nominations are confirmed either by unanimous consent or by overwhelming margins on rollcall votes. The number of truly controversial, hotly contested judicial nominations is small. Still at least 18 Members of this body have voted against a judicial nomination of their own party.

If the case against some of these nominees is so strong—and we have heard a great hue and cry about how some of them are out of some sort of mainstream—then Senators may do so again. But the prospect of being on the losing side of a small number of confirmation votes does not justify turning these fundamental principles of separation of powers inside out. It does not justify the minority hijacking the Senate's role of advice and consent so it can hijack the President's power to appoint judges.

Yet that is indeed what these filibusters are attempting to do. Defeating a vote to end debate can serve a laudable, temporary purpose of ensuring full and vigorous debate. That full and vigorous debate can help the Senate make a more informed confirmation decision. But these recent unprecedented, leader-led filibusters defeat all votes to end debate for the purpose of preventing confirmation of these nominations altogether. Doing so turns the separation of powers on its head.

Mr. President, the frame of reference, the organizing principle for evaluating these judicial filibusters, is the separation of powers. I think the case is compelling that the judicial filibuster campaign underway today, by which the minority tries to commandeer the Senate's role of advice and consent so they can wrongly attempt to trump the President's constitutional authority to appoint judges, violates that principle and cannot be allowed to continue.

If the minority will not relent and return to the tradition by which the Senate, through a majority, exercises its role of advice and consent, then I believe the majority must act to restore that tradition. The frame of reference for solving this judicial filibuster crisis is the Senate's constitutional authority to determine our own rules and procedures.

Just as the Constitution establishes a system of self-government for the Nation, it establishes a system of self-government for the Senate. Subject always to the Constitution itself, we choose for ourselves how we want to do business. It may not always be nice, neat, and orderly, but it is up to us to decide. One of the clichés that the judicial filibuster proponents dreamed up is the cry that any solution to this crisis would require "breaking the rules to change the rules." Presumably, that catchy little phrase refers to the fact that invoking cloture on an amendment to the text of our written rules requires not just 60 votes but two-thirds of the Senators present and voting. This argument is, I suppose, intended to make people think our written rules are the only guide for how the Senate operates.

Most of our citizens may not know one way or the other. Nobody can fault them for not being schooled in the peculiar art of Senate procedure. But my fellow Senators certainly know the answer.

Every Senator in this body knows that the Standing Rules of the Senate are only one of several things that guide how we do business. The solution to the judicial filibuster crisis which the majority leader, Dr. FRIST, will pursue will neither break the rules nor change the rules. The Standing Rules of the Senate will read the same next week as they did last week. Instead, the solution we will utilize is a parliamentary ruling by the Presiding Officer, something that is at least as important as our written rules for the way we conduct our day-to-day business.

When a Senator asks the question of procedure or raises a point of order, the Presiding Officer's answer to that question, or his ruling on that point of order, becomes a precedent for the Senate. These parliamentary precedents guide what we do as much as our written rules. Let me stress something very important at this point. The Constitution gives the role of advice and consent to a majority, not to a minority.

Similarly, the Constitution gives the authority to decide how the Senate does business to the Senate, not to the Presiding Officer.

There are no monarchs or dictators in America, or in the United States Senate. Should the Presiding Officer rule that the Senate may proceed to vote on judicial nominations after sufficient debate, that will become a parliamentary precedent guiding this body only after a majority of Senators votes to make it so.

As I have discussed before in the Senate, this mechanism might better be called the Byrd option because, when he was majority leader, the distinguished Senator from West Virginia, Mr. BYRD, repeatedly used it to change how the Senate does business.

The Senator from West Virginia knows that I have the greatest respect for him. I heard him on the Senate floor again this afternoon. But as I will

describe in the next few minutes, I believe my friend from West Virginia doth protest too much.

In 1977, for example, then-Majority Leader BYRD used this mechanism to eliminate what was called the postcloture filibuster. If the Senate voted to invoke cloture on a bill, rule XXII imposed a 1-hour debate limit on each Senator. Senators could get around that limit, however, by introducing and debating amendments. Rule XXII allowed this practice, but the majority leader opposed it—BYRD. He made a point of order against it, the Presiding Officer ruled in his favor, and a simple majority of Senators voted to back up the ruling.

