Mr. SANTORUM. I will get the answer to the first question. I do not have the answer, but I will get that, No. 1. No. 2, this is different than the Nebraska statute. In fact, it was drafted in response to the Supreme Court's ruling in the Carhart v. Stenberg case.

To the other question, have there been hearings conducted about it, the answer is, no, there have not been hearings in the Senate. I do not know whether the House has conducted hearings on this language or not, but I can certainly find that out.

We are making the case and we will continue to make the case, and I assume those who oppose this legislation will make their case, as to the constitutionality of this legislation in its amended form that was struck down by the U.S. Supreme Court. I will go through those arguments repeatedly. I do not have time now because we only have about 5 minutes and I do have some other things I want to say.

Clearly, we believe we have addressed the issue of health. The Supreme Court, in the Carhart v. Stenberg case, took the record of the lower court. The lower court found that the health exception was needed based on the record, and the U.S. Supreme Court took the findings of fact from the district court and applied the standard that they would apply to this case, that the district court was clearly erroneous in coming to that decision. They did not find that standard to be met and so they accepted the underlying premise.

Congress has, on repeated occasions, made findings of fact in preparation for review by the courts, and in a vast number of these cases, the courts have been very deferential to Congress, as a body, that gets into much more detail through the process of hearings. We have had numerous hearings about this procedure in both the Senate and the House.

So while the Senator from Illinois has asked if we have had any recent hearings, we have had plenty of hearings on this issue and plenty of hearings about the medical necessity of this procedure. I ask the Senator from Illinois or any Senator who opposes this legislation, please come to the floor and present one case where this procedure is medically necessary. I do not think we need any more hearings. All I need is one case where this procedure would be medically necessary. In 7 years, no one has come to the floor of the Senate, no one has come to a hearing, no one has come before a hearing, no one has come anywhere, publicly, privately or otherwise, and presented a case where this is medically necessary for the health of the mother. So if there are no cases where it is medically necessary for the health of the mother, it is by definition outside of the rubric of Roe v. Wade. Now, that is a finding of Congress. That is a finding of Congress that is continuing to be substantiated by the inaction of those who oppose this to come up with a case.

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

Mr. SANTORUM. Sure, I am happy to yield.

Mr. REID. Let me say, through the Chair, to the Senator from Pennsylvania, the manager of this bill, the majority leader asked Senator DASCHLE and I to try to do something to move this legislation along. In good faith, we have narrowed the number of amendments to seven or eight that we have offered. The reason Senator MURRAY and I did this amendment is we thought we would get all the prevention issues out of the way quickly.

The point I am trying to make to my friend is that we are going to offer these together or separately. We are going to have votes on these amendments one way or the other. That is why we have asked that there be no second-degree amendments. Everyone should understand that we will come back and reoffer these.

In good faith, we are trying to move this legislation along. There is no effort to stall or to delay in any way. In good faith, we are trying to work this out with the other side. I only say this because the Senator said the committees wanted to look this over. Senator MURRAY and I are going to get a vote on these four issues. We would like to do it all at once. That would be the best way to do this. I want to make sure the leader hears from us what we are trying to do.

Mr. SANTORUM. I certainly respect the desire of the Senator from Nevada to get votes on these amendments, and we may well be able to accommodate that in a clean fashion directly, but I do not know the answer to that. I am still waiting to hear from the chairmen who have just seen this amendment a few minutes ago, to get a sense as to whether they believe there are some things that can be done to improve upon this recommended language.

The second point, in response to the Senator from Illinois, is the issue of vagueness. That was the other issue with which the Supreme Court dealt. We have come up with a much clearer definition.

The Senator from Washington said this is a deceptive amendment, that this language is very broad language and it does not limit it to a partial-birth abortion. I ask the Senator from Washington, or the Senator from California who was on the floor last night with the same argument, if they could describe a procedure that would be banned by the language in this bill. Give me another procedure and give me the definition of that procedure and tell me how that procedure would be banned by this bill.

The Senator from Washington brought in a case which certainly is a very distressing case, one that I can relate to on a personal basis, of a child who was discovered in utero with a fetal abnormality. The abortion performed on that child was done at 16 weeks. It was not a partial-birth abortion and under this legislation would continue to be legal. So we did not restrict at all the procedures that are done in any hospital in this country, because hospitals do not do this procedure. Abortion clinics do this procedure.

As I have said many times, they do it for one reason: the convenience of the abortionist to do more abortions in a shorter period of time. The doctor who developed this procedure developed it, in his words, so he could do more late-term abortions. He said this procedure takes 15 minutes. The other one takes 45. So he could do more abortions in 1 day. That does not strike me as one that was developed for medical necessity or to protect the health of women, but to protect the pocketbook of an abortionist, and that is not the kind of medicine that we should confirm or affirm in the Senate.

I yield the floor.

EXECUTIVE SESSION

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

The VICE PRESIDENT. Under the previous order, the hour of 11 a.m. having arrived, the Senate will now go into executive session and resume consideration of Executive Calendar No. 21, which the clerk will report.

The assistant legislative clerk read the nomination of Miguel A. Estrada, of Virginia, to be United States Circuit Judge for the District of Columbia Circuit.

The VICE PRESIDENT. Under the previous order, the time until 12:30 p.m. shall be equally divided between the two leaders or their designees.

The majority leader is recognized.

Mr. FRIST. Mr. President, thank you for presiding this morning. I appreciate your participation as our Presiding Officer in what we all recognize is an important moment for the Senate, the Senate that we all serve.

I have asked for this session over approximately the next hour and a half because one of our most important roles as Senators is to vote on executive nominations, including judges, lifetime appointees, who serve such a vital role in our constitutional design.

Because of the current debate, I have looked to our Founders for some guidance. John Adams, who helped create our Federal judiciary with his independence and its lifetime appointments, gave us a guide. He wrote that judges should be:

> Men of experience on the laws, of exemplary morals, invincible patience, unruffled calmness, indefatigable application. . . (and) subservient to none.

This is a high standard for a nominee and one I believe that Miguel Estrada has met. But it is also a charge for our Senate as the steward of an independent judiciary. Has the Senate met

the Adams test or has this unprecedented filibuster and delay brought us all to the point of failing to meet that charge of John Adams?

Elected by my constituents, I am a Senator. Selected by my colleagues, I serve as Republican leader. Recognized by the Chair, I act as majority leader. With these responsibilities, I am entrusted as a guardian of the Senate. Its institutions, its traditions, its obligations are my unique charge, not only as leader but as a Member.

I am sensitive to this serious responsibility and I look forward to the discussion over the next hour and a half as we elevate the debate to what was intended under advise and consent as spelled out in the Constitution. As we move forward in the conversation over the course of the morning, with not just this nomination at issue but, really, our overall function as an institution under scrutiny, I will listen to all to hear their concerns and ideas about how best to move forward in a way that does justice to this nominee, but also to our institution and our Constitution.

To that end, our president, George Bush, has sent a letter to Senator DASCHLE and myself on this topic. Among his observations, he wrote the following:

I ask Senators of both parties to come together to end the escalating cycle of blame and bitterness and to restore fairness, predictability, and dignity to the process. I ask that the Senate take action, including adoption of a permanent rule, to ensure timely up or down votes on judicial nominations both now and in the future, no matter who is President or which party controls the Senate. This is the only way to ensure that our judiciary works and that good people remain willing to be nominated to the Federal bench.

All senators should have a chance to have their voices heard and their votes counted. All Presidents should have their judicial nominees considered and voted upon in a reasonable time. All nominees considered and voted upon in a reasonable time. All nominees should have the certainty of an up-or-down Senate vote within a reasonable time. All judges should have the assurance that vacancies on their courts will not persist for years. And all Americans should have the assurance that the federal courts will remain open and fully staffed to resolve their disputes and protect their rights and liberties.

As leader, I tend to listen closely and patiently to the deeply held opinions expressed on the floor in hopes we can rise above the moment and act as our Founders intended. I ask unanimous consent the letter dated March 11 to myself and Senator DASCHLE from the President of the United States be printed in the RECORD.

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

THE WHITE HOUSE,
Washington, DC, March 11, 2003.

Hon. BILL FRIST,
Majority Leader, U.S. Senate, Washington, DC.

DEAR SENATOR FRIST: The Senate is debating the nomination of Miguel A. Estrada to be a Judge of the United States Court of Appeals for the District of Columbia. Miguel Estrada's life is an example of the American Dream. He came to this country from Honduras as a teenager barely speaking English and went on to graduate with honors from Harvard Law School. He has argued 15 cases before the Supreme Court of the United States and served in the United States Department of Justice under Presidents of both political parties. The American Bar Association has given him its highest rating. When appointed, he will be the first Hispanic ever to serve on the D.C. Circuit.

I submitted Mr. Estrada's nomination to the Senate on May 9, 2001. But his nomination has been stalled for partisan reasons for nearly 2 years in which the Senate has not held a vote either to confirm or to reject the nomination.

The Senate has a solemn responsibility to exercise its constitutional advice and consent function and hold up or down votes on judicial nominees within a reasonable time after nomination. Senators who are filibustering a vote on Miguel Estrada are flouting the intention of the United States Constitution and the tradition of the United States Senate. The filibuster is the culmination of an escalating series of back-and-forth tactics that have marred the judicial confirmation process for years, as many judicial nominees have never received up or down Senate votes. And now, a minority of Senators are threatening for the first time to use ideological filibusters as a standard tool to indefinitely block confirmation of well-qualified nominees with strong bipartisan support. This has to end.

The judicial confirmation process is broken, and the consequences for the American people are real. Because of the Senate's failure to hold timely votes, the number of judicial vacancies has been unacceptably high during my Presidency and those of President Bill Clinton and President George H.W. Bush. The Chief Justice has warned that the high number of judicial vacancies, when combined with the ever-increasing caseloads, leads to crowded courts and threatens the administration of justice. When understaffed, the Federal courts cannot act in a timely manner to resolve disputes that affect the lives and liberties of all Americans. The courts cannot decide constitutional cases promptly, which harms people seeking to vindicate and protect their rights, and the courts cannot rule on commercial cases efficiently, which hurts the economy, businesses, and workers. Our system of equal justice under law administered fairly and efficiently is at risk. The American Bar Association in 2002 accurately described the situation as an ''emergency.''

My concern about the state of the judicial confirmation process is not new. In June 2000, I proposed timely votes for all nominees, stating that the confirmation process ''does not empower anyone to turn the process into a protracted ordeal of unreasonable delay and unrelenting investigation.'' In May 2001, when I announced my first judicial nominations, I urged the Senate to rise above the bitterness of the past and again asked that every judicial nominee receive a timely up or down vote. In October 2002, after nearly two additional years in which too many nominees did not receive votes, I proposed a specific, commonsense plan involving all three Branches that, among other steps, would ensure that all judicial nominees receive an up or down Senate vote within 180 days of nomination.

Over the years, many Senators of both political parties have publicly agreed with the principle that every judicial nominee should receive a timely up or down Senate vote. Similarly, the Federal Judiciary, speaking through the Chief Justice in his 2001 Year-End Report, has stated that the Senate should ''schedule up or down votes on judicial nominees within a reasonable time after receiving the nomination.''

I ask Senators of both parties to come together to end the escalating cycle of blame and bitterness and to restore fairness, predictability, and dignity to the process. I ask that the Senate take action, including adoption of a permanent rule, to ensure timely up or down votes on judicial nominations both now and in the future, no matter who is President or which party controls the Senate. This is the only way to ensure that our Judiciary works and that good people remain willing to be nominated to the Federal bench.

All Senators should have a chance to have their voices heard and their votes counted. All Presidents should have their judicial nominees considered and voted upon in a reasonable time. All nominees should have the certainty of an up or down Senate vote within a reasonable time. All Judges should have the assurance that vacancies on their courts will not persist for years. And all Americans should have the assurance that the Federal courts will remain open and fully staffed to resolve their disputes and protect their rights and liberties.

As I stated last October, the current state of affairs in the United States Senate is not merely another round of political wrangling. It is a disturbing failure to meet a responsibility under the Constitution. Our country deserves better, the process can work better, and we can make it better. The Constitution has given us a shared duty, and we must meet that duty together. Thank you for your attention to this important matter.

Sincerely,

GEORGE W. BUSH.

Mr. FRIST. Mr. President, I will designate Senator HATCH to be in control of the remaining time on the Republican side.

With that, I yield the floor.

The VICE PRESIDENT. The Democratic leader is recognized.

Mr. DASCHLE. Mr. President, I regret to say that the White House and many of our Republican colleagues have twisted this debate beyond all recognition. It is sadly ironic that Republicans now seek to cast this as a debate about constitutionality, for it is Republicans who evidently are quite ready to throw over our Constitution's enduring principles merely because they do not fit the politics of the moment.

Democrats have been accused of subverting the Constitution for mere political gain. We have been accused of subjecting a nominee to ''unprecedented obstructionism.'' We have been accused of employing these tactics in the service of racism. Enough is enough. It is time to call the rhetoric of some of our Republican colleagues for what it is: Rank hypocrisy and cynical manipulation of fact.

While in the majority, Democrats facilitated the confirmation of 100 of the President's nominees to the Federal bench. After proving our cooperation, we now have the temerity to ask one nominee a series of simple questions that go directly to the question of his qualifications and judicial temperament.

We asked the administration to provide the documents the nominee drafted during his tenure at the Department

of Justice, documents that have been provided by both Democratic and Republican administrations in the past. We ask these questions not to score cheap political points but to fulfill our solemn obligations under the Constitution.

The Senate, not just the Senate majority but the entire Senate, is required under the Constitution to provide advice and consent to the President on his nominations. All we have asked is that we be given the information necessary to provide that informed consent. Mr. Estrada, however, has chosen not to cooperate.

That is his right. But it is our constitutional duty to reserve our judgment until we know the whole picture.

Imagine a job applicant refusing to fill out the last four pages of a five-page application.

You couldn't get a job flipping burgers with that response. Surely, the American people would not reward such intransigence with a lifetime appointment to the second-most powerful court in the land.

Republicans disagree, and so it is the recalcitrance of the nominee and the administration, not Democratic opposition, that is responsible for this delay today.

Today, Republicans, one after another, will come to this chamber to claim that they are shocked that any nominee could be treated to this unprecedented obstructionism.

Let me be charitable and say that only willful amnesia allows our colleagues to levy such charges.

In 1994, Senate Republicans stood before this chamber trying to persuade their colleagues to filibuster one of President Clinton's nominations to the Federal bench.

The current Chairman of the Judiciary Committee said then that the minority has to protect itself and those the minority represents.''

In 2000, the Senate was forced to vote on cloture because for 4 years, Republicans filibustered judicial nominee, Richard Paez and, for two years, Marsha Berzon.

Fifteen Republican Senators, including Senator FRIST, Senator INHOFE, Senator CRAIG, Senator BROWNBACK, Senator DEWINE, and others voted to continue the filibuster of Richard Paez.

Thirty Senators voted to ''indefinitely postpone''—quoting from the resolution—Mr. Paez's nomination, which had then been pending for more than 1,500 days. That's right, 1,500 days.

No Republicans objected then. No Republican expressed concern for the unprecedented obstructionism that could endanger the Constitution that we are likely to hear about this morning.

No Republican dared to castigate his colleagues by calling the opposition to Mr. Paez ''anti-Hispanic.''

But the truth is, by comparison to the treatment of other nominees by the Republican majority, Mr. Paez and Ms. Berzon could almost be considered fortunate; at least their nominations made it to the floor.

Under the Republican majority, more than 50 different Clinton administration judicial nominees saw their nominations killed, not because of the shared objections of 41 Republican Senators, but because a single Senator chose to place an anonymous hold on their nomination. These nominations never received a hearing or a vote in the Judiciary Committee, let alone consideration on the floor of the Senate.

By describing this sad history, I do not mean to indicate how the confirmation process should work. It should not.

The President promised he would work with us on his judicial nominees. But instead he continues to nominate many extraordinarily controversial candidates.

We stand ready to cooperate in the nomination and confirmation of qualified judges who will enforce the law and protect the rights of all Americans. We demonstrated that on many occasions already in this Congress.

But we fear that we will be kept waiting.

The suggestion that the Democratic request for information is inappropriate is equally ludicrous.

When Robert Bork was nominated to the Supreme Court, the Senate sought and received his memos as Solicitor General, including one to the President on the application of Executive privilege to the case of the Nixon audiotapes.

When Justice William Rehnquist was nominated to the Supreme Court, the Senate sought and received all of the memos that he had written as a clerk to Justice Robert Jackson.

When Stephen Trott was nominated to the Ninth Circuit, the Senate sought and received line attorney memos regarding the appointment of special prosecutors.

When Benjamin Civiletti was nominated to be Attorney General, the Senate sought and received his line attorney memos regarding anti-trust settlement recommendations.

And when William Bradford Reynolds was nominated for Associate Attorney General, the Senate sought and received his memos to the Solicitor General regarding a discrimination case, a school prayer case, and internal legal memos on a redistricting case.

Our request for information from Mr. Estrada is both appropriate and well-grounded in precedent. Yet because that precedent stands in the way of their political ends, Republicans now seek to deny their own words and their own actions.

They are here today claiming that the Constitution is threatened by the very same procedures they themselves employed. They are here today claiming that the Constitution can be threatened by the very same powers that it grants.

The Constitution is secure. The Democrats support it by refusing to let one third of our Government become a rubber stamp.

Alexander Hamilton, foremost among the Framers in his support for a strong presidency, wrote in the Federalist Papers that the Senate's role in confirmations was an indispensable check on executive power.

In explaining the advise and consent clause, he wrote:

> Might not [the President's nomination] be overruled? I grant that it might. . . . [but] if by influencing the President be meant restraining him, that is precisely what must have been intended.

Mr. President, every Member of this body took an oath ''to uphold and defend the Constitution of the United States.'' That is exactly what Democrats are doing.

I yield the floor.

The VICE PRESIDENT. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I have listened to the distinguished majority leader, and I have been very interested in what he has had to say. The fact is, in spite of what he has said, there has never been a filibuster that has been successful against a circuit court of appeals nominee—never—in the history of the Senate.

During the time President Clinton was President of the United States, I was chairman of the committee for 6 years. I admit there were some on our side who wanted to filibuster some of his nominees. I worked very hard and diligently to make sure no filibuster could succeed. As a matter of fact, I don't think there was a serious, true filibuster at any time against any of the Clinton nominees.

I suppose people can have their own viewpoint, but the fact is that we helped to make sure no filibuster would succeed. We on this side made sure—the leadership on this side, including myself as leader of the Judiciary Committee—that no filibuster would succeed.

In fact, there is only one filibuster in the history of the country that has succeeded, and that was against Justice Fortas, back in 1968. I do not agree with that. I think it was the wrong thing then. It is the wrong thing now. It is really the big issue we are talking about today.

With regard to the request for additional information from Mr. Estrada and the unfortunate claim that he has not cooperated with the other side, look at the transcript—almost 300 pages long. It is one of the longest hearings on a circuit court of appeals nominee in history. Just look at the transcript. He answered question after question after question.

Then every Democrat on the committee was given an opportunity to submit written questions. Only two did. The others didn't avail themselves of that opportunity. They called that hearing a very fair hearing. It was conducted by them. It could have gone on longer. They could have gone on another day if they had wanted to, or more than 1 day, more than 2 days. They didn't do it. The reason they

didn't is that they thought they would never call him up anyway. Unfortunately for them, they lost the election and today the Republicans are in control and he has been called to the floor. Once called to the floor, he deserves an up-or-down vote under our laws.

They are saying that, in spite of an almost 9-hour committee hearing, in spite of having all of his briefs and his oral arguments before the Supreme Court in 15 cases, in spite of the fact that he has the unanimously well qualified highest recommendation of their gold standard, the American Bar Association, in spite of the fact that they have numerous other documents and records and have documented his cases, they are saying they do not know enough about Mr. Estrada so they have to go into the highly privileged matters concerning recommendations for appeals, certiorari, and amicus curiae matters, some of the most privileged documents in the history of the country, in the Solicitor General's Office, in spite of the fact that seven living former Solicitors General have said that should never be allowed.

