not on a federal court. As Alabama's Attorney General, in a case involving a disabled man forced to crawl up the courthouse stairs to reach the courtroom, Mr. Pryor argued that the disabled have no fundamental right to attend their own public court proceedings. His nomination was rushed through the Committee despite serious questions about his ethics and even his candor before the Committee.

History will judge us harshly in the Senate if we don't stand tall against the brazen abuses of power demonstrated by these nominees. The issues at stake in these nominations go well beyond partisan division. The basic values of our society—whether we will continue to be committed to fairness and opportunity and justice for all—are at issue.

Many well-qualified, fair-minded nominees could be quickly confirmed if the Bush administration would give up its right-wing litmus test. Why, when there are so many qualified Republican attorneys, would the President choose nominees whose records raise so much doubt about whether they will follow the law? Why force an all-out battle over a few right-wing nominees, when the nation has so many more pressing problems, such as national security, the economy, education, and health care?

Our distinguished former colleagues, Republican Senator David Durenberger and Democratic Senator and Vice President Walter Mondale, recently urged the Senate to reject the nuclear option. They reminded us that ''Our federal courts are one of the few places left where issues are heard and rationally debated and decided under the law.''

Five words they used said it all—''let's keep it that way.'' To reach the goals important to the American people, let's reject the nuclear option, and respect the checks and balances that have served the Senate and the nation so well for so long.

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

The Senator from Nevada.

FILIBUSTER OF JUDICIAL NOMINEES

Mr. ENSIGN. Mr. President, I would like to think that if some of the finest and most respected jurists in our country's history were nominated today to sit on the Federal bench, their successful confirmation by the Senate would be guaranteed. I am talking about jurists such as Chief Justice John Marshall, Chief Justice Earl Warren, and Justice Oliver Wendell Holmes. Imagine where we would be today without their bright, insightful legal minds.

Unfortunately, in today's bitter and partisan atmosphere, I don't see how any of them would make it through this grueling, humiliating, and endless judicial nomination process. That is a disturbing thought. We must put an end to this mockery of our system before it becomes impossible to undo the damage.

I am sure a lot of Americans believe this is politics as usual. It is not. Filibustering of judicial nominations is an unprecedented intrusion into the longstanding practice of the Senate's approval of judges.

We have a constitutional obligation of advise and consent when it comes to judicial nominees. While there has always been debate about nominees, the filibuster has never been used in partisan fashion to block an up-or-down vote on someone who has the support of a majority of the Senate.

In our history, many nominees have come before us who have generated strenuous debate. Robert Bork and Clarence Thomas are two of what the other side would consider more controversial figures to be considered for a position on the Federal bench. It is important to note that both of these men, despite the strong feelings they generated from their supporters and their detractors, received an up-or-down vote. Now, sadly, due to the efforts of the Democrats in the Senate, the 214-year tradition of giving each Federal candidate for judge a solid ''yea'' or ''nay'' is at risk.

Senate tradition is not the only thing at risk here, though. The quality of our judiciary is at grave risk. It is and should continue to be an honor to be nominated to serve on the Federal bench. Nominees are aware of the rigorous process that goes along with their nomination—intense background checks and the opening of one's life history to the public. However, highly qualified and respected nominees do not sign on to being dragged through a bitter political battle. If we allow the filibustering of nominees to continue, I fear that those highly qualified candidates will decline to put themselves and their families through the abyss of this process. The American judicial system will be sorely hurt should this happen. And it already happened with Miguel Estrada, who was an outstanding nominee. We cannot afford to let this happen and let it continue.

I believe that anyone who has been nominated by the President and is willing to put his or her name forward and be subjected to the rigorous confirmation process deserves a straight up-or-down vote on his or her nomination in both committee and on the floor of the Senate. Guaranteeing that every judicial nominee receives an up-or-down vote is truly a matter of fairness. It doesn't mean that there is no debate or opportunity to disagree. It does mean fair consideration, debate, and a decision in a process that moves forward.

I say that today with the Republican President in the White House and a Republican majority in the Senate, but I know we will uphold the up-or-down vote when we eventually have Democrats back in control. That is because this is the fairest way to maintain the health of the judicial nomination process and the quality of our courts.

Our Founding Fathers set up a form of Government with three separate branches, and they were all very distinct. The current state of affairs in the Senate threatens the very balance of power. Although the up-or-down vote is critical to maintaining that balance, there is a need to reform the committee process as well. Each committee should discharge nominees, whether it is with a positive or a negative vote. But at some point, that nominee deserves to have a vote of the full Senate on the floor. The committee should not have the power to kill a nominee on its own.

