They both, in a sense, spend it, or some small portion of it. I just want everybody to know that the President of the United States, who seems to be saying, ''Don't cut any taxes,'' is at the same time saying, however, ''Give me $14.148 billion in new money,'' out of that same surplus for things that the country needs that he calls emergencies. They are all listed and they are all detailed in this statement that has been printed in the RECORD.

I repeat, I don't believe, from the surplus standpoint, that there is any difference between the two. In other words, if you want to spend a huge amount of the surplus and you want to spend it for $100 billion worth of American programs, needed or otherwise, you have diminished it by $100 billion. If you choose to cut taxes by $100 billion, you have diminished this surplus by $100 billion. It is the same diminution. It is the same reduction, the exact same effect. We estimate the surplus to be $1.6 trillion over the next decade. And now we will engage here and elsewhere in a debate with reference to these emergency supplementals, which will be year long, which will spend some of that. We will engage in a discussion of whether there should be some for tax cuts.

I repeat. The tax cut bill that the House proposed in the first year is $7 billion. The new expenditures requested by the President is $14.1 billion. It seems to me that deserves consideration when we start saying we shouldn't have tax cuts, but we should spend the money.

I yield the floor.

FEDERAL VACANCIES REFORM ACT OF 1998

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of debate of Senate bill 2176, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 2176) to amend sections 3345 through 3349 of title V, United States Code (commonly referred to as the ''Vacancies Act'') to clarify statutory requirements relating to vacancies in and appointments to certain Federal offices, and for other purposes.

The Senate resumed consideration of the bill.

Mr. THOMPSON. Madam President, the Senate today will vote on whether to invoke cloture on the Federal Vacancies Reform Act. This legislation, which enjoys bipartisan cosponsorship, is necessary to restore the Senate's authority as an institution in the process of appointing important Federal officials.

Madam President, I request that I be allotted 20 minutes of our time.

The PRESIDING OFFICER. The Senator has that right.

Mr. THOMPSON. Madam President, I want to make sure that we reserve plenty of time for the distinguished Senator from West Virginia, Senator BYRD, who is really in many ways the author of this legislation and has been such a guiding light and firm supporter for so long a period of time.

Article II, section 2 of the Constitution provides that

The President shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public ministers and consuls, 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, but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or the heads of departments.

This is an important provision of the Constitution's system of checks and balances.

The Supreme Court, in 1997, said that the appointments clause ''is more than just a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme.'' By requiring the participation of the Senate with the President and selecting officers, the framers believed that persons of higher quality would be appointed than if one person alone made those appointments.

One of the ways in which those persons would be better would be in respecting individual liberties.

So the appointments clause serves to protect better government administration and the rights of the American people.

The appointments clause was also adopted because manipulation of official appointments was one of the revolutionary generation's greatest grievances against executive power.

As participants in the appointments process, we Senators have an obligation, I believe, to ensure that the appointments clause functions as it was designed, and that manipulation of executive appointments not be permitted. Nonetheless, we also need to recognize that despite the appointments clause, there will be times when officers die or resign in office. Their duties should continue to be performed by someone else on a temporary basis. It may not be possible as a matter of logistics that each temporary official serving as an acting officer in a position subject to the appointments clause will himself or herself receive Senate confirmation. Early Congresses recognized the need for persons to serve temporarily in advice and consent positions when vacancies arose, even when the person had not received Senate confirmation.

The Vacancies Act has existed one way or another since then, with length of temporary service increasing to 120 days in legislation that was passed in 1988. The 1886 Vacancies Act was intended to provide the exclusive means for filling temporary appointments. And it has operated that way for several years.

However, in 1973, the Justice Department, in seeking to appoint a temporary FBI Director in the midst of the Watergate scandal, appointed L. Patrick Gray without complying with the terms of the Vacancies Act. The Department for the first time made a public declaration that its organic statute created an alternative method for designating temporary appointments at the Department of Justice not subject to any time limit was there position. Since 1973 the Department has continued to make acting appointments outside the strictures of the Vacancies Act.

The Justice Department relies on its organic statute's ''vesting and delegation'' provision, which states that the Attorney General can designate certain other powers to whomever she chooses in the Department, since specific statutory functions were not given to the subordinate officials. The Department makes this claim although current law states that a

. . . temporary appointment . . . to perform the duties of another under the Vacancies Act . . . may not be made otherwise than as provided by the Vacancies Act.

But the Justice Department's organic statute was designed simply to coordinate all Federal Government litigation, and did not change the Vacancies Act.

The legislative history of the Department's organic statute confirmed this. In 1988, Congress, recognizing that the Justice Department was not applying the Vacancies Act as Congress clearly intended, sought to amend the act to make it more clear. They changed the law to eliminate this unsupported position of the Justice Department largely through the efforts of Senator JOHN GLENN of Ohio. The Department of Justice, however, refused to read the language as Congress intended, relying on its same old arguments.

As a result, the Department of Justice believes that the Attorney General can designate acting officers for 2 or even 3 years. The head of the Criminal Division—an important position with respect to guidance in Federal prosecutions, including independent counsel—was vacant for 2½ years without a nomination.

An acting Solicitor General served an entire term at the Supreme Court, and no nomination for the position was ever sent to the Senate. Even the administration claims that an acting person can serve for only 120 days. But after an acting person served for 181 days, the administration designated another person to serve as the Acting Assistant Attorney General for Civil Rights.

Today all 14 Departments have similar language in their organic statutes. Now many Departments, at DOJ's urging, are claiming similarly that the Vacancies Act doesn't apply to them either as an exclusive means for filling vacancies.

There is no time limit on temporary services. That has been adhered to under the organic statutes, making both the Vacancies Act and the appointments clause effective nullities,

according to the Comptroller General. The Comptroller General disagrees with the Justice Department's reading of current law, and all of the other Departments who have tagged along after the Justice Department.

Each Department has at least one temporary officer now who has served longer than 120 days, allowed by the Vacancies Act. The nomination should be able to be sent to the Senate within 4 months. Since the President lacks any inherent authority to make appointments for offices that require Senate confirmation, the President's noncompliance with the Vacancies Act means noncompliance with the Constitution.

As of earlier this year, when the Governmental Affairs Committee held its hearing on oversight of the Vacancies Act, of the 320 executive Department's advice and consent positions, 64 were held by temporary officials. Of the 64, 43 served longer than 120 days before a nomination was even submitted to the Senate. Other Departments are following Justice's lead.

The acting head of the Census Bureau is neither the first assistant, nor a person who has been confirmed by the Senate, which is what the Vacancies Act currently requires.

Of the nine vacant advice and consent positions at Commerce, seven have been filled by acting officers for more than 120 days. And one had been acting temporarily for 3 years.

It is true that the Senate has not always acted on nominees as soon as it should. But that issue should be addressed separately.

Many of the criticisms of the Senate's handling of the nominations is unwarranted since vacancies often remain open for lengthy periods before nominations are submitted.

The Senate is now being publicly criticized for holding up the confirmation of Richard Holbrooke to be the U.N. Ambassador, for example, when in fact the administration has not even submitted his nomination to the Senate. The fact is that the administration is under a current statutory duty to have acting officers serve for 120 days, which can be extended simply by the administration sending the Senate a nominee.

That means that if the Senate does not act it has to bear the responsibility for an acting person's service at that point. Responsibility is clearly placed where it belongs if an acting person continues to serve. But since the administration does not follow existing law, the Senate in many instances never gets a chance to even consider a permanent nominee.

Under the administration's view, the entire set of confirmed officials in our Government could resign the day after they were confirmed, and acting officials who have not received the advice and consent of the Senate can run the Government indefinitely.

That situation is completely at odds with what constitutional scheme and the framers created to protect individual liberties.

There is another reason this bill should be enacted—the Court ruling recently that undermines the Vacancies Act further. Under the current law, if a vacancy in a covered position occurs, the first assistant to that officer becomes the acting officer for up to 120 days. In the alternative, the President can designate another Senate confirmed officer to act as the acting officer for 120 days. The 120 days can be extended if the President submits a permanent nominee for the position to the Senate. That creates an incentive for the President to submit nominations to the Senate. Recent court interpretations have greatly confined the operation of the Vacancies Act.

In March, the United States Court of Appeals for the District of Columbia circuit approved the legality of actions taken by an acting director of the Office of Thrift Supervision who had served for 4 years without a nomination for the position ever having been submitted to this body. The Senate-confirmed director resigned in 1992 and purported to delegate all of his authority to OTS' deputy director for Washington operations. This person, who was neither the first assistant nor the Senate-confirmed individual, served as the acting director until October 1996.

The President then invoked the Vacancies Act to designate a confirmed HUD official to serve as the acting director and submitted the nomination to the Senate for the position within 120 days. The bank challenging the legality of the acting officer's appointment argued that the 120 days had expired 120 days after the Senate-confirmed director's resignation created a vacancy, long before the Senate-confirmed person was named the acting officer. But the Court held that the 120 days is a limitation only on how long an acting officer can serve, not a limitation on how soon after the vacancy arises that the President must submit a nomination.

It allowed the later Senate-confirmed director to ratify the actions of the prior acting director. Thus, if there is no first assistant, the President can wait for 4 years to send a nomination to the Senate while an acting official, in this case selected by the head of the agency, not the President, runs an important agency. This is not what the framers thought that they had established. It runs contrary to the Vacancies Act itself and corrective action therefore is necessary.

In any case, this administration, as stated above, has allowed many acting officers to serve for more than 120 days as permitted by the Vacancies Act without submitting a nomination to the Senate. The Vacancies Act presently has no enforcement mechanism, so once again the Senate's constitutional advice and consent prerogative is undermined. In Federalist Paper 76 Hamilton cautioned that:

> A man, who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body; and that body, an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing.

So by disregard of the Vacancies Act and installing at its sole disposition numerous officials to important positions in the Government who escape the independent body's review is contrary to the original intent of the framers. Without a possibility of rejection, there is much less care taken in the proposing. S. 2176 will restore the constitutional balance and cloture should be invoked on the bill.

Madam President, let me briefly discuss the provisions of S. 2176. Upon the death, resignation or inability to serve of an officer of an executive Agency, the first assistant to the officer becomes the acting officer subject to the bill's time limits. Because of additional background processing that is now required of nominees, the bill proposes lengthening the time of acting service from the current 120 days to 150 days.

If the President so directs, a person who has already received Senate confirmation to another position can be made the acting officer in lieu of the first assistant. This is basically the framework, Madam President, that is currently the law except we are extending the time period that the President has within which to make his decision. The first assistant has to have served 180 days in the year preceding the vacancy in order to be the acting officer, in order for someone to be put in in a very short period of time to be the first assistant so that they may then be appointed the acting officer.

The acting officer may serve 150 days beginning on the date the vacancy occurs. The acting officer may continue to serve beyond 150 days if the President submits a nomination for the position even if that occurs after the 150th day. So at the 150-day expiration, the President still has it within his sole discretion to make the nomination; just simply send the nomination up and the acting officer can come back once again and assume his duties. If a first or second nomination is withdrawn, rejected, or returned, the person can serve as the acting officer until 150 days after the withdrawal, rejection, or return.

Recognizing the large number of positions that are to be filled in a new administration, the bill extends the 150-day period by 90 days for any vacancies that exist when a new President is inaugurated or that arise in the 60 days following a new Presidential inauguration.

The bill will extend the provisions of the Vacancies Act to cover all advice and consent positions in executive Agencies except those that are covered by express specific statute that provide for acting officers to carry out the functions and duties of the office. Forty-one current statutes now allow

the President or the head of an executive Department to designate or provide automatically for a particular officer to become an acting officer. The bill also exempts multimember commissions, and it retains holdover provisions of current law.

The bill expressly states that vesting and delegation statutes do not constitute statutes that govern the appointment of acting officers to specific positions. The bill will thus end the specious argument of the Justice Department that it and other Departments' organic statutes provide an additional means, and really a superseding means of appointing acting officials apart from the Vacancies Act.

The bill also creates an enforcement mechanism for the Vacancies Act, something that is also sorely needed. Today, acting officers regularly exceed the 120-day limitation without consequence. Under 2176, an office becomes vacant if 150 days after the vacancy arises no Presidential nomination for the position has been submitted to the Senate. For offices other than the heads of Agencies, the functions and duties that are specifically to be performed only by the vacant officer can be performed by the head of that particular agency. That means that all functions and duties of every position can be performed at all times. But if a nomination is not submitted within the Vacancies Act period, only the head of the Agency can perform the specific duties of the vacant offices. Hopefully, that will create an incentive for the President to go ahead and submit a nomination. As soon as the nomination is submitted, the acting officer can then resume performing the duties and functions of the vacant office. No one may ratify any actions taken in violation of the bill's vacant office provisions.

Madam President, this approach will not penalize the acting person in any way, but it will encourage the submission of nominees within 150 days without jeopardizing the performance of any Government function if that deadline is missed.

The Vacancies Reform Act also establishes a reporting procedure. Each Agency head will report to the General Accounting Office on the existence of vacancies, the person serving in an acting capacity, the names of any nominees, and the date of disposition of such nominee. The Comptroller General will then report to the Congress, the President, and the Office of Personnel Management on the existence of any violations of the Vacancies Act. This will provide useful information to the President so he will know the progress of the 150-day clock and will benefit the Senate as well.

This bill has been modified to take into account objections raised by members of the committee and elsewhere as well as the administration. In committee, we lengthened the Presidential transition period. We permitted the President to name an acting officer by submitting a nomination even after the 150-day period has expired. We agreed to consider shortening the length of service prior to the vacancy a first assistant must satisfy to become an acting officer. This bill is institutional and not partisan. Members should vote for cloture in recognition of the fact that the Senate and the Presidency will not always be controlled by the parties that control these institutions today, and in recognition of the duty that we all share to uphold the Constitution and protect the legitimate prerogatives of this institution.

Madam President, I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. LEVIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Michigan

PRIVILEGE OF THE FLOOR

Mr. LEVIN. Madam President, I ask unanimous consent that a legislative fellow on my Governmental Affairs subcommittee staff, Antigone Potamianos, be granted floor privileges during consideration of S. 2176.

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

Mr. LEVIN. I thank the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. THOMPSON. Madam President, I yield such time to the Senator from West Virginia as he may consume.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. Madam President, I thank the distinguished Senator from Tennessee, Mr. THOMPSON, who is chairman of the Governmental Affairs Committee in the Senate. Let me commend him and his committee for reporting this bill. That committee has worked long and hard and very industriously in an effort to craft legislation that, in its final analysis, goes a long way toward protecting the prerogatives of the Senate under the Constitution, in particular with reference to the appointments clause, which appears in article II, section 2, of the Constitution.