In each of the cases that the distinguished majority leader has cited where some documents have been given, these documents were given pursuant to specific requests for documents.

In this case, we have the generalized request of a fishing expedition into virtually every document he ever worked on at the Solicitor General's Office. No one has ever allowed a fishing expedition into these privileged documents of the Justice Department, let alone the Solicitor General's Office.

I join my colleagues here to voice grave concern over what appears to me to be a system in serious danger of breaking. I am talking about the system by which the Senate exercises its constitutional obligation to provide advice and consent on judicial nominees.

At the outset of my remarks, let me take a moment to set straight the proper role of the Senate in the confirmation of judicial nominees, starting with the text of the Constitution. In its enumeration of presidential powers, the Constitution specifies that the confirmation of judges begins and ends with the President. The Senate has the intermediary role of providing advice and consent. Here is the precise language of Article II, Section 2:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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.

There is no question that the Constitution squarely places the appointment power in the hands of the President. As Alexander Hamilton explained in The Federalist No. 66:

> It will be the Office of the President to nominate, and, with the advice and consent of the Senate, to appoint. There will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose—they can only ratify or reject the choice he may have made.

It is significant that the Constitution outlines the Senate's role in the appointments process in the enumeration of presidential powers in Article II, rather than in the enumeration of congressional powers in Article I. This choice suggests that the Senate was intended to play a more limited role in the confirmation of Federal judges.

Hamilton's discussion of the Appointments Clause in The Federalist No. 76 supports this reading. Hamilton believed that the President, acting alone, would be the better choice for making nominations, as he would be less vulnerable to personal considerations and political negotiations than the Senate and more inclined, as the sole decision maker, to select nominees who would reflect well on the presidency. The Senate's role, by comparison, would be to act as a powerful check on ''unfit'' nominees by the President. As he put it,

> [Senate confirmation] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

This is a far cry from efforts we've seen over the past couple of years to inject ideology into the nominations process, and to force nominees to disclose their personal opinions on hot-button and divisive policy issues like abortion, gun control, and affirmative action which undoubtedly will come before the courts.

Historically, deliberation by the Senate could be quite short, especially when compared to today's practice. Take, for example, the 1862 nomination and confirmation of Samuel F. Miller to the United States Supreme Court. He was nominated, confirmed, and commissioned all on the same day! The Senate formally deliberated on his nomination for only 30 minutes before confirming him. His experience was not the exception. Confirmations on the same day, or within a few days, of the nomination were the norm well into the 20th century.

Contrast the Estrada nomination. He waited nearly a year and a half for his confirmation hearing, which lasted for hours. His nomination is now in its fifth week of debate on the Senate floor, nearly 2 years after the President nominated him. Clearly, this is a far cry from the role for the Senate that the Framers contemplated. What was enumerated in the Constitution as advice and consent has in practice evolved to negotiation and cooperation in the best cases, and delay and obstruction in the worst cases—like that of Mr. Estrada.

The Estrada nomination illustrates what is wrong with our current system of confirming judicial nominees. Despite a bipartisan majority of Senators who stand ready to vote on his nomination, a vocal minority of Senators is precluding the Senate from exercising its advice and consent duty. This is tyranny of the minority, and its is unfair.

It is unfair to the nominee, who must put his life on hold while he hangs in endless limbo, wondering whether he will be confirmed. It is unfair to the judiciary, our co-equal branch of government, which needs its vacancies filled. It is unfair to our President, who has a justified expectation that the Senate will give his nominees an up-or-down vote. And it is unfair to the majority of Senators who are prepared to vote on this nomination.

The filibuster of Mr. Estrada's nomination also represents a new low in the annuals of judicial confirmations. If Mr. Estrada is not confirmed, he will be the first lower court judicial nominee defeated through a filibuster. More broadly, he will be the first judicial nominee, period, defeated through a party-line filibuster, since the filibuster of the Fortas nomination for Chief Justice was supported by Democrats and Republicans alike. This bipartisan opposition was apparently well grounded, since Justice Fortas ultimately resigned from the Supreme Court amid allegations of ethical misconduct.

Of course, no such allegations of misconduct surround Mr. Estrada—only pure partisan politics can be blamed for the obstruction of a vote on his nomination. Let me take a moment to illustrate.

What does it take? There are so many Republican efforts to confirm Miguel Estrada that the nomination is in the fifth week of debate on the Senate floor. There is no end in sight. Seventeen attempts for unanimous consent to end the debate and have the vote were all rejected by our colleagues on the other side. The White House offer for Mr. Estrada to answer written questions was rejected by all but one Democratic Senator—all but one when they offered him to answer written questions. The White House offer for Estrada to meet with Senators was rejected by all but one Democratic Senator.

It doesn't sound to me as if they really want to know what is on his mind. In my opinion, they could easily do so by merely meeting with him and asking him any questions they want.

Of course, cloture filed to end the debate was rejected.

The system is broken. This case illustrates it more than any other case that has ever come before the Senate.

There can be little doubt that the breakdown in the Senate's advice and consent role is not limited to Mr. Estrada's nomination. All nominees for the circuit courts of appeals have suffered, as these charts illustrate.

Let me just go through this. I am talking about a system in danger of breaking. I think it is broken. This

shows the average days pending for circuit court nominees for the first 2 years of a President's tenure. In the case of Ronald Reagan, it took an average of 51 days for circuit court nominees to be pending before they got to a vote on the floor. In the case of President George Herbert Walker Bush, it took an average of 83 days in order to get a judge pending. In the case of President Clinton, it did go up. It took an average of 107 days. With George W. Bush, the current President, it has taken 355 days.

That is a system in need of repair. What we are seeing is a slowdown in the confirmation of Federal judges.

Look at this: Again, a system in danger of breaking.

The confirmation rate of circuit court nominees for the first 2 years: Reagan, 95 percent; Bush, 96 percent; and, Clinton, 86 percent of his circuit court nominees were confirmed. George W. Bush has 53 percent.

Mr. SARBANES. Mr. President, will the Senator yield for a question? Does the Senator have a chart that would indicate the very same information but would take the Clinton nominees in the first 2 years when the control of the Senate was in the Senator's party?

Mr. HATCH. I don't have that chart.

Mr. SARBANES. Wouldn't that be a more pertinent chart?

Mr. HATCH. Let me put it this way: If we had not gone through—

Mr. SARBANES. The Senator picked the Clinton years when his own party was in the majority.

Mr. HATCH. That is right.

Mr. SARBANES. What is happening here—my perception, at least—is that what the Senator is now complaining about is a tactic which was instituted by the other side of the aisle in the very recent past.

Now we are being told this isn't the right way to do business. But no one on that side of the aisle said it wasn't the right way to do business only a few years ago when they were doing exactly the same thing.

Mr. HATCH. May I reclaim my time?

The VICE PRESIDENT. The Senator from Utah has the floor.

Mr. HATCH. If the Senator has questions, I will be happy to take them. In the case of President Clinton, yes, in the first 2 years it was 86 percent. Yes, JOE BIDEN was chairman at that time. Yes, the Republicans cooperated to make sure those circuit court nominees went through. In the first 2 years of George W. Bush, the Democrats were in control of the committee. We cooperated all we could. That is the best we could get done. I think those statistics still stand up very strongly.

What we are seeing is a slowdown in the confirmation of Federal judges—a systematic and calculated effort to block the nominees of the President of this country from the Federal bench. It is time to stop it. It is time to reform the system, to de-escalate. The first step, of course, is to vote on Mr. Estrada's confirmation. But there is much more that we can do to ensure that no other judicial nominee repeats this experience. I urge my colleagues to join me in my efforts to put an end to partisan politics in the confirmation process.

I have to say, both sides have not been right in this process in the past years. I am not trying to just find fault there, but one fault I can find: Never in the history of this country has there been a filibuster succeed against a circuit court of appeals nominee. To argue that he has not provided enough documentation or enough answers when they refused to meet with him, refused to submit written questions, when they had one of the longest hearings on record for a circuit court of appeals nominee, when they have a massive amount of documents, not only all the arguments he made before the Supreme Court but his briefs as well and a tremendous, almost 300-page record of proceedings before the committee, it certainly makes my point.

To come here and say that we now have to have privileged records on a fishing expedition that doesn't name anything specifically seems to me to fly in the face of what is right and proper.

As I understand it, we will go back and forth. I yield the floor.

The VICE PRESIDENT. Under the previous order, the Senator from Massachusetts is recognized for 10 minutes.

Mr. KENNEDY. Mr. President, Republicans claim that we do not have a right to an extended debate on a judicial nominee lacks any foundation. The Constitution gives a strong role to the Senate in confirming federal judges. Both the text of the Appointments Clause of the Constitution and the debates over its adoption make clear that the Senate should play an active and independent role in selecting judges.

The Constitutional Convention met Philadelphia from late May until mid-September of 1787. On May 29, 1787, the Convention began its work on the Constitution with the Virginia Plan introduced by Governor Randolph, which provided ''that a National Judiciary be established, to be chosen by the National Legislature.'' Under this plan, the President had no role at all in the selection of judges.

When this provision came before the Convention on June 5th, several members were concerned that having the whole legislature select judges was too unwieldy. James Wilson suggested an alternative proposal that the President be given sole power to appoint judges. That idea had almost no support. Rutledge of South Carolina said that he ''was by no means disposed to grant so great a power to any single person.'' James Madison agreed that the legislature was too large a body, and stated that he was ''rather inclined to give [the appointment power] to the Senatorial branch'' of the legislature, a group ''sufficiently stable and independent'' to provide ''deliberate judgments.''

A week later, Madison offered a formal motion to give the Senate the sole power to appoint judges and this motion was adopted without any objection. On June 19, the Convention formally adopted a working draft of the Constitution, and it gave the Senate the exclusive power to appoint judges.

On July 18, the Convention reaffirmed its decision to grant the Senate the exclusive power. James Wilson again proposed ''that the Judges be appointed by the Executive'' and again his motion was overwhelmingly defeated. The issue was considered again on July 21, and the Convention again agreed to the exclusive Senate appointment of judges. In a debate concerning the provision, George Mason called the idea of executive appointment of Federal judges a ''dangerous precedent.''

Not until the final days of the Convention was the President given power to nominate Judges. On September 4, 2 weeks before the Convention's work was completed, the committee proposed that the President should have a role in selecting judges. It stated: ''The President shall nominate and by and with the advice and consent of the Senate shall appoint judges of the Supreme Court.''

The debates, make clear, however, that while the President had the power to nominate judges, the Senate still had a central role. That is what the debate made clear. For instance, Governor Morris of Pennsylvania described the provision as giving the Senate the power ''to appoint Judges nominated to them by the President.

The Convention, having repeatedly rejected proposals that would lodge exclusive power to select judges with the executive branch, could not possibly have intended to reduce the Senate to a rubber stamp role.

The reasons given by delegates to the Convention for making the selection of judges a joint decision by the President and the Senate are as relevant today as they were in 1787. The Framers refused to give the power of appointment to a ''single individual.'' They understood that a more representative judiciary would be best served by giving Members of the Senate a major role.

The Senate has never hesitated to fully exercise this power. During the first 100 years after ratification of the Constitution, 21 of 81 Supreme Court nominations—one out of four—were rejected, withdrawn, or not acted on. During these confirmation debates, ideology often mattered. John Rutledge, nominated by George Washington, failed to win confirmation as Chief Justice in 1795. Alexander Hamilton and other Federalists opposed him because of his position on the controversial Jay Treaty. A nominee of President James Polk was rejected because of his anti-immigration position. A nominee of President Hoover was rejected because of his anti-labor view.

A very substantial number of us believe that we are facing another historic constitutional confirmation which only the Senate's power and processes can resolve. Our President

has embarked on a course that threatens the balance of powers and the independence of the judiciary. His legal advisors have set him on a course to stack the U.S. Courts with judges who will judge in accordance with a narrow and extreme set of views, views outside of the judicial mainstream and aimed at making draconian and sudden changes in the direction of life and liberty in this Nation. President Bush is not the originator of this court-stacking plan. It began decades ago with his predecessors in the White House and Justice Department. It has been enabled by the successful efforts of some in our own body to retard the filling of judicial vacancies over the past two presidential terms.

The White House and its allies have not been bashful about admitting their radical goal. Our own respect for the judiciary leaves no doubt that our President was lawfully elected. But there is not the slightest basis for the argument that any popular mandate supports such a massive shift in judicial direction.

As Senators we have the power, and the responsibility to ourselves, our constituencies and our institution, to resist revolutionary change in the balance of power. We have the power—and responsibility—to reject the notion that a President can suddenly fashion the judiciary in his own image. We have a special responsibility to do so when the Senate is so evenly divided that, after due consideration and debate based on all the necessary information, the switch of a few votes could change the result. We certainly have the obligation to do so when the Executive Branch prevents us from exercising our assigned constitutional powers of advice and consent by depriving us of any access to the only documents which might tell us what kind of a judge a nominee will be—the very documents which the President's lawyers used to select and vet the nominee.

The issue before us today is about much more than Miguel Estrada. It is about the essential nature of our government; it is about the core values of the Senate; it is about our history and our legacy.

We must not let the Founders down. We must not let our predecessors down. We must not let our constituents down. We must not let our Nation down.

The VICE PRESIDENT. Who yields time?

Mr. HATCH. Mr. President, I yield 5 minutes to the Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I begin by taking direct issue with the arguments by the Senator from Massachusetts. The advice and consent function set forth in the Constitution has been consistently interpreted for 216 years to confirm Presidential nominations, unless there is a reason not to. That has been the practice. Now we have a new position advocated by the Democrats, saying if there are 41 obstructors, then the Democrats want an equal share in the process of judicial selection.

The Senator from South Dakota raised the consideration that no one on this side of the aisle had spoken up, when in effect the shoe was on the other foot when the Democrats controlled the White House and Republicans controlled the Senate. There were those on this side of the aisle who spoke up and said worthy nominees submitted by President Clinton should be confirmed. I was one of them. We did confirm a number of contested nominations: Judge Richard Paez, Marsha Berzon, Roger Gregory, and others.

So it is true there have been delays when one party has controlled the White House and the other party has controlled the Senate. And Republicans are not blameless in this process. But I submit that in the 107th Congress, with President Bush in the White House and the Democrats in control of the Senate, the process has been carried to great extreme. This year, with the Republicans controlling both the White House and the Senate, we have had the unprecedented position of a filibuster on a judge for the court of appeals.

In the history of the judicial confirmation process, there has been only one prior filibuster, and that was on Justice Abe Fortas, nominated to be Chief Justice. That involved an issue of integrity, and that was a bipartisan filibuster. We had, perhaps, the most bitter contest on confirmation when Circuit Judge Clarence Thomas was up for confirmation to the Supreme Court. Within 50 minutes, let alone 5 minutes, I could not begin to summarize the contest there on the bitterness of the proceedings. Justice Thomas was confirmed 52–48. But no one suggested there ought to be a filibuster. The regular rule was followed. Even though there was a tie vote in the Judiciary Committee, which would not customarily, under Judiciary Committee rules, permit the matter to be advanced to the full body, it did come to the full Senate and there was no filibuster, and Justice Thomas was confirmed.

When the Democrats—and I very much deplore the partisan nature of this debate, but it is a matter of Democrats versus Republicans, and it is my hope we will find a way to solve it. When the Democrats raise issues about Miguel Estrada answering more questions, or raise the contention that his work as an assistant Solicitor General ought to be disclosed, they are, pure and simple, red herrings.

A long litany of nominees have come before the Judiciary Committee who have declined to answer questions and have been confirmed. In the judicial process, judges are not expected to give opinions until there is a case in controversy, until there are facts, until briefs are submitted, until there is oral argument, until there is deliberation among the judges, then a decision is made—not to answer a wide variety of hypothetical questions that are posed in nomination proceedings.

On the confirmation process of Merrick Garland, I asked the question: Do you favor, as a personal matter, capital punishment?

Mr. Garland replied: This is really a matter of settled law now. The Court has held that capital punishment is constitutional and lower courts are expected to follow the rule.

Because of time limitations, I shall not go into detail on that. When Marsha Berzon appeared before the committee, she was asked by Senator Robert Smith about the abortion issue. Marsha Berzon was later confirmed.

I ask for 2 additional minutes.

Mr. HATCH. Mr. President, I yield the Senator 2 more minutes.

Mr. SPECTER. Marsha Berzon responded that the matter was settled, regardless of what her views were. A similar response was given by Judith Rogers to questions by former Senator Cohen.

With respect to Miguel Estrada's work as an Assistant Solicitor General, seven former Solicitors General wrote to Senator LEAHY, laying out the fact that it is of ''vital importance of candor and confidentiality in the Solicitor General's decision-making process that Miguel Estrada's work should not be disclosed.''

I am delighted that we have been joined by a number of Senators from the other side of the aisle. It is my hope that we will yet get five additional Senators who will break the deadlock and we will move to cloture and we will end this debate.

This controversy is poisoning the Senate beyond any question. It is distracting the Senate from other very important business. I hope we will find a way out promptly and ultimately establish a protocol so many days after a nomination is submitted, a hearing by the Judiciary Committee; so many days later, a committee vote; so many days later, floor action; so that regardless of what party controls the White House and what party controls the Senate, the public business will be attended to and the partisanship will be taken out of the selection and confirmation of Federal judges.

I yield the floor.

The VICE PRESIDENT. Under the previous order, the Senator from Nevada is recognized for 5 minutes.

Mr. REID. My colleagues on the other side of the aisle argue that the Senate's extended debate over Mr. Estrada's nomination is somehow unconstitutional. This is, at the very least, curious. They say Senate rule XXII, which allows for cloture on judicial nominations, is unconstitutional. Very curious. That rule provides that a vote of 60 Members of this body may end debate.

They point to the Constitution which provides several examples where a supermajority is required to approve a measure. Since nominations are not mentioned, they argue, only a simple majority should be required.

But the majority's focus on the vote count misses the point. If cloture had

not been extended to nominations, among other things, in 1949, what would be the result? Well, maybe a single Senator could engage in unlimited debate. There would be no provision whatsoever to cut off that debate. There would be no provision to get to a vote—whether it be a supermajority or a majority vote.

Surely my colleagues do not argue that extended debate in the world's greatest deliberative body is unconstitutional.

We will continue to exercise our right to debate this nominee until he answers the Judiciary Committee's questions and provides the committee with his memoranda.

The vigorous debate we continue to have on the Estrada nomination reflects our fidelity to our constitutional obligations to advise and consent to Presidential judicial nominees.

It is that role that is the proper subject of a constitutional debate.

What did the Founding Fathers have in mind when they made that provision? In the Federalist Paper No. 47, James Madison, quoting Montesquieu, stated:

> There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.

In Federalist No. 76, Alexander Hamilton was more specific when he explained that the Senate's role:

> [w]ould be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters [while serving as an] efficacious source of stability in the Administration.

In a lecture at the Heritage Foundation in 1993, David Forte said, in Federalist No. 10 and 51, Madison proposed division within the central government into a complex separation of powers. Forte said:

> The liberties of the people would therefore be protected, first by the residuum of sovereignty left to the states, and secondly, by tying different constituencies to separate parts of the federal government—House of Representatives, Senate, Executive, and Judiciary—and giving each branch some part of each other's powers in order to defend itself against any branch's aggrandizement of its own powers.

As Justice Brandeis said in Myers v. United States:

> The doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power.

Justice Brandeis went on to say:

> The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Indeed, this is the heart of the Estrada debate. The administration has advised this nominee not to answer our questions. It refuses to turn over documents which have been provided in the past and which would help evaluate this nominee.

The administration has made it impossible for the Senate to fulfill its constitutional duty. The White House seeks to wield unchecked power over the appointment of lifetime Federal judges, but that is not what the Founders of our country had in mind or what the Constitution provides. The Constitution divides power over nominations between the President and the Senate.

In an article in the Emory Law Journal, Professor Carl Tobias discussed how that intent of the Constitution's drafters has been carried out:

> The Senate has actively participated in naming judges since the chamber's creation because members of this body have a significant stake in affecting . . . appointments.