I sincerely hope we can put an end to this crisis, judge judicial nominees on the basis of their character, qualifications, and experience, and return to fulfilling our constitutional duty.

I understand that the majority leader has just put forward a proposal to correct the unfair treatment of judges. Senator FRIST's proposal will ensure that each and every nominee will be treated fairly. It will ensure that each nominee will receive a fair up-or-down vote, whether a Republican President or a Democrat President nominates him or her.

I commend Senator FRIST for his leadership. His proposal ensures future nominees are treated fairly. I urge my colleagues to adopt Senator FRIST's proposal.

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

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

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. CRAPO. Mr. President, I would like to take a few moments to discuss the issue that seems to be the major topic of debate now in the Senate. It is that of the question of how we approach the nomination and confirmation of judges.

Frankly, I think that the level of hostility and the level of debate that has increased around this issue is becoming alarming to the American people—not so much necessarily because of their objection or concern about the various positions being taken but because of the concern about how the Senate is running, the question of whether we in the Senate are working on the business of the American people in a way that is in the best interest of public discourse, or whether the dynamic in the Senate is deteriorating into a highly partisan, highly personal, and highly difficult climate in which we are increasingly facing gridlock.

Mr. President, I would like to go back through the debate because a lot has been said about what the role of the filibuster is as we approach the issue of confirmation of judges. I believe it is important because, frankly, I notice in some of the advertising that

is going on across the country right now that the argument being made seems to be that the filibuster was established in the Constitution by our Founding Fathers as one of the checks and balances of our system.

The reality is that from 1789 until 1806, the Senate did not have anything close to a filibuster. In fact, the Senate had the traditional motion for the previous question in its rules, which, for those who don't follow these things closely, meant that a majority could close debate on any issue when there was a motion to proceed to a vote. The majority could close the debate.

So, clearly, there is no mention of the filibuster in the Constitution and, clearly, until at least 1806 there was no possibility for utilization of the filibuster in the Senate. Even after 1806, when for other reasons the Senate eliminated the motion for the previous question, the idea of filibustering never really took hold in the Senate until much later. In fact, it was about the 1840s when a group of Senators realized that under the rules there was no way for them to be stopped from debating, and they basically started the idea of filibustering and approaching the management of issues in the Senate by utilization of the tool of filibustering—namely, refusing to stop debating and let the Senate move on to a vote.

Even though that practice started in the 1840s, it was used very sparingly and over the years really wasn't that big of a problem. When Senators tried it, they worked out issues they were raising, and issues were resolved. The Senate never really adopted a cloture rule until the 1917 timeframe. The cloture rule, for those who don't follow Senate procedure that closely, is the rule by which the Senate tries to stop a filibuster. It has been in different forms over the years, but in its current form—since 1917, it has evolved—it requires 60 votes in the Senate to adopt cloture, which means that we will then go into a process which will eventually wind down debate on a bill and move us to a point where we can vote on a matter. So even in 1917, when the original cloture rule was adopted, it didn't really mention judicial nominations, because at that point the Senate didn't really contemplate the use of the filibuster on judicial nominations.

The cloture rule was rewritten in 1949. At that time, it was expanded to include all matters which technically included judicial nominations. But even after 1949, filibusters were rarely, if ever, even tried on judicial nominations; and when they were tried on judicial nominations, with one exception, when both parties supported the filibuster, even when filibusters were tried on judicial nominations, they were stopped. Never, until this last Congress, the Congress previous to this, with that one exception I mentioned when both parties supported it, did the Senate support the utilization of a filibuster on the nomination of a judge.

In the last couple of years, we have seen an increasing and frequent utilization of filibusters for nominations on the judiciary. That is what brought us to this battle right now. The question the Senate is grappling with and which the American people, I believe, are justifiably very concerned about is, What should the role of the Senate be? What should the procedure of the Senate be when considering judicial nominations?

That takes us, in my opinion, back to the U.S. Constitution. In article II of the U.S. Constitution, which is the core around which this debate should focus, it provides that 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, which includes judges of the other courts. The President shall nominate and, by and with the advice and consent of the Senate, shall appoint. So the question there is, Does the Constitution absolutely prohibit a filibuster? No. Does the Constitution absolutely authorize filibusters? No. The Constitution simply says the President shall nominate and, by and with the advice and consent of the Senate, he shall appoint judges.

Our job now is to determine how to run the rules of the Senate in the closest accommodation to the spirit of the Constitution of the United States.