Nearly two decades later, the Senator from West Virginia reflected on how he used the Byrd option in 1977. Let me refer to the chart. He described it this way:

I have seen filibusters. I have helped to break them. There are few Senators in this body who were here in 1977 when I broke the filibuster on the natural gas bill.

I was here, by the way. To continue:

I asked Mr. Mondale, the Vice President, to go please sit in the chair; I wanted to make some points of order and create some new precedents that would break these filibusters. And the filibuster was broken—back, neck, legs, and arms. . . . So I know something about filibusters. I helped to set a great many of the precedents that are in the books here.

So don't say we are trying to change the rules. We are following the Byrd rule that was set four times as he was majority leader. He changed Senate procedures without changing Senate rules.

The Senator from West Virginia did it again in 1979. Rule XVI explicitly states that the Senate itself must decide whether amendments to appropriations bills are germane. Then-Majority Leader BYRD made a point of order that the Presiding Officer may decide that question instead. The Presiding Officer ruled in his favor and a majority of Senators voted to affirm the ruling. Once again, a parliamentary ruling changed Senate procedures without changing Senate rules.

It happened again in 1980. As we have discussed, rule XXII requires 60 votes to invoke cloture, or end debate, on any matter pending before the Senate. This includes bills or nominations, but it also includes motions to proceed to those bills or nominations.

Then-Majority Leader BYRD wanted the Senate to confirm an individual nomination. He made a single motion to go into executive session to consider a nomination, a step that is not debatable under our rules, and to proceed to an individual nomination, a step that was debatable.

This time, the point of order came from a Republican Senator, arguing that this procedural two-step was improper. The Presiding Officer agreed, ruling against what Majority Leader BYRD was trying to do. He still prevailed when a majority of Senators voted to overturn the Presiding Offi-

cer's ruling. Doing so eliminated the filibuster on a motion to proceed to a specific nomination.

Mr. President, this chart shows that seven Democratic Senators serving in this body today voted to eliminate those nomination-related filibusters. They proved not only that the Byrd option is legitimate, but also that it can be used to limit debate. I leave it to these Senators to explain how they could vote to eliminate nomination-related filibusters in 1980 but support nomination filibusters today.

This 1980 example is particularly relevant because it utilized a parliamentary ruling to eliminate a nomination-related filibuster—not a filibuster of the nomination itself but a filibuster on the motion to proceed to the nomination. That is, of course, a distinction without a difference. Either one keeps a nomination from final approval.

Mr. President, still other examples exist, but I will not go into more detail. Suffice it to say that using parliamentary rulings to change Senate procedures without changing Senate rules is a well-established method for the Senate to govern itself. Should the majority leader, Senator FRIST, utilize it, he will be on solid ground. He will simply be relying upon the precedent that his predecessor, Senator BYRD, helped put on the books.

If the majority leader does utilize the Byrd option, nobody will be able to suggest, let alone charge, he is doing so precipitously. He has been patient, methodical, and even cautious when it comes to this important matter. Far from the image of trigger-happy warriors being used in some interest ads out there, the majority leader will utilize the Byrd option only after trying every conceivable alternative first, and he has done so.

The minority has had every opportunity to do what it says it wants to do; namely, debate these nominations. The nominees being filibustered, for example, include Texas Supreme Court Justice Priscilla Owen, nominated 1,474 days ago to a judicial position that has been vacant for more than 8 years—more than 8 years and considered a judicial emergency.

Justice Owen received a unanimous "well-qualified" rating from the American Bar Association, the highest rating they give, which our Democratic colleagues once called the gold standard for evaluating nominees. Let me repeat that. She was rated unanimously as "well-qualified" by the American Bar Association, which is not a conservative organization, and some are calling her "out of the mainstream." Give me a break.

Justice Owen was at the top of her law school class. She had the highest score on the Texas bar exam in 1977. She is supported by 15 past presidents of the Texas Bar Association, both Democrats and Republicans, and was endorsed for reelection by virtually every major newspaper in the State of Texas. Out of the mainstream? My gosh, she defines the mainstream.

I mention Justice Owen as an example, though her opponents use the same tactics against nominee after nominee. They claim that Justice Owen is what they call an extremist, or outside of the mainstream, most often by tallying up winners and losers in her judicial decisions. They say she rules too often on this side in criminal cases, too often on that side in civil cases, not enough for this or that political interest.