He continued:

> There has also been a venerable tradition in the senatorial involvement in the choice of nominees. . . . The state's senators or senior elected officials who are members of the President's political party have ordinarily recommended candidates whom the Chief Executive in turn has nominated.
>
> In short, judicial selection has been a shared responsibility of the President and the Senate. . . .

I would add that this is as the Founders intended.

The Cato Institute's ''Handbook for Congress'' puts it quite nicely:

> More important than knowing a nominee's ''judicial philosophy'' is knowing his philosophy of the Constitution. For the Constitution, in the end, is what defines us as a nation.

The Constitution defines the role of the President and the role of the Senate—

The VICE PRESIDENT. The Senator has spoken for 5 minutes.

Mr. REID. Mr. President, Senator KENNEDY used all his time. I ask for an additional minute.

The VICE PRESIDENT. The Senator is recognized.

Mr. REID. Continuing with the quote:

> More important than knowing a nominee's ''judicial philosophy'' is knowing his philosophy of the Constitution. For the Constitution, in the end, is what defines us as a nation.

The Constitution defines the role of the President and the role of the Senate in the process of selecting lifetime Federal judges. It is a shared responsibility. This administration and this nominee seek to exercise near total power over that process. If there is something unconstitutional afoot in the consideration of Mr. Estrada's nomination, it is that the President seeks to prevent the Senate from exercising its constitutional duty.

Mr. HATCH. Mr. President, I yield up to 5 minutes to the distinguished Senator from Texas.

The VICE PRESIDENT. The Senator from Texas is recognized.

Mr. CORNYN. I thank the Chair.

Mr. President, Daniel Webster once said that ''justice is the greatest interest of man on Earth.'' I cannot help but think of that phrase as I read from today's letter from President George W. Bush, which was previously admitted as part of the RECORD, when he says:

> The Chief Justice warns that the high number of judicial vacancies, when combined with the ever-increasing caseloads, leads to crowded courts and threatens the administration of justice.

It has also long been recognized that ''justice delayed is justice denied,'' and that is exactly what is happening to American citizens throughout this country, while President Bush's judicial nominees are being filibustered and slow boated. The President is being denied his prerogative of choosing his nominees for Federal benches subject to the advice and consent, the proper constitutional role of the Senate, being exercised.

I rise this morning with great concern about the state of our judicial confirmation process, something that Senator SPECTER and others have commented on. They have called for reform, for a fresh start, and I believe that is called for.

The Constitution makes clear that the President appoints judges with the advice and consent of the Senate. It has long been established, by constitutional text, by Senate tradition, and by Supreme Court precedent, that that means a majority of the Senate. But today, a bipartisan majority of the Senate is being denied the opportunity to vote on Miguel Estrada, by a minority that is intent on changing the rules, applying a double standard, and denying Miguel Estrada an up-or-down vote in this Chamber.

Somehow, this process has disintegrated to the point where a partisan minority of the Senate will not even allow a bipartisan majority to vote. This, of course, is not what the Constitution says or what the Founders had in mind. Our Founders never intended that the judicial confirmation process would become so poisonous as it has today.

This filibuster, this act of preventing a bipartisan majority from expressing its consent to Mr. Estrada's nomination, is, as we have heard, without precedent.

I could not help but think also about last year's debate over the confirmation of another nominee of President Bush, someone with whom I served on the Texas Supreme Court, and that is Justice Priscilla Owen, who will come up again this Thursday for another hearing in the Senate Judiciary Committee.

Some people during that process criticized the Texas system of electing judges, one that has been established in our constitution since Reconstruction and which also is replicated in the constitutions of other States.

Justice Owen has, as I have, long been an advocate for reforming the way in which Texas selects judges. But, Mr. President, whatever the problems the various States may have in their judicial selection systems, nothing—absolutely nothing—compares to how badly broken the system of judicial confirmation is here in Washington, DC.

In Texas, at least, the people are given a choice of judicial nominees and there is an opportunity for debate and

discussion and, at long last, there is a vote. Whatever you can say about the process, we always get there. We always hold a vote.

Somehow we have lost our way in the Senate. When the President nominates individuals of high caliber to serve the American people through an appointment to the Federal bench, and bipartisan majorities of the Senate stand enthusiastically ready to confirm those individuals, the process of confirming these highly qualified nominees is simply obstructed.

As I say, I have long believed we need a fresh start, as articulated by others, to the judicial confirmation process, and the first step would be to bring this fine judicial nominee, Miguel Estrada, to a vote. It has already been too long. It is time to vote.

I yield the floor.

The VICE PRESIDENT. Who yields time?

Under the previous order, the Senator from Illinois is recognized for 5 minutes.

Mr. DURBIN. I thank the Chair.

Mr. President, this is a curious situation: A person with an extraordinary background, Miguel Estrada, coming to the United States as an immigrant with limited knowledge of English, in a few years rises to the top of the Harvard Law School; he then goes on to work in the Solicitor General's Office dealing with Supreme Court decisions, working in the Department of Justice at the very highest levels.

It is an extraordinary story of personal achievement, academic achievement, and professional achievement. That is why the conduct of Miguel Estrada during this confirmation process has been so puzzling.

I believe he has received bad advice. I think the people at the Department of Justice who said to him, whatever you do do not answer questions directly, they were not fair to Miguel Estrada.

When you consider the questions which he refused to answer, these were not unreasonable questions. My colleague and friend from Alabama, Senator SESSIONS, regularly asked Democratic nominees the same questions we asked of Miguel Estrada in reference to Supreme Court Justices whom he admired, in reference to Supreme Court decisions with which he agreed or disagreed. No one argued that this was out of bounds or unfair. They said Senator SESSIONS was entitled to ask that of judicial nominees.

I have before me Richard Paez, Marsha Berzon, all of the different Democratic nominees who faced those very questions and answered them, as they should have.

When the same questions were posed to Miguel Estrada, his handlers at the Department of Justice said: Stay away from those questions. Do not answer those questions.

When Senator SCHUMER of New York asked Miguel Estrada about Supreme Court decisions that he would take exception to within the last 40 years, or even beyond, he went on to say:

> I ought not to undertake to, in effect, hold the Court to task for the purpose of having gotten something wrong when I haven't been in their shoes in the sense of having had access to all of the materials, argument, research, and deliberation that they had.

He ducked the question, a question so basic that a law student in a constitutional law course would answer that question. But Miguel Estrada refused. And that raises another question. I think he has received poor advice from the White House, because the White House has said that he cannot produce for us documentation that really tells the story of his legal views, documentation that has been presented by many nominees. They have said, no, we are stonewalling it; we are not going to release that information to Congress. So now Miguel Estrada is stalled in the Senate because he has refused to cooperate in the questioning, refused to produce the documents, refused to answer basic questions which Republican Senators asked time and again of Democratic nominees, fair questions, reasonable questions.

This last weekend, I went to Alabama. It was my first visit to that State ever. I went with a group known as Religion in Politics, with Congressman JOHN LEWIS and Senator SAM BROWNBACK, to visit in Montgomery, Selma, and Birmingham, the sites of some of the most dramatic historic events in the civil rights movement in America. It was something to stand on Edmund Pettus Bridge in Selma with JOHN LEWIS on Saturday near the 38th anniversary of that march, at the exact spot where he was beaten down, hit in the head, suffered a concussion. JOHN LEWIS said to me: There never would have been a Selma to Montgomery march were it not for the courage of one Federal district court judge, Frank Johnson. Frank Johnson, a Republican appointee under the Eisenhower administration, stood up for what was right in the civil rights movement. With his courage, he not only had death threats on a regular basis, his mother's home was fire bombed. This man had the courage to stand up for the right thing.

When he passed away, Senator HATCH was right to introduce a resolution honoring Frank Johnson for his courage, saying that he had the courage to stand up against Plessy v. Ferguson, separate but equal. He had the courage to argue for one man one vote before its time had come.

I put that experience in the context of this conversation. This is not a routine decision. This is not another thing that the Senate should consider as part of some process that really we do not have to dwell on. We are appointing men and women to positions on the bench where they can make historic decisions. Frank Johnson did.

The court that Miguel Estrada aspires to is an even higher court, the second highest court in the land. Would it not have been reasonable for Miguel Estrada to have said that he disagreed with Plessy v. Ferguson, the basis of segregation in America for almost 100 years? He refused, and that is why his nomination languishes.

I yield the floor.

The VICE PRESIDENT. The Senator from Utah.

Mr. HATCH. I yield 4 minutes to the distinguished Senator from South Carolina.

The VICE PRESIDENT. The Senator from South Carolina is recognized.

Mr. GRAHAM of South Carolina. Mr. President, I have been in the Senate now for a couple of months at most—it seems longer—and I am bearing witness to a change in the Constitution I never envisioned I would be a witness to.

The minority on the other side, not all of them because some of them voted to allow Miguel Estrada a vote up or down, are, in effect, changing the Constitution. We can have an academic debate whether it is legal or not, but there are five situations in the Constitution where the Framers required a supermajority vote. Confirming a judge was not one of them. We are witnessing and we are part of a change to our Constitution by the fact that they are filibustering this judge requiring 60 votes to confirm a judge.

Why is this happening? What is going on? It is not about the way questions were answered. It is not about getting memos that no Solicitor General would allow to be released on their watch, Democrat or Republican. This is a calculated effort by our friends on the other side post-2002 election to go after our President.

They had a meeting before Miguel Estrada had a hearing, and their meeting was about: You are laying down too much for President Bush. You need to stand up to him.

They made a calculated decision to stand up to him by going after his judges. They are, in effect, changing the Constitution, and this is wrong. It is wrong politically and it is wrong constitutionally. Whether it is illegal, I do not know, but I know it is going to hurt our country and history will judge us poorly for allowing this to happen.

This is an effort to go after the President in a way that no other party has ever gone after a President before, and we will pay a price as a nation if this is successful.

I know my colleagues are better than this. I know they are capable of doing better than this because I can read what they said on other occasions when the shoe was on the other foot.

When I came to the Chamber a few minutes ago, the Senator from Massachusetts was giving us a history lesson about the role of the Senate and the President in confirming judges. This is what he said on March 7, 2000: Over 200 years ago, the Framers of the Constitution created a system of checks and balances to ensure that excessive power is not concentrated to any branch of the Government. The President was given the authority to nominate Federal judges with the advice

and consent of the Senate. The clear intent was for the Senate to work with the President, not against him, in the process. In recent years, however, by refusing to take timely action on so many of the President's nominees, the Senate has abdicated its responsibility.

He was right then. He could see at that moment the problems that were being created for this country if we overly played politics with judicial nominations. He is wrong today because he is blinded by the politics of 2002.

We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues do not like them, do not like their answers, do not like the way they are behaving, do not like the advice they are getting—I am adding this now—vote against them, but give them a vote. That was Senator KENNEDY, February 3, 1998.

If Senators want to vote against somebody, vote against them. I respect that. State their reasons. I respect that. But do not hold up a qualified judicial nominee.

Senator LEAHY said: I have stated over and over again on this floor that I would object and fight against any filibuster on a judge, whether somebody I opposed or somebody I support. I thought the Senate should do its duty by giving them a vote.

They were right then. They could see clearly.

Mr. LEAHY. The Senator happened to mention my name. I ask if the Senator will yield?

Mr. GRAHAM of South Carolina. Yes.

Mr. LEAHY. Would the Senator be willing to state the whole quote? He has left out a very significant part in that quote. Is he willing to put the whole quote, the accurate quote?

Mr. GRAHAM of South Carolina. Absolutely.

The VICE PRESIDENT. The time has expired.

Mr. GRAHAM of South Carolina. I will be glad to do that. Could I, in turn, ask the Senator a question?

The VICE PRESIDENT. The Senator's time has expired.

Who yields time?

Mr. HATCH. I will yield time for the question.

Mr. GRAHAM of South Carolina. Is Senator LEAHY willing to answer my question?

Mr. LEAHY. Mr. President, whose time is this on?

The VICE PRESIDENT. The time of the Senator from Utah.

Mr. LEAHY. Is the Senator from North Carolina going to answer the question I asked him? Is he willing to read the whole quote? The Senator from South Carolina.

Mr. GRAHAM of South Carolina. South Carolina.

Mr. LEAHY. I beg your pardon. I apologize. Will the Senator from South Carolina be willing to read the whole quote?

Mr. GRAHAM of South Carolina. Absolutely. Rather than taking the time, I will put it in the RECORD.

Mr. LEAHY. If the Senator would read the whole quote in context, I am happy to answer any questions he has. If he is unwilling—

Mr. GRAHAM of South Carolina. Absolutely, I will. I do not have it, but if somebody will give it to me.

Mr. LEAHY. It is obvious that the Senator from South Carolina did not have the whole quote or he would not have quoted me out of context so badly.

The VICE PRESIDENT. The additional time of the Senator from South Carolina has expired.

Who yields time? Under the previous order, the Senator from New York is recognized.

Mr. HATCH. I yield time for the distinguished Senator from South Carolina to complete his question, and I hope the distinguished Senator from Vermont will answer his question.

The VICE PRESIDENT. The Senator from South Carolina is recognized.

Mr. GRAHAM of South Carolina. I do not want to misquote the Senator. I do not want to put words in his mouth. I do not want to take one part of his quote to suggest it means something that it really does not.

My question simply put: In June 1998, was the Senator trying to tell the Senate that it is wrong to filibuster a judge?

Mr. LEAHY. Mr. President, am I responding on the time of the Senator from Utah?

The VICE PRESIDENT. The Senator is correct.

Mr. LEAHY. If the Senator would read the whole quote, he would understand I was talking about the anonymous holds on Judge Sotomayor, and anonymous holds were being used as a filibuster. I made that very clear in that statement.

Interestingly enough, even though we have corrected the record a number of times on the floor, pointing out when that misstatement has been made, apparently those were times when the distinguished Senator from South Carolina was not on the floor.

The VICE PRESIDENT. The time of the Senator is expired. Under the previous order, the Senator from New York is recognized for 5 minutes.

Mr. SCHUMER. Mr. President, I am so glad to see so many of my colleagues in the Chamber today, although I wish they were here to debate the issues the American people are asking us about. What is happening with the impending war in Iraq? How will we pay for it? What is happening with stimulating the economy? What are we going to do to have average working men and women gain jobs? We have lost 2 million jobs.

Let the record show the reason we are not talking about those issues and we are continuing to talk about Mr. Estrada is that is what the Republican majority wants to do.

Mr. Estrada has a job. I think he probably gets paid a very nice salary, and he deserves it. But what about the 2 million Americans who do not have jobs, who have lost jobs since President Bush became President? Why can't we be debating that issue? I urge my colleagues to start talking about that and how we will stimulate the economy; and to start talking about how we will gain more allies in our struggle with Iraq; and to start talking about how we will pay for postwar Iraq.

It is at the insistence of my colleagues that we continue to debate this issue, although we have reached an impasse. We are not going to yield on something we think is a constitutional principle. We can sit here and debate and debate and debate, but you will not change anyone's voting. The reason is very simple. The reason is we believe sincerely and firmly this is not about any one individual, but this is about the constitutional process of advise and consent. This is about learning what potential judges think before they go to the bench to make decisions that affect our lives for a generation. We are entitled to do that. That is what the Founding Fathers intended, it is clear.

In the first nomination to the Supreme Court, where many of the original Founding Fathers who wrote the Constitution were present, Mr. Rutledge, the nominee of President Washington, was turned down because they did not agree with his views on the Jay Treaty.

The other side wanted debate; when they had nominees, they questioned. People asked, what is the difference? My colleagues on the other side knew Judge Paez's record and they knew Judge Berzon's record, and they chose to vote against him. That is fair. We all let ideology enter into the way we vote. Those who deny it are being less than candid. Otherwise, the votes would be sprinkled evenly between Democrats and Republicans.

When the other side was there, let me read a quote from Senator HATCH, a man I greatly respect and regard as a friend.

> The careful scrutiny of judicial nominees is one important step in the process, a step reserved to the Senate alone . . . I have no problem with those who want to review these nominees with great specificity.

My colleagues on the other side of the aisle, we are simply carrying out what Senator HATCH said was perfectly appropriate, what he had no problem with. We have not learned anything about Miguel Estrada's views with great specificity. And what we fear—and you will regret it if there comes a Democratic president—is that nominees will refuse to answer all questions, as Miguel Estrada did, and they will have no track record, and Presidents will endeavor to find people who have no known views when they nominate them to the bench.

My guess is the White House knows Miguel Estrada's views. My guess is they carefully researched it. When it comes time to make those views public, part of the constitutional process,

we are denied that right by a nominee who stonewalls and does not answer the most obvious questions, and by a White House that will not release documents that have been released—in the cases of Mr. Bork, Justice Rehnquist, Mr. Civiletti, and Mr. Reynolds. All of them released the same documents the White House refuses to release now.

I ask the American people, ask yourselves a question, my friends. Why are they so afraid to reveal Miguel Estrada's record? If he proves to be a mainstream conservative, he will pass this Chamber. I have voted for over 100 of the 110 nominees. I disagree with most of them, but I don't think they are out of the mainstream, and the President deserves some benefit. But if Mr. Miguel Estrada's record shows he is so far beyond the mainstream that he will try to make law from the bench and not interpret the law, which those who are on the far left and far right tend to do, he should not be made a judge. The bottom line is, we have no way of answering that question until we follow Senator HATCH's mandate.

Mr. WARNER. Will the Senator yield?

The VICE PRESIDENT. The time of the Senator has expired.

Mr. WARNER. I ask if the manager will give me a minute or two?

Mr. REID. Will the Senator from Virginia yield so we can enter into a unanimous consent request?

The VICE PRESIDENT. Who yields time?

Mr. REID. Mr. President, I ask unanimous consent debate on this matter be extended until the hour of 12:50 with the time equally divided between both sides.

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

Mr. HATCH. I yield to the Senator from Virginia.

Mr. WARNER. I say to my colleague—

Mr. SCHUMER. I am delighted to yield for a question.

Mr. WARNER. You brought up the history of Rutledge. I discussed this at length last night on the Senate floor.

Mr. SCHUMER. Mr. President, that is on the time of the Senator from Utah.

Mr. WARNER. You brought up the very important case of George Washington's nomination, Rutledge, who had been a constitutional Framer, and his colleagues in this Chamber, some of whom were constitutional Framers, turned him down, correct—but they did it by a vote. Am I not correct on that?

Mr. SCHUMER. You are correct.

Mr. WARNER. That is the essence of what we are trying to establish here, namely that a vote is what the Framers envisioned when they put in the supermajority, as the Senator from South Carolina put it. They did not put a supermajority in for nominations, the concept being that the President and the Senate would work together. Otherwise, the President could thwart the process by putting no one up for judicial nomination, thinking that the Senate would be arbitrary, and the Senate could arbitrarily, as I think we are doing now, turn them down.

As I mentioned last night on the Senate floor, unless we work together under the doctrine of checks and balances, which is inherent in the Constitution, we could thwart the ability of this Nation having any Federal judiciary.

Mr. SCHUMER. If I might answer briefly, my colleague.

Mr. HATCH. On your own time.

Mr. SCHUMER. I was asked a question.

The VICE PRESIDENT. The time of the Senator has expired. Who yields time?

Mr. LEAHY. I yield 1 minute to the Senator.

Mr. SCHUMER. If I might answer my good friend from Virginia, I have tremendous respect for his integrity.

Yes, there was a vote on Mr. Rutledge—after he revealed his views on the Jay Treaty and other issues. Of course, we should have a vote on Miguel Estrada. I don't disagree with that. But not until we know how he feels on the vital issues of the day.

How does he feel about the first amendment? How does he feel about the commerce clause? Does he believe, like some on the bench, that the commerce clause has been expanded too broadly and we ought to go back to regulation by the 50 States?

I have no idea, I say to my friend from Virginia. I have no idea of how he feels.

Mr. LEAHY. I yield one more minute to the Senator.

Mr. SCHUMER. I have no idea how he feels about the first amendment or about the 11th amendment, and the balance between the Federal Government and the States, the very issues the Founding Fathers wanted us to know.

The judiciary, and I know my colleague knows this, is the one nonelected branch of the government. The advice and consent clause——

Mr. HATCH. I can speak for Mr. Estrada. I know he feels very good about the first amendment. All of us do. I don't think that is the question.