Madam President, nearly two weeks ago, on September 15th, I had the high privilege of addressing my colleagues in the Old Senate Chamber as part of the Leadership Lecture Series sponsored by the distinguished Majority Leader. In my remarks, I emphasized two points which I thought were important for all Senators to consider. First, I maintained that, if the legislative branch were to remain a coequal branch of our government, then it must be eternally vigilant in protecting the powers and responsibilities vested in it by the Constitution. Secondly, I noted that, throughout its history, the Senate has been blessed with individuals who were willing to rise above party politics, and instead act in the best interest of this nation and this institution.

The legislation before us today goes to precisely the type of concern I raised in my remarks. S. 2176, the Federal Vacancies Reform Act, would strengthen existing law, thus protecting the Senate's constitutional ''Advice and Consent'' role in the process of nominating and appointing the principal officers of our government. And, because this bill speaks to the very integrity of the separation of powers and the system of checks and balances embedded in our Constitution, it is a measure which I believe all Senators can support, regardless of party affiliation.

To give my colleagues some idea of the dimensions of this problem, earlier this year, I asked my staff to survey the various cabinet-level departments to ascertain how many of these so-called ''advice and consent'' positions were being filled in violation of the Vacancies Act. I can report that the trend is disturbing: Of the 320 departmental positions subject to Senate confirmation, 59, or fully 18 percent, were being filled in violation of the Vacancies Act. At the Department of Labor, for example, one-third of all advice and consent positions were being filled in violation of the Vacancies Act. At the Department of Commerce, 9 of 29, or 31 percent, of those positions were being filled in violation of the Act. And, at the Department of Justice, 14 percent of the advice and consent positions were being filled by individuals in contradiction of the Vacancies Act. Clearly a problem exists.

As my colleagues know, the process used by the President to staff the executive branch is laid out in the Appointments Clause of the Constitution. That clause, found in Article II, section 2, states, in part, that the President

> . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, 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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Because vacancies in these advice and consent positions may arise from time to time when the Senate is not in session, the Constitution also provides that

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Madam President, in an effort to secure the Senate's constitutional authority under the Appointments Clause, Congress established a statutory scheme that lays out not only the order of succession to be followed should one of these senior positions become vacant, but which also sets a strict limit on the length of time an individual may temporarily fill such a position. That legislation, which has been in place since July of 1868, is known as the Vacancies Act, and is codified in sections 3345 through 3349 of Title 5 of the U.S. Code.

For those who may not be familiar with the Vacancies Act, this is the essence of what it says. First, section 3345 provides that if the head of an executive department—a member of the President's Cabinet, for example—dies, resigns, or is otherwise sick or absent, his or her first assistant shall perform the duties of that office until a successor is appointed. Second, section 3346 states that when a subordinate officer—generally those positions at the deputy and assistant secretary levels—dies, resigns, or is otherwise sick or absent, that officer's first assistant also moves up to take over the duties of the office until a successor is appointed. And third, despite either of those self-executing methods for temporarily filling a vacant position, section 3347 authorizes the President to direct any other officer, whose appointment is subject to Senate confirmation, to exercise the duties of the vacant office. In any event, absent a recess appointment, those three sections of the Vacancies Act provide the exclusive statutory means of temporarily filling a vacant advice and consent position.

But whichever method is used—either automatic succession, as contained in sections 3345 and 3346, or presidential selection, as contained in section 3347, Madam President, the key to protecting the Senate's constitutional role in the appointments process lies in section 3348 of the Vacancies Act. That section plainly states that, should one of these positions become vacant due to death or resignation, it shall not be filled on a temporary basis for more than 120 days, unless a nomination is pending before the Senate. Originally, Madam President, when the legislation was enacted in 1868, the period of time was only 10 days. And then in 1891 that period was extended to 30 days. And in 1988 that period was extended to 120 days.

It is precisely that time restriction on the filling of these vacant positions that is, I believe, the linchpin of this issue. Without that barrier, without the 120-day limitation on the length of time a vacancy may be temporarily filled, no President need ever forward a nomination to the U.S. Senate. Instead, the President—any President, Democrat or Republican—can staff the executive branch with ''acting'' officials, who may occupy the vacant position for months, or even years at a time, as the distinguished manager of the bill, Mr. THOMPSON, has already alluded to.

In short, to eliminate the time constraint in the Vacancies Act, or to effectively eliminate it by tolerating noncompliance, is to wholly undermine the integrity of the U.S. Senate's constitutional advice and consent authority. So this is a serious matter.

Yet, despite the seemingly plain language of this 130-year-old Act, the Department of Justice has challenged the force of the Act on the grounds that those provisions are not the only statutory means of filling a vacancy. In fact, for more than a quarter of a century, through Democratic administrations and Republican administrations, the Justice Department has simply refused to comply with the requirements of the Vacancies Act. Instead, the Department claims that the Act is somehow superceded by other statutes which give the Attorney General overall authority to run the Department of Justice.

On December 17, 1997, I wrote to the Attorney General requesting clarification of the Department's position with respect to the Vacancies Act. Specifically, I wanted to know whether or not the Attorney General believed that this 130-year-old statute had any application to the Justice Department. On January 14 of this year I received a response to my letter in which the Department reiterated its position that the Attorney General's authority under sections 509 and 510 of Title 28 ''. . . is independent of, and not subject to, the limits of the Vacancies Act.''

For the benefit of those who have never read those two sections of Title 28, let me refer to the relevant language so that everyone will understand the fallacy of the Justice Department's argument. Section 509 states that, with certain exceptions that are not at issue here today, ''all functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General. . . .'' Section 510, meanwhile, states that ''the Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.''

Those two very broad, very general provisions—the first placing all functions of the Department under the control of the Attorney General, and the second allowing the Attorney General to delegate those functions—are being used to justify what amounts to an end run around the Vacancies Act, which is protective of the Senate's rights under the Appointments Clause of the Constitution.

As I have noted, defiance of the plain language of the Vacancies Act is not an isolated case. In 1973, for example, the Department of Justice refused to admit that L. Patrick Gray, who had been appointed acting Director of the Federal Bureau of Investigation following the death of J. Edgar Hoover in May of 1972, was serving in that capacity in violation of the time limitation contained in the Vacancies Act. In 1982, the Department's Office of Legal Counsel dismissed out of hand—dismissed out of hand the restrictions of the Vacancies Act as simply ''inapplicable'' to the Department—meaning the Justice Department. In 1984, the Department again asserted that ''. . . the specific provisions of 28 U.S.C. §510 override the more general provisions of the Vacancies Act.'' And, in 1989, the Justice Department determined that the Vacancies Act ''. . . does not extinguish other statutory authority for filling vacancies and that the Act's limitations do not apply to designations made pursuant to those authorities.''

Madam President, I submit that that position is untenable, and is untenable for two simple reasons: First, there is no historical basis—absolutely none—for the suggestion that Congress ever meant sections 509 and 510 of Title 28 to exempt the Department of Justice from the requirements of the Vacancies Act. And, secondly, the logical extension of the Department's argument—now get this, the logical extension of the Department of Justice's argument would render meaningless—meaningless the entire advice and consent prerogative contained in the Appointments Clause, article II section 2, of the U.S. Constitution.

Turning first to the Department's claim that sections 509 and 510 of Title 28 somehow preempt the Vacancies Act, I note that those provisions trace their origin to, and are a codification of, a 1950 congressional action known as Reorganization Plan No. 2. As my colleagues may know, throughout the 1950's, Congress passed a series of plans designed to reorganize the various executive branch departments. The purpose of Plan No. 2 was to establish direct lines of authority and responsibility within the Department of Justice, and to give the Attorney General overall responsibility for the effective and economic administration of the Department.

However, there is nothing—I repeat, absolutely nothing—in the language of Plan No. 2 that would indicate that it was ever meant to supersede the Vacancies Act. On the contrary, as the Senate's report which accompanied the measure made clear at that time, and I quote from that committee report, ''Plan No. 2 does not give to the Department of Justice any more powers, authority, functions or responsibilities than it now has.'' What could be more clear?

Finally, it is worth noting that the general language contained in Plan No. 2 is virtually identical to language found in the reorganization plans for the Departments of the Interior, Labor, Commerce, and Health and Human Services. In fact, every one of the 14 cabinet-level departments has these general provisions in its basic charter. Every one! Every one of the 14 cabinet-level departments. And it is precisely that common linguistic thread that leads to the second fatal flaw of the Justice Department's analysis.

If we accept this fallacious argument—that these broad, housekeeping provisions somehow override, or are, in the Department's words, ''independent of, and not subject to'' the more specific provisions of the Vacancies Act—then any executive branch department—any executive branch department whose functions are vested in the department's head, who, in turn, can

delegate those functions to subordinate officers, would be exempt from the provisions of the Vacancies Act. Of course, exemption from the Vacancies Act would then mean that an individual could be appointed to an advice and consent position for an indefinite period of time. Who thinks that the Founding Fathers meant for that to be?

Consequently, to accept the position of the Department of Justice is to accept the position that the United States Senate—that is this body—with the concurrence of the House of Representatives, has systematically divested itself of its constitutional responsibility to advise and consent to Presidential nominations.

Madam President, I wonder how many Senators believe that. I wonder how many of my colleagues are prepared to accept such a specious argument. How many of my colleagues truly believe that the Senate has simply handed over one of the most effective checks against the abuse of executive power? How many will agree that we have given away what the Supreme Court has rightly characterized as ''. . . among the significant structural safeguards of the constitutional scheme''? It was referring to the Appointments Clause in the Edmund v. United States case of 1997.

I, for one, do not subscribe to that specious argument, nor do I believe that any other Senator would support such a contention.

After all, don't we swear an oath, ''so help me God,'' to support and defend the Constitution of the United States, before we enter into office?

At the same time, it is not fair to say the fault for this situation lies entirely in the executive branch; a part of it lies with us. An honest assessment of this matter will show that Congress must bear a good deal of the responsibility for its failure to aggressively demand strict compliance with the provisions of the Vacancies Act.

For 46 years I have been in the Congress, and I have noticed a steady decline in the desire, the willpower, and the determination of Members of Congress to speak out in protection of the powers of the legislative branch.

When I came here it wasn't like that, but more and more and more, it seems that there is an inability, or at least an unwillingness, on the part of Congress to stand up in support of its constitutional powers against the executive branch and those in the executive branch who would make incursions into and upon the constitutional powers of the Congress.

Each of us, individually and collectively, must concede that this institution, this Senate, and the other body, have been less than strenuous in protecting the constitutional rights and powers of the legislative branch.

Congress did, of course, make an attempt to assert the supremacy of the Vacancies Act when it last amended the statute some 10 years ago. That was the second year of the 100th Congress. I was majority leader in the Senate at that time, and on April 20, 1988, the Senate's Committee on Governmental Affairs, in a report accompanying a broader bill of which the Vacancies Act amendments were a part, stated thusly:

> . . . the present language, however old, makes clear that the Vacancies Act is the exclusive authority for the temporary appointment, designation, or assignment of one officer to perform the duties of another whose appointment requires Senate confirmation. The exclusive authority of the Vacancies Act would only be overcome by specific statutory language providing some other means for filling vacancies. As such, the Committee expressly rejects the rationale and conclusions of other interpretations of the meaning and history of the Vacancies Act. . . .

That was the language that was contained in the 1988 committee report.

And yet, despite that language, it remains a fact that the Vacancies Act has not been complied with. As a result, the time has come, and the time is now, for Congress to take the matter into its own hands and address the situation foursquare, right head on. That is what we are attempting to do here. I believe that S. 2176, the Federal Vacancies Reform Act, is the vehicle that will accomplish that goal.

This bill was introduced on June 16 by Senators THOMPSON, THURMOND, LOTT, ROTH, and myself. Three months before, on March 16, I had introduced S. 1761, the Federal Vacancies Compliance Act. Although my bill took a slightly different approach, I believe it is fair to say that it served as a basis for the bill before us today. I was privileged, through the courtesy of the distinguished chairman of the committee, Mr. THOMPSON, to be the lead witness at the March 18 hearing held by the Governmental Affairs Committee. Senator LEVIN was there; Senator GLENN was there; Senator DURBIN was there; and other Senators, I believe.

This legislation here today is the result of months of study, months of discussion, and months of difficult negotiation. By extending the time limitation on how long an acting official may serve, it is a bill that clearly recognizes the realities inherent in today's nominating process. It is a bill that goes out of its way to accommodate the inauguration of a new President by giving the new administration up to 8 months to forward nominations, something not currently contained in the Vacancies Act. So we are going the extra mile in an effort to accommodate the problems of the executive branch. And it is a bill that works to encourage the timely forwarding of nominations. Most importantly, though, it is a bill which will, once and for all, put an end to these ridiculous, specious, fallacious arguments that the Vacancies Act is nothing more than an annoyance to be brushed aside.

Madam President, it is time for this institution to state, in no uncertain terms, that no agency—no agency—will be permitted to circumvent the Vacancies Act, or any other Act for that matter, designed to safeguard our constitutional duties. We cannot, as James Madison warned in Federalist 48, simply rely upon the ''parchment barriers'' of the Constitution if we are to remain a coequal branch of this government.

I urge my colleagues to reflect upon this issue, and, in so doing, to hopefully conclude, as I have, that what is at stake here is something much greater than the Vacancies Act. I hope all Senators will understand that, each time a vacancy is filled by an individual in violation of the Vacancies Act, yet another pebble is washed off the riverbank of the Senate's constitutional role, and that, as more and more of these pebbles tumble downstream, the bank weakens, until, finally, it collapses. But above all, I hope my colleagues will agree that we have a responsibility to the American people and to this institution, the Senate of the United States, to shore up that riverbank, to stop the erosion that has taken place, and to reverse the wretched trend of acquiescing on our constitutional duties that seems to have so ominously infected this Senate.

Let us wait not a day longer in defending the Senate's rights of the Constitution. We are told by the great historian Edward Gibbon that the Seven Sleepers of Ephesus were seven youths in an old legend who were said to have fled to the mountains near Ephesus in Asia Minor to escape the prosecution of the emperor Decius, who reigned in the years 249–251 A.D. Pursuers discovered their hiding place and blocked the entrance. The seven youths fell into a deep slumber, which was miraculously prolonged, without injury in the powers of life. After a period of 187 years, the slaves of Adolius removed the stones to supply materials for some rustic edifice. The light of the sun darted into the cavern and awakened the sleepers, who believed that only a night had passed. Pressed by the calls of hunger, they resolved that Jamblichus, one of their number, should secretly return to the city to purchase bread. The youth, Jamblichus, could no longer recognize the once familiar aspect of his native country. His singular dress and obsolete language confounded the baker, and when Jamblichus offered to pay for the food with coins 200 years old and bearing the stamp of the tyrant Decius, he was arrested as a thief of hidden treasure and dragged before a judge. Then followed the amazing discovery, said Gibbon, that two centuries had almost elapsed since Jamblichus and his companions had escaped from the rage of a pagan tyrant. The emperor Theodosius II believed a miracle had taken place, and he hastened to the cavern of the Seven Sleepers, who related their story, following which they all died at the same moment and were buried where they had once slept.