Whether Justice Owen is controversial, whether anybody considers her inside or outside of some kind of mainstream, these may be reasons to vote against her confirmation, not to refuse to vote at all. By the way, we have Senators on the Judiciary Committee—Democratic Senators—who believe that any business ought to be automatically found against, even if they are right under the law, that anybody who may be an unfortunate person ought to be found for even though they are wrong in the law.

That is not the way the law works. They criticize Justice Owen because, even though she has upheld the weak and the oppressed in many decisions in the Texas Supreme Court, she has upheld the law sometimes to the lament of those who think the weak and oppressed should win no matter what the law says. That is all you can ask of a judge.

The Judiciary Committee has more than once approved her nomination, and she deserves a vote in the Senate. But rather than give her a fair vote, those fearing they will lose are blocking it with a filibuster.

On April 8, 2003, Senator BENNETT, my colleague from Utah, asked the then-assistant minority leader, Senator REID, how much time the Democrats would require to debate the nomination fully. This is what he said:

There is not a number of hours in the universe that would be sufficient [to debate this nominee].

They did not want to debate Justice Owen, they wanted to defeat her. Debate was not a means to the end of exercising advice and consent. It was an end in itself to prevent exercising advice and consent. The majority leader has made offer after offer after offer of more and more time, hoping that the tradition of full debate with an up-or-down vote would prevail. That hope is fading, as Democrats have rejected every single offer.

Finally, last month, the minority leader admitted that "this has never been about the length of the debate." That is what the minority leader said. It has never been about the length of the debate. That was said April 28, 2005.

Unanimous consent is the most common way we structure how we consider bills and nominations. Because the Democrats rejected that course, Majority Leader FRIST was forced to turn in March 2003 from seeking unanimous consent to the more formal procedure of motions to invoke cloture. During the 108th Congress, we took 20 cloture votes on 10 different appeals court

nominations. More than 50, but fewer than 60, Senators supported every one of these motions.

In other words, there was bipartisan support for a vote up or down for each of those nominees. That was enough to confirm but not enough to end debate under the filibuster rules, misapplied here. The circle was complete, and the minority's strategy of using the filibuster to prevent confirmation of majority-supported judicial nominations was in full swing. Still the majority leader held off, resisting the growing calls to implement a deliberate solution to this unprecedented, unfair, and, frankly, outrageous filibuster blockade.

The election returns provided more evidence that the American people oppose using the filibuster to prevent fair up-or-down votes on judicial nominations. But hope that the voice of those we serve would change how we serve them was soon shattered. The minority made it clear that they would continue their filibuster campaign.

The minority can say this is a narrow effort focused on a few appeals court nominees. It is not. This is about the entire judicial confirmation process. It is about rigging that process so the minority can do what only the majority may legitimately do in our system of Government: determine how the Senate exercises its role of advice and consent.

It is the Constitution, not the party line or interest group pressure, not focus groups or interest group ad campaigns, that should guide us here. I have been told, for example, and I hope it is not true, that my friend from Nevada, the minority leader, may appear in a television ad created and paid for by the Alliance for Justice, one of the rabid leftwing groups involved in this obstruction campaign. I hope he will not do that. I think that would be regrettable. They are part of the problem here. They have virtually been against anybody for the circuit courts of appeal and many of the former nominees for the Supreme Court of the United States of America.

The Constitution assigns the nomination and appointment of judges to the President, not to the Senate. The Senate checks that power by deciding whether to consent to appointment of the President's nominees. We exercise this role by voting on confirmation. As such, filibusters designed to prevent confirmation of majority-supported judicial nominations undermine the separation of powers.

The Constitution helps us both evaluate the problem and highlight the solution. The Constitution gives the Senate authority to determine how we will do our business. That includes not only our written rules but also parliamentary precedents that change procedures without changing those rules.

Our Democratic colleagues have had literally dozens of opportunities to return to our confirmation tradition of up-or-down votes for judicial nomina-

tions reaching the Senate floor. They have chosen the path of confrontation rather than that of cooperation. They exercised the true nuclear option by blowing up two centuries of tradition. If the majority leader utilizes the Byrd option, it will truly be as a last resort, and it will be a constitutional means of solving an unconstitutional problem.