The Senator has a right to ask written questions and meet with him personally to ask how he feels about something. I am sure he feels very good about him.

The VICE PRESIDENT. Who yields time?

Mr. SCHUMER. Mr. President, may I have 1 minute?

Mr. LEAHY. I yield an additional 1 minute.

The VICE PRESIDENT. The Senator from New York is recognized.

Mr. SCHUMER. If Mr. Estrada feels good about the first amendment, I ask my colleague, why can't he tell us? And why can't he elaborate? What does he feel about Buckley v. Valeo, a case we debated here for a long time? It is a past case. How far does he feel the first amendment ought to go?

It is certainly not good enough, not only for the Senators but for the American people to hear my friend from Utah say he feels good about the first amendment, I say to my colleagues, or the second, or the fourth, or any of the other vital amendments.

I say to my colleagues, this is not a laughing matter. This is serious stuff about the one nonelected branch of Government.

The Founding Fathers wanted, in the advice and consent process, serious questions. Just as Senator HATCH said, it was a part of the process to ask those questions when President Clinton's nominees were before us. What is good for the goose is good for the gander. I yield.

The VICE PRESIDENT. The Senator from Utah.

Mr. HATCH. I yield up to 3 minutes to the Senator from Missouri.

Mr. TALENT. Mr. President, I want to place this debate in historical context. The tradition of the Senate has been to confirm judicial nominations of the President if the nominees were competent, if they were qualified, if they were honest, if they had a record and background in the law, in the practice of law or on the bench or in academia, that suggested they could live up to the standards of the judiciary. If they did, they were confirmed and confirmed without having to answer questions that nobody ever has had to answer and would usurp and undermine the executive branch and the Solicitor General's Office if they had to answer it. Under those standards, hundreds of people in Miguel Estrada's circumstances have been confirmed without even any controversy, much less a filibuster, and everybody here knows it.

You can always invent a reason to be opposed to somebody. Senators on the other side have been good at doing that with regard to Miguel Estrada, but he ought to be confirmed. At least he ought to have a vote, if we are going to follow the traditions of the Senate.

Now those traditions have broken down to the point we not only are voting not to confirm people, we are not even allowing a vote. We have Senators conducting a filibuster on somebody because they suspect they might disagree with his jurisprudence.

What is it we are so afraid Miguel Estrada might believe; a man who went to Harvard Law School, was an editor of the Law Review, served in the Solicitor General's Office, has been given high marks by everybody who has ever supervised him? Of course he is in the mainstream.

In the past, we gave people the benefit of the doubt. We don't have time, with every judicial nominee, to go through everything they might believe about every particular judicial issue. The fact is, if we were applying the traditions of the Senate, or anything close, this man would be confirmed and we could move on. Now we cannot even get a vote, and everybody here knows that.

The Senate is broken. It is broken at a time where we may be going to war. The economy is in trouble. Of course we need to move on. I hear Senators from the other side saying we should not be debating this, we should be moving on. Yes. Exactly. But you can't stand up and conduct a filibuster and then say you are not obstructing. You are. Let us have a vote on this man. He will probably carry. Other nominees we have votes on may not carry. Let's get the Senate working together.

It is not the end of the world if somebody gets on the court of appeals that you don't like. He is not going to change the Constitution. He is on the court of appeals. Let's vote on him and let's move on.

What concerns me is something to which the Senator from New York referred. I am concerned that a few years from now a Democratic President may get elected and he is going to start nominating people and we are going to get back on this, except from this side of the aisle. It would be wrong.

I have three kids. They are 12, 10, and 6.

The VICE PRESIDENT. The time of the Senator has expired.

Mr. TALENT. Can I have another minute to talk about my family?

Mr. HATCH. I grant the Senator 1 more minute.

The VICE PRESIDENT. The Senator is recognized.

Mr. TALENT. I appreciate it. Sometimes I go down to our little rumpus room and they are arguing about something, and the one thing I tell them I don't want to hear is: They started it. He started it.

There is a code of conduct to which you should adhere. Let's adhere to it. That is in the interest of this Senate. It is in the interests of the Constitution and the interests of the people. What must the people think when they see us doing this on an appellate court nomination? I ask my friends from the other side of the aisle, I know it was done—not to this extent but from this side of the aisle—to some of President Clinton's nominees. Let's go back to the standard we always followed. Let's make the Senate work. Let's keep it from being broken.

I thank the Senator for yielding.

The VICE PRESIDENT. Who yields time? The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, how much time is available to both sides?

The VICE PRESIDENT. The majority has 10 minutes 13 seconds; the minority, 14 minutes 11 seconds.

Mr. LEAHY. I thank the distinguished Presiding Officer.

I welcome the distinguished Presiding Officer to the Senate today in his capacity as President of the Senate. It is not often we see the Vice President in the chair of the Senate. With the U.N. Security Council meeting today, the OPEC meeting, the unsettled and threatening circumstances in so many parts of the world from the Middle East to the Korean peninsula to Iran and Iraq, we should feel very honored that the Vice President would take time out of his schedule related to those kinds of issues to be with us today.

I hope he will come back to the Senate when we debate the disastrous economic situation in the country, the loss of 2.5 million jobs in the last 2 years following 8 years of a million new jobs being added every year, or the 300,000 lost last month.

I know Senator DASCHLE sought for weeks to proceed to debate on S. 414, the Economic Recovery Act of 2003, which among other things includes the First Responders Partnership Grant Act, something that we could use in Vermont and Utah and Wyoming and everywhere else, but the Senate Republican majority has blocked debate and action on the Economic Recovery Act.

So, today, instead of debating the international situation, the need to pass an economic stimulus package, the need for an increased commitment to homeland defense, the need for legislation to provide a real prescription drug benefit for seniors or the many other matters so deeply concerning Americans, Republicans are insisting on returning again in some form to debate the nomination of Miguel Estrada.

I wonder if I might have order, Mr. President?

The VICE PRESIDENT. The Senate will be in order.

Mr. LEAHY. I note that what has impeded a Senate vote on the Estrada nomination has been the political game being played by the White House with this nomination. It is part of an effort to pack the Federal courts.

In many ways, the debate has been in the hands of the White House. This is a debate that could have ended at any time the White House wanted it to end. We wonder, is there something in Mr. Estrada's writings that the White House doesn't want us to see? The White House could have long ago solved this impasse by letting the Senate have access to Mr. Estrada's memos, especially since Mr. Estrada said he is perfectly willing to have us see those memos. We have plenty of questions we wanted to ask about it but we have to have the paperwork. He told us even though he said under oath he is willing to let us see it, the White House told him he could not.

So really this debate is in the control of the White House, not in the control of the leaders of the Senate. Past administrations provided legal memos in connection with the nominations of Robert Bork, William Rehnquist, Brad Reynolds, Stephen Trott, and Benjamin Civiletti, and this administration actually provided White House Counsel's office memos of its nominee to the EPA.

Our request for his memos was made nearly one full year ago, Mr. President. The White House also could have helped resolve this impasse through instructing the nominee to answer questions about his views at his hearing, to act consistent with last year's Supreme Court opinion by Justice Scalia in a case the Republican Party won to allow judicial candidates to share their views, and to stop the pretense that he has no views. The White House is using ideology to select its judicial nominees but is trying to prevent the Senate from knowing the ideology of these nominees when it evaluates them.

Instead, it appears that the Senate Republican majority, at the direction of the White House, chose to extend this debate because its political operatives hope to use it to falsely paint those who will not be steam rolled as somehow being ''anti-Hispanic.'' The Republicans' resort to partisanship regarding this nomination disregards the legitimate concerns raised by many Senators as well as by respected Hispanic elected officials and Hispanic civil rights leaders. Moreover, the Republican approach and the President's approach has been to divide: to divide the Senate, to divide the American people and, on this particular nomination, to divide Hispanic Americans against each other.

That is wrong. It is wrong because the President campaigned on a platform of uniting, not dividing. It is wrong because our country needs us to build consensus and work together, especially in these most challenging times.

Instead of bringing up legislation that could unite us or setting aside time for debate on the international and domestic challenges our country is facing, the Republicans have again returned to the nomination of Mr. Estrada and they have set aside an hour and one-half this morning for a constitutional debate. Many Democratic Senators have already spoken about the Senate's proper role in the confirmation process under the Constitution. I recall, in particular, statements by Senators DASCHLE, REID, BINGAMAN, BOXER, CLINTON, CORZINE, DODD, DORGAN, DURBIN, EDWARDS, FEINGOLD, FEINSTEIN, HARKIN, JOHNSON, KENNEDY, KOHL, LAUTENBERG, LEVIN, MIKULSKI, SARBANES and SCHUMER, among many others.

What is disconcerting about the recent debate is what appears to be the Republican majority's willingness to sacrifice the constitutional authority of the Senate as a check on the power of the President in the area of lifetime appointments to our federal courts. I fear, Mr. President, that the Republican majority's efforts to re-write Senate history in order to rubber-stamp this White House's federal judicial nominees will cause long-term damage to this institution, to our courts, to our constitutional form of government, to the rights and protections of the American people and to generations to come. I have served in the Senate for 29 years, and until recently I have never seen such stridency on the part of an executive administration or such willingness on the part of a Senate majority to cast aside tradition and upset

the balances embedded in our Constitution so as to expand presidential power.

In the time set aside by the Republican majority for this debate today, I welcome the opportunity to shed light on the fiction that cloture votes, extended debate, and discussion of the views of nominees are anything new or unprecedented. What I do find unprecedented is the depths that the Republican majority and this White House are willing to go to override the constitutional division of power over appointments and longstanding Senate practices and history. It strikes me that some Republicans seem to think that they are writing on blank slate and that they have been given a blank check to pack the courts. They show a disturbing penchant for reading our Constitution in isolation from its history and the practices that have endured for two centuries, in order to suit their purposes of the moment.

A few years ago, when Republicans were in the Senate minority and a democratically elected Democratic President was in the White House, columnist George Will, for example, had no complaint about a super-majority of 60 votes being needed to get an up or down vote on legislation or nominations proposed by the President. In fact, reflecting Republican sentiment at the time, what he said in his defense of the Republican filibuster of President Clinton's proposals, was the following:

> The Senate is not obligated to jettison one of its defining characteristics, permissiveness regarding extended debate, in order to pander to the perception that the presidency is the sun about which all else in American government—even American life—orbits.

This is from the Washington Post on April 25, 1993. It apparently did not trouble him or other Republicans when they were in the Senate minority that the Constitution expressly requires more than a simple majority for only a few matters. In fact, Mr. Will wrote: ''Democracy is trivialized when reduced to simple majoritarianism—government by adding machine. A mature, nuanced democracy makes provision for respecting not mere numbers but also intensity of feeling.''

Of course, that was in 1993 and President Clinton's proposals and a Democratic Senate majority were being contested by Republican filibusters. What is different a mere 10 years later? Just that the parties have switched roles and this year Democrats are in the Senate minority and a Republican occupies the White House. I ask unanimous consent that a recent article by Edward Lazarus that critiques Mr. Will's new position be printed in the RECORD.

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

[From the Washington Post, Apr. 25, 1993]

GEORGE WILL, MIGUEL ESTRADA, AND THE CLOTURE VOTE: HOW WILL'S FLIP-FLOP OF POSITIONS ILLUSTRATES THE INCREASING COLLAPSE OF THE POLITICS/LAW DISTINCTION

By Edward Lazarus

The flurry over Miguel Estrada's controversial nomination to the U.S. Court of Appeals for the District of Columbia continues on. So does the Senate Democrats' filibuster to stop Estrada from being confirmed.

Meanwhile, a rarely-invoked Senate Rule on the cloture vote has once again become a hot political football. Senate Rule XXII requires 60 votes of the Senate's 100 to stop debate, and break a filibuster.

Rule XXII's constitutionality is debated. Some believe that votes must be by a simple majority of 51, not a supermajority of 60, except in the limited cases in which the Constitution imposes a different rule.

Attorney Lloyd Cutler has put the argument as follows: ''The text of the Constitution plainly implies that each house must take all its decisions by majority vote, except in the five expressly enumerated cases where the text itself requires a two-thirds vote: the Senate's advice and consent to a treaty, the Senate's guilty verdict on impeachments, either house expelling a member, both houses overriding a presidential veto and both houses proposing a constitutional amendment.''

It's an interesting argument. Even more interesting is that the high priest of conservative columnists, George F. Will, has, over time, taken both sides of it—first attacking it, and now recently embracing it.

What spurred Will's change of mind? Sadly, it seems to be purely politics. That would be fine if it were an issue of policy, and politics. But it's not: It's an issue of constitutional law, which is supposed to have an answer deriving from history and precedent—an answer that transcends politics.

GEORGE WILL'S FLIP-FLOP ON THE CLOTURE VOTE

Will, a historian of sorts, frequently opines on legal and constitutional issues. He generally holds himself out, as most commentators do, as an honest broker of ideas, albeit a broker with a distinct perspective.

In that role, Will has twice addressed the issue of Rule XXII.

The first time was in 1993. At the time, Democratic stalwarts, such as Cutler, were challenging Rule XXII. They feared that, despite Democratic majorities in both the House and Senate, Republicans would use the filibuster to frustrate the agenda of the new Democratic president, Bill Clinton.

At the time, Will took Cutler to task for his doubts about the constitutionality of Rule XXII. He complained that taking issue with the Rule was ''institutional tinkering'' that ''would facilitate the essence of the liberal agenda—more uninhibited government.'' And he took direct aim at Cutler's argument about the Rule.

Specifically, Will argued that the five instances of supermajority votes listed in the Constitution were the only time supermajority votes could be used for externally-oriented legislation—''the disposition by each house of business that has consequences beyond each house, such as passing legislation or confirming executive or judicial nominees.'' However, ''procedural rules internal to each house,'' according to Will, ''are another matter.'' And in that sphere, a supermajority cloture vote was fine.

Indeed, Will pointed out, history supports this view: ''[T]he generation that wrote and ratified the Constitution—the generation whose actions are considered particularly illuminating concerning the meaning and spirit of the Constitution—set the Senate's permissive tradition regarding extended debate. There was something very like a filibuster in the First Congress.''

Fair enough. Until one reads the column Will published last week in The Washington Post regarding the Estrada nomination. Here's what Will has to say now (with emphases added):

''The president, preoccupied with regime change elsewhere, will occupy a substantially diminished presidency unless he defeats the current attempt to alter the constitutional regime here. If at least 41 Senate Democrats succeed in blocking a vote on the confirmation of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit, the Constitution effectively will be amended.''

If Senate rules, exploited by an anti-constitutional minority, are allowed to trump the Constitution's text and two centuries of practice, the Senate's power to consent to judicial nominations will have become a Senate right to require a 60-vote supermajority for confirmations. By thus nullifying the president's power to shape the judiciary, the Democratic Party will wield a presidential power without having won a presidential election.

Wait a second. So Will now agrees with Cutler? And not only that, he reads both the Constitution's text and ''two centuries of practice'' relating to filibusters entirely differently than he once did? What's prompted his change of mind? And doesn't he owe Cutler an apology?

Obviously, conscientious commentators do change their views when they re-examine them and find them in error. I am no fan of a ''foolish consistency'' in such matters. But this kind of change of mind—without explanation or apology—is quite troubling.

Also troubling is the fact that Will's close analysis of the Constitution and the First Congress's proceedings, so important to him in 1993, is entirely missing here. And his venom—once directed at Cutler—now draws on Cutler (without attribution) instead. Only one conclusion seems possible: This is an exquisitely brazen example of intellectual flip-floppery that has nothing to do with law or the Constitution, or American history, and everything to do with conservative politics.

WHAT THE FLIP-FLOP MEANS FOR WILL, AND FOR ALL OF US

The flip-flop is an embarrassment to Will and his reputation. Sadly, it may also be more than that as well. I fear that Will's adventure in hypocrisy is emblematic of what may well be the worst truth in American political discourse: nothing is shameful anymore. And no sense of integrity—an integrity that transcends politics—remains.

It seems especially ironic (or perhaps appropriate) that Will should come to represent this problem. After all, he—and commentators of his ilk—have spent the last decade or two bemoaning the rise of moral relativism in our society. They mourn the death of ''shaming'' as an instrument of behavior modification for politicians and citizens alike.

In the culture wars, Will and others like him have been the army defending such concepts as objective truth and personal responsibility. They have been the ones saying there is a right thing to do, independent of politics, independent of the times. They have carried the banner of integrity, in short. Now it's plain, though, that Will has torn up that banner even while pretending to uphold it.

I confess that I'm a sucker. I believe in these kinds of things—integrity, truth, certain absolute moral values, a right thing to do. Maybe it's all that Plato I read in college. I've always believed there is such a

thing as a ''true'' answer (even if we cannot know it with certainty), and that there are ways of discerning better from worse, whether in argument or music or literature.

Nowhere did these beliefs seem to be more important than in the field of law. Courts wield great power to shape the social order and control the destiny of individuals. Their integrity rests ultimately on the belief that their decisions are not merely just that—exercises of power—but are, in addition, principled attempts to discern the proper meaning of the law. And the idea that there is a ''proper meaning'' in the first place, in turn presumes a universe that recognizes a genuine ability to choose better arguments over weaker ones, regardless of what one thinks of the results the arguments lead us to.

In according with these principles, I've critiqued legal reasoning even when I agree with its result, if I've felt the reasoning itself was flawed. For instance, though I support abortion rights, I've expressed strong qualms about Roe.

Now, however, it seems integrity is being radically redefined, as pure loyalty—fealty to the party, the political beliefs, the results that one prefers. Lying in the service of a cause has become, in some circles, honorable to do.

CHANGING TIMES HAVE USHERED IN A NORM OF INTELLECTUAL DISHONESTY

Intellectual dishonesty is pure poison to the enterprise of the law. Yet countless examples show intellectual dishonesty has now become a routine, expected part of American discourse. The most obvious half-truths and hypocrisies are greeted with shrugged shoulders and a grunt of ''what did you expect?''

These dishonesties that we have come to accept too easily range from the non-reasoning of Bush v. Gore, to the logic-defying economic rationale for more tax cuts, to the ever-shifting justification of war in Iraq. And they extend to just about every other significant issue of law and policy that affects American life.

Why does this happen? It cannot be because all the people perpetrating these intellectual frauds are bad people. It's been my experience (limited, I admit) that most people who go into government or devote themselves to a life of public policymaking or intellectualism, do so for the best of reasons—because they want to help shape the world for the better.

Then why? I found a partial answer watching, last night, an old clip of Daniel Ellsberg being interviewed by Walter Cronkite, in the wake of Ellsberg's controversial release of the Pentagon Papers. To paraphrase, Ellsberg contended that our society had become so divided, with each side so bent on perpetuating itself in power, that government and the world around it imposed a sustained and terrible pressure on good people to make a choice. They could either leave that world or, far worse, give up the search for truth, in exchange for the search for victory.

That was more than 30 years ago. Has anything much changed?

Mr. LEAHY. As Mr. Will noted in 1993, one of the key attributes of the Senate is the venerable tradition of extended debate and deliberations. In fact, not until 1917 was there even a provision in the Senate rules to allow for cloture, a procedure by which the Senate acts to cut off debate. The Senate first adopted the cloture rule in 1917. At that time, cloture was limited to and could only be sought on legislative matters. The cloture rule was extended in 1949 to include measures and matters, which includes judicial nominations. Thus, prior to 1949, there was no mechanism to limit debate on nominations, and in fact, disputes over nominations—to the few hundred seats in the federal judiciary—were handled and resolved by Senators behind closed doors.

Earlier in this debate today, one Senator indicated that all prior Supreme Court nominees had been given votes. I will just name a few judicial nominees who were not acted upon by the Senate earlier in American history: John M. Read, nominated by President Tyler on February 7, 1845; Edward Bradford, nominated by President Fillmore on August 16, 1852; Henry Stanbery, nominated by President Andrew Johnson on April 16, 1866; and Stanley Mathews, nominated by President Hayes on January 26, 1881. The facts are that many judicial or executive nominations were defeated in the Senate by inaction or by the threat of a filibuster over the years.