Madam President, the moral of the story, as far as I am concerned, is this:

The Senate has slept on its rights for all too many years.

Let us awaken to the threat posed by circumventions by the executive branch of the appointments clause and act to preserve the people's rights and the people's liberties, assured to them by the checks and balances established by our forefathers.

In the proverbs of the Bible, we read: ''Remove not the ancient landmark, which thy fathers have set.'' The landmark of the appointments clause was established by our forefathers. We can suffer its removal only at our peril, at the Senate's peril, and at the people's peril. Let us, as Senators, not be found wanting at this hour.

It would require more than ''a mere demarkation on parchment'' to protect the constitutional barriers between the executive and legislative departments. It will require nothing less than an ambition that counteracts ambition. Senators, vote for this legislation. Vote for cloture today so that we can move on with the legislation. In the words of Hamilton, in the Federalist No. 76, ''It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.''

Madam President, I yield the floor.

Mr. LEVIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Madam President, I yield myself 15 minutes.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. LEVIN. Madam President, I, too, think we need to amend the Federal Vacancies Act, because the current act has too many loopholes and insufficiently protects the constitutional prerogative of the Senate to have Senate-confirmed officials serving in top positions in the executive branch. It is because I believe we should amend the Federal Vacancies Act that I voted to report the bill out of committee and, along with, I think, all or most of our colleagues, voted to proceed to Senate consideration of the bill.

But I will oppose cloture on the bill at this time, because if we adopt cloture now, it would mean that relevant amendments could not be considered. After cloture, only what are called germane amendments, as we all know, can be considered. That is a very narrow and a very strict rule. And for us to preclude the possibility of relevant amendments, relevant to this subject, being offered, without the opportunity even to offer those amendments, it seems to me, does not do justice to this subject.

I commend Senator BYRD and Senator THOMPSON for bringing this issue to our attention. Senator BYRD was the witness who appeared before our committee—and the Chair is also a distinguished member of this committee—and brought to our attention, very forcefully, the current loopholes that exist, at least the alleged loopholes that exist, in the Federal Vacancies Act.

These loopholes have been used by Presidents—I think inappropriately used. And surely Senator BYRD has laid out a very powerful case in this bill. And Senator THOMPSON and others laid out a very powerful case that we should close those loopholes. But we should close those loopholes considering relevant amendments in the process. And obtaining cloture immediately upon proceeding to the consideration of the bill will preclude the consideration of relevant amendments.

The bill before the Senate would make several important changes to the current Vacancies Act to close a number of those loopholes. First, it would make clear that the act is the sole legal statutory authority for the temporary filling of positions pending confirmation. Both Senator BYRD and Senator THOMPSON have stated forcefully why it is so important for us to close that loophole. In our judgment, that loophole does not exist. I think in the opinion of probably most Senators that loophole does not exist. But, nonetheless, whether it is a real one or an imaginary one, it has been used by administrations in order to have people temporarily fill positions pending confirmation for just simply too long a period of time, which undermines the Senate's advice and consent authority.

So the first thing this bill would do would be to make clear that the act, the Federal Vacancies Act, is the sole legal statutory authority for temporarily filling positions pending confirmation. Agencies would no longer be able to claim that their organic statutes trump the act and empower them to have acting officials indefinitely.

Second, the act's time period authorizing an individual to be acting in the vacant position would be increased to 150 days from the date of the vacancy. The current act provides for 120 days, and it is unclear on whether the period runs from the date of the vacancy or the date a person assumes the acting position.

Finally, the bill would provide for an enforcement mechanism for violations of the time period. And that is really an important point, because without some kind of an enforcement mechanism, these violations can take place without being corrected.

So the enforcement mechanism provides that if no nomination is submitted within the 150-day period, the position would have to remain vacant and any duties assigned just to that position by statute could be performed only by the agency head. As soon as a nomination is submitted, the bill provides that an acting official could then assume the job temporarily until the Senate acts on the nomination.

While the staff was making efforts to try to negotiate a unanimous consent agreement and perhaps a managers' amendment for Senate consideration of this bill, a cloture motion was filed. In my judgment, it was filed prematurely. And now if, indeed, this cloture motion passes, amendments which are relevant to this subject, important amendments, relevant to this subject, would not be subject to consideration and debate by the U.S. Senate.

Again, I am one who would like very much to see a reform of the Vacancies Act and to see that reform enacted in this Congress. Senator BYRD and Senator THOMPSON and others deserve the thanks of all of us for bringing the Senate's attention to this issue. Senator BYRD, again, took the lead in prompting the Governmental Affairs Committee to hold a hearing on this topic last March and pointed out the Justice Department's regrettable practice of having persons serve as acting officials in top-level positions for significant periods of time without Senate confirmation.

By having acted, officials serve in this way; and ignoring the purpose of the existing Vacancies Act, the Department delays or avoids Senate confirmation.

The Vacancies Act was originally enacted in 1868. Its whole purpose is to encourage the President to submit nominations in a timely fashion. In 1988, the Governmental Affairs Committee amended the act to preclude an agency—in particular, the Justice Department—from avoiding Senate confirmation and the requirements of the Vacancies Act by arguing that the act did not apply to their Departments. Unfortunately, the technical language that the committee used back then to accomplish this didn't do the job, at least in the eyes of the Department of Justice, and some agencies—and the Department of Justice, for one—have continued to operate outside of the intent of that law.

The bill before the Senate, then, attempts to rein in agencies like the Justice Department. It also attempts to set clearer guidelines on what agencies can and can't do with respect to vacancies, and it creates an action-enforcing mechanism that will encourage Presidents to act promptly on submitting nominations.

Now, in the eyes of many Members of this body, the Senate also has an important responsibility to act promptly on the nominations once they are received. That is why it would be relevant to debate the question as to whether or not a bill which amends the Vacancies Act to force the President to make timely nominations—in order to evade the clear constitutional role of the Senate in advising and consenting to such nominations—that such a bill could also appropriately address the Senate's duty to act on such nominations once they are submitted. That doesn't mean approve the nominations, that simply means to act on those nominations.

When we take up this subject of nominations, we need a bill which will

ensure that nominations are made in a timely way, but we also have to avoid crafting an unrealistic bill that could leave many key positions vacant. I don't think any of us want to do that. That is why this bill extends the time that a new administration would have in order to fill these positions without triggering the action-enforcing mechanism.

We need to recognize, however, that this vetting process for nominees—the exploratory process, the FBI checks—has become much more complicated and complex than it was even a decade ago when the act was last amended. Increasingly adversarial confirmation proceedings have required that background investigations and other steps in the vetting process are more thorough and lengthy.

We asked the Congressional Research Service to look at the length of time it took for the first Clinton administration to make nominations and the time for Senate confirmation of those nominations, and to compare those numbers to the time it took the first Reagan administration in 1981 to make those nominations and for the Senate to act on those nominations. The results reflect that both the nomination and the Senate confirmation process are simply taking longer. In 1981, President Reagan took an average of 112 days to submit a nomination; President Clinton, in 1993, took an average of 133 days to make a nomination.

In addition to Presidents taking longer because the process simply takes longer, the Senate is also taking much longer to confirm nominees. In 1981, the Senate took an average of 30 days to confirm nominees; in 1993, the Senate took an average of 41 days to confirm Clinton administration nominees. So the reality that it takes a greater period of time for these nominations to be made should be reflected in the bill. It is reflected by a 30-day extension for the time period, which we have all referred to. Whether or not that is enough is subject to debate, and there will be amendments on that subject as well.

As I have indicated, in addition to crafting a bill that reflects today's more adversarial nominations climate, there are many who feel strongly that we in the Senate should acknowledge our own responsibility to act on nominations that we receive from the administration. We, in the Senate, rightfully want to protect our constitutional prerogative to advise and consent on nominations and not to have positions filled by people whose nominations have not been confirmed by the Senate. By the same token, we should discharge our duties in a prompt matter once those nominations are submitted to us.

Currently, there are many, many examples of the Senate failing, both in committee and on the floor, to act on nominations. We are appropriately critical of the administration for not sending up nominations in a timely way, but it is also appropriate for us as an institution to act one way or the other on those nominations once they are received. It is the desire of some of our colleagues to offer amendments that would require the Senate to act in a timely fashion on nominations, both by considering them in committee and by requiring a vote on them on the Senate floor. Again, not a positive vote guaranteed, just a vote.

Madam President, I think this bill moves us in the right direction. It is a bill that would close loopholes which many of us did not think even existed but which are being utilized by administrations to make appointments of these temporary people for long periods of time without submitting the nominee's name to the Senate for advice and consent. There are many provisions about which concerns have been raised, and it is perfectly appropriate, I believe, for those issues to be debated and to be resolved here on the Senate floor.

I also would plan on offering an amendment to provide for a cure of a violation; that is, to allow an official to temporarily act in a vacant position once a nomination has been submitted, even if that nomination is submitted during a long recess. The bill is not clear, in my judgment, as to what happens when the 150-day period runs prior to, for instance, a sine die recess but when the intention to nominate a particular person is submitted to the Senate to the extent that is permitted during a sine die recess.

It would seem to me that, just as the bill appropriately holds the 150-day period when a nomination is submitted and permits somebody to serve in that capacity where there is an intent to nominate, so if the 150-day period happens to run out before a recess but the intention to nominate a particular person is submitted to the Senate during that recess, then also a temporary appointment ought to be permitted.

Madam President, I will offer an amendment at an appropriate time to have a person as an acting official permitted after the 150-day period has expired, when a recess occurs and the nominee or a nominee's name is submitted to the Senate during that recess.

There are a number of concerns which a number of our colleagues have raised with the bill as drafted, and some of these concerns, again, would be reflected in relevant amendments but which are not technically germane and would be precluded and foreclosed if cloture were invoked.

For example, the bill restricts who can be an acting official, in case of a vacancy, to a first assistant or another advice and consent nominee. That is too restrictive a pool of acting officials and does not give this administration, or any administration, the ability to make, for instance, a long-time senior civil servant within the agency an acting official. Such senior civil servants may be the best qualified to serve as acting officials. First assistants may not exist for all vacant positions. Further, designating another advice and consent nominee to serve as an acting official takes that person away from the duties of their regular job. The category of persons who can act needs to be made larger, in my judgment, and in the judgment of others who will be offering amendments along this line—who, at least, want to offer amendments along this line, assuming that they are afforded the opportunity to do so.

This provision that I have referred to, the restriction that I have referred to, may be operating particularly harshly at the start of a new administration when many vacancies exist. At such times, not many first assistants may be holding over from previous administrations. Therefore, the first assistant slots may be empty, also. Similarly, few other Senate-confirmed officers will exist that the President could choose from to serve in a vacant position. One of our colleagues intends to offer an amendment to allow qualified civil servants to be acting officials, also. And again, this amendment, like some of the other amendments that are sought to be offered here, may not be technically germane and can be foreclosed after cloture.

I don't think it is appropriate that relevant amendments should be foreclosed. That is why I am somebody who believes we need to amend the Federal Vacancies Act in order to close the existing loophole, and in order to protect the constitutional prerogative of the President, and I also want to protect the prerogative of Senators to offer relevant amendments. That is the issue we are going to be voting on—whether or not Senators ought to have an opportunity to offer relevant amendments, or whether they should be precluded from doing that by cloture being invoked so prematurely, when a bill has just been brought to the floor, and then being denied the opportunity to offer amendments on issues that are clearly relevant to this issue.

So the bill is an important one. The issue is an important one. I think we are all in the debt of the sponsors for bringing this bill to the floor. It is appropriate that the Senate debate this bill and that Senators who have relevant amendments, although not technically germane, be offered the opportunity to offer those amendments, have them voted on, and to have these issues, some of which I have discussed, resolved.

I hope we will vote against cloture and that we will proceed to continue on the bill and have people offer amendments—hopefully relevant amendments—and to try to work out a unanimous consent agreement to see if we can't come up with a list of relevant amendments that people could offer on this subject so that they would not be foreclosed, being in a postcloture situation, from offering amendments that are relevant to this important issue, but not technically germane.

I yield the floor.

Mr. THOMPSON addressed the Chair.

The PRESIDING OFFICER. The Senator from Tennessee is recognized.

Mr. THOMPSON. Madam President, I yield the Senator from South Carolina 10 minutes.

The PRESIDING OFFICER. The Senator is recognized for 10 minutes.

Mr. THURMOND. Madam President, I rise today in support of cloture on S. 2176, the Federal Vacancies Reform Act. This legislation should be entirely nonpartisan because it is essential to the advice and consent role of the Senate.

Recent Administrations, both Republican and Democrat, have failed to send nominations to the Senate in a timely manner. Instead, they have appointed people to serve in an acting capacity for long periods of time without seeking confirmation.

This is a matter of great significance. One of the primary fears of the Founders was the accumulation of too much power in one source, and the separation of powers among the three branches of government is one of the keys to the success of our great democratic government. An excellent example of the separation of powers is the requirement in Article 2, Section 2 of the Constitution that the President receive the advice and consent of the Senate for the appointment of officers of the United States. As Chief Justice Rehnquist wrote for the Supreme Court a few years ago, ''The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch.''

The Vacancies Act is central to the Appointments Clause because it places limits on the amount of time that the President can appoint someone to an advice and consent position in an acting capacity without sending a nomination to the Senate. For too many years, the Executive Branch has failed to comply with the letter or the spirit of the law.

I raised this issue for the first time this Congress in April of last year at a Justice Department oversight hearing. At the time, almost all of the top positions at the Justice Department were being filled in an acting capacity. They included the Associate Attorney General, Solicitor General, Assistant Attorney General for Civil Rights, Assistant Attorney General for the Criminal Division, and Assistant Attorney General for the Office of Legal Counsel.

President Clinton allowed the Criminal Division of the Justice Department to languish for over two and one half years before submitting a nomination. The government had an Acting Solicitor General for an entire term of the Supreme Court. Most recently, the President installed Bill Lann Lee as Acting Chief of the Civil Rights Division in blatant disregard of the Judiciary Committee's decision not to support his controversial choice. Mr. Lee has been serving as Acting Chief for ten months, and the President apparently has no intentions of nominating someone the Judiciary Committee can support.