I go back in time because I was here when Senator BYRD was the minority leader. He had a tremendous majority of Democrats on the floor. When Ronald Reagan was President, he never once used the filibuster to stop Ronald Reagan's nominees, even though some of those nominations gave him and other Democrats tremendous angst. He utilized the power to vote against them. Whether he is right or wrong is almost irrelevant here. The fact is that he did what 214 years of Senate tradition required: he allowed those nominees to go ahead and have a vote. And, after all, that is what we need to do here.

What is wrong with giving these circuit courts of appeal nominees who have bipartisan support and the support of the American Bar Association simple up-or-down votes? If you do not agree with them, you have the right and power to vote against them, and that is the proper way to handle it. Let's not throw 214 years of tradition down the drain and, of course, let's not blow up the Senate if we do not get our way.

Mr. President, I notice the distinguished Senator from Montana is here. I yield the floor.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BURNS. Mr. President, I thank my good friend from Utah. He laid out in pretty logical form what is at stake.

I have come to the Senate floor today to talk on an issue about which I seldom speak on this floor. I come to lend my voice maybe to break this impasse in which we find ourselves.

The Senate has dwelt and droned for endless hours with at times very inflammatory language of which some of us and folks in America, the viewing public, have no doubt become very weary.

I just got off an airplane from Montana. When I walked off that plane, I said it is time to act so we can move on to the business of addressing the issues that are pressing the times. We have run out of time and options, and now we must decide, and the hour is now.

I cannot remember a time when I read more history of the Senate than on this occasion or in this situation. Some have made statements that this has never happened before in our history. That is wrong because there have been some contentious times facing each and every Congress since our beginning, and Draconian actions were taken to deal with the issues of the dangerous times, times of great peril. We survived them, and we will survive this one also. That is the greatness of this country and the Senate because I

think at times we underestimate our own abilities.

It just seems to me that in the Senate, we cannot allow a small minority to radically alter longstanding traditions just because it does not like a President or maybe his or her judicial nominees.

During the 108th Congress, the other side used the filibuster to block up-or-down votes on 10 nominations to the Federal appeals courts. All of these judicial nominees had bipartisan majority support. The Senate would have confirmed them had they been permitted a vote. And never in the history of this country has a judicial nominee with clear majority support been denied confirmation due to a filibuster.

Further, nearly one-third of President Bush's nominations to the courts of appeal were denied up-or-down votes. The Democrats used or threatened to use the filibuster. In that respect, President Bush now has the lowest appeals court confirmation rate for the first 4 years of any modern Presidency.

Has each judicial nomination been blocked due to improper qualifications? Everybody on this floor has talked about that, and the answer is no. Rather, each nomination has been blocked by a partisan few who are willing to change Senate tradition and custom of advice and consent imposing a 60-vote requirement on each nomination.

Every one of the judicial nominees being blocked by filibuster is of the highest academic and intellectual quality, and each represents a broad cross-section of American society.

More importantly, all these nominees have demonstrated that they respect the rule of law. They are committed to interpreting and applying the law as it relates to the Constitution of the United States of America. Those folks who want to say this is a constitutional amendment, go to article II, section 2, and read what it says.

The American people should know that for more than 200 years, the rule for confirming judges has been fair on an up-or-down vote. In the heart of every American I know, there is a common sense of fairness. These good people being nominated by President Bush are, at the very least, entitled to receive a vote. Whether you disagree or agree with the particular person being nominated for a judgeship, it is incumbent on this legislative body to provide full and fair open debate on the nomination and to then allow proper democratic procedures to take place.

We have heard words such as "rubberstamp." I do not think you could say that. Were minority leaders such as Howard Baker and Everett Dirksen and majority leaders such as ROBERT C. BYRD and Bob Dole rubberstamp Senators? I do not think so. I have heard the talk of the radical right. I wonder if there is a radical left also that grabs the ears of some folks.

Let there be no doubt about this issue—it is as clear as a Montana

morning. It is obstructionism that has caused this crisis that looms over us today.

During the 108th Congress, 10 judicial nominations were either filibustered or threatened the use of filibuster, and 6 other nominations along with it. All of these nominations were supported by Senators of both parties and opposed only by a partisan minority. In fact, Judge Owen has received four votes in the Senate, and she carried the vote each time. Yet she is not on the Fifth Circuit Court of Appeals.