Republicans resurrected and amplified those tactics in the years 1995–2001 to defeat more than 50 of President Clinton's judicial nominees and to delay for years the confirmation of many others. In 1999, only 22 percent of President Clinton's circuit court nominees were confirmed. That was the first time in recent memory that a circuit court nominee was substantially more likely not to be confirmed than to be confirmed. For all of 1999 and 2000, only 44 percent of President Clinton's circuit court nominees were confirmed, making it more likely than not that his circuit court nominees would not be confirmed, unlike the nominees of the prior three Presidents, even during their last years in office. That is why vacancies on the circuit courts more than doubled from 16 in 1995 to 33 when the Senate reorganized in the summer of 2001. That is why this President has had so many circuit vacancies to fill, and he has shown little bipartisanship in his choices. In fact, rather than uniting people with his choices for lifetime appointments, he has sent forward a slate of circuit court nominees that has generated tremendous controversy and division.

In essence, until Republicans had a Republican President, Republicans interpreted the Advice and Consent Clause of the Constitution to allow a handful of anonymous Republican Senators to prevent an ''up or down'' vote by the full Senate on scores of qualified and moderate, mainstream judicial nominees of President Clinton. Now, when Democratic Senators have expressed genuine concerns about the lack of information regarding Mr. Estrada and have made a well-founded request to see his writings as a public servant, Republicans claim it is wrong and unconstitutional for Senators to act in accordance with Senate rules and tradition and their longstanding role as a check and balance on the President's appointment power.

The disregard for rules and traditions is especially unfortunate when what is at stake in judicial nominations are lifetime appointment for judges who will have the power to change how the Constitution is interpreted and whether civil rights, environmental protections, privacy and our fundamental freedoms will be upheld. With respect to the Estrada nomination, what is at stake is a seat on the second highest court in the country and the swing vote on that important court.

Most of the decisions issued by the D.C. Circuit in the nearly 1,400 appeals filed per year are final because the Supreme Court now takes fewer than 100 cases from all over the country each year. This court has special jurisdiction over cases involving the rights of working Americans as well as the right to a cleaner environment. This is a court where federal regulations will be upheld or overturned, where privacy rights will either be retained or lost, and where thousands of individuals will have their final appeal in matters that affect their financial future, their health, their lives and their liberty.

This is a court that has vacant seats due to anonymous Republicans blocking the last two nominees to this court by a Democratic President. Those nominees had outstanding legal credentials and qualifications but during President Clinton's last term, the Republican-controlled Senate would not proceed to an up or down vote on either of them.

The word ''filibuster'' derives from the Dutch word for piracy, or taking property that does not belong to you. Under that ordinary definition, it would be accurate to say that at least two of the vacancies on the D.C. Circuit, for which Republicans blocked qualified nominees, were filibustered, as well. Republicans, who exploited every procedural rule and practice to block scores of Clinton nominees anonymously from ever receiving an up or down vote, now want to change the rules midstream, to their partisan advantage, again so that all of their nominees get votes as quickly as possible. The whole reason this President has so many circuit vacancies to fill is because this was the booty of their piracy, their filibustering of judicial seats that arose during the Clinton Administration while they prevented votes on that President's qualified nominees.

For example, a Mexican-American circuit court nominee of President Clinton, Judge Richard Paez, was forced to wait more than 1,500 days to be confirmed. Even after the Republican filibuster was broken by a cloture vote to end debate, many Republicans joined an unsuccessful motion to indefinitely postpone his nomination. None of the more than 30 Republicans who voted against cloture in connection with that nomination or who voted in favor of Senator SESSIONS unprecedented motion ''to indefinitely postpone'' the vote on Judge Paez's nomination, which had been pending for more than 1,500 days, should be

heard to complain if Democratic Senators seek more information about this President's nominees before proceeding to a vote for a lifetime appointment.

Senator Bob Smith, a straight talker from New Hampshire, outlined the Senate's history of filibusters of judicial nominees and said:

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

Thus, the Republicans' claim that Democrats are taking ''unprecedented'' action regarding the circuit court nomination of Mr. Estrada—much like the bogus White House claim that our request for Mr. Estrada's work while paid by taxpayers was ''unprecedented''—is simply untrue. Republicans' desire to rewrite their own history is wrong. They should come clean and tell the truth to the American people about their past practices on nominations. They cannot change the plain facts to fit their current argument and purposes.

Back in 2000, Senator HATCH candidly admitted after cloture was invoked on the Paez nomination and Senator SESSIONS made his unprecedented motion to indefinitely postpone any vote on that judicial nomination that Judge Paez's nomination had been filibustered. He said:

Indeed, I must confess to being somewhat baffled that, after a filibuster is cut off by cloture, the Senate could still delay a final vote on a nomination. A parliamentary ruling to this effect means that, after today, our cloture rule is further weakened.

Republicans should not have come to the floor and told the American people over the last month that Democratic Senators had done something unprecedented in debating and opposing the Estrada nomination. They themselves did it quite recently and have done it repeatedly. Let us be honest about this and straight with the American people. Given the time allotted for today's debate, I cannot discuss them all but I will include in the record some of the other examples of Republican filibusters of presidential nominations from the nomination of Justice Abe Fortas to be Chief Justice of the United States Supreme Court through the nominations of Stephen G. Breyer, now Justice Breyer, to the First Circuit; Rosemary Barkett to the 11th Circuit; H. Lee Sarokin to the 3rd Circuit; and Marsha Berzon and Richard Paez to the 9th Circuit.

Even more frequent during the years from 1995 through 2001, when Republicans controlled the Senate majority, were Republican efforts to defeat President Clinton's judicial nominees through inaction and anonymous holds for which no Republican Senator could be held accountable. Republicans held up almost 80 judicial nominees who were not acted upon during the Congress in which President Clinton first nominated them, Republicans eventually defeated more than 50 judicial nominees without a recorded Senate vote of any kind, just by refusing to proceed with hearings and Committee votes due to the anonymous acts of one or more Republicans.

Beyond the question of judicial nominees, Republicans also filibustered President Clinton's nomination of Dr. Henry Foster to become Surgeon General of the United States. This was an Executive Branch nominee that Republicans filibustered successfully in spite of two cloture votes in 1995. Dr. David Satcher's subsequent nomination also required cloture but he was successfully confirmed.

Other executive branch nominees who were filibustered by Republicans included Walter Dellinger, whose name has been invoked with approval by Republicans during the debate on the Estrada nomination. Mr. Dellinger was nominated to be Assistant Attorney General for the Office of Legal Counsel and two cloture petitions were required to be filed and both were rejected by Republicans. In this case we were able finally to obtain a confirmation vote after significant efforts and Mr. Dellinger was confirmed to that position with 34 votes against him. He was never allowed to be a confirmed Solicitor General because Republicans had made clear their opposition to him.

In addition, in 1993, Republicans objected to State Department nominations and even the nomination of Janet Napolitano to serve as the U.S. Attorney for Arizona, resulting in cloture petitions. In 1994, Sam Brown was nominated to be an Ambassador. After three cloture petitions were filed, his nomination was returned to President Clinton without Senate action. This was another successful filibuster by Republicans, and this was to a short-term appointment to serve in the Executive Branch, not to a lifetime appointment. Also in 1994, Derek Shearer was nominated to be an Ambassador and it took two cloture petitions to get to a vote before he was confirmed. In 1994, Ricki Tigert was nominated to chair the FDIC and it took two cloture petitions to get to a vote and confirmation of that executive nomination.

In addition, some remember Republican unwillingness to allow a Senate vote on the nomination of Bill Lann Lee to serve as the Assistant Attorney General for the Civil Rights Division at the Department of Justice. He told the Judiciary Committee that he would follow the law and enforce the law. He was the choice of the President to serve in that President's administration, but Republicans would not accord him an up or down vote before the United States Senate.

Republicans now claim that extended debate on this nomination is somehow unprecedented. I would point out that we have had a lot of extended debates and cloture votes over the last decade. I lost count of the number of times we had to vote on cloture when President Clinton was making nominations. This chart shows some of the Republican filibusters of nominations, leaving out their filibusters of legislation.

So when Republican Senators now talk about the Senate Executive Calendar and presidential nominees, it must be remembered that they recently filibustered several nominees and they succeeded in blocking many nominees by cloture votes and through anonymous holds. Here is a more complete list of recent Republican filibusters:

REPUBLICAN FILIBUSTERS OF NOMINEES

Year	Nominee and position	Cloture petitions filed
1968	Abe Fortas, Supreme Court	*1
1980	William Lubbers, NLRB	3
1980	Don Zimmerman, NLRB	3
1980	Stephen Breyer, 1st Circuit	2
1987	Melissa Wells, Ambassador	1
1987	William Verity, Commerce	1
1993	Walter Dellinger, Justice	2
1993	Five State Department Nominees	2
1993	Janet Napolitano, Justice	1
1994	Larry Lawrence, Ambassador	1
1994	Rosemary Barkett, 11th Circuit	1
1994	Sam Brown, Ambassador	*3
1994	Derek Shearer, Ambassador	2
1994	Ricki Tigert, FDIC	2
1994	H. Lee Sarokin, 3rd Circuit	1
1995	Henry Foster, Surgeon General	*2
1998	David Satcher, Surgeon General	1
2000	Marsha Berzon, 9th Circuit	1
2000	Richard Paez, 9th Circuit	1

I would note that the Fortas, Brown and Foster cloture votes resulted in effect in the defeat of their lifetime or short-term appointments. Some of these filibusters occurred when the Republicans were in the minority—as with Senator Helms' filibuster of a State Department appointee of President Reagan, and some were while Republicans were in the majority—as with the filibuster of Judge Paez's nomination.

Notwithstanding the recent Republican efforts to filibuster that Hispanic circuit court nominee and their failure to give hearings or votes to three other Hispanic circuit court nominees of President Clinton in addition to other nominees, Republicans have come to this floor and made unfounded attacks against Democrats who have expressed concerns about Mr. Estrada's nomination. It appears the Senate Republican majority, at the direction of the White House, chose to extend this debate because political operatives hope to use it to falsely paint those who were not to be steamrollered as somehow anti-Hispanic. The Republican's approach of crass partisanship regarding this nomination——

Mr. SANTORUM. Mr. President, will the Senator yield for a question? These were not times when Republicans were in charge, is that correct?

Mr. LEAHY. Once I finish my speech I will be glad to yield to questions. I control the floor. Once I have finished my speech I will be glad to.

Mr. SANTORUM. Will he yield for a question?

Mr. SCHUMER. Regular order, Mr. President.

Mr. SANTORUM. I just want to make sure the RECORD is correct because the Senator said Republicans were in charge at that time.

The PRESIDING OFFICER (Mr. SESSIONS). The Senator from Vermont has the floor.

Mr. SANTORUM. I just want to make sure the RECORD is correct.

Mr. LEAHY. The partisanship regarding this nominee disregards the legitimate concerns raised by many Senators. It is wrong because distinguished Latino leaders, who have spent their lives seeking justice and greater representation of Hispanic lawyers as judges, have been attacked by Republicans for showing courage and honesty in their judgment that this nomination is wanting. Joining the League of United Latin American Citizens, which previously wrote to the Senate disassociating itself with Republican attacks on Democratic Senators, yesterday the National Council of La Raza issued a statement condemning the treatment of Congressional Hispanic Caucus by Republicans. The NCLR statement notes how ''deeply offended'' it is by Mr. Estrada's supporters calling Congressional Hispanic Caucus members ''tyrannical,'' ''racist,'' and ''anti-Latino''.

Moreover, the Republican approach and the President's approach have been to divide the Senate, to divide the American people—may I have order, Mr. President? May I have order?

Mr. SCHUMER. Mr. President, may we have order?

The PRESIDING OFFICER. The Senator from Vermont has the floor. He may or may not yield.

Mr. LEAHY. That is wrong. The President campaigned on a platform of uniting, not dividing. It is wrong because our country needs us to build consensus and we should work together especially in these most challenging times. These are the years of Republican filibusters of judicial or executive branch nominees: 1968, 1980, 1980, 1980, 1987, 1987, 1993, 1993, 1993, 1994, 1994, 1994, 1994, 1994, 1994, 1995, 1998, 2000, 2000.

For Republicans to claim that they have never filibustered a circuit court nominee is just incorrect. For them to claim that they have never ''successfully'' filibustered a lifetime or short-term appointee's nomination is also incorrect. The debate on Mr. Estrada's nomination is important.

I think in the debate on this nomination, this is not a nomination that unites rather than divides. Certainly within the Hispanic community itself, highly respected members of the Hispanic community oppose Miguel Estrada.

Mr. HATCH. Mr. President, will the Senator yield for a question?

Mr. LEAHY. I would be glad to. Let me finish these comments, and then I will yield on the time of the Senator from Utah.

In this case, it appears to me that the White House really wants to play politics. They could end this debate today if they wanted to. They can make these papers available so that Miguel Estrada can be asked questions based on them. Miguel Estrada has said under oath that he is perfectly willing to answer the questions, but the White House told him he is not allowed to. Once they are willing to, let us have a hearing and then let us go forward on questions based on what is in there.

The administration, however, seems to believe that somehow the Senate is their own unit to be used for whatever type of politicking they want. They renominated Judge Charles Pickering despite his ethical lapses. They renominated Justice Priscilla Owen despite her record as a conservative activist judge and after being rejected by the Judiciary Committee. Both of these nominees were rejected by the Senate Judiciary Committee after fair hearings and open debate last year. Sending these renominations to the Senate is unprecedented. No judicial nominee who has been voted down in Committee has ever been renominated to the same position by the President. The White House in tandem with the new Republican majority in the Senate is choosing these battles over nominations purposefully. Dividing rather than uniting has become their modus operandi.

Among the consequences of this partisan strategy is that for the last month, the Senate has been denied by the Republican leadership meaningful debate on the situation in Iraq. I commend Senator BYRD, Senator KENNEDY and the other Senators on both sides of the aisle who have nonetheless sought to have the Senate fulfill its constitutional role as a forum for debate and careful consideration of our nation's foreign policy in accordance with the shared power provided in the Constitution. The decision by the Republican Senate majority to focus on controversial nominations rather than the international situation or the economy says much about their mistaken priorities. The Republican majority sets the agenda and they schedule the debate, just as they have here this morning.

Among the consequences of this partisan strategy, of course, what has happened by the Republican scheduling of debate on this nomination is we don't have sufficient time to debate the Iraq situation. We don't talk about war in Iraq even though there is great division in this country. We don't talk about an administration which inherited the largest surplus any administration has ever inherited. The Clinton administration left the largest budget surplus to this administration than any administration ever had, and now Republicans are creating the largest deficit in history. The Clinton administration created a million new jobs a year. This administration is losing a million jobs a year. But if the Republican controlled Senate continues to schedule debate on Miguel Estrada, they will not have to talk about that.

That kind of tells me why they are doing this. Here is the greatest deliberative body in the world, and we don't have a debate on the war in Iraq. The Canadian Parliament does. The British Parliament does. The U.S. Senate does not.

I would be willing to yield to the Senator from Utah on his time.

Mr. HATCH. I will ask the question on my time. Will the Senator answer on his time?

Mr. LEAHY. On the time of the Senator from Utah.

Mr. HATCH. Let me ask the question on my time. I would like the answer on the Senator's time.

As to the number of circuit court of appeals judges, No. 1, who was in charge of the Senate when Abe Fortas was defeated by a filibuster? No. 2, were any of those circuit court nominees defeated by filibuster, or were they all confirmed?

Mr. LEAHY. Mr. President, I will refer to this in my statement. All of these were Republican filibusters and a few times a few Democrats joined with the Republicans in their efforts to block these nominees. Some of the Republican filibusters were successful, and some were not, but they all were filibusters and they all involved cloture petitions. A filibuster is still a filibuster even if it does not succeed in blocking the nominee forever. The Republican filibuster of Judge Paez's circuit court nomination proves that.

I fear that what the Republican majority is trying to do is rewrite Senate history in order to rubberstamp the Federal judicial nominees of this White House and that this will cause long-term damage to the Senate and the courts.

I have served in the Senate for 29 years. I have never seen a President so eager to divide rather than unite. I have never seen such stridency on the part of an executive administration or such willingness as this Senate majority's to cast aside tradition, the rules, and those things that give us a check and balance. It is unfortunate because the country expects more of us.

We see the most deliberative body on Earth—the Senate—not even debating the war we are about to go to in a matter of days, if the news accounts are correct, and we are talking about this because this is the Republican agenda, packing the courts.

In the debate Republicans have insisted upon, a number of fictions have been told. The cloture votes, the extended debate, and the discussion of the views of nominees is not anything new or unprecedented. What is going on here is unprecedented—with the Republican blank slate, no past history, and they think they can do whatever they want to do.

During the time when President Clinton was here and the Republicans were in charge, there were scores of nominees on which we didn't even have a vote. We had anonymous holds by Republicans. We didn't have up-or-down votes. Now, when we express genuine concern, now, when we say why can't Mr. Estrada show us the writings that he has said under sworn testimony he is willing to show us but the White House blocks him from showing us, somehow we are blocking. Maybe it appears that the Republicans like the

rules when they are using them, but they don't like the rules when we are using them.

Even though Republicans blocked some Hispanic nominees of President Clinton and scores of others, I must add that the debate on the nomination of Mr. Estrada is not part of any retaliation. We have genuine concerns about his nomination, his answers and the documents we have requested to better understand his unvarnished views. In addition, we worked hard to move quickly on the vast majority of this President's judicial nominations, to demonstrate our fairness and bipartisanship. In just 17 months, the Democratic-led Senate confirmed 100 of President Bush's judicial nominees, even though Republicans averaged only 38 per year. We more than doubled the rate of confirmation. We also held hearings for 20 circuit court nominees and confirmed 17 of them in just 17 months, following on the heels of a Republican average of just 7 circuit nominees confirmed per year, and one year in which they allowed zero circuit court nominees to be confirmed. So, we worked very hard to return the nomination process to a more consistent and steady pace, after the obstruction in prior years. So far this year, 5 judicial nominees of this President have already been confirmed.

The confirmation of 100 judges nominated by this President was not enough for Republicans to be satisfied. They want every one of this President's judicial nominees to be confirmed no matter their ethical record or record of activism or their controversy. They want every judicial nominee on the courts immediately despite the serious concerns raised by Senators and citizens alike. They want to pack the court with many divisive judicial nominees who will tilt the balance of the courts for decades to come.

The fact is, it appears to me, the decision is being made not here in the Senate but by a political arm of the White House.

They have made these controversial appointments despite the recent history of the moderate nominees to these circuits of President Clinton who were blocked. If we use the ordinary definition of filibuster, we could say that at least two of the vacancies on the District of Columbia Circuit were filibustered despite the well-qualified nominees sent up by President Clinton. They were never allowed to be voted on. They didn't make it to the floor. Republicans blocked nominees in a far easier way. They didn't even bring them up. They were nonpersons—almost like the old Soviet Union. When you looked at the picture of the Politburo, you would find out the next year when the picture was shown they were X'd out.

Mr. SCHUMER. Mr. President, will my colleague yield for a question?

Mr. LEAHY. Certainly.

Mr. SCHUMER. How many of these nominees were never brought up even for debate? Does my colleague think it is even worse than trying to figure out what his views are than never having the debate on the floor and never bringing them up and never giving them a chance?

Mr. LEAHY. The Republicans wouldn't allow over 50 of President Clinton's nominees to ever have a hearing or ever have a vote. Many of these individuals were nominated years earlier. We never got to know what the reasoning behind the anonymous Republican holds was. Even when we finally did, for example, a Mexican-American circuit court nominee of President Clinton, Judge Richard Paez, was forced to wait more than 1,500 days to be confirmed. And even then, we had to vote in favor of cloture to get the up or down vote on his nomination. Fifteen Republicans voted against cloture—after he waited more than 20 months for a floor vote during the four-plus years he was pending before the Senate. In fact, one Republican Senator moved to indefinitely postpone Judge Paez's nomination, even though he had waited for 1,500 days, and 31 Republicans voted in favor of indefinitely postponing that nomination in March of 2000. If they had had the votes they never would have let him be confirmed. Not one Republican came to the floor during the time Judge Paez was waiting for a vote and suggested that the Republican filibuster during any of those 1,500 days was unconstitutional or anti-majoritarian.