Let me be clear. The issue is not about any one President or any one nominee. It is about preserving the institutional role of the Senate. A Republican President has no more right to ignore the appointments process than a Democrat President.

I responded to this problem by introducing a resolution about one year ago. However, I soon realized that a total rewrite of the Vacancies Act with an enforcement mechanism would be required to force the Executive Branch to follow the law in this area. Thus, earlier this year, I sponsored a bill on behalf of myself and the Majority Leader to rewrite the law regarding vacancies.

Today, I am pleased today to be an original cosponsor of S. 2176, the bill that we are debating today. It contains the two primary objectives that I outlined when I testified before the Governmental Affairs Committee earlier this year: the need to totally redraft the Vacancies Act and to provide a mechanism for enforcement. Senator THOMPSON has done a fine job in drafting S. 2176 and in shepherding it through the Governmental Affairs Committee. He has worked hard to create a bipartisan consensus for this legislation. In that regard, I am pleased that my distinguished colleague who is an expert on the institution of the Senate, Senator BYRD, is an original cosponsor of this legislation.

S. 2176 would correct the Attorney General's misguided interpretation of the current Vacancies Act. In fact, she practically interprets the Act out of existence. Based on various letters to me, it is clear that if her interpretation were correct, no department of the Federal government would be bound by the Vacancies Act. There would be no limitation on the amount of time someone could serve in an acting capacity. There would be no limitation on how long the advice and consent role of the Senate could be ignored.

Additionally, the bill has an enforcement mechanism, while the current law has none. Because there is no consequence if the Vacancies Act is violated today, the Executive Branch simply ignores it. This change is essential for the Act to be followed in the future. The bill provides that the actions of any person serving in violation of the Vacancies Act are null and void, until a nominee is forwarded. There can be no argument that this will paralyze an office because the President can make the office active by simply forwarding a nomination.

It is also important to note that the bill gives the President an extra 30 days to submit a nomination. It extends the time from 120 days to 150 days, with even more time at the start of the administration. These were concessions to the Executive Branch. Indeed, the bill overall makes no more change than necessary in the Vacancies Act to make sure it will be followed in the future.

The question before us is cloture on S. 2176. We should invoke cloture now and move to any amendments that members wish to propose. Cloture on the motion to proceed was easily invoked last week in a completely bipartisan vote, and I hope we can get a similar consensus today.

Madam President, we must act in a bipartisan fashion to preserve the advice and consent role of the Senate. We must require any administration in power, whether Democrat or Republican, to respect this Constitutional role of the Senate. As the Supreme Court has stated, ''The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.'' By passing the Vacancies Reform Act, we can reaffirm the separation of powers for the sake of the Senate and the entire Republic.

Madam President, I yield the floor.

Mr. LEVIN. Madam President, I yield 15 minutes to the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Illinois is recognized for 15 minutes.

Mr. DURBIN. Thank you, Madam President.

I thank the Senator from Michigan for yielding.

Madam President, I rise today to oppose this effort to bring to a close debate on the Vacancies Act reform legislation, S.2176. I urge my colleagues to join me in voting against cloture.

Without so much as a blink, a breath, or a blush, a cloture motion on the bill itself was immediately filed last Thursday morning on the heels of the Senate's agreement to proceed to this bill. This quick flinch maneuver is an attempt to deny Members the opportunity to offer meaningful relevant amendments to improve this legislation, such as those I intend to pursue to address the Senate's responsibility to act expeditiously on pending nominations.

Before I outline the importance of assessing both sides of the process and outline my specific reservations about the bill as presently drafted, I wish to emphasize that I share the convictions and concerns of the sponsors, notably Senators BYRD, THURMOND, and THOMPSON, about the critical need to preserve and protect the constitutional prerogative of the Senate to advise and consent to Presidential nominations to executive branch positions. I am sure that I am not alone in this view.

I appreciate the sponsors' zeal to remedy what has grown to be, numerous instances and examples throughout the government, of outright challenges to Senate authority by ignoring the Vacancies Act. There has been flagrant and contagious disregard for the application of the existing law as the sole mechanism for temporarily filling advise and consent positions while awaiting the nomination and confirmation of the official candidate.

I wholeheartedly concur that this law needs clarification so that moves to end-run its application are halted. The bill as advanced by the Governmental Affairs Committee laudably addresses this exclusivity question.

Thus, I do not oppose efforts to bolster the Vacancies Act as the exclusive mechanism (with limited and explicit exceptions) for the president to designate officials to temporarily fill vacancies in positions requiring Senate confirmation.

Unfortunately, in its current form this bill goes well beyond that justifiable but limited goal in several respects. Moreover, it fails to go far enough to address the Senate's duty to timely act on nominations.

While the Administration may well bear some responsibility for the slow pace of nominations, I am dismayed that the Senate would want to so severely restrict the ability to fill vacant positions temporarily and to conduct the people's business while at the same time impeding the nominations process and confirming nominees at a snail's pace.

The Senate bears partial responsibility for the time it takes to nominate officials for Senate confirmed positions. This Congress has subjected the Administration's nominees to unprecedented scrutiny, using almost any prior alleged indiscretion—no matter how trivial—by a nominee as an excuse to delay or prevent a vote.

Senators have also interjected themselves into the President's nominations process to an unparalleled degree. As a result, that front-end process—the selection, recruitment, and vetting of candidates—takes longer than ever before.

The nomination and confirmation process, it has been observed, is one of ''the President proposing, the Senate disposing.'' If the Senate expects adherence to the rigid parameters this bill would impose on advancing candidates, we as its Members need to be ready and willing to diligently consider these candidates for public office and take prompt and deliberate action to confirm or reject them.

The Senate has frequently declined to exercise its advice and consent responsibility in a timely and appropriate manner. Too often, nominations die in Committee, languish interminably on the Executive Calendar, or simply take months or years to move through this Chamber.

Just as the President has a responsibility to forward nominees to the Senate in a timely fashion, we in the Senate have a concomitant obligation to discharge our constitutional prerogative of advice and consent on those candidates in an efficient and expeditious fashion.

We cannot simply confront practical deficiencies in the front-end phase of the process for recruiting and evaluating qualified candidates and ignore our own responsibilities.

We owe it not only to the Executive, but to the American public, to offer—not withhold—our advice and where appropriate, our consent.

I have filed and certainly hope to have an opportunity to offer some relevant amendments designed to address those instances of dilatory Senate Committee processing and floor inaction once a nominee is advanced to the calendar.

One amendment would provide that any nomination submitted to the Senate that is pending before a Senate committee for 150 calendar days shall on the day following such 150th day, be discharged and placed on the Senate executive calendar and be considered as favorably reported.

Another amendment would require the Senate to take up for a vote any nomination which has been pending on the Executive Calendar in excess of 150 days. Such Senate consideration must occur within 5 calendar days of the 150th day. In effect, it creates an end point after which we can no longer hold up a nominee.

I am not suggesting that we would give our consent to all of these nominees. I am basically saying that this process should come to a close. The Senate should vote. It should make its decision.

If we want to reasonably time-limit the front end of the process—with which I do not disagree—and promptly fill vacancies, we need to be equally willing to build some finality into the back-end of the process and impose some time limits on our own consideration of these candidates.

The first problem I find with this bill is that filling positions in the Government requires time far longer than that specified in this bill.

I have an amendment which suggests increasing the 150-day period to 210 days. I am sure people are wondering, if they are following this debate, why it would take so long for any kind of process to review a nominee. Well, as it turns out, the average number of days that a vacancy exists prior to a Senate nomination for the White House is 313 days. What could possibly take 313 days in investigating the qualifications of an individual to fill the job?

Consider all of the things that are going to be investigated. Not only the lengthy forms the individual must fill out, ethics disclosures, financial statements, fingerprints and the like, but also an FBI investigation, a Federal Bureau of Investigation report on that person, the opportunity for groups to contact the White House and say that they either oppose or support the individual, the opportunity for Members of Congress to come forward and suggest to the administration that they either support that nominee or they oppose it. And as it turns out, some of these things such as an FBI report may not happen as quickly as some people imagine. We have heaped on that agency additional responsibilities every year. We entrust them with very important jobs. We tell them that we want them to fingerprint and make certain that those who want to be citizens of the United States, in fact, have no criminal record in any foreign country. That is a valid question, but it is an additional administrative responsibility.

The list goes on and on and on. As a consequence, when the administration comes to this agency, and it is only one example, and asks for a timely review of an individual nominated for a position, they sometimes have to wait in line. And while they wait the clock is ticking.

And consider this as well. As a result of this legislation, saying the administration shall only have 150 days, what if in the midst of this process—say, for example, 4 or 5 months into the process—the administration reaches a conclusion that the individual should not go forward and the nomination should not be sent to the Senate. Does the clock start to run again? No. The clock continues to run 150 days, so the new nominee, starting over going through all these processes, trying to clear all these hurdles, is still burdened by the original clock ticking at 150 days. I don't think it is realistic. I don't think it is fair. Merely adding 30 additional days to the current 120-day timeframe within which an acting official may temporarily perform the duties and functions of the vacant office unless the Senate has forwarded a nominee to the Senate within that span is impractical. It is unrealistic, and I do not believe it is adequate.

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

Mr. DURBIN. I will be happy to yield.

Mr. BYRD. The Senator from Illinois has suggested an amendment, Madam President, as far as I am concerned, I could accept. Why not let us invoke cloture; that amendment is certainly a germane amendment, and have the Senator put it up for action by the Senate? I am one who would vote for it.

Mr. DURBIN. I thank the Senator from West Virginia, and I certainly appreciate those comments. But we are told by the Senate Parliamentarian that the amendment would be relevant but not germane, and therefore any action for cloture which would put a burden on the Senate to act within a certain period of time on nominees that are sent would be wiped away, or could be wiped away by this cloture motion.

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

Mr. DURBIN. I will be happy to yield.

Mr. BYRD. I may have misunderstood the Senator. I thought the Senator was suggesting that the 150 days is not enough and that he would like to see 30 additional days. That would certainly seem to be germane as far as I am concerned.

Mr. DURBIN. If the Senator will allow me to respond, that amendment is germane. The only other amendments which would impose a responsibility on the Senate to move a nominee out of committee within 150 days after it is sent from the White House or

to move it off the Executive Calendar for a vote within 150 days, I am told by the Senate Parliamentarian, may not be allowed if cloture is invoked.

Mr. BYRD. Yes. I expect the Parliamentarian is right on that. I would not argue with that, nor would I probably support it.

If the Senator will allow me, the Constitution doesn't say that the Senate has to confirm the nominees. It simply says the President cannot have the full responsibility and power himself to name people to important positions. This is a matter that has to be shared under the Constitution between the President and the Senate. This constitutional provision—the appointments clause—I am trying to protect today is being given the runaround by the Justice Department and several other Departments, and I want to protect that constitutional power that is given to the Senate. As to whether or not the Senate acts on nominations, the Constitution doesn't require the Senate to act, but I think that the Senate does act, and would continue to act, on nominations within a reasonable period of time.

Having been the majority leader of the Senate during three different Congresses, I can say to the distinguished Senator that when I was majority leader we had nominations left on the calendar at the end of a Congress, in all three of the Congresses in which I served as majority leader. When we adjourned sine die that Executive Calendar was not wiped clean. We all did the best we could, but we did leave some nominations on the calendar. And I certainly share the Senator's feeling that the Senate ought to act expeditiously, in a reasonable fashion, but when it comes to requiring the Senate to act on all nominations, I don't think the Constitution requires that. And I might have to part company with the Senator at that point. But some of his other suggestions, I think, are very well made.

Mr. DURBIN. I thank the Senator from West Virginia. It pains me to believe we would have a difference of opinion, but those things do occur. I am certain the Senator as majority leader did his constitutional responsibility—there has never been a doubt about that—and also acted with dispatch in a timely manner.

I think the Senator makes a good point. We not only want to protect the clear constitutional responsibility and right of the Senate in this process, we want to bring the best men and women forward to continue serving our Government, and we want it all done in a timely fashion. My concern with this bill is it addresses one side of the equation. It says to the executive branch, you have to move in a more timely fashion to bring these men and women to the Senate for consideration. If we are clearly looking for filling vacancies in a timely fashion, that is only half the process. Once the nomination is brought to the Senate, we should move in a timely fashion, too. Otherwise, using the old reference to equity, we don't come to this argument with clean hands, and that is why I think there should be some symmetry here in the requirement of the executive as well as the legislative branch.

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

Mr. DURBIN. I will be happy to yield.

Mr. BYRD. And I thank him for yielding. The Senator, as I think I understand, suggested that if we are going to deal with one part of the equation, namely, the nominating process by the executive, and protect ourselves in that regard, we ought to be equally interested in dealing with the other half of the equation by requiring action by the Senate to confirm or reject nominees.

May I with great respect suggest—and I am doing this for the record. I am sure I am not ahead of the Senator in thinking this—I am trying to address the constitutional side of the equation and stop the administration, not only this administration but also previous administrations, from conducting a runaround of the constitutional advice and consent powers of the Senate. I am suggesting we deal with that constitutional side of the equation.

Now, the other side, which the distinguished Senator mentions, if he will pardon my saying so, I think what he is talking about is the political side of the equation. That part is not included in the Constitution. The Constitution doesn't require the Senate to act on any nomination. But that is the political side. I would like to deal with the constitutional side, and that is the purpose of this legislation. And then we can do the best we can on dealing with the political side. The Senator is quite right; neither side comes into this matter with perfectly clean hands. That is an old equity maxim.

It reminds me of Themistocles who happened to say, one day, ''that he looked upon it as the principal excellence of a general to know and foresee the designs of the enemy;'' Aristides answered, ''that is indeed a necessary qualification; but there is another very excellent one, and highly becoming a general, and that is to have clean hands.'' The same thing would apply here. Neither party has clean hands when it comes to moving all nominations sent by a President to an up or down vote. As majority leader during the Presidential years of Mr. Carter and again during the 100th Congress, I can remember that the calendars were not always cleared of items that had been reported by committees when adjournments sine die occurred. I hope that we will not get bogged down in this way about a purely political matter when a far more important constitutional matter, important to the prerogatives of the Senate in the matter of appointments is at hand.

And let me state to the Senator the number of nominees that were left on the executive calendar when I was majority leader, at the time of sine die adjournment.

When I was majority leader—I will just take one Congress, for example, the 100th Congress.

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

Mr. BYRD. Mr. President, I ask unanimous consent the Senator have an additional 5 minutes.

Mr. LEVIN. Reserving the right to object, and I surely hope I will not, I wonder how much time remains.