Look at William Myers. The President nominated the former Solicitor of the Interior Department for the Ninth Circuit. Mr. Myers, a distinguished attorney, is a nationally recognized expert in the area of natural resources and land use law. However, despite his long service as National Park Service volunteer and a lifetime of respect and enjoyment of the outdoors, the other side held his previous clients' positions against him and accused him of being hostile to the environment, therefore blocking his nomination and taking away the Senate's responsibility to give him a vote.

We have all heard about Priscilla Owen of Texas. She has already been voted on four times in this body and carried the vote every time. Janice Rogers Brown, a California Supreme Court justice, was nominated to the DC Circuit. The first African American to serve on the California high court, Justice Brown received public support of 76 percent of California voters.

I think I heard my good friend from Delaware say they have 2 Senators from California, and they each represent over 17 million people. She represented the whole State and got 76 percent. Yet she was denied a vote on this floor.

William Pryor, Judge Pryor, has been serving with distinction on the Eleventh Circuit since the President gave him a recess appointment in February of 2004. Previously, he served 6 years as an Alabama attorney general. Although he repeatedly demonstrated his ability to follow the law, he has been blocked by the Democrats' filibuster because he has "deeply held" beliefs, taking away the Senate's responsibility to vote for him.

One of the country's rising stars in the judicial world, Miguel Estrada, could be described as the finest, the best, and the brightest among his peers. This Honduran immigrant who went to Harvard Law School and clerked for the Supreme Court was debated on this Senate floor for more hours than any other judicial nomination in Senate history. After cloture votes repeatedly failed, he asked the President to withdraw his name from consideration, thereby allowing the other side to prevent the DC Circuit from having a very talented jurist to interpret and apply the law, again taking away our responsibility to vote for him.

What are we doing here? Are we dumbing down the judiciary when the

best and the brightest have offered themselves to serve after they were nominated by this President?

Now we are faced with finding a solution to this so-called crisis. They have already admitted that the filibuster is not about the qualification of the judges. They just do not want these judges. They just do not want judges appointed to the court by President Bush. So if we allow this to continue, it will be acquiescing to the partisan minority's unilateral change in the Senate practices for the last 200 years, a 60-vote requirement to confirm judges when only a simple majority up-or-down vote has been the standard of practice in this Senate for a long time, and is also alluded to in the Constitution of the United States.

I would say the Constitution trumps any rule that we may make, that we put in place here for our rules of procedures and conduct. I think the Constitution trumps them. Now we find ourselves in this crisis. No more time. Now is the time to vote.

The Senate has demonstrated in the past that it need not stand by and allow a minority to redefine the traditions, rules, practices and procedures of the Senate.

The Constitution gives the Senate the power to set its own rules, procedures, and practices, and the Supreme Court has affirmed the continuous power of a majority of members to do so.

The exercise of a Senate majority's constitutional power to define Senate practices and procedures has come to be known as the "constitutional option."

The constitutional option can be exercised in several different ways, such as by creating precedents to effectuate the amendment of Senate Standing Rules or by creating precedents that address abuses of Senate customs by a minority of Senators. Regardless of the variant, the purpose of the constitutional option is the same—to reform Senate practices in the face of unforeseen abuses.

An exercise of the constitutional option under the current circumstances would return the Senate to the historic and constitutional confirmation standard of a simple majority for all judicial nominations.

Employing the constitutional option here would have no effect on the legislative filibuster because virtually every Senator would oppose such an elimination. Instead, the constitutional option's sole purpose would be the restoration of longstanding constitutional standards for advice and consent.

For more than 200 years, the rule for confirming judges has been a fair, up-or-down vote.

For over 200 years, the Senate has honored both the minority's right to debate and the full Senate's right to vote on judicial nominees. No other minority leader in American history has claimed that the right to debate equals

the right to prevent the full Senate from exercising its constitutional duty to advise and consent.

For over 200 years, Senators did not filibuster judicial nominees. Was the Senate just a rubber stamp for its first 200 years? Did every Senate before the 108th Congress fail to carry out its constitutional duty to advise and consent? The answer is a resounding "no."

Further, for 70 percent of the twentieth century, the same party controlled both the White House and the Senate, yet Minority Leaders on both sides of the aisle did not filibuster the President's judicial nominees.