In fact, today made me think of this when we have the two distinguished Presiding Officers, the distinguished Vice President and the distinguished Senator from Alabama. The distinguished Senator from Alabama actually objected to the Vice President at that time being in the chair in the closing moments of the debate on Judge Paez's nomination because the executive branch had nominated him and that was a conflict of interest in his view. Of course, Republicans did not make a similar motion today when it was a Republican Vice President in the chair during a debate about a Republican nominee.

Let us just be a little bit honest about what is going on here. This is sauce for the goose and sauce for the gander. And yet this Administration and many Republicans have not acknowledged our effort to turn the other cheek and confirm 100 of this President's judicial nominees in the prior 17 months of Democratic leadership of the Senate. Many of those nominations were to seats that were blocked from being filled during the prior period of Republican control of the Senate.

It cannot be that only the rules Republicans like at the times that they like them are the rules that are followed in the Senate, but more and more that seems to be what the Republican majority is demanding. They should not pretend the rules no longer apply simply because the Republican majority finds them inconvenient, but that is happening more and more in the Senate. Regrettably, it has occurred recently in connection with judicial nominees before the Judiciary Committee, when the Republicans insisted on breaching Rule IV, a longstanding rule of our Committee that allows for extended debate, as well.

I would like to address a most troubling development that demonstrates how Republicans are violating longstanding Senate rules to suit themselves. Two weeks ago in a meeting of the Senate Judiciary Committee, the Chairman unilaterally declared the termination of debate on two controversial circuit court nominations. Senator DASCHLE termed it deeply troubling and a ''reckless exercise of raw power by a Chairman,'' and he is right. The Democratic Leader observed that the work of this Senate has for over 200 years operated on the principle of civil debate, which includes protection of the minority. When a Chairman can on his own whim choose to ignore our rules that protect the minority, not only is that protection lost, but so is an irreplaceable piece of our integrity and credibility.

The Democratic Leader noted that faithful adherence to rules is especially important for the Senate and for its Judiciary Committee. He noted ''how ironic that in the Judiciary Committee, a Committee which passes judgment on those who will interpret the rule of law,'' that it acted in conscious disregard of the rules that were established to apply to its proceedings. If this is what those who pontificate about ''strict construction'' mean by that term, it translates to winning by any means necessary. If this is how the judges of the judicial nominees act, how can we expect the nominees they support as ''strict constructionists'' to behave any better? Given this action in disrespect of the rights of the minority, how can we expect the Judiciary Committee to place individuals on the bench who respect the rule of law? In my 29 years in the Senate and in my reading of Senate history, I cannot think of so clear a violation of Senators' rights.

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

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

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

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

It was rarely utilized but Rule IV set the ground rules and the backdrop against which rank partisanship was required to give way, in the best tradition of the Senate, to a measure of bipartisanship in order to make progress. That is the other important function of the rule.

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

In fact, the only occasion I recall when Senator HATCH was previously faced with implementing Committee Rule IV, he did implement it. In 1997 Democrats on the Committee were seeking a Senate floor vote on President Clinton's nomination of Bill Lann Lee to be the Assistant Attorney General for Civil Rights at the Department of Justice. Then, Senator HATCH acknowledged: ''Rule IV of the Judiciary Committee rules effectively establishes a committee filibuster right . . . .'' In 1997, Chairman HATCH acknowledged: ''Absent the consent of a minority member of the Committee, a matter may not be brought to a vote.'' In that case, in 1997, Chairman HATCH followed the rules of the Committee.

Last month the bipartisan tradition and respect for the rights of the minority ended when Chairman HATCH decided to override the rule rather than follow it. He did so expressly and intentionally, declaring: ''[Y]ou have no right to continue a filibuster in this committee.'' He decided, unilaterally, to declare the debate over even though all members of the minority were prepared to continue the debate and that debate was, in fact, terminated prematurely. Senator HATCH completely reversed his own position from the Bill Lann Lee nomination and took a step unprecedented in the history of the Committee.

In his recent letter to Senator DASCHLE, Senator HATCH now contends that he ''does not believe the Committee filibuster should be allowed and [he] thinks it is a good and healthy thing for the Committee to have a rule that forces a vote.'' I ask that the exchange of letters between Senator HATCH and the Democratic Leader be included in the RECORD.

Our Committee rule, while providing a mechanism for terminating debate and reaching a vote on a matter, does so while providing a minimum of protection for the minority. It is even that minimum protection that Chairman Hatch will no longer countenance. It is Senator HATCH who has ''turned Rule 4 on its head'' last month, after 24 years of consistent interpretation and implementation by five chairmen. Never before his letter to Senator DASCHLE has anyone since the adoption of the rule in 1979 ever suggested that its purpose was to be narrowed and redirected to thwart what he called ''an obstreperous Chairman who refuses to allow a vote on an item on the Agenda.'' After all, as Senator HATCH recognizes in his letter, it is the chairman's prerogative to set the agenda for the mark-up.

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

The Committee and the Senate have crossed a threshold of partisan overreaching to rubber-stamp judicial nominees that should never have been crossed. I urge the Republican leadership to recommit the nominations of Deborah Cook and John Roberts to the Judiciary Committee so that they can be considered in accordance with the Committee's rules. The action taken last month should be vitiated and order restored to the Senate and to the Judiciary Committee. I urge the Judiciary Committee and the Senate to rethink the misstep taken last month and urge the Chairman and the Committee to disavow the misinterpretation and violations of Rule IV that occurred. Order and comity need to be restored to the Judiciary Committee. An essential step in that process is the restoration of minority rights under Rule IV and recognition of minority rights thereunder.

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

In circumstances such as these, when the rights of the minority are being violated and Senate rules and longstanding practices are breached, the minority is left with very few options and very little choice in how it must proceed. This President has been the most politically aggressive and the most unilateralist President I have seen in my 29 years in the Senate in his nominations. The Republican majority is now choosing to abet his efforts at the expense of the Senate minority's rights and the constitutional role of the Senate. That is most regrettable.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, how much time remains on both sides?

The PRESIDING OFFICER. Nine minutes, 42 seconds; the other side has 40 seconds.

Mr. HATCH. I would like to correct the RECORD. When all of those circuit court judges were approved and confirmed, during the time when the filibuster occurred on Fortas—the only filibuster which was really a true filibuster—it was bipartisan and the Democrats controlled the Senate.

I yield 2 minutes to the distinguished Senator from Tennessee.

Mr. ALEXANDER. Mr. President, the Senator from Illinois earlier brought up the distinguished late Judge Frank Johnson of Alabama and commended him for doing the right thing. I wanted to remind the Senate of why Judge Johnson was able to do the right thing in desegregating the south. It was because of John Minor Wisdom of Louisiana and John Brown of Texas and Elbert Tuttle of Georgia, who were Republican appellate court judges appointed by a Republican President named Eisenhower at a time in the 1950s when the Democratic side of the Senate was using the filibuster to kill every important piece of civil rights legislation that was proposed in the Senate.

Senator Eastland of Mississippi, Senator Stennis of Mississippi would never have approved Judge Wisdom's nomination or never have agreed with it if they had known that he and Judge Brown and Judge Tuttle would order the admission of James Meredith to the University of Mississippi.

So at a time when these distinguished former Democratic Senators were filibustering every piece of civil rights legislation in the Senate, they didn't even consider filibustering an appellate judge. That way Judge Wisdom, Judge Brown, and Judge Tuttle all were confirmed, and all ordered James Meredith to be admitted.

The relevance of the point of the Senator from Illinois is that today's Democrats, our friends on the other side, are going further than the Democratic filibusters against the civil rights bills in the 1950s. They are denying the President the traditional right to nominate and appoint judges. I don't know what happened in the past, but I know what this one Senator will do in the future. If there is a Democratic President and I am in this body, and if he nominates a judge, I will never vote to deny a vote on that judge. If two or three more Senators on both sides will do the same thing, we could go back to having more respect for our judicial nominating process.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I yield 2 minutes to the distinguished Senator from Texas.

Mrs. HUTCHISON. Mr. President, when the Founding Fathers wrote our Constitution, they said that judicial nominees would be confirmed by the advice and consent of the Senate. Clearly that has always been a majority vote. They specified in the Constitution when a larger vote was necessary, such as treaties, which require two-thirds. In fact, when the 25th amendment to the Constitution was approved by the Senate in 1965, the Vice President of the United States, if appointed, would be required to receive a majority vote of the House and Senate for confirmation. So to say that a judge should require a supermajority is to amend the Constitution without going through the process.

That is what is happening today with Miguel Estrada. We are being required to muster 60 votes. We know we have 55 because we have had a vote now. We have had a cloture vote, and 55 people in the Senate believe Miguel Estrada should be confirmed for the Federal bench. And yet he is not confirmed because we have a higher threshold.

We can't amend the Constitution through a filibuster. We cannot take away the power of the President's appointments that are given in the Constitution with a filibuster. This is different from any other filibuster. A filibuster on an issue is a legitimate tool. But a filibuster on a judicial nominee takes the balance of power and skews it in favor of the legislature over the President's right to have his people appointed to the Federal bench.

The Senate needs to look carefully at the precedent being set. It is not right in a judicial nomination to hold a 60-vote threshold when the Constitution clearly says 51.

The PRESIDING OFFICER. The Senator's 2 minutes have expired.

Mr. HATCH. Mr. President, I yield 2 minutes to the distinguished Senator from Minnesota.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. Mr. President, many years ago when the Senate was the Supreme Court's upstairs neighbor in this building, a significant event took place which provides us with a warning. A young Architect of the Capitol wanted to improve the sight lines in the Supreme Court Chamber on the first floor. Calculating that one of the support pillars was unnecessary, he brought in a crew to remove it. Halfway through the project, the ceiling fell in on the Supreme Court Chamber, which was also the floor of the Senate above, destroying both Chambers for a period of time. The lesson is that when you tamper with one branch of Government, it can affect others in a way you cannot anticipate, and any attempt to tamper with the delicate balance of power must be met with suspicion and repelled with conviction.

We are tampering with that balance when we now, through filibuster, require a supermajority to confirm a Federal court of appeals judge.

President Bush did not get all the popular votes or all the electoral votes. The election was decided in an unprecedented manner. But when he was sworn in, he received all the constitutional powers of the Presidency. His ability to be the Commander in Chief is not partial. His ability to sign or veto legislation is not compromised. His ability to submit judicial nominees to this body for an up-or-down vote, something every President has exercised for over 200 years, is in no way limited.

Politics has its place, but not to the extent of stopping a vote on a judge at any and all costs. Let's discuss the merits of this nominee, his qualifications, his judicial temperament, but then let us follow the constitutional process we have followed for two centuries and vote yes or no on advice and consent for the President's nominee to the court of appeals.

For my colleagues who have concerns about Mr. Estrada's answers, or if you didn't like the things he didn't answer, vote against him. But give him a vote. Let's follow the Constitution. Let's not change the constitutional standing.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I yield the remainder of my time to the distinguished Senator from South Carolina.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM of South Carolina. Mr. President, I am now going to read a June 18, 1998 statement of the Senator from Vermont involving Clarence Sundram and other judges who were subject to discussion on that day:

> If Senators are opposed to any judge, bring them up and vote against them. But don't do an anonymous hold, which diminishes the credibility and respect of the whole U.S. Senate.
>
> I have had judicial nominations by both Democrats and Republican Presidents that I intended to oppose. But I fought like mad to make sure they at least got a chance to be on the floor for a vote.
>
> I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.
>
> If we don't like somebody the President nominates, vote him or her down. But don't hold them to this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators.

My statement is simply this: We are bearing witness to a constitutional change. And having looked at the statement of Senator LEAHY and his present conduct, we are bearing witness to a change on his part. He was right in 1998 to oppose the filibusters. He is wrong today to engage in one.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I thank the Senator for being the first person on his side of the aisle to actually read my whole statement. It is obvious I was speaking of a filibuster by an anonymous hold.

I welcome the Vice President to the Senate today in your capacity as President of the Senate. It is not often that we see the Vice President in the chair. With the meeting of the United Nations Security Council today and the OPEC meeting and the unsettled and threatening circumstances in so many parts of the world, from the Middle East to the Korean peninsula to Iran and Iraq, the Vice President has chosen to be in the Senate this morning. I look forward to seeing him as well if the Senate ever turns its attention to the disastrous economic situation in this country and the loss of more than 2.5 million jobs in the last two years and more than 300,000 last month. Senator DASCHLE and the Democratic leadership have sought for weeks to proceed to debate on S. 414, the Economic Recovery Act of 2003, which includes the First Responders Partnership Grant Act, but the Senate Republican majority has blocked debate and action. This morning, instead of debating the international situation, the need to pass an economic stimulus package, the need for increased commitment to homeland defense, legislation to provide a real prescription drug benefit for seniors or the other matters so deeply concerning Americans, we are returning in some form to debate a nomination that we have debated for over a month and on which cloture was defeated last week.

I note that what has impeded a Senate vote on the Estrada nomination has been the political game being played by the White House with this nomination as part of its effort to pack the Federal courts. The White House could have long ago solved this impasse by honoring the Senate's role in the appointment process through providing the Senate access to Mr. Estrada's legal work—just as past administrations have provided legal memos in connection with the nominations of Robert Bork, William Rehnquist, Brad Reynolds, Stephen Trott, and Ben Civiletti and this administration did with a

nominee to the EPA—and through instructing the nominee to answer questions about his views—consistent with last year's Supreme Court opinion by Justice Scalia—and to stop pretending that he has no views. The White House is using ideology to select its judicial nominees but trying to prevent the Senate from knowing the ideology of these nominees when it evaluates them.

Instead, it appears that the Senate Republican majority, at the direction of the White House, chose to extend this debate because its political operatives hope to use it to falsely paint those who will not be steam rolled as somehow ''anti-Hispanic.'' The Republican's approach of crass partisanship regarding this nomination disregards the legitimate concerns raised by many Senators as well as by respected, Hispanic elected officials and Hispanic civil rights leaders. Moreover, the Republican approach and the President's approach have been to divide: to divide the Senate, to divide the American people and, on this particular nomination, to divide Hispanics against each other.

That is wrong. It is wrong because the President campaigned on a platform of uniting not dividing. It is wrong because our country needs us to build consensus and work together, especially in these most challenging times. It is wrong because distinguished Latino leaders, who have spent their lives seeking justice and greater representation of Hispanic lawyers as judges, have been attacked by Republicans for showing courage and honesty in their judgment that this nomination is wanting. Joining the League of United Latin American Citizens, which previously wrote to the Senate disassociating itself with Republican attacks on Democratic Senators, yesterday the National Council of La Raza issued a statement condemning the treatment of the Congressional Hispanic Caucus by Republicans. The NCLR statement notes how ''deeply offended'' it is by Mr. Estrada's supporters calling Congressional Hispanic Caucus members ''tyrannical,'' ''racist,'' and ''anti-Latino.''

This Administration has also shown disrespect for the concerns of Senators in renominating both Judge Charles Pickering, despite his ethical lapses, and Justice Priscilla Owen, despite her record as a conservative ''activist'' judge, both of whom were rejected by the Senate Judiciary Committee after fair hearings and open debate last year. Sending these re-nominations to the Senate is unprecedented. No judicial nominee who has been voted down has ever been re-nominated to the same position by any President. The White House in conjunction with the new Republican majority in the Senate is choosing these battles over nominations purposefully. Dividing rather than uniting has become their modus operandi.

Among the consequences of this partisan strategy is that for the last month, the Senate has been denied by the Republican leadership meaningful debate on the situation in Iraq. I commend Senator BYRD, Senator KENNEDY and the other Senators on both sides of the aisle who have nonetheless sought to have the Senate fulfill its constitutional role as a forum for debate and careful consideration of our Nation's foreign policy. The decision by the Republican Senate majority to focus on controversial nominations rather than the international situation or the economy says much about their mistaken priorities. The Republican majority sets the agenda and they schedule the debate, just as they have here this morning.

Many Democratic Senators have already spoken to the Constitution and the Senate's proper role in the confirmation process. I recall, in particular, statements by Senators DASCHLE, REID, BINGAMAN, BOXER, CLINTON, CORZINE, DODD, DORGAN, DURBIN, EDWARDS, FEINGOLD, FEINSTEIN, HARKIN, JOHNSON, KENNEDY, KOHL, LAUTENBERG, LEVIN, MIKULSKI, SARBANES and SCHUMER, among many others.

What is disconcerting about the recent debate is what appears to be the Republican majority's willingness to sacrifice the constitutional authority of the Senate as a check on the power of the President in the area of lifetime appointments to our Federal courts. I fear, Mr. President, that the Republican majority's efforts to re-write Senate history in order to rubber-stamp this White House's Federal judicial nominees will cause long-term damage to this institution, to our courts, to our constitutional form of government, to the rights and protections of the American people and to generations to come. I have served in the Senate for 29 years, and until recently I have never seen such stridency on the part of an executive administration or such willingness on the part of a Senate majority to cast aside tradition and upset the balances embedded in our Constitution so as to expand presidential power.

In the time set aside by the Republican majority for this debate today, I am glad to have an opportunity to shed light on the fiction that cloture votes, extended debate, and discussion of the views of nominees are anything new or unprecedented. What I do find unprecedented is the depths that the Republican majority and this White House are willing to go to override the constitutional division of power over appointments and longstanding Senate practices and history. It strikes me that some Republicans seem to think that they are writing on blank slate and that they have been given a blank check to pack the courts. They show a disturbing penchant for reading our Constitution in isolation from its history and the practices that have endured for two centuries to suit their purposes of the moment.

A few years ago, when Republicans were in the Senate minority and a democratically elected Democratic President was in the White House, columnist George Will, for example, had no complaint about a super-majority or 60 votes being needed to get an up or down vote on legislation or nominations proposed by the President. In fact, reflecting Republican sentiment at the time, what he said in his defense of the Republican filibuster of President Clinton's proposals, was the following:

> The Senate is not obligated to jettison one of its defining characteristics, permissiveness, regarding extended debate, in order to pander to the perception that the presidency is the sun about which all else in American government—even American life—orbits. (Washington Post, April 25, 1993.)

It apparently did not trouble him or other Republicans when they were in the Senate minority that the Constitution expressly requires more than a simple majority for only a few matters. In fact, Mr. Will wrote:

> Democracy is trivialized when reduced to simple majoritarianism—government by adding machine. A mature, nuanced democracy makes provision for respecting not mere numbers but also intensity of feeling.

Of course, that was in 1993 and President Clinton and a Democratic Senate majority were being contested by Republican filibusters. What is different a mere 10 years later? Just that the parties have switched roles and this year Democrats are in the Senate minority and a Republican occupies the White House. I ask unanimous consent that a recent article by Edward Lazarus that critiques Mr. Will's new position be included in the RECORD.

As George Will noted in 1993, one of the key attributes of the Senate is the venerable tradition of unlimited debate. In fact, not until 1917 was there even a provision in the Senate rules to allow for cloture, a procedure by which the Senate acts to cut off debate. The Senate first adopted the cloture rule in 1917. At that time, cloture was limited to and could only be sought on legislative matters. The cloture rule was extended in 1949 to nominations by amending it to include measures and matters, which included judicial nominations. Thus, prior to 1949, disputes over nominations—to the 100 seats in the Federal judiciary—were handled and resolved by Senators behind closed doors and many judicial nominations were defeated in the Senate by inaction or the threat of a filibuster. Republicans resurrected those tactics in the years 1995–2001 to defeat more than 50 of President Clinton's judicial nominees.

In essence, until they had a Republican President, Republicans interpreted the Advice and Consent Clause of the Constitution to allow a handful of anonymous Republican Senators to prevent an ''up or down'' vote by the full Senate on scores of qualified judicial nominees. Now, when Democratic Senators have expressed genuine concerns about the lack of information regarding Mr. Estrada and have made a well-founded request to see his

writings, Republicans claim it is wrong and unconstitutional for Senators to act in accordance with Senate rules and tradition and their longstanding role as a check and balance on the President's appointment power.