Mr. BYRD. And that that time not be charged against either side.

The PRESIDING OFFICER. The Senator from Michigan has 21 minutes; the Senator from Tennessee has 9 minutes. Is there objection to the request?

Mr. LEVIN. The modified request, we have no objection to.

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

Mr. BYRD. I will just say this. To show that we all sometimes fail to have clean hands, when I was majority leader in the second session of the 100th Congress—I don't mind saying this—the civilian nominations totaled 516, including 112 nominations carried over from the first session; 335 of these were confirmed, 170 were unconfirmed, and 11 were withdrawn. So, this is a failing that can be ascribed to both Democrats and Republicans when they are in control of the Congress.

But, yet, I come back to my original premise; namely, that the Constitution did not require me to call up all those nominations off the calendar. It didn't say I had to do that. But it did say, with respect to nominations, that appointments to vacancies were to be shared by the President and the Senate, and that is what this bill is contemplating to enforce and what I am fighting for today.

I thank the distinguished Senator.

Mr. DURBIN. I thank the Senator from West Virginia.

I would just say that I can't believe that I hurried back from Chicago this morning to come to the floor of the U.S. Senate to actually engage my friend and fellow Senator from West Virginia in any debate about the Constitution. I plead nolo contendere. I am not able to join you in that. And I can't even reach back in Greek or Roman history for any kind of solace or defense.

I am not sure who the author was, it could have been a Greek or Roman, maybe a West Virginian, or even an Illinoisan, who once said the profound statement, ''What is sauce for the goose is sauce for the gander,'' and that is what I am attempting to argue here. That is, if we are going to impose on the executive branch a requirement to produce the nominee in 150 days, or if the time goes beyond that to suffer the possibility of not having an acting person in that slot, then we should accept the responsibility on the Senate side as well, to act in a timely manner on these nominees.

Mr. BYRD. Mr. President, will the Senator yield? I hope he will forgive me.

Mr. DURBIN. I will be happy to yield.

Mr. BYRD. I am not here to engage in challenging his statements. He is one of the fine Members of this Senate; one of the newer Members, in a way. He served a long time in the House of Representatives. He comes to the Senate well prepared to be a good Senator, and he is a good Senator.

But, again, I am concerned about that part of the responsibility which the Constitution places on both the executive and the legislative. I think the legislative is being given the runaround by the Judiciary Department. It has not just been during this administration. It has been, as I say, going on for over 25 years, and this is an opportunity for us to correct that, I hope we would vote for cloture and perhaps some of the Senators' amendments—which are certainly worthy of consideration and probably of adoption, some of them—could be given a chance to be offered and debated. I hope we would invoke cloture, indeed, to have an opportunity to do that.

Mr. DURBIN. I thank the Senator from West Virginia.

I think what we have found is that rarely do we visit this rather obscure area of the law, the Vacancies Act. I am hoping in this visitation on one side, that we have some balance and impose requirements on the Senate to act in a timely fashion, as we impose a requirement on the executive branch to report a nominee in a timely fashion. But I also hope the time periods that we choose are realistic. I think anyone involved in this process at any level understands that when a person's name comes up in nomination, they are subjected to far greater scrutiny than ever before. It discourages many good people from even trying public service, and I am sure that many have been disappointed.

But let us, I hope, during the process of this debate, be sensitive to this reality. And it is a reality that, under the bill, the meter keeps on ticking even when this scrutiny is underway, even if it is interrupted and a new nominee is proposed for a post. And if, in fact, at 150 days the nomination is not forthcoming, then, as I understand this bill, we would preclude the President from filling the spot with an acting person. That, to me, is a sort of decision which on its face makes sense but may have some practical ramifications. It may affect the ability of the administration to choose the person most able to handle a matter that involves public health, public safety, or the national defense. I also think that this bill too narrowly restricts who can function in an acting capacity.

The PRESIDING OFFICER. The additional 5 minutes of the Senator has expired.

Mr. LEVIN. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator from Michigan has 21 minutes remaining.

Mr. LEVIN. I will be happy to yield an additional 5 minutes to the Senator from Illinois.

Mr. DURBIN. Mr. President, I am concerned this bill too narrowly restricts those who can function in an acting capacity. I am worried that, in fact, the administration will not be able to pick that person best able to fill the spot, to conduct the duties, and to perform the functions of the office in the best way. I don't think that serves our country well. This bill could preclude the President from naming the most qualified person to serve as an acting officer. I do not think that will help us in any way.

Third, while it would not affect this President, experience has shown that at the beginning of a new administration filling positions in the Government requires far longer than specified in this bill. At the outset of any new administration, the President must nominate individuals to at least 320 positions in 14 different executive departments. The new President cannot possibly make all the required nominations within the 240 days allowed by this bill.

In 1993, when the nominations process was, if anything, simpler than today, the new administration was able to forward only 68 percent of the nominees within the first 240 days. Unless this time period is changed, the next administration could face departmental shutdowns because of this bill.

The enforcement mechanism of this bill, which establishes that no one can perform the functions and the duties of the vacant office, is a sanction which would lead to administrative immobilization.

I would like to also note it is ironic that we are here today debating whether to close off consideration of a measure designed to limit how long an acting official may temporarily fill an executive branch vacancy and legally perform the duties while awaiting an advancement of a nominee. The impetus is on the President to send nominees more expeditiously; yet with acting officials in many of these agencies, the work can continue. Such is not the case with the sister branch of Government which has eluded our debate here today, the Judiciary. In fact, a more serious crisis sits on the doorstep of the U.S. Senate, one that has been sorely neglected this year by many of the same people on the other side of the aisle who are proposing this change in the Vacancies Act.

We must recognize there is no similar vehicle or parallel authority like the Vacancies Act for filling vacancies on the Federal bench. There are presently 22 candidates to fill judicial vacancies on the Executive Calendar of the U.S. Senate, and 24 pending before the Senate Judiciary Committee—3 of those from my State. Unlike the executive branch where qualified acting officials may step in, in the judicial branch we don't have ''acting'' or ''interim'' judges.

I think, frankly, if we are going to assume some responsibility here, as we should, and impose responsibility on the executive branch, we should meet our responsibility. I think that responsibility requires us to act in a timely fashion on nominees sent before us. The reason I oppose cloture is I would like to see that the Senate shall also be held to the responsibility of acting in a timely fashion. If, after 150 days languishing in a committee there is no report on an individual, the name should come to the floor. If, after 150 days languishing on the Executive Calendar that name has not been called for a vote, it should be. Vote the person up or down. They are qualified or they are not. But to impose all of the burden on the executive branch and to step away from our responsibility I don't think is fair. It doesn't engage the symmetry, which I think is important.

I will concede, as Senator BYRD has said, the constitutional question is directly addressed by this bill, but I think there is a larger question about the process and whether or not we meet our twin goals: timely consideration and ultimately the very best and most able people who are selected to serve us in Government.

Mr. President, I yield back my remaining time.

The PRESIDING OFFICER. Who yields time?

Mr. THOMPSON addressed the Chair.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. I yield myself 5 minutes.

The PRESIDING OFFICER. The Senator is recognized.

Mr. THOMPSON. Mr. President, I have a couple of points. With regard to the desire for symmetry, I point out that the symmetry and the balance are provided for in the Constitution itself. It is not symmetrical to take a constitutional provision and our constitutional duties, on the one hand, and equate it with legislation that people might be for or against, on the other. The Constitution provides that the President has the power to make the appointment, but only with the advice and consent of the Senate. It is part of our separation of powers, part of our checks and balances. Therein is the balance.

What we have today is a situation where the President, the current President, as Presidents in the past, has made nominations and figured out ways around the prerogatives of the Senate. We are in a situation today where we are not doing our duty. The U.S. Senate is not doing its duty in upholding its right and protecting and preserving its right.

We can bring this matter back. We cannot have cloture and bring this matter back time and time again. But we must recognize, with the provision, of course, of being able to offer germane amendments, we must recognize

that this situation is ongoing. We can debate legislation at any time. If it is deemed desirable to put a time limit on the U.S. Senate to consider appointments, we can debate that.

I think it is very bad legislation. As most Senators, I think, know, there is more than one reason why nominations languish up here sometimes. Sometimes they languish for very good reasons. Sometimes it is an attempt to work with the White House with regard to someone who has problems. Instead of just saying no and sending it back or telling them to take it back, we find ways to work around the problems we have. There are many reasons why that would be bad legislation, but it is something that can be considered at any time.

We have had this vacancies situation with us about 130 years now in terms of this legislation, and there are all kinds of things that can be added to it at this date, that it would probably be better if it were considered separately and invoke cloture today so we can address a problem that is really important in terms of the constitutional responsibilities of this body.

With regard to the other objections of the bill and talking about that this is too confining on the front end, actually we either are continuing practices that have been with us for 130 years or we are making them more liberal. We are giving the President greater leeway. We are giving him 150 days instead of 120 under current law. If we do not pass this legislation, he will keep 120 days instead of the 150 we are trying to give him. People are concerned about a new President coming in. We have added an additional 90 days to the 150 days in which a new President will have to make his nominations. We also added another liberalizing provision that, if he lets the 150 days expire and then there is a period of time and then he makes the nomination, the acting person can go back and resume his duties. These are all liberalizing provisions.

I understand the need to consider amendments. I was hoping that the possibility of germane amendments would get us through this, in light of the fact that we have spent a lot of time working on a bipartisan basis and making several changes.

We have made changes since this legislation was introduced to allow the President to cure a vacancy by sending up a nomination even after 150 days; by modifying the exclusion provision to exclude chief financial officers, for example; to allow a 150-day period when it expires during a recess to be extended to the second day after the Senate reconvenes; to reduce from 180 days to 90 days the length of time a first assistant held that position and can be eligible to be a nominee; extended the transitional period following a new President's inauguration, as I said, from 180 days to 240 days. In most of these cases, we have worked out on a bipartisan basis extensions and liberalizations from what is the current law.

While there would not be an opportunity to offer relevant amendments that are not germane, I suggest that this is something whose time has come and that we would be doing a disservice if we did not go ahead and move this legislation—something that, as I say, has to do—it is not just a normal piece of legislation, it has to do with the carrying out of our constitutional duties.

I yield the floor.

Mr. GLENN. Mr. President, I rise today to discuss S. 2176, the ''Federal Vacancies Reform Act of 1998'' introduced this summer by Senator THOMPSON, Chairman of the Governmental Affairs Committee with jurisdiction over the Act. I want to thank Senator LEVIN for managing the bill today. I also want to thank Chairman THOMPSON for the accommodations his staff has afforded Democratic staff in the negotiations leading up to this brief debate. We, on our side of the aisle, were blindsided, to say the least, by the filing of the cloture petitions last week as staff were negotiating the terms of a unanimous consent agreement on, and the substance of a managers' amendment to this very bill.

As we know, the Vacancies Act governs the temporary filling of what we call ''advise and consent'' or PAS positions (Presidentially-appointed, Senate-confirmed) in the Executive Branch. As I have said many times before, I remain concerned about two important goals of any new law we pass: (1) As Senator BYRD—the best expert this body has on Senate procedure and constitutional law—has repeatedly noted, this is one of the Senate's most important and serious constitutional prerogatives in that we are expected—required, in fact, under the Constitution—to provide our advise and consent on the nominees the President submits to us for our consideration; and (2) maintaining the smooth functioning of government with the large number of vacancies we seem to have to deal with. On one hand, we have more slots in government than ever before which means more vacancies. On the other hand, our confirmation process is long and tedious keeping acting officials (many of whom are very qualified to fill their slots) in their positions for longer than we intend.

Combined, these concepts make the continuity of the functioning of government a challenge to achieve, but certainly not impossible. We should be creating a process that reflects reality and provides the proper safeguards and enforcement mechanisms.

I believe the bill as it stands now improves on current law, but I think there is still work to be done. The White House has issued a veto letter on this bill. While I consider this important legislation, I remain concerned about many of the issues raised by the Administration, and I have filed amendments to address many of these concerns.

For instance, are we being too limiting in who can become an acting official? Current law mandates that an acting official can be the first assistant or anyone the President designates. We will be narrowing current law to include the first assistant or any PAS official the President designates. The importance of this change is that in the absence of a first assistant or at the President's discretion, we will be requiring someone whom the Senate has already approved to fill a slot for which the Congress has required the Senate's advise and consent. But do we really want a President to designate a PAS from HUD to assume the additional responsibilities of a PAS position at Department of Education? Or vice versa? Do we want these folks who already have plenty of responsibility as it is to assume the added responsibility of a second position? With the vetting process taking longer and the noteworthy downsizing in government that has occurred over the last 6 years, perhaps it's time to consider a hybrid category of who can be a temporary acting official.

I intend to offer an amendment to add a third category which would include qualified individuals of a certain level or higher who are already within an agency in which a vacancy occurs. Such individuals—who could include high-level members of the civil service—would be familiar with the agency, its processes and culture; possess some institutional memory; and be fully capable of the task. This gives the President a larger pool from which to choose an acting official, particularly in a case where there is no first assistant, and the President must turn to another PAS official to temporarily fill the slot. In addition, it allows a larger category of who can act at the beginning of an administration to keep government functioning at a time when there are not many PAS officials. I think this amendment is critical to the success of the legislation, and I hope Senators on both sides will give it serious consideration. I will not be able to support the bill if this issue is not addressed in it.

In addition, I hope to offer amendments which would give the President the authority to extend the period for a temporary official if a case of national interest arose and a nomination for the position had not yet been sent up. In such cases, under the amendment the President upon certification to Congress of the particular national interest—be it national security, natural disaster, economic instability or public health and safety—would be able to extend the temporary appointment one time for 90 days.

Finally, I hope to offer an amendment which would further decrease the requirement for a first assistant who will be an acting officer and the nominee to 45 days. At the beginning of a new administration, there may not be enough PAS officials to perform their own duties let alone those of another position. This will be the case particularly where there is a change in party

in the White House. In addition, because of the restriction in the bill on first assistants who serve in acting capacities who will also be the nominees, the administration will be required to fill the first assistant slot as well as the vacant PAS slot. My amendment would allow first assistants to be appointed, act in the vacant slot for 45 days and then be nominated to fill the slot on a permanent basis before the end of the 60-day period for which extensions are granted at the beginning of a new administration.

I hope that other amendments that may be offered which would impose the same constraints on the Senate as this legislation would impose on an administration will also have a fair opportunity to be considered. While some see no connection between the Vacancies Act and the responsibilities of the Senate to act on nominations, I believe the two are inextricably linked. I do not believe we can go forward in reforming one process until we commit to reforming our own.