The choice is not between being a rubber stamp or filibustering a judicial nominee. For over 200 years, Senators agreed that the proper way to oppose a judicial nominee is to vote "no." They went to the floor and explained why they opposed the nominee. They tried to persuade their colleagues. They tried to persuade the American people. Then, they voted no. They did not filibuster or threaten to shut down the U.S. Senate.

Until now, every judicial nominee with support from a majority of Senators was confirmed. The majority-vote standard was used consistently throughout the 18th, 19th and 20th centuries—for every administration until President George W. Bush's judicial nominations were subjected to a 60-vote standard.

These good people, being nominated by President Bush, are at the very least entitled to receive a vote.

Whether you agree or disagree with the particular person being nominated for a judgeship, it is incumbent on this great legislative body to provide full, fair and open debate on the nomination and to then allow the proper democratic procedures to take place.

The Senate has demonstrated in the past that it need not stand by and allow a minority to redefine the traditions, rules, practices and procedures of the Senate.

The Constitution gives the Senate the power to set its own rules, procedures, and practices, and the Supreme Court has affirmed the continuous power of a majority of members to do so.

Because of this partisan minority, because of this obstructionism and because of the partisan minority's continued actions to take away the Senate's duty and responsibility to vote on the nominations before this great body, we face a crisis that has only 2 remedies:

Either the partisan minority allow the Senate to fulfill its duty and responsibility to vote on President Bush's judicial nominations by not continuously invoking the filibuster.

Or, the Senate must invoke the necessary and requisite constitutional option to prevent the tyranny of the minority and the radically altering of longstanding traditions of the United States Senate.

Accordingly, I rise today to strongly urge my colleagues to stop the obstructionism and to allow President Bush's

judicial nominations receive a fair, up-or-down vote and, therefore, to allow this great legislative body to carry out its constitutional duty of advice and consent—a responsibility that we, as Senators, have been duly elected to uphold by the American people.

There is a little housekeeping we might do before my good friend, the Senator from Wisconsin, chooses to speak. I thank the Senator for that.

I ask unanimous consent I be permitted to speak as in morning business.

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

APPOINTMENT

The PRESIDING OFFICER. The Chair, on behalf of the Vice President, in accordance with 22 U.S.C. 1928a-1928b, as amended, appoints the following Senator as Acting Vice Chairman to the NATO Parliamentary Assembly for the spring meeting in Ljubjana, Slovenia, May 2005: the Honorable PATRICK LEAHY of Vermont.

WELCOMING HIS EXCELLENCY HAMID KARZAI, THE PRESIDENT OF AFGHANISTAN

Mr. BURNS. I ask unanimous consent the Senate now proceed to consideration of S. Res. 152, which was submitted earlier today.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The assistant legislative clerk read as follows:

A resolution (S. Res. 152) welcoming His Excellency Hamid Karzai, the President of Afghanistan, and expressing support for a strong enduring strategic partnership between the United States and Afghanistan.

There being no objection, the Senate proceeded to consider the resolution.

Mr. BURNS. I ask unanimous consent the resolution be agreed to, the preamble be agreed to, and the motion to reconsider be laid upon the table.

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

The resolution (S. Res. 152) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, reads as follow:

S. RES. 152

Whereas Afghanistan has suffered the ravages of war, foreign occupation, and oppression;

Whereas following the terrorist attacks of September 11, 2001, the United States launched Operation Enduring Freedom, which helped to establish an environment in which the people of Afghanistan are building the foundations for a democratic government;

Whereas, on January 4, 2004, the Constitutional Loya Jirga of Afghanistan adopted a constitution that provides for equal rights for full participation of women, mandates full compliance with international norms for human and civil rights, establishes procedures for free and fair elections, creates a system of checks and balances between the

executive, legislative, and judicial branches, encourages a free market economy and private enterprise, and obligates the state to prevent terrorist activity and the production and trafficking of narcotics;

Whereas, on October 9, 2004, approximately 8,400,000 Afghans, including nearly 3,500,000 women, voted in Afghanistan's first direct Presidential election at the national level, demonstrating commitment to democracy, courage in the face of threats of violence, and a deep sense of civic responsibility;

Whereas, on December 7, 2004, Hamid Karzai took the oath of office as the first democratically elected President in the history of Afghanistan;