It cannot be that only the rules Republicans like at the times that they like them are the rules that are followed in the Senate, but more and more that seems to be what the Republican majority is demanding. They should not pretend the rules no longer apply simply because the Republican majority finds them inconvenient, but that is happening more and more in the Senate. Regrettably, it has occurred recently in connection with judicial nominees before the Judiciary Committee, when the Republicans insisted on breaching Rule IV, a longstanding rule of our Committee that allows for extended debate, as well.

What is at stake in judicial nominations are lifetime appointment for judges who will have the power to change how the Constitution is interpreted and whether civil rights, environmental protections, privacy and our fundamental freedoms will be upheld. With respect to the Estrada nomination, what is at stake is a seat on the second highest court in the country and the swing vote on that important court.

Most of the decisions issued by the D.C. Circuit in the nearly 1,400 appeals filed per year are final because the Supreme Court now takes fewer than 100 cases from all over the country each year. This court has special jurisdiction over cases involving the rights of working Americans as well as the right to a cleaner environment. This is a court where Federal regulations will be upheld or overturned, where privacy rights will either be retained or lost, and where thousands of individuals will have their final appeal in matters that affect their financial future, their health, their lives and their liberty.

This is a court that has vacant seats due to anonymous Republicans blocking the last two nominees to this court by a Democratic President. Those nominees had outstanding legal credentials and qualifications but during President Clinton's last term, the Republican-controlled Senate would not proceed to an up or down vote on either of them.

The word ''filibuster'' derives from the Dutch word for piracy, or taking property that does not belong to you. Under that ordinary definition, it would be accurate to say that at least two of the vacancies on the D.C. Circuit, for which Republicans blocked qualified nominees, were filibustered, as well. Republicans, who exploited every procedural rule and practice to block scores of Clinton nominees anonymously from ever receiving an up or down vote, now want to change the rules midstream, to their partisan advantage, again. The whole reason this President has so many circuit vacancies to fill is because this was the booty of their piracy, their filibustering of judicial seats that arose during the Clinton Administration while they prevented votes on that President's qualified nominees.

For example, a Mexican-American circuit court nominee of President Clinton, Judge Richard Paez, was forced to wait more than 1,500 days to be confirmed, and even after the Republican filibuster was broken by a cloture vote to end debate, many Republicans joined an unsuccessful motion to indefinitely postpone his nomination. None of the more than 30 Republicans who voted against cloture in connection with that nomination or who voted in favor of Senator SESSIONS' unprecedented motion ''to indefinitely postpone'' the vote on Judge Paez's nomination, which had been pending for more than 1,500 days, should be heard to complain if Democratic Senators seek more information about nominations before proceeding to a vote for a lifetime appointment.

I also recall that during the closing moments of that debate Senator SESSIONS objected that the Vice President of the United States was presiding over the Senate in his capacity as the President of the Senate. The Senator from Alabama objected that he should not be allowed to preside. I have not raised that objection to the Vice President presiding here today but have, instead, welcomed the Vice President. This is further demonstration that Democrats have been more moderate and much more cooperative with this Administration than Republicans were with the prior Democratic Administration.

I will include in my full statement for the RECORD the words of the Republican Senators who filibustered President Clinton nominees. Senator Bob Smith, a straight talker from New Hampshire, outlined the Senate's history of filibusters of judicial nominees and said:

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

Thus, the Republicans' claim that Democrats are taking ''unprecedented'' action—much like the bogus White House claim that our request for Mr. Estrada's work while paid by taxpayers was ''unprecedented''—is simply untrue. Republicans' desire to rewrite their own history is wrong. They should come clean and tell the truth to the American people about their past practices on nominations. They cannot change the plain facts to fit their current argument and purposes.

Senator HATCH candidly admitted after cloture was invoked on the Paez nomination and Senator SESSIONS made his unprecedented motion to indefinitely postpone any vote on that judicial nomination:

> Indeed, I must confess to being somewhat baffled that, after a filibuster is cut off by cloture, the Senate could still delay a final vote on a nomination. A parliamentary ruling to this effect means that, after today, our cloture rule is further weakened.

Republicans should not have come to the floor and told the American people over the last month that Democratic Senators had done something unprecedented in opposing the Estrada nomination. They themselves did it quite recently and have done it repeatedly. Let us be honest about this and straight with the American people. Given the time allotted for today's debate, I cannot discuss them all but I will include in the RECORD some of the other examples of filibusters of presidential nominations from the nomination of Justice Abe Fortas to be Chief Justice of the United States Supreme Court through the nominations of Stephen G. Breyer, now Justice Breyer, to the First Circuit; Rosemary Barkett to the 11th Circuit; H. Lee Sarokin to the 3rd Circuit; and Marsha Berzon and Richard Paez to the 9th Circuit.

Even more frequent during the years from 1995 through 2001, when Republicans controlled the Senate majority, were Republican efforts to defeat President Clinton's judicial nominees through inaction and anonymous holds for which no Republican Senator could be held accountable. Republicans held up almost 80 judicial nominees who were not acted upon during the Congress in which President Clinton first nominated them and eventually defeated more than 50 judicial nominees without a recorded Senate vote of any kind, just by refusing to proceed with hearings and Committee votes.

Beyond the question of judicial nominees, Republicans also filibustered the nomination of Dr. Henry Foster to become Surgeon General of the United States. This was an executive branch nominee that Republicans filibustered successfully in spite of two cloture votes in 1995. Dr. David Satcher's subsequent nominaton also required cloture but he was successfully confirmed. Other executive branch nominees who were filibustered by Republicans included Walter Dellinger, whose name has been invoked with approval by Republicans during the debate on the Estrada nomination. Mr. Dellinger was nominated to be Assistant Attorney General and two cloture petitions were required to be filed and both were rejected by Republicans. In this case we were able finally to obtain a confirmation vote after significant efforts and Mr. Dellinger was confirmed to that position with 34 votes against him. He was never confirmed to his position as Solicitor General because Republicans had made clear their opposition to him.

In addition, in 1993, Republicans objected to State Department nominations and even the nomination of Janet Napolitano to serve as the U.S. Attorney for Arizona, resulting in cloture petitions. In 1994, Sam Brown was nominated to be an Ambassador. After three cloture petitions were filed, his nomination was returned to President

Clinton without Senate action. Also in 1994, Derek Shearer was nominated to be an Ambassador and it took two cloture petitions to get to a vote before he was confirmed. In 1994, Ricki Tigert was nominated to chair the FDIC and it took two cloture petitions to get to a vote and confirmation of that executive nomination.

So when Republican Senators now talk about the Senate Executive Calendar and presidential nominees, they must be reminded that they recently filibustered many, many qualified nominees. [chart] In addition, some of us remember Republican unwillingness to allow a Senate vote on the nomination of Bill Lann Lee to serve as the Assistant Attorney General for the Civil Rights Division at the Department of Justice. He told the Judiciary Committee that he would follow the law and enforce the law. He was the choice of the President to serve in that President's administration, but Republicans would not accord him an up or down vote before the United States Senate.

Now let me turn to a most troubling development that demonstrates how Republicans are violating longstanding Senate rules to suit themselves. Two weeks ago in a meeting of the Senate Judiciary Committee, the Chairman unilaterally declared the termination of debate on two controversial circuit court nominations. Senator DASCHLE termed it deeply troubling and a ''reckless exercise of raw power by a Chairman,'' and he is right. The Democratic Leader observed that the work of this Senate has for over 200 years operated on the principle of civil debate, which includes protection of the minority. When a Chairman can on his own whim choose to ignore our rules that protect the minority, not only is that protection lost, but so is an irreplaceable piece of our integrity and credibility.

The Democratic Leader noted that faithful adherence to rule is especially important for the Senate and for its Judiciary Committee. He noted ''how ironic that in the Judiciary Committee, a Committee which passes judgment on those who will interpret the rule of law,'' that it acted in conscious disregard of the rules that were established to apply to its proceedings. If this is what those who pontificate about ''strict construction'' mean by that term, it translates to winning by any means necessary. If this is how the judges of the judicial nominees act, how can we expect the nominees they support as ''strict constructionists'' to behave any better? Given this action in disrespect of the rights of the minority, how can we expect the Judiciary Committee to place individuals on the bench that respect the rule of law? In my 29 years in the Senate and in my reading of Senate history, I cannot think of so clear a violation of Senators' rights.

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

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

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

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

It was rarely utilized but Rule IV set the ground rules and the backdrop against which rank partisanship was required to give way, in the best tradition of the Senate, to a measure of bipartisanship in order to make progress. That is the other important function of the rule.

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

In fact, the only occasion I recall when Senator HATCH was previously faced with implementing Committee Rule IV, he did so. In 1997, Democrats on the Committee were seeking a Senate floor vote on President Clinton's nomination of Bill Lann Lee to be the Assistant Attorney General for Civil Rights at the Department of Justice. Then, Senator HATCH acknowledged: ''Rule IV of the Judiciary Committee rules effectively establishes a committee filibuster right. . . .'' In 1997, Chairman HATCH acknowledged: ''Absent the consent of a minority member of the Committee, a matter may not be brought to a vote.'' In that case, in 1997, Chairman HATCH followed the rules of the Committee.

Last month the bipartisan tradition and respect for the rights of the minority ended when Chairman HATCH decided to override the rule rather than follow it. He did so expressly and intentionally, declaring: ''[Y]ou have no right to continue a filibuster in this committee.'' He decided, unilaterally, to declare the debate over even though all members of the minority were prepared to continue the debate and it was, in fact, terminated prematurely. Senator HATCH completely reversed his own position from the Bill Lann Lee nomination and took a step unprecedented in the history of the Committee.

In his recent letter to Senator DASCHLE, Senator HATCH now contends that he ''does not believe the Committee filibuster should be allowed and [he] thinks it is a good and healthy thing for the Committee to have a rule that forces a vote.'' I ask that the exchange of letters between Senator HATCH and the Democratic Leader be included in the RECORD.

Our Committee rule, while providing a mechanism for terminating debate and reaching a vote on a matter, does so while providing a minimum of protection for the minority. It is even that minimum protection that Chairman HATCH will no longer countenance. It is Senator HATCH who has ''turned Rule 4 on its head'' last month, after 24 years of consistent interpretation and implementation by five chairmen. Never, before his letter to Senator DASCHLE, has anyone since the adoption of the rule in 1979 ever suggested that its purpose was to be narrowed and redirected to thwart ''an obstreperous Chairman who refuses to allow a vote on an item on the Agenda.'' After all, as Senator HATCH recognizes in his letter, it is the chairman's prerogative to set the agenda for the mark-up.

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

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

the Chairman and the Committee to disavow the misinterpretation and violations of Rule IV that occurred. Order and comity need to be restored to the Judiciary Committee. An essential step in that process is the restoration of minority rights under Rule IV and recognition of minority rights thereunder.

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

In circumstances such as these, when the rights of the minority are being violated and Senate rules and longstanding practices are breached, the minority is left with very few options and very little choice in how it must proceed. This President has been the most aggressive and unilateral I have seen in my 29 years in the Senate in his nominations. The Republican majority is now choosing to abet his efforts at the expense of the Senate minority's rights and the constitutional role of the Senate. That is all most regrettable.

I yield back my time.

Mr. KYL. Mr. President, in order to understand the constitutional problem we face with the filibuster of Miguel Estrada, it is important for the Senate and the public to focus on what is really going on here.

This filibuster is not a dispute about Mr. Estrada's answers to questions. If it were about unanswered questions then more than two Democrats would have taken up the White House's offer to pose new written questions to Mr. Estrada or to meet with him privately and ask them in person. But they did not, and it is now clear that the repeated refusal even to ask questions has exposed the emptiness of that argument. I hope we hear no more of it.

This filibuster also is not a dispute about confidential documents from the Solicitor General's office. Our filibustering colleagues must know that for the administration to comply with this demand is to undermine the effectiveness of the Department of Justice and its ability to defend the American people's interests in court. They must know that the President will not jeopardize the people's interests and that these confidential documents cannot be disclosed. So this document request is an unserious demand made precisely because the administration will not comply—just as four former Democrat Solicitors General have advised. No, this dispute is not about confidential memos.

The fact is that there is plenty of information available—more than enough information for a thoughtful Senator to make a decision whether to vote up or down. But don't take my word for it. Take Minority Leader DASCHLE'S word for it. Last week the distinguished minority leader said that Mr. Estrada is too conservative and that he opposes his confirmation. How could the minority leader possibly have reached that conclusion if the record is so bare? How could he have reached any conclusion? The answer is obvious: Mr. Estrada's record is more than ample for Senators to explore. Just as over 51 Senators have reviewed the record to their satisfaction and concluded that Mr. Estrada is qualified and should be confirmed, so must Senator DASCHLE have reviewed the record and concluded that he should not be confirmed. He did not need more information.

So, why are we still here? Why is does this debate continue? Let us put aside these arguments about supposedly unanswered questions and disclosure of confidential memoranda, and let's focus on what this is really about: power. An unprecedented power-play by a partisan minority to re-define our constitutional ''advice and consent'' obligation at least for circuit court judicial nominees. This filibuster is about changing the rules of the game forever.

For 214 years, the Senate has interpreted ''advice and consent'' to require majority approval for any judicial nominee who reaches the Senate floor. But if filibustering Democrats prevail here, that rule will forever be changed. No longer will the ''advice and consent'' clause mean majority rule. Instead, it will mean 60 votes.

Now, my filibustering colleagues may say, ''well, no—we're not trying to change the standard; we just want more information.'' The time for dodging the essence of this constitutional moment has passed. There can no longer be any question that the true goal of this filibuster is to defeat Mr. Estrada's nomination by preventing a vote, to change the standard from a simple majority to a 60-vote requirement.

A month ago the Senior Senator from Pennsylvania called this power-play a ''constitutional revolution,'' and it saddens me to say that I must agree. A key part of our Constitution is its ordering of power between the different branches and parts of Government. Our Constitution is written, but we rely upon more than just the written word to understand its meaning. We rely upon the considered opinions of those who are charged with its interpretation. In most cases, that is the Supreme Court and the inferior courts that Congress establishes. But the Supreme Court is not the only body charged with interpreting the Constitution, because some areas of the Constitution are not subject to conventional judicial review. One of those areas is the ''advice and consent'' obligation of Congress. To understand that clause, the Senate must do the interpreting. The Senate has long had the constitutional obligation to decide what those words mean.

Throughout our history the Senate has had one consistent answer to the question of what ''advice and consent'' meant for lower court judicial nominees. That settled, bipartisan constitutional understanding of ''advice and consent'' was that only a majority vote is required. Now, a determined minority is determined to change the meaning of those words. And that is indeed a ''constitutional revolution,'' just as Senator SPECTER has said.

Let's turn to the Constitution. I know some of my Republican colleagues have argued that the Constitution mandates ''advice and consent'' by a simple majority vote. They may be right. As has been said, the Constitution contains seven provisions calling for a supermajority from the legislature: overriding a veto, convicting on impeachment, expelling members of the House or Senate, ratifying treaties, proposing constitutional amendments, establishing Presidential incapacity, and during the Civil War era, removing the disabilities of rebellious officeholders. But the Constitution is silent as to ''advice and consent.'' The U.S. Supreme Court has observed that a simple majority is the background rule in legislatures. It is therefore understandable that many have concluded that ''advice and consent'' mandates a simple majority for confirmation. Certainly as a democratically-elected body we should always have a strong presumption in favor of rule by simple majority. Only when an alternative supermajority rule is clear should we depart from that democratic tradition.

I also appreciate the argument that a filibuster in this context is different than a filibuster on legislation because the appointment and confirmation of judges is a shared responsibility we have with the President. Respect and comity demand that we give proper deference to presidential prerogatives. I certainly agree that filibustering a presidential judicial nominee endangers the traditional respect between the branches of Government, and that as Senators we have a responsibility to protect the relationship between the branches both for present and future Senators and Presidents.

So it might be the case that the constitutional text and structure mandate a simple majority, but I must say that I am not 100 percent convinced. It is possible that the Constitution's silence on this question was exactly that: silence. And it is possible that by remaining silent, the Founding Fathers intended to leave the question open for its own interpretation. I think we should allow for that possibility. But my skepticism does not change my conclusion, which is that we should apply a simple-majority requirement for confirmations.

Why do I reach this conclusion? Because the weight and precedent of the

Senate's longstanding constitutional interpretation of its own ''advice and consent'' obligation compels it. Thus, even if the question was open in 1789, we have 214 years of experience and tradition to tell us what the right interpretation was. And the right interpretation is that the same interpretation that bipartisan majorities of the Senate have forever believed—that only a simple majority is required to confirm a lower court nominee.

The most obvious evidence of this tradition is the history itself. No lower court nominee has ever been rejected due to a heightened, 60-vote requirement. To be sure, some Senators have contemplated this change before. Over 30 Democrats tried to filibuster J. Harvie Wilkinson in 1984, Sidney Fitzwater in 1986, and Edward Carnes in 1992. A much smaller group of my fellow Republicans tried to filibuster Marsha Berzon and Richard Paez in 2000. So the issue has been raised before, although never in such a dramatic and pointed fashion as it is today.

Let me address for a moment the unique case of Abe Fortas. In 1968, Justice Abe Fortas was nominated for the Chief Justice position. Opposition was roughly divided between the political parties, based significantly upon alleged improper financial dealings and other ethical issues that eventually drove him to resign under threat of impeachment. Unlike the case at hand, there is no record in that case of a Senate majority willing to confirm Mr. Fortas. The single cloture vote failed 45–43. So it cannot be said that the will of the majority was thwarted, because no majority appears to have existed to confirm that nomination. The President withdrew the nomination before we ever found out the answer to that question. So unlike in the present case, the majority was not thwarted by filibuster.

But returning to the more recent history, it is important to point out that in every one of those cases, however, cooler heads prevailed. The Senate stepped back from that precipice and said ''No, this we will not do. We will not filibuster judicial nominees.'' Senators such as the ranking member of the Judiciary Committee, Senator LEAHY, were so opposed in principle to such a constitutional change that he declared that he would ''object and fight against any filibuster on a judge, whether it is somebody I opposed or supported.'' The Washington Post reports that in 1991 during the Clarence Thomas nomination battle, Senator LEAHY declared himself ''totally opposed'' to a filibuster, even as abortion activists urged such a step. And in 2000 a clear majority of Republicans joined with Democrats and invoked cloture on the Berzon and Paez nominations.

This is our tradition. We do not block judicial nominees by filibuster. This isn't a Republican constitutional interpretation. It isn't a Democrat constitutional interpretation. It is the Senate's interpretation. And in the Senate, where so much is based upon tradition, sometimes tradition is all we have to enforce constitutional norms. We rely upon our colleagues to say, as Senator LEAHY said, that they will fight on principle against the abuse of process regardless of whose particular ox is being gored. That is why I voted for cloture on the Paez nomination, and against confirmation. I refused to upset 214 years of settled constitutional interpretation and change our constitutional norms forever. I was unwilling to risk the damage to the Senate and to the nominations process that would result.

Let there be no mistake about it: If a minority of Senators are able to force a change to our 214-year-old constitutional tradition, we do great damage to this body and to the process by which judges are nominated and confirmed. And those changes will be permanent.

Now, I am a conservative, and I naturally resist unnecessary tinkering with our constitutional system. But I also understand that constitutional changes do happen, and that they are not always bad. I am an original sponsor of a constitutional amendment, S. 1, in this very Congress. But we have an amendment process for changes to the Constitution. We require 2/3 of each House of Congress, and then ¾ of the States. We have a process, and our constitutional stability depends on respecting that process.

This constitutional issue is unique, because the issue is probably not justiciable. I do know that a few professors have concluded that a judicial nominee in Mr. Estrada's shoes may have standing to challenge a filibuster, but the last thing we want is for a court to get involved. This is a Senate matter. And as a Senate matter, all we have is our wisdom and respect for a 214-year tradition to guide us. Can traditions change? Of course they can. We should be very wary of upsetting settled traditions because for the most part, traditions exist for a reason, but we should always be open to improvement.