I want to note that as the negotiations on this bill proceeded, we were not only looking to see how this law would operate in this second-term Democratic administration. Indeed, some day this law will be utilized by a Republican administration. With this in mind, we attempted to help craft a fair piece of legislation.

In that vein, I want to emphasize again that the process by which this bill has come to the floor for such limited debate with no opportunity for action prior to the cloture vote, is discouraging both for our faith in a fair process and for the fate of this legislation.

NOMINATION OF BILL LANN LEE

Mr. LEAHY. Mr. President, as the Senate considers possible amendments to the Vacancies Act, we have occasion to focus on the Senate's advice and consent role for all presidential nominations and the American people have an opportunity to review how well, or how badly, this Senate has fulfilled that constitutionally-mandated role.

It is important to explore ways to help the Executive Branch improve the process by which the President nominates, the Senate confirms and then the President appoints people to serve in important positions within the executive and judicial branches of our federal government. Indeed, I have often joined with Senator BYRD to defend the authority of the Senate on this issue and to protect the Senate's role against the executive encroachments by way of excessive use of the recess appointment power.

I recall when the Reagan and Bush administrations were abusing the power of recess appointment and note, by contrast, how sparingly President Clinton has used that constitutional authority. I am advised that while President Reagan made 239 recess appointments in 8 years and President Bush made 78 recess appointments in 4 years, President Clinton has used his recess appointment power only 45 times over the last 5 years.

I also recall how President Clinton acted with great restraint last year when he and the Attorney General joined to appoint Bill Lann Lee the Acting Assistant Attorney General for Civil Rights rather than using his power to make that a recess appointment.

Let us focus on the nomination of Bill Lann Lee. He was initially nominated to head the Civil Rights Division in July 1997. At the end of 1997, that nomination got caught up in one of the narrow, partisan-driven whirlwinds that hit Washington every now and then. The result was that the nomination became a victim of the anti-affirmative action lobby and was denied a vote by the full Senate. Bill Lee was mischaracterized last fall as a wild-eyed radical and as someone ready to impose an extreme agenda on the United States. He was misportrayed as a supporter of quotas. The Republican majority demonized this fine man and killed his nomination by denying him a Senate vote.

After looking at Bill Lee's record, I knew he was a man who could effectively lead the Civil Rights Division, enforce the law and resolve disputes. I reviewed his record of achievement and saw a practical, problem solver and noted last year that no one who has taken the time to review his record could call him an idealogue. I recognized that Bill Lee would be reasonable and practical in his approach to the job, and that he would be a top-notch enforcer of the Nation's civil rights laws.

Bill Lann Lee has been serving for almost 10 months now as the Acting Assistant Attorney General for Civil Rights, and he has established a solid track record. He is doing an outstanding job for all Americans. I have had a chance to take a close look at what he has been doing while serving as the acting head of the Civil Rights Division. What I find is a record of strong accomplishments. I see professionalism and effective problem solving. I find him enforcing the law in a sensible and fair manner.

Accordingly, I urge the Senate finally to consider the nomination of Bill Lann Lee and to confirm him to this important post. The President renominated Bill Lann Lee to be Assistant Attorney General in charge of the Civil Rights Division on January 29 of this year. Given his outstanding performance over the past 10 months, I urge the Senate to show him the fairness of a vote on his nomination. I am confident that when Senators consider his nomination and review his record, a majority of the United States Senate will vote to confirm this outstanding nominee.

It is to raise this matter to the attention of the American people and for action by the Senate, that I have filed an amendment to the Vacancies Reform Act bill to provide for a vote on the longstanding nomination of Bill Lann Lee before the Senate ends this year's session.

As we consider how to improve the Vacancies Act, the Senate would do well to consider its lack of action on the many outstanding nominations that the President has sent to us over the past several years on which the Senate has taken no vote. In addition to unprecedented delays in the consideration of judicial nominations—46 judicial nominations are pending and 22 are on the Senate calendar—there have been a number of executive branch nominations who have been denied consideration and a vote for many, many months.

Bill Lann Lee is an example. He was first nominated for the important position of Assistant Attorney General for Civil Rights on July 21, 1997, over 14 months ago. When no Senate vote was taken on his nomination last year, he was renominated on January 29, 1998. For the past 8 months his nomination has, again, been bottled up in committee.

This is an historic nomination. Bill Lann Lee is the first Asian-American to head the Civil Rights Division. He deserves to be confirmed by the Senate and to be accorded the full measure of recognition for all that he has achieved and all that he is doing on behalf of all Americans.

The Senate was denied the opportunity to vote on that nomination before adjournment in 1997. With one notable and courageous exception, the Republican majority of the Judiciary Committee would not report the nomination to the Senate so that the Senate could vote whether to confirm this outstanding nominee. Although the Republicans have a majority in the Senate, they have been unable to pass legislative proposals to undermine the nation's commitment to equal opportunity and civil rights. As a result, the Republican majority decided to stall the Lee nomination without a vote as a trophy to its extremist factions. This nomination could not be defeated in a fair up or down vote, so they determined to avoid that Senate vote altogether and at all costs.

I understand that Senator DURBIN, a thoughtful member of both the Senate Government Affairs Committee, from which this bill emerged, and the Senate Judiciary Committee, which refused to report the Lee nomination to the Senate for action, has filed a series of amendments to the Vacancies Reform Act to begin to deal with this aspect of the problem—Senate inaction on nominations. I will study those proposals with great interest.

I was disappointed this year that the Senate Judiciary Committee repeatedly postponed and eventually canceled hearings regarding the performance of the Civil Rights Division of the Justice Department under the leadership of Bill Lann Lee. I was disappointed because such a hearing would have offered us a chance to look at the outstanding on-the-job performance of our

Acting Assistant Attorney General for Civil Rights.

Over the past 10 months, the Division has focused most intensely on three areas of the law: violations of our Nation's fair housing laws, enforcement of the Americans with Disabilities Act (''ADA''), and cases involving hate crimes. Bill Lee and his team of civil rights attorneys have made advances in each of these areas of the law.

The Division has resolved a number of housing discrimination cases over the past few months, including the following: An agreement was reached with two large New Jersey apartment complexes resolving allegations that the defendants had discriminated against potential renters based on family status and race.

A housing discrimination case in Michigan was settled involving an apartment manager who told black applicants that no apartments were available at the same time that he was showing vacant apartments to white applicants. An agreement was also reached with the second largest real estate company in Alabama, which had been steering applicants to agents and residential areas based on race.

The Civil Rights Division has also focused on educating the public about the ADA and enforcing it where necessary. These cases have included: resolution of a case in Hawaii to allow those who are vision impaired to travel to the State without having to quarantine their guide dogs for four months in advance of arrival;

a consent decree with the National Collegiate Athletic Association so that high school athletes with learning disabilities have the opportunity to compete for scholarships and participate in college athletics; an agreement with private hospitals in Connecticut to ensure patients who are deaf have access to sign-language interpreters; and assistance to the State of Florida to update their building code to bring it into compliance with the ADA. Florida joins Maine, Texas and Washington State in having a certified building code thereby ensuring better compliance with the ADA by architects, builders and contractors within the State.

The Civil Rights Division has also resolved several hate crimes cases over the past 7 months, including:

In Idaho, six men pleaded guilty to engaging in a series of racially motivated attacks on Mexican American men, women and children, some as young as 9; in Arizona, three members of a skinhead group pleaded guilty to burning a cross in the front yard of an African American woman; and in Texas, a man pleaded guilty to entering a Jewish temple and firing several gun shots while shouting anti-Semitic slurs.

The Division has also been vigorously enforcing its criminal statutes, including: indictments against three people in Arkansas charged with church burning; guilty pleas by 16 Puerto Rico correctional officers who beat 22 inmates and then tried to cover it up; cases arising from Mexican women and girls, some as young as 14, being lured to the U.S. and then being forced into prostitution; and guilty pleas from 18 defendants who forced 60 deaf Mexican nationals to sell trinkets on the streets of New York. Out of concerns about slavery continuing in the U.S., Bill Lann Lee has created a Worker Exploitation Task Force to coordinate enforcement efforts with the Department of Labor. I commend the Acting Assistant Attorney General for putting the spotlight on these shameful crimes.

Other significant cases which the Civil Rights Division has handled in the past few months include the following: several long-standing school desegregation cases were settled or their consent decrees were terminated, including cases in Kansas City, Kansas; San Juan County, Utah; and Indianapolis, Indiana. Japanese-Latin Americans who were deported and interned in the United States during World War II finally received compensation this year. Lawsuits in Ohio and Washington, D.C. were settled to allow women access to women's health clinics.

The record establishes that Bill Lann Lee has been running the Division the way it should be run. Here in Washington, where we have lots of show horses, Bill Lee is a work horse—a dedicated public official who is working hard to help solve our Nation's problems. I commend him and the many hard-working professionals at the Civil Rights Division.

Bill Lee has served as acting head of the Civil Rights Division for 10 months now. Given the claims made by many in the Senate last fall that Mr. Lee would lead the Division astray, you might expect that he would be in the headlines every day associated with some extreme decision. Instead, we have seen the strong and steady work of the Division—solid achievements and effective law enforcement.

A few weeks ago, I received a letter from Governor Zell Miller of Georgia that is emblematic of the record that Bill Lee has established. Governor Miller discusses Bill Lee's efficient and effective ability to settle an action which involved Georgia's juvenile detention facilities. He notes that he was not exactly a fan of the Civil Rights Division before Bill Lee came along and writes that he ''was fearful that Georgia would be unable to get a fair forum in which to present our position, and that we would once again be compelled to engage in protracted and expensive litigation.'' Governor Miller writes that his fears were unfounded, that the parties engaged in ''intensive and expeditious negotiations'' and reached a fair agreement. Governor Miller also notes:

I have indicated to Mr. Lee both personally and publicly that he and his staff treated Georgia with professionalism, fairness, and respect during our negotiations. Under the direction of Bill Lann Lee, what began as a potentially divisive and litigious process was transformed into an atmosphere where the State was able to have its case heard fairly, resulting in a reasonable agreement benefiting all parties. This is the way in which the Civil Rights Division should operate in its dealings with the states, and I am pleased to commend Mr. Lee and his staff for their efforts in this matter.

The Acting Assistant Attorney General continues to build on his reputation as a professional and effective negotiator, who routinely earns praise from opposing parties. I had high expectations for Bill Lann Lee when he was nominated and I have not been disappointed. He is doing a terrific job. It is time for the Senate to end his second-class status and confirm him.

We need Bill Lee's proven problem-solving abilities in these difficult times. It is wrong for the Senate to ignore his nomination any longer and a shameful slight to him, to his family and to all who care about fairness and equal rights.

I remember vividly when Mr. Lee appeared at his confirmation hearing almost one year ago. He testified candidly about his views, his work and his values. He understood that as the Assistant Attorney General for the Civil Rights Division his client is the United States and all of its people. He told us poignantly about why he became a person who has dedicated his life to equal justice for all when he spoke of the treatment that his parents received as immigrants.

Mr. Lee told us how in spite of his father's personal treatment and experiences, William Lee remained a fierce American patriot, volunteered to serve in the United States Army Air Corps in World War II and never lost his belief in America. He inspired his son and Bill now inspires his own children and countless others across the land. Mr. Lee noted:

My father is my hero, but I confess that I found it difficult for many years to appreciate his unflinching patriotism in the face of daily indignities. In my youth, I did not understand how he could remain so deeply grateful to a country where he and my mother faced so much intolerance. But I began to appreciate that the vision he had of being an American was a vision so compelling that he could set aside the momentary ugliness. He knew that the basic American tenet of equality of opportunity is the bedrock of our society.

Bill Lann Lee has remained true to all that his father and mother taught him. I continue to work to end the ugliness of Senate inaction on his nomination. If opponents want to distort his achievements and mischaracterize his beliefs, let them at least have the decency to engage in that debate on the floor of the Senate so that this long-standing nomination can be acted upon—either vote it up or vote it down, but vote on it. His career of good works and current efforts should not be rewarded with continued ugliness. Such treatment drives good people from public service and distorts the role of the Senate. I have often referred to the Senate as acting at its best when it serves as the conscience of the nation. In this case, I am afraid that the Senate has shown no conscience.

Bill Lann Lee is a man of integrity, of honesty and of fairness. Born in Harlem, to Chinese immigrant parents, he has lived the American dream and stayed faithful to American values. He has done nothing to justify the unfair treatment by the Senate.

As a child he worked in his parents' laundry after school. He went on to graduate magna cum laude from Yale College and to obtain a law degree from Columbia University. Bill Lann Lee has spent his life helping others—helping them to keep their jobs, to keep their homes, to have a chance at a well-earned promotion and to raise healthy children.

As western regional counsel for the NAACP Legal Defense Fund, a public interest law firm founded by Thurgood Marshall in 1939, Mr. Lee litigated hundreds of cases ranging from employment discrimination claims to efforts to ensure probation offices are widely dispersed throughout Los Angeles to ensuring that poor children are tested for lead poisoning. His extensive experience and renowned skill at settling cases has served him well as Acting Assistant Attorney General for the Civil Rights Division.

Most impressive is the array of former opposing counsels and parties who support Mr. Lee's nomination. In addition to Governor Miller, consider the words of Los Angeles Mayor Richard Riordan: Our ''negotiations could not have concluded successfully without Mr. Lee's practical leadership and expertise.'' I believe Mayor Riordan's enthusiastic support and assurance that Mr. Lee has ''practiced mainstream civil rights law'' should carry some weight.

Mr. Lee is a top quality candidate. He has all the essential qualities for this job—a legal career devoted to top-notch civil rights work, an outstanding degree of integrity and a commitment to practical solutions. This year he also has a proven track record as the Acting Assistant Attorney General.

No one can argue that the President has sent to us a person not qualified by experience to lead the Civil Rights Division. Bill Lee's record of achievement is exemplary. He is a man of integrity and honor and when he said to this Committee that quotas are illegal and wrong and that he would enforce the law, no one should have any doubt about his resolve to do what is right. The Senate should vote on this outstanding nominee. He is the right person to lead the Civil Rights Division into the next century. We need his proven problem-solving abilities in these difficult times.

Unfortunately, last year's consideration of this outstanding nominee took a decidedly partisan turn when the Speaker of the House chose to intervene in this matter and urge the Senate Republican Leader to kill this nomination. In his unfortunate letter, Speaker GINGRICH unfairly criticized Mr. Lee and accused him of unethical conduct. The allegations of wrongdoing carelessly lodged against Mr. Lee are contradicted by the Republican Mayor of Los Angeles, Richard Riordan, as well as the Vice-President of the Los Angeles Police Commission, T. Warren Jackson, the Assistant City Attorney, Robert Cramer, and the City Attorney, James K. Hahn, but the damage had been done.