Whereas nationwide parliamentary elections are planned in Afghanistan for September 2005, further demonstrating the Afghan people's will to live in a democratic state, and the commitment of the Government of Afghanistan to democratic norms;

Whereas the Government of Afghanistan is committed to halting the cultivation and trafficking of narcotics and has pursued, in cooperation with the United States and its allies, a wide range of counter-narcotics initiatives;

Whereas the United States and the international community are working to assist Afghanistan's counter-narcotics campaign by supporting programs to provide alternative livelihoods for farmers, sustainable economic development, and capable Afghan security forces; and

Whereas, on March 17, 2005, Secretary of State Condoleezza Rice said of Afghanistan "this country was once a source of terrorism; it is now a steadfast fighter against terrorism. There could be no better story than the story of Afghanistan in the last several years and there can be no better story than the story of American and Afghan friendship. It is a story of cooperation and friendship that will continue. We have a long-term commitment to this country": Now, therefore, be it

Resolved, That the Senate—

(1) welcomes, as an honored guest and valued friend of the United States, President Hamid Karzai on the occasion of his visit to the United States as the first democratically elected President of Afghanistan scheduled for May 21 through 25, 2005;

(2) supports a democratic, stable, and prosperous Afghanistan as essential to the security of the United States; and

(3) supports a strong and enduring strategic partnership between the United States and Afghanistan as a primary objective of both countries to advance their shared vision of peace, freedom, security and broad-based economic development in Afghanistan, the broader South Asia region, and throughout the world.

STATE CRIMINAL ALIEN ASSISTANCE PROGRAM REAUTHORIZATION ACT OF 2005

Mr. President, I ask unanimous consent the Senate now proceed to immediate consideration of Calendar No. 56, S. 188.

The PRESIDING OFFICER. The clerk will report the bill by title.

The assistant legislative clerk read as follows:

A bill (S. 188) to amend the Immigration and Nationality Act to authorize appropriations for fiscal years 2005 through 2011 to carry out the State Criminal Alien Assistance Program.

There being no objection, the Senate proceeded to consider the bill.

Mr. BURNS. I ask unanimous consent the Feinstein amendment at the desk be agreed to, the bill as amended be read a third time and passed, and the motion to reconsider be laid upon the table.

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

The amendment (No. 763) was agreed to, as follows:

(Purpose: To require that certain funds are used for correctional purposes)

At the end add the following new section:

SEC. 3. LIMITATION ON USE OF FUNDS.

Section 241(i)(6) of the Immigration and Nationality Act (8 U.S.C. 1231(i)(6)) is amended to read as follows:

"(6) Amounts appropriated pursuant to the authorization of appropriations in paragraph (5) that are distributed to a State or political subdivision of a State, including a municipality, may be used only for correctional purposes."

The bill (S. 188), as amended, was read the third time and passed, as follows:

S. 188

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "State Criminal Alien Assistance Program Reauthorization Act of 2005".

SEC. 2. AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEARS 2005 THROUGH 2011.

Section 241(i)(5) of the Immigration and Nationality Act (8 U.S.C. 1231(i)(5)) is amended by striking "appropriated" and all that follows through the period and inserting the following: "appropriated to carry out this subsection—

"(A) such sums as may be necessary for fiscal year 2005;

"(B) \$750,000,000 for fiscal year 2006;

"(C) \$850,000,000 for fiscal year 2007; and

"(D) \$950,000,000 for each of the fiscal years 2008 through 2011."

SEC. 3. LIMITATION ON USE OF FUNDS.

Section 241(i)(6) of the Immigration and Nationality Act (8 U.S.C. 1231(i)(6)) is amended to read as follows:

"(6) Amounts appropriated pursuant to the authorization of appropriations in paragraph (5) that are distributed to a State or political subdivision of a State, including a municipality, may be used only for correctional purposes."

ORDER OF PROCEDURE

Mr. BURNS. I ask unanimous consent that the majority leader be recognized at 5:30 p.m. today; provided further that from 6 to 7 this evening be under the control of the majority leader or his designee, that from 7 to 8 p.m. be under the Democratic control, with time continuing to rotate in that fashion until 9 a.m.

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

Mr. BURNS. I yield the floor.

The PRESIDING OFFICER. The Chair will note the minority now controls 41 minutes.

The Senator from Wisconsin.