However, if we are going to upset 214 years of constitutional interpretation and institutional tradition, shouldn't we require something more than the intransigence of 44 Senators who won't even admit that they are trying to change the constitutional rule? The Founding Fathers recognized that when we change constitutional rules, we should do so based on supermajority votes, not minorities' refusals to votes. As I said a moment ago, when we amend the Constitution, it takes two-thirds of both Houses of Congress. Then if it passes, it cannot be enacted until three-quarters of the States support it. That is not minority rule, but supermajority rule. I might add that even when the Supreme Court changes its constitutional interpretations through its decisions, they have to act by majority vote or new law is not created. Without a majority, there is no change to the constitutional rule.

What is happening here is dramatically different. Here, a minority—not a simple majority, and certainly not a supermajority—seeks to change a settled constitutional rule and overturn 214 years of the Senate's constitutional interpretation. I submit that this fundamental change to our constitutional understanding of the ''advice and consent'' power must not be allowed to take effect. And it certainly should not be undertaken by a minority of Senators for short-term gain. To do so jeopardizes not only the Senate's relationship with the President, who has the constitutional obligation to make judicial nominations, and the Judiciary, which is understaffed and in desperate need for a fair process consistent with our longstanding constitutional norms. It jeopardizes the respect that future Senates will give to our traditional constitutional norms. And it calls into question whether the Senate can be trusted with its stewardship over those norms in the future. Will the Supreme Court ultimately become involved in Senate affairs? I certainly hope not, but I have less confidence today than I did a month ago that no court would involve itself in these matters. And that is a day I do not want to see.

So, as I said, this is not about needing more information. The distinguished minority leader made that clear last week. Senator DASCHLE has enough information. He opposes the nominee. This is about power—the power of the minority to change 214 years of constitutional norms and interpretation. I urge my filibustering colleagues on the other side of the aisle to step back, look at the history, and ask themselves whether they truly believe that it should take 60 votes to confirm a judge. And, equally important, whether they believe that a minority of Senators should be able to wash away the Senate's longstanding traditional understanding of its advice and consent obligations. I submit that our obligation to the Constitution and to the institution of the Senate demands more than what we are seeing today.

Mr. HATCH. Mr. President, I rise in response to my colleagues' assertions about the Senate's role in the judicial confirmation process. I am compelled by their statement to provide a more complete record on the origins of the Senate's constitutional obligation to provide advice and consent on judicial nominees.

The constitutional duty of the President to nominate and appoint, and the intervening duty of the Senate to provide advice and consent, is set forth in Article II, Section 2:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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.

Some of my Democratic colleagues have argued that the record of the debate of the Constitutional Convention leads to the conclusion that the Senate plays the central role in this process. This assertion is based on the Convention's initial—and, I should add, temporary—adoption of proposals that a national judiciary be established to be chosen by the national legislature, and its concurrent rejection of proposals that the President be given the sole power to appoint judges. My colleagues suggest that only in the final days of the Convention was the President given a role—the power to nominate judges—and that somehow this time line of events signals a more central role for the Senate than the actual text of the Constitution suggests.

It is first important to note that, contrary to the impression that my colleague from Massachusetts may have left, the record of the Convention indicates that the discussion of the establishment of the judiciary was limited to only a few actual days. During that time there were, indisputably, competing views as to how the judiciary should be established—by the Executive or by the legislature. But a careful review of the notes of the Constitutional Convention leads to the conclusion that the Framers bestowed on the President the paramount role in appointing judges.

There was significant opposition to the proposals to place the appointment power exclusively in the Senate. For example, according to the notes from the Convention for July 18, 1787, a delegate from Massachusetts, Nathaniel Ghorum, suggested ''that the Judges be appointed by the Executive with the advice & consent of the 2d. branch, in the mode prescribed by the constitution of Masts. This mode had been long practiced in that country, & was found to answer perfectly well.'' James Wilson, one of the leading figures at the Convention, made a motion ''that the Judges be appointed by the Executive.'' Mr. WILSON later wrote, ''Instead of controlling the President still farther with regard to appointments, I am for leaving the appointment of all the principal officers under the Federal Government solely to the President. . . .''

Thus the debate progressed over exclusive appointment by the legislature versus exclusive appointment by the President. James Madison sought a compromise when he suggested the power of appointment be given to the President with the concurrence of 1/3 of the Senate. This is an interesting suggestion, given that we now face a virtual veto by a minority. Madison's proposed compromise has been turned on its head. Rather than a supermajority to disapprove the President's nominee, this Senate is demanding a supermajority for approval.

Some of my colleagues on the other side of the aisle seem to want to continue the debate of the Constitutional Convention. That debate is over. The resolution of the respective roles of the President and the Senate are found in the language of the Constitution, which in Article II vests the nomination and appointment powers in the President.

As Alexander Hamilton explained in The Federalist No. 66:

It will be the Office of the President to nominate, and, with the advice and consent of the Senate, to appoint. There will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose they can only ratify or reject the choice he—may have made.

The distinguished Assistant Democratic Leader referred to The Federalist No. 76, wherein Alexander Hamilton discussed the appointing power of the Executive. Hamilton stated ''To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.'' This passage indicates the Founders' understanding of a limited role for the legislature in the confirmation process. That role is for the Senate to act as a check on improper appointments resulting from favoritism or unfit character by the President.

The treatment of Mr. Estrada by the Senate is far different from the advice and consent role contemplated by the Framers. A vocal minority of Senators is blocking the majority, which stands ready to vote on his nomination. This is tyranny of the minority and it is unfair to all—to the Senate, to the President, to the nominee, and to the Judiciary.

Mr. President, I call upon my colleagues who are denying an up or down vote on the nomination of Mr. Estrada to let the Senate work its will. The President has done his duty in nominating Mr. Estrada. It is now our duty to consent or to withhold consent by an up or down vote. Let's end the debate on this nomination and proceed to that vote.

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

Mrs. FEINSTEIN. Mr. President, I rise to speak about charges that the ongoing filibuster against Miguel Estrada is somehow unconstitutional, as some have claimed.

I take this job very seriously, and it is not often that I support preventing an up or down vote on any issue. In fact, this is the only time I have ever supported a filibuster against a judicial nominee, and I do so for very specific reasons, as do so many of my Democratic colleagues.

Contrary to the charges we have been hearing over the last few days, I believe this filibuster is precisely what the Founders of this Nation had in mind when they created a three-branched system of government with checks, balances, advice and consent.

This filibuster is not about preventing a conservative nominee from getting onto the court. Rather, this filibuster is about a failure of this administration to adequately seek the advice and participation of the U.S. Senate in the judicial nominations process, particularly with regard to this nominee.

I have spoken several times about Mr. Estrada specifically, and each time I have been clear, as have my colleagues—this is a nominee about whom we know very, very little, and he and this administration have simply not done enough to give us the kind of information we need to properly perform our constitutional duty of advice and consent. Because we are prevented from performing this constitutional duty, we have been forced to resort to a procedure, well within the Senate rules and by no means unprecedented, to enforce those rights.

The filibuster is one of the key devices throughout our nation's history that has protected the right of the minority party, or even of one Senator. Without a filibuster right on nominations, there might never be advice and consent at all. And that would turn the Constitution on its head.

My colleagues on the other side of the aisle have attempted to make much of the fact that the Constitution does not provide for a ''super-majority'' vote on nominations, unlike constitutional amendments or treaties. This is true—the Constitution is silent on the issue of how many votes a nomination should take.

But the Constitution is equally silent about how many votes it would take to proceed to other measures as well—a patient's bill of rights, for example. Or a ban on human cloning. Or the assault weapons ban. Or education bills. Or even major civil rights legislation. Yet nobody argues that it would be unconstitutional for one or more Senators to filibuster these bills. Unwise, perhaps. Subject to public outcry, maybe. A legitimate subject of reasoned debate, absolutely. But unconstitutional? No.

Now let me address the issue of whether this filibuster is ''unprecedented,'' as some have charged. If we look at the facts, we soon see that the only really unprecedented aspect of this filibuster may be its success. Many have tried, but few have succeeded. And this may be a good indication of how strongly we feel about enforcing our constitutional role of advice and consent to this and other nominations now before us.

The majority now argues that any filibuster of a judicial nominee is unconstitutional because it essentially establishes a new, 60-vote threshold for judicial nominees. But this 60-vote threshold has long been in place for

controversial nominees facing objections from one or more Senators.

Again, the only real difference between the situation with Miguel Estrada and the situations where cloture votes were required on other nominees is that here, today, there are not enough votes to meet that 60-vote threshold.

The procedure is the same—a cloture vote.

The debate is the same—over a nomination to the federal judiciary.

Only the outcome is different, and I don't see how the outcome can determine the constitutionality of the process.

Let me list some other filibusters and cloture votes throughout recent history.

In 1968, Abe Fortas was actually prevented from becoming Chief Justice of the Supreme Court by filibuster. The other side may argue that this was a bipartisan filibuster, and they are right—but this is not the point. The point is, a filibuster was used as a tool, and the nomination failed.

In 1980, Stephen Breyer had to go through two cloture motions to obtain a seat on the First Circuit—to debate, Miguel Estrada has only had one cloture vote.

In 1994, a cloture vote finally stopped a filibuster against Rosemary Barkett, a nominee to the 11th Circuit.

In 1994, H. Lee Sarokin's nomination to the Third Circuit required a cloture vote before it could proceed.

In 2000, the nominations of both Marsha Berzon and Richard Paez to the Ninth Circuit Court of Appeals—nominations which had been stopped dead in their tracks literally for years by that time—underwent cloture votes. Richard Paez had waited for more than 1,500 days before he was given that cloture vote.

To be perfectly frank, hearing these charges from the other side of the aisle is surprising given how many other Clinton nominees were stopped cold by secret holds and other parliamentary tactics, both in committee and on the floor.

For instance, Elena Kagan was a Clinton nominee to the D.C. Circuit Court of Appeals—the same circuit to which Miguel Estrada is now nominated. In fact, Ms. Kagan was Miguel Estrada's supervising editor on the Harvard law review, yet Republicans stopped her nomination cold without even getting to the point of a filibuster, or a public accounting of who was for, and who was against, that nominee.

Elena Kagan was never filibustered on the floor, but she was effectively ''filibustered'' in committee by one or two Senators who prevented a hearing or a committee vote.

Other nominees to the circuit courts who were denied hearings or committee votes include Helene White for the Sixth Circuit, Jorge Rangel for the Fifth Circuit, Bonnie Campbell for the Eighth Circuit, and the list goes on and on. In fact, dozens of Clinton nominees were blocked in committee by anonymous holds or other obstructionist tactics, so there was no need for a filibuster on the floor.

It is most surprising to hear these charges of unconstitutionality from the other side of the aisle, given that many of my Republican colleagues actually participated in filibusters against Clinton nominees.

Richard Paez, for example, was one of President Clinton's Hispanic nominees to the circuit court, and he could not move on the floor until a cloture petition was filed. When the vote finally came to end the filibuster, the majority of the Senate voted to do so and Richard Paez is now a federal judge.

But many of my Republican colleagues voted to continue that filibuster, just three short years ago. Indeed, almost exactly three years ago, on March 8, 2000, fourteen Republican Senators voted to continue the filibuster against Richard Paez, including some of those who now argue that filibusters themselves are unconstitutional.

And when the cloture vote came on that same day for Marsha Berzon, another Clinton nominee who waited years for a hearing and up or down vote, thirteen Republican Senators voted to continue that filibuster as well.

How can these Senators now argue that this filibuster is unconstitutional? Is it only unconstitutional when Democrats filibuster a nominee, but constitutional for Republicans to do the same? Is it only unconstitutional if the filibuster succeeds?

The fact is, this filibuster is very constitutional, and in fact it may even be necessary to enforce the constitution's other provisions, such as the advice and consent power granted to the U.S. Senate.

I do not relish where we find ourselves today, nor do any of my colleagues—on either side of the aisle.

We stand poised to enter a war against Iraq, and under the constant threat of international terrorism. Our budgets are running at record deficits, the economy is still in trouble, and we recently reorganized our entire homeland security apparatus. All of these issues require the attention in this body.

The nominations debate is clearly very important to the future of our judiciary and to the rule of law for decades to come, and there is no question that this issue should not, can not, and will not, be ignored.

But we should be concentrating our efforts, and our limited resources in terms of time, staff and attention, on these other important issues as well.

It is clear now that Miguel Estrada will not become a federal judge unless our requests are met. Any further debate on this nominee is really a distraction from the many other important issues we should address.

I appreciate the attendance of the distinguished Vice President of the United States here today, and I appreciate the gravity of this debate.

But I urge the Republican leader and my colleagues to move beyond this debate so we can resolve these other, very important issues.

The PRESIDING OFFICER. The Senate majority leader.

Mr. FRIST. Mr. President, I appreciate the consideration of both sides of the aisle. We extended the debate for an additional 20 minutes. Normally we would have completed at 12:30. I think that represents the fact that the debate has been valuable, informative, and I do appreciate so many Members on both sides of the aisle coming forward and speaking during this period of time where my objective, as I said 2 hours ago, was to elevate the debate and talk about advice and consent as spelled out in the Constitution.

Much of what we have heard about is larger than any single nominee, even one as distinguished and compelling as Miguel Estrada. I think most of us would agree that the process of advise and consent has gone awry. I suspect most of us will probably have different viewpoints on why that has happened, why it has evolved to the point where we are today. I respect those differing views.

One thing is clear to me—the system is not working well, it is broken, and that is a disheartening thought on my part. But to America it is an unfortunate truth. I think it is coming to the time we need to stop blaming each other and find a way to fix the system itself. With 17 unanimous consent requests, 100 hours of debate, still the nominee being subjected to a filibuster, where we don't see an end in sight, an up-or-down vote, I conclude the system is not working.

As has been pointed out, filibusters on executive nominations—until now, recently—has been exceedingly rare. As leader, that strikes me as a good thing. But it seems to be changing, and that is why it is important for us to carefully examine advise and consent as spelled out in the Constitution and our interpretation of that.

I do want to make a proposal for the other side of the aisle and I ask the assistant minority leader to think about it. The proposal is not in the form of a unanimous consent request at this point but possibly after lunch today. The proposal recognizes the context in which we find ourselves. It may be possible in the near future that we will have a military conflict, although I hope and pray that is not the case. But we need to begin later this week, and aggressively next week, addressing the issue surrounding the Federal budget. We want to focus on the economy and get it moving again. We have Medicare and prescription drugs, which we must address. We have a lot to do. The proposal that I will make—and I would like for the other side of the aisle to consider this—to the chairman and ranking member is that arrangements will be made for Miguel Estrada to appear again before the Senate Judiciary

Committee in exchange for a date certain for an up-or-down vote on his nomination.

The second hearing is something we had not believed was appropriate, but I want to show both sides of the aisle that we are trying to reach out to do everything possible to go that extra mile and try to get an answer that works.

This is not a formal unanimous consent request at this time, but I do want to offer that opportunity. Again, it would be in exchange for a vote, up or down, at a time certain—to actually have another formal Judiciary Committee hearing with Miguel Estrada. It is my hope the other side of the aisle will decide it is time to conclude the debate and that we can focus on the challenges that lie ahead.

Mr. REID. Will the leader allow me to respond? Otherwise, I will use leader time.

Mr. FRIST. Yes.

Mr. REID. I appreciate that since being chosen majority leader the Senator from Tennessee has gone out of his way to make sure we have ample debate. He has used the cloture motion rarely, and we appreciate that very much. But I say, regarding the Estrada matter, we have been very consistent in our requests. No. 1 is that he answer questions. The Senator said he would try to satisfy that. But until he supplies the memoranda from the Solicitor's office, it is not going to change the position of the people on this side of the aisle. So if he makes the unanimous consent request, we will simply renew our unanimous consent request, as we have done on other occasions.

Mr. FRIST. Mr. President, I yield the floor.

Mr. LEAHY. Mr. President, would the distinguished majority leader take a moment just to make a quick observation?

Mr. FRIST. Mr. President, I will yield for 1 minute, and then we will go to lunch.

Mr. LEAHY. Mr. President, I appreciate very much the distinguished majority leader trying to figure out a way to get through this impasse. It is in the tradition of majority leaders, and I have served with every majority leader since the time of Mike Mansfield. Majority leaders try to work these matters out, and I appreciate that.

I urge him, in doing so, to look at the fact that Miguel Estrada has said he is willing to discuss his papers and find a way that that could be done. I think his suggestion of a hearing where questions would be asked based on that would be very workable. But I commend the distinguished majority leader for doing what is the tradition of leaders—to try to find a way through this.

Mr. FRIST. Thank you, Mr. President.

RECESS

The PRESIDING OFFICER. The hour of 12:30 p.m. having arrived and passed, the Senate is adjourned.

Thereupon, the Senate, at 12:56 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mr. VOINOVICH).

LEGISLATIVE SESSION

PARTIAL-BIRTH ABORTION BAN ACT OF 2003—Continued

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session and continue consideration of S. 3, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 3) to prohibit the procedure commonly known as partial-birth abortion.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

UNANIMOUS CONSENT REQUEST—EXECUTIVE CALENDAR NOS. 32, 34, 35, 36 AND 55

Mr. FRIST. Mr. President, as in executive session, I ask unanimous consent that with respect to Calendar No. 32, Jeffrey Sutton, to be a U.S. circuit judge for the Sixth Circuit, there be 4 hours for debate equally divided between the chairman and the ranking member, or their designees, and that following the conclusion of that time, the Senate proceed to a vote on the confirmation of the nomination, with no intervening action or debate.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Reserving the right to object, Mr. President, on the circuit court judges, we have a couple circuit court judges on which we believe we can work out an agreement. Jeffrey Sutton is not one of them. So I object.

The PRESIDING OFFICER. Objection is heard.

Mr. FRIST. Mr. President, as in executive session, I ask unanimous consent that with respect to Calendar No. 34, Deborah Cook, to be a U.S. circuit judge for the Sixth Circuit, there be 4 hours for debate equally divided between the chairman and ranking member, or their designees, and that following the conclusion of that time, the Senate proceed to a vote on the confirmation of the nomination, without intervening action or debate.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Reserving the right to object, this woman, along with Mr. Roberts, is part of those nominations we believe were improperly reported out of the committee. So I object to her and to Mr. Roberts at this time until there is another hearing in the Judiciary Committee.

The PRESIDING OFFICER. Objection is heard.

Mr. FRIST. Mr. President, as in executive session, I ask unanimous consent that with respect to Calendar No. 35, John Roberts, to be a U.S. circuit judge for the DC Circuit, there be 4 hours for debate equally divided between the chairman and ranking member, or their designees, and that following the conclusion of that time, the Senate proceed to a vote on the confirmation of the nomination, with no intervening action or debate.

Mr. REID. Objection.

The PRESIDING OFFICER. Objection is heard.

Mr. FRIST. Mr. President, as in executive session, I ask unanimous consent that with respect to Calendar No. 36, Jay S. Bybee, to be a U.S. circuit judge for the Ninth Circuit, there be 4 hours for debate equally divided between the chairman and ranking member, or their designees, and that following the conclusion of that time, the Senate proceed to a vote on the confirmation of the nomination, with no intervening action or debate.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Reserving the right to object, Mr. President, Senator BIDEN had an objection to this proposed judge. We heard from his staff earlier today that probably has been resolved, but we will not know that until they check with Senator BIDEN who, as my colleague knows, is indisposed having had surgery. We will get back later, hopefully today. Therefore, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. FRIST. Mr. President, there are five individuals who are on the Executive Calendar. This is the last of the five. I will ask unanimous consent for him, as well, but clearly we want to move ahead as much as possible and want to continue to work with the other side. We do want to reach out once again. These unanimous consent requests are a part of our efforts to reach out and advance the process. I hope we can resolve this shortly.

Mr. President, as in executive session, I ask unanimous consent that with respect to Calendar No. 55, Timothy Tymkovich, to be a U.S. circuit judge for the Tenth Circuit, there be 4 hours for debate equally divided between the chairman and ranking member, or their designees, and that following the conclusion of that time, the Senate proceed to a vote on the confirmation of the nomination, with no intervening action or debate.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Reserving the right to object, Mr. President, I have spoken to the leader and to the ranking member of the Judiciary Committee on the other judges. I have not spoken to either of them about this man. For that reason, I object.