I recall when times were different. I recall when charges were raised against Clarence Thomas and the Judiciary Committee held several days of additional hearings after that nomination had already been reported by the Judiciary Committee to the full Senate. There was a tie vote in Committee on the Thomas nomination, which would not have even been reported to the Senate had we not also voted virtually unanimously, with six Democrats joining seven Republicans, to report the Thomas nomination to the floor without recommendation. Of course, ultimately the nomination of Judge Thomas to become Justice Thomas was confirmed by the Senate.

It remains my hope that the Senate will now give Bill Lann Lee the same fairness that we showed Clarence Thomas and allow his nomination to be voted upon by the United States Senate. It would be ironic if, after the Senate proceeded to debate and vote on the Thomas nomination—one that included charges that he engaged in sexual harassment—the Republican leadership prevented the Senate from considering a nominee because he has worked to remedy sexual harassment and gender discrimination.

After consultation with Senators, the President acted after Congress's adjournment last fall to name Bill Lann Lee the Acting Assistant Attorney General for Civil Rights. The President then followed through on his commitments and renominated this distinguished civil rights attorney and public servant on January 29, 1998. This Senate is now approaching adjournment, again, and, again, the Senate is not voting whether to confirm or reject this nomination. The President has fulfilled his end of the bargain and acted with restraint and respect in this regard. The Senate has done nothing with respect to this nomination but ignore it. So, when we criticize this President for not sending up nominees fast enough, let us not forget that the Senate has now had ample opportunity for over two years to act on the nomination of Bill Lann Lee and the Senate has not.

Last year, I was honored to stand on the steps to the Lincoln Memorial, where the Rev. Martin Luther King Jr. spoke 35 years ago and inspired the nation toward the promise of equality. I heard our colleagues Senator KENNEDY and Senator FEINSTEIN speak about the continuing struggle to provide equal opportunity to all Americans. I took inspiration from the wisdom of Rep. JOHN LEWIS whose compass is ever true on these matters. We heard Rep. MAXINE WATERS declare in no uncertain terms the support of the Congressional Black Caucus for Bill Lann Lee, Representative PATSY MINK take pride in reiterating the support of the Congressional Asian Pacific Caucus and Representative XAVIER BECERRA add the support of the Congressional Hispanic Caucus.

I heard Justin Dart, a dedicated public servant who worked with President's Reagan and Bush, declare that people with disabilities support Bill Lann Lee and Representative BOB MATSUI recount the dark days before the civil rights laws when his family had to suffer the indignity of internment because of the Japanese ancestry.

Just last week when Congress presented Nelson Mandela with the Congressional Gold Medal, we drew upon the American tradition of Lincoln, King and so many who labored long and sacrificed much in the struggle toward equality for all Americans. We honored that past last week. We could extend it today by taking up and voting upon the nomination of Bill Lann Lee to be Assistant Attorney General for the Civil Rights Division. I call upon the party of Lincoln to be fair to Lee and vote on this nomination.

Let the Senate debate and vote on the nomination of Bill Lann Lee. If the Senate is allowed to decide, I believe he will be confirmed and will move this country forward to a time when discrimination will subside and affirmative action is no longer needed; a time when each child—girl or boy, black or white, rich or poor, urban or rural, regardless of national or ethnic origin and regardless of sexual orientation or disability—shall have a fair and equal opportunity to live the American dream.

JUDICIAL NOMINATIONS

Mr. President, as we debate how to change federal law to require executive nominations within certain time frames and to preclude responsibilities from been fulfilled when a confirmed nominee is not present, we also need to consider how the Senate fulfills its duties with regard to nominees who have been before us for many months without Senate action. Since July I have been comparing the Senate's pace in confirming much-needed federal judges to Mark McGwire's home run pace. As the regular season ended over the weekend, Mark McGwire's home run total reached 70. Unfortunately, the Senate's judicial confirmation total remains stalled at 39.

As recently as 1994, the last year in which the Senate majority was Democratic, the Senate confirmed 101 judges. It has taken the Republican Senate 3 years to reach the century mark for judicial confirmations—to accomplish what we did in one session.

The Senate went ''0 for August,'' risks going ''0 for September'' and is threatening to go ''0 for the rest of the year.'' Indeed, I have heard some say that the Republican Senate will refuse to confirm any more nominations all year. That would be wrong and would

certainly harm the administration of justice and perpetuate the judicial vacancies crisis. Senate action has not even kept up with normal attrition over the past 2 years, let alone made a real difference in filling longstanding judicial vacancies. Both the Second Circuit and the Ninth Circuit have had to cancel hearings due to judicial vacancies. Chief Judge Winter of the Second Circuit has had to declare a circuit emergency and to proceed with only one circuit judge on their 3-judge panels. Recently, he has had to extend that certification of emergency.

Yet in spite of that emergency, the Senate continues to stall the nomination of Judge Sonia Sotomayor to the Second Circuit. Her nomination has been stalled on the Senate calendar for over six months. Chief Judge Winter's most recent annual report noted that the Circuit now has the greatest backlog it has ever had, due to the multiple vacancies that have plagued that court.

For a time Judge Sotomayor's nomination was being delayed because some feared that she might be considered as a possible replacement for Justice Stevens, should he choose to resign from the Supreme Court. After the Supreme Court term had ended and Justice Stevens had not resigned, the Senate might have been expected to proceed to consider her nomination to the Second Circuit on its merits and confirm her without additional, unnecessary delay. Unfortunately, that has not been the case.

When confirmed she will be only the second woman and second judge of Puerto Rican descent to serve on the Second Circuit. Just as Sammy Sosa is a source of great pride to the Dominican Republic and to Latin players and fans everywhere, Judge Sotomayor is a source of pride to Puerto Rican and other Hispanic supporters and to women everywhere.

Judge Sonia Sotomayor is a qualified nominee who was confirmed to the United States District Court for the Southern District of New York in 1992 after being nominated by President Bush. She attended Princeton University and Yale Law School. She worked for over 4 years in the New York District Attorney's Office as an Assistant District Attorney and was in private practice with Pavia & Harcourt in New York. She is strongly support by Senators MOYNIHAN and D'AMATO.

I note that one of her recent decisions, Bartlett v. New York State Board of Law Examiners, that had been criticized by her opponents, was affirmed in principal part on September 14 by a unanimous panel of the Second Circuit. In an opinion written by Judge Meskill, the Court agreed ''with the district court's ultimate conclusion that Dr. Bartlett, who has fought an uphill battle with a reading disorder throughout her education, is among those for whom Congress provided protection under the ADA and the Rehabilitation Act.'' In this, as in her other decisions that opponents seek to criticize, Judge Sotomayor applies the law. That is what judges are supposed to do. This affirmance belies the charge that she is or will be a judicial activist.

Ironically, it was Judge Sotomayor who issued a key decision in 1995 that brought an end to the work stoppage in major league baseball. If only the breaking of the single season home run record could signal the end of the work stoppage in the Senate with respect to her nomination.

Instead of sustained effort by the Senate to close the judicial vacancies gap, we have seen extensive delays continued and unexplained and anonymous ''holds'' become regular order.

I began this year challenging the Senate to maintain the pace it achieved at the end of last year when 27 judges were confirmed in the last nine weeks. Instead, the Senate has confirmed only 39 judicial nominees in 25 weeks in session. Had the Senate merely maintained the pace that it set at the end of last year, the Senate would have confirmed 75 judges—not 39 judges—by now.

We have 22 qualified nominees on the Senate calendar awaiting action. Including those still pending before the Committee, we have a total of 46 judicial nominations awaiting action, some of whom were first received over three years ago.

The Senate continues to tolerate upwards of 75 vacancies in the federal courts with more on the horizon—almost one in 10 judgeships remains unfilled and, from the looks of things, will remain unfilled into the future. The Senate needs to proceed more promptly to consider nominees reported to it and to do a better job fulfilling its constitutional responsibility of advice and consent.

Unfortunately, the record that the Senate is on pace to set this year with respect to judicial nominations is the record for the amount of time it takes to be confirmed once the nomination is received by the Senate. For those few nominees lucky enough to be confirmed as federal judges, the average number of days for the Senate confirmation process has continued to escalate. In 1996, that number rose to a record 183 days on average. Last year, the average number of days from nomination to confirmation rose dramatically yet again. From initial nomination to confirmation, the average time it took for Senate action on the 36 judges confirmed in 1997 broke the 200-day barrier for the first time in our history. It was 212 days.

The time is still growing and the average is still rising, to the detriment of the administration of justice. The average time from nomination to confirmation for judges confirmed this year is 259 days. That is three times as long as it was taking before this partisan slowdown.

I have urged those who have been stalling the consideration of the President's judicial nominations to reconsider and work to fulfil this constitutional responsibility. Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges.

The federal judiciary's workload was at least 60 percent lower than it is today when the Reagan-Bush administrations took office. The federal court's criminal docket alone is up from 28,921 cases in 1980 to 50,363 last year. That is an increase of over 70 percent in the criminal case filings in the federal courts.

During the Reagan and Bush administrations, whether it had a Democratic or Republican majority, the Senate promptly considered and confirmed judges and authorized 167 new judgeships in response to the increasing workload of the federal judiciary. While authorized judgeships have increased in number by 25 percent since 1980, the workload of the federal courts has grown by over 60 percent during the same period. That is why the prolonged vacancies being perpetuated by delays in the confirmation process are creating such strains within the federal courts.

Unlike other periods in which judicial vacancies could be attributed to newly-created judgeships, during the past four years the vacancies crisis has been created by the Senate's failure to move quickly to consider nominees to longstanding vacancies.

In the early and mid-1980's, vacancies were between 25 and 34 at the beginning of each session of Congress. By the fall of 1983, the vacancies for the entire federal judiciary had been reduced to only 16.

With attrition and the 85 new judgeships created in 1984, vacancies reached 123 at the beginning of President Reagan's second term, but those vacancies were reduced to only 33 within two years, by the fall of 1986. A Democratic Senate in 1987 and 1988 reduced the vacancies still further to only 23 at the end of the 100th Congress.

It was not until additional judgeships were created in 1990 that the next significant increase in vacancies occurred and then, again, a Democratic Senate responsibly set about the task of helping fill those vacancies with qualified nominees. Although President Bush was notoriously slow to nominate, the Democratic Senate confirmed 124 nominees in President Bush's last two years in office and cut the vacancies in half.

With respect to the question of vacancies, it is also important to note that in 1997 the Judiciary Conference of the United States requested an additional 53 judgeships be created. The Republican Congress has refused to consider that workload justified request. My bill to meet that request, S. 678, the Federal Judgeship Act of 1997, has received no attention since I introduced it over a year ago. Had those additional judgeships been created, as

they were in 1984 and 1990 under Republican Presidents, current judicial vacancies would number 128 and total almost 14 percent of the federal judiciary.

Last week Senator GRAHAM spoke about authorizing the additional District Court judges recommended by the Judicial Conference and needed around the country. These are the judges who try federal criminal cases and hear complex federal civil litigation. Given the Republican Senate's tenacious refusal to consider and confirm judges for the vacancies that currently exist, it seems unlikely that the Republican majority would be willing to authorize the additional federal judicial resources that are needed around the country. That is a shame. The Senator from Florida is right to try and I join him in his efforts.

No one should take comfort from the number of confirmations achieved so far this year. It is only in comparison to the dismal achievements of the last two years that 39 confirmations could be seen as an improvement. The President has been doing a better job of sending the Senate scores of nominees more promptly. Unfortunately, qualified and capable nominees are still being delayed too long and stalled.

I have pledged to continue to work to end the judicial vacancies crisis and to support efforts to provide the federal judiciary with the resources it needs to handle its growing caseload and serve the American people.

When the Senate is asked to consider amendments to the Vacancies Act, it should also reconsider its own inaction on the many outstanding nominees that the President has sent the Senate and that the Senate is refusing to consider.

Indeed, earlier this year I proposed a bill that requires the Senate to vote on nominations for Court of Appeals vacancies that created an emergency under federal law. The week after Chief Judge Winter of the Second Circuit certified such an emergency last spring, I introduced the Judicial Emergency Responsibility Act, S. 1906. The purpose of this bill is to supplement the law by which Chief Justice Winter certified the judicial emergency, a judicial emergency that still persists in the Second Circuit, and to require the Senate to do its duty and to act on judicial nominations before it recesses for significant stretches of time. The Senate should not be taking vacations when a Circuit Court is suffering from a vacancy emergency.

I introduced the bill just before the Senate adjourned for a 2-week recess and I urged prompt action on the nominations then pending to fill those Second Circuit vacancies. At that time, the nomination of Judge Sonia Sotomayor was among those favorably reported and had been on the Senate Calendar awaiting action for a month. That was five months ago. Still, there has not been any action.

I did not believe that the Senate should be leaving for a two-week recess in April or a four-week recess in August and leaving the Second Circuit with vacancies for which it had qualified nominations pending. I do not believe that the Senate should adjourn this year without voting on the many qualified judicial nominees that have been pending before the Senate for so long without action. I have been urging action on the nominees to the Second Circuit for more than a year. The Senate is failing in its obligations to the people of the Second Circuit, to the people of New York, Connecticut and Vermont. We should call an end to this stall and take action.

I intend to consult with the managers of the bill, but believe that I should offer S. 1906 as an amendment to the pending measure.

What the Senate is proceeding to do to the judicial branch in refusing to vote on nominees and perpetuating judicial vacancies is too reminiscent of the government shutdown only a couple of years ago and the numerous times of late when the Republican congressional leadership has recessed without completing work on emergency supplemental and disaster relief legislation. As we approach the end of the session, the Republican Congress has yet to pass a budget or enact the 13 annual appropriations bills that are our responsibility. Must we wait for the administration of justice to disintegrate further before the Senate will take this crisis seriously and act on the nominees pending before it? I hope not.

I look forward to Senate debate on suggestions to impose responsibility upon itself in its treatment of judicial nominations.

The PRESIDING OFFICER. Who yields time?

Mr. LIEBERMAN addressed the Chair.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. LIEBERMAN. I thank the Chair.

Mr. President, I yield myself up to 10 minutes from the time allocated to Senator LEVIN.

The PRESIDING OFFICER. The Senator from Connecticut is recognized.

Mr. LIEBERMAN. I thank the Chair.

Mr. President, let me say at the outset that the bill before us addresses a very important problem, which is to say the need to protect the Senate's constitutional role in the appointment of Federal officers. The Constitution, as my colleagues have indicated, provides that the President's power to appoint officers of the United States is to be exercised ''by and with the Advice and Consent of the Senate. . . .''

Unfortunately, in too many cases over the course of the past several administrations, the Senate's constitutional prerogatives have too often been ignored through the executive's far-too-common practice of appointing acting officials to serve lengthy periods in positions that are supposed to be filled with individuals confirmed by the Senate. I think it is, therefore, entirely appropriate—indeed necessary—for Congress to act to remedy this situation.

I appreciate very much the leadership given by the Senator from West Virginia, the Senator from South Carolina, and the chairman of our committee, the Senator from Tennessee. I also appreciate those Senators' willingness to work with the members of the Governmental Affairs Committee, including this Senator, to accommodate some of the concerns we have had as the bill moved through committee.

The fact is, throughout that whole period of time, the effort to reform the Vacancies Act has been a truly bipartisan one, as it should be. Even though I believe there are some problems remaining with the bill, I also am confident that the process of resolving those problems has been conducted in good faith and with fairness on all sides.

I therefore regret that, along with many of my colleagues, I find myself in the situation I am today, which is to say, prepared to vote against cloture on this bill, because I believe there remain serious substantive problems with the bill, and the procedural situation we are in now with a cloture motion having been filed in an attempt to limit debate will frustrate our ability to work together to solve some of those remaining problems.

I think it is particularly unfortunate that we find ourselves in this position on this bill because I am confident that, were we not forced immediately into a cloture vote, we likely could work out the problems that remain with the bill. It remains my hope, if cloture is not obtained on the vote that will occur in a little more than 10 minutes, that we can continue to work together to achieve a unanimous consent agreement that will allow perhaps for amendments that are relevant, if not germane, according to the procedures of the Senate.

Let me briefly give an example of one of the problems that I think remains with the bill which is of concern to some. As the bill is currently drafted, only one of two individuals can serve as acting officials in the case of a vacancy: Either the first assistant to the vacant position, a term of art that generally refers to the top deputy; or someone already confirmed by the Senate for another position. Because individuals holding Senate-confirmed positions already have a lot to do, it almost always will be the first assistant who takes over as the acting.

But, by the terms of the bill, a first assistant apparently can take over only if he or she was the first assistant at the time of the vacancy. This severe limitation on the universe of individuals who may serve as acting is, in my view, a mistake that could be harmful to the functioning of the executive branch because it will have the effect of forcing many important positions to remain vacant, potentially for several months at a time. That is because

there are many times when a vacancy occurs at a time that the first assistant position is also vacant.

There may be other times when a first assistant, who was there when the vacancy occurred, may want to leave his or her job during the pendency of that vacancy. In both situations, as I read the literal terms of the bill as it is before us, it would require that during the duration of the vacancy, which could be many months long, we would be requiring that no one other than people who had already been confirmed for other positions would be eligible to serve as the acting in the vacant position. We would be effectively denying the executive branch the ability to put someone else in that position on an acting basis.

Also troubling is what can happen when a new President comes into office. If individuals in Senate-confirmed positions leave before the new President takes office, as often happens, then the only people who would be qualified to serve as acting officials as the new administration gets off the ground, because they were the first assistants at the time of the vacancy, are holdovers, often political appointees from the previous administration. That could create an awkward situation that would require a new administration to staff itself with a previous administration's political appointees.

I am confident that we could work this problem out were the bill to come to the floor under the normal processes. But, unfortunately, in the posture that it is now in, it is not so.

So I must say I again will vote against cloture, but I do remain hopeful that if cloture is not granted on this next vote, we will be able to find a way together to continue the bipartisan path that this bill has taken, until this moment when it has reached the Senate floor, and find a way to find a common ground to move forward with this bill on which a lot of work has been done, and, though it is detailed and intricate, in which the public interest finds a great expression.

I thank the Chair and yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. THOMPSON. May I inquire how much time remains?

The PRESIDING OFFICER. The Senator from Tennessee controls 4 minutes. The Senator from Michigan controls 8 minutes 23 seconds.

Mr. THOMPSON. I ask the Senator from West Virginia if he has additional comments.

I yield myself 2 minutes.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. A couple quick points.

My friend from Connecticut makes good points, as usual. I point out, though, that the concern about, someone could not be a first assistant if they had not been there for so many days, that would not keep them from being the acting officer. If they were appointed to the permanent position, they would have needed to have been there for 90 days. But just to be the acting officer, anyone who serves in that position would become the acting officer without having been there any length of time.

With regard to the second concern with regard to a new administration, my understanding is there is always a holdover person who is a Senate-confirmed person who traditionally takes care of those problems—essentially the same situation we have had for the last 130 years with regard to those concerns, I believe.

I yield the Senator from West Virginia the remainder of my time, which I think is probably 2, 3 minutes.

Mr. BYRD addressed the Chair.

The PRESIDING OFFICER. The Senator from West Virginia is recognized.

Mr. BYRD. Mr. President, I again thank the distinguished chairman for his outstanding service that he has performed in the interest of the Constitution, the interest of this institution, and the interest of the liberties of the people which we are all trying to protect in this measure.

Mr. President, I believe there—we only have less than 2 minutes; is that right?

The PRESIDING OFFICER. The Senator has 2½ minutes remaining.

Mr. BYRD. How much time does the distinguished Senator from Connecticut wish to——

The PRESIDING OFFICER. The Senator has 8 minutes remaining.

Mr. BYRD. If the distinguished Senator from Connecticut will yield me a little of his time.

Mr. LIEBERMAN. I yield the Senator as much time as he wants.

Mr. BYRD. Mr. President, I am reminded of that situation which occurred in 63 B.C. Sallustius writes about. And it is referred to as the conspiracy of Catiline. After Caesar had spoken in the Roman senate, protesting against the death penalty for the conspirators, for the accomplices of Catiline, Cato the Younger was called upon by Cicero, the consul, to speak. Cato demanded that the accomplices of Catiline be put to death under the ancient laws of the republic.

From Cato's speech I quote only the following strain: ''Do not think that it was by arms that our ancestors raised the state from so small beginnings to such grandeur, but there were other things from which they derived their greatness. They were industrious at home, just rulers abroad, and into the Senate Chamber they brought untrammeled minds, not enslaved by passion.''

Now, Mr. President, I urge my colleagues in the Senate not to let their minds be trammeled with passion. Keep them untrammeled and focused on the injury that is being done to the Senate by the executive department in the flaunting and circumventing of the appointments clause, which this legislation addresses and is intended to secure for the Senate its rights and prerogatives under the Constitution.

Democrats and Republicans who reverence the Constitution and who pride themselves in having been given the honor to serve in this institution—the legislative branch—I hope will stand up for the institution and bind ourselves to the mast of the Constitution, as did Odysseus when the divine Circe bade him to stay away from the Sirens' isle.

I hope that we will keep in mind that we are making several improvements in this bill as it is written. And as the distinguished chairman of the Governmental Affairs Committee has so eloquently pointed out within the last few minutes, even without amendments this bill is a liberal advancement—liberal from the standpoint of the administration, whatever administration it might be, Democratic or Republican. It gives more time to the administration.

So if we turn down this opportunity, I hope the opportunity will come again. But if it does not, then the administration is the loser, as well as the Senate—but the Senate is the greater loser because of the constitutional requirements under the appointments clause which give the Senate a share in the appointments of individuals to important positions in the executive branch and the judicial branch.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut has 6 minutes remaining.

Mr. LIEBERMAN. I thank the Chair.

PRIVILEGE OF THE FLOOR

Mr. LIEBERMAN. I rise simply to make an unrelated motion. I ask unanimous consent that privileges of the floor be granted to Laureen Daly of my staff during the pendency of S. 442 and H.R. 3529.

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

Mr. LIEBERMAN. I thank the Chair.

Mr. President, I think on this side we have spoken our piece. For the reasons indicated, we hope that our colleagues will vote against cloture and then that both sides can come together to achieve common ground and pass this important piece of legislation.

I, therefore, yield back the remaining time from our side.

The PRESIDING OFFICER. All time is yielded back.

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provision of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on S. 2176, the Vacancies Act:

Trent Lott, Strom Thurmond, Charles Grassley, Thad Cochran, Wayne Allard, Ben Nighthorse Campbell, Don Nickles, Orrin G. Hatch, Pat Roberts, Tim

Hutchinson, Richard Shelby, Conrad Burns, Jim Inhofe, Connie Mack, Fred Thompson, Spencer Abraham.

CALL OF THE ROLL

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

VOTE

The PRESIDING OFFICER. The question is, Is it the sense of the Senate that debate on Senate bill 2176, the Federal Vacancies Reform Act of 1998, shall be brought to a close? The yeas and nays are required under the rule. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Missouri (Mr. BOND), the Senator from New York (Mr. D'AMATO), and the Senator from Alabama (Mr. SESSIONS) are necessarily absent.

Mr. FORD. I announce that the Senator from South Carolina (Mr. HOLLINGS), the Senator from Massachusetts (Mr. KENNEDY), the Senator from Illinois (Ms. MOSELEY-BRAUN), the Senator from Nevada (Mr. REID), the Senator from New Jersey (Mr. TORRICELLI), and the Senator from Oregon (Mr. WYDEN) are necessarily absent.

I further announce that, if present and voting, the Senator from Nevada (Mr. REID) would vote ''no.''

The yeas and nays resulted—yeas 53, nays 38, as follows:

[Rollcall Vote No. 289 Leg.]

YEAS—53

Abraham	Frist	McCain
Allard	Gorton	McConnell
Ashcroft	Gramm	Murkowski
Bennett	Grams	Nickles
Brownback	Grassley	Roberts
Burns	Gregg	Roth
Byrd	Hagel	Santorum
Campbell	Hatch	Shelby
Chafee	Helms	Smith (NH)
Coats	Hutchinson	Smith (OR)
Cochran	Hutchison	Snowe
Collins	Inhofe	Specter
Coverdell	Jeffords	Stevens
Craig	Kempthorne	Thomas
DeWine	Kyl	Thompson
Domenici	Lott	Thurmond
Enzi	Lugar	Warner
Faircloth	Mack	

NAYS—38

Akaka	Durbin	Lautenberg
Baucus	Feingold	Leahy
Biden	Feinstein	Levin
Bingaman	Ford	Lieberman
Boxer	Glenn	Mikulski
Breaux	Graham	Moynihan
Bryan	Harkin	Murray
Bumpers	Inouye	Reed
Cleland	Johnson	Robb
Conrad	Kerrey	Rockefeller
Daschle	Kerry	Sarbanes
Dodd	Kohl	Wellstone
Dorgan	Landrieu	

NOT VOTING—9

Bond	Kennedy	Sessions
D'Amato	Moseley-Braun	Torricelli
Hollings	Reid	Wyden

The PRESIDING OFFICER. On this vote, the yeas are 53, the nays are 38. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is not agreed to.

The majority leader is recognized.

UNANIMOUS-CONSENT AGREEMENTS

Mr. LOTT. Mr. President, I ask unanimous consent that at 10 a.m. on Tuesday, September 29, and notwithstanding rule XXII, the Senate proceed to the consideration of a conference report to accompany H.R. 6, the Higher Education Act, and there be 30 minutes equally divided for debate on the report.

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

Mr. LOTT. I further ask unanimous consent that following the debate on the education conference report, it be temporarily set aside and the Senate return to the consideration of the conference report to accompany H.R. 4013, the Department of Defense appropriations bill and there be 10 minutes of debate equally divided on that report.

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

Mr. LOTT. I further ask unanimous consent that following debate on the defense conference report, it be temporarily set aside and the Senate then proceed to vote on adoption of the higher education conference report, to be followed immediately by a vote on the adoption of the defense conference report.

And finally, I ask unanimous consent that the cloture vote on the motion to proceed to the Internet tax bill occur immediately following the aforementioned stacked votes.

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

Mr. LOTT. Further, I ask unanimous consent that all votes following the first vote on Tuesday morning be limited to 10 minutes in length.

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

Mr. LOTT. Finally, I ask unanimous consent that following the last vote in the stacked sequence Tuesday morning, there be a period of morning business until 12:30 p.m., with the time equally divided between Senators WELLSTONE and JEFFORDS, or their designees; further that when the Senate reconvenes at 2:15, there be an additional period for morning business until 3:15 p.m. equally divided between the two aforementioned Senators, or their designees.

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

Mr. LOTT. Mr. President, I note that the time that we have designated here for Senators JEFFORDS and WELLSTONE is so that they can go over the final details of what is included in the higher education bill. This is a very important bill, a lot of good work has been done, and I commend all the Senators involved for completing that.

I yield the floor.

MORNING BUSINESS

Mr. LOTT. Mr. President, I ask unanimous consent that there now be a period for the transaction of morning business with Senators permitted to speak for up to 10 minutes each until 7 p.m.

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

Mr. DOMENICI addressed the Chair.

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

ENERGY AND WATER APPROPRIATIONS HOLD

Mr. DOMENICI. Mr. President, I note the presence of the minority leader in the Chamber. I wish to state for the Senate that I understand the Energy and Water appropriations bill has a hold on the minority side, and I wanted to say if it has to do with the Tennessee Valley Authority, I would like very much to discuss that with the Senator because there is nothing we can do about it in this bill. But there is another thing we are going to do in another bill, and we would like to share that with you, whoever has the hold. I would very much like to do that. If that is the only hold, we can't fix the bill as far as TVA, but we can take some action to try to alleviate the problem in another way before we leave.

I yield the floor.

Mr. DASCHLE. Mr. President, let me just respond to the distinguished Senator from New Mexico. I have discussed—

Mr. FORD. Mr. President, may we have order.

The PRESIDING OFFICER (Mr. ALLARD). The Senate will please come to order.

Mr. DASCHLE. I have discussed the matter with the Senator who has the hold, and I think there will be some effort made to resolve the matter either tonight or tomorrow morning, so we will proceed with every expectation we can come to some resolution soon.

Mr. DOMENICI. I thank the Senator.

Mr. DASCHLE. I yield the floor.

ACCESS TO CHINESE MARKETS

Mr. GORTON. Mr. President, it looks like the administration has just experienced a tardy but welcome revelation, Mr. President. After 6 years of coddling its rulers and selling out U.S. exporters, some in the administration are now beginning to realize that ''engagement'' has not moved China toward free trade but to greater protectionism.

The $50 billion a year and growing bilateral United States trade deficit, the largest with any trading partner in the world but Japan, wasn't enough. The continued and egregious market access barriers to U.S. agricultural products weren't enough. The defiant stance against WTO negotiators wasn't enough. And the flagrant violation of the intellectual property rights of the American software and entertainment industries wasn't enough.

But finally, China has pushed at least one member of the administration too far. The straw that broke the camel's