The question, as I see it, is, Does the Constitution contemplate that the President is entitled to a vote on his nominees? And if so, is that vote a majority vote or is it a vote of a supermajority, like 60, or two-thirds? It has been argued on the floor today that all the Constitution contemplates is some kind of a vote, whether it be a 60-vote supermajority, a two-thirds vote, or a majority vote, that the Senate can decide, but all the Constitution contemplates is some kind of a vote.

I disagree. I believe the Constitution contemplated that by a majority vote the Senate would give its advice and consent. I believe the best way to operate this Senate is to utilize the principle of advice and consent as one in which we should give the President an up-or-down vote on those nominees who are able to get sufficient support to get out of the Judiciary Committee to the floor of the Senate. As I say, historically, never, until the last Congress, has the Senate operated in any other way.

There are those who have tried filibusters, but never have just 41 Senators stood solidly together and said: No, we will not allow a nominee who has enough majority support to get to the floor of the Senate to have a vote.

There are those who are saying the President is trying to pack the Court and that the President is trying to change the dynamics of the judiciary with people who are out of the mainstream. Again, I do not believe anything could be further from the truth.

There has been a lot of debate on this floor over the last few weeks about these nominees, but let's look at a couple of these nominees to see what it is we are talking about.

One of the filibustered nominees is Justice Priscilla Owen. She has served on the Texas Supreme Court since 1995. In 2000, Justice Owen was overwhelmingly reelected to a second term on that court, receiving 84 percent of the public vote. I do not think that is out of the mainstream.

During her 2000 election bid, every major newspaper in Texas endorsed her. Before joining the supreme court, she was a partner with a well-respected Texas law firm, having practiced law for 17 years.

Justice Owen has significant bipartisan support in Texas, including three former Democratic judges on the Texas Supreme Court and a bipartisan group of 15 past presidents of the State bar of Texas.

Whether one agrees or disagrees with her philosophy, one cannot argue that she is not mainstream. In fact, a bipartisan group of 15 former presidents of the State bar of Texas—that bipartisan group about which I talked—states:

> Although we profess different party affiliations and span the spectrum of legal and policy issues, we stand united in affirming that Justice Owen is a truly unique and outstanding candidate to appointment to the Fifth Circuit [Court of Appeals].

They go on to say she has all the qualities to be a good independent judge.

Another who is being attacked is the Honorable Janice Rogers Brown, a nominee from the Supreme Court of California to be on the District of Columbia Circuit Court. In her 9 years on the California Supreme Court, Justice Brown has earned the reputation of being a brilliant and a fair justice who rules on the law.

Her nomination has received broad support from across the political spectrum, and she also stood for reelection in the California judicial system where she received 76 percent of the public vote in California the last time she was on the ballot, which belies the notion that she could be out of the mainstream.

She has dedicated over 25 years of her legal career to public service and she, too, is supported by a broad array of bipartisan jurists and legal scholars in her State.

Let me talk about one more, a nominee from my State, the State of Idaho, William Myers, who has been nominated to the Ninth Circuit Court of Appeals. Bill Myers is a former Solicitor of the Department of Interior and is a highly respected attorney who has extensive experience in the fields of natural resources, public lands, and environmental law. He actually was confirmed by this Senate by unanimous consent when he was confirmed to serve as Solicitor of the Department of Interior.

Before coming to the Department of Interior, he practiced at one of the most respected law firms in the Rocky Mountain region, and he has a rich history of service in public offices. He is a

very avid outdoorsman and conservationist and has himself wide support from bipartisan interests. In fact, the former Democratic Governor of Idaho, Cecil Andrus, indicated he is one who deserves our support, has the integrity, judicial temperament, and experience to be a good judge.

Former Democratic Wyoming Governor Mike Sullivan, who also served as U.S. Ambassador to Ireland under the Clinton administration, endorsed Mr. Myers, saying he is ''a thoughtful, well-grounded attorney who has reflected by his career achievements a commitment to excellence.''

My point in reviewing these three candidates, because my time is limited today, is to show that although there is an argument that the President is trying to submit candidates who are not in the mainstream, the argument does not fit the facts. What is happening is President Bush is being denied the opportunity for even a vote on his nominees to be the judges on the various circuit courts of this country.

I think we ought to come back to the Constitution and to the initial question which I pose: What does the Constitution of the United States contemplate in terms of how the Senate should operate when it fills its role as providing advice and consent in the nomination and appointment of judges?

I think it is very important to note that what we are debating is not the elimination of the filibuster. We have an Executive Calendar and a legislative calendar in the Senate, and the proposal is to address the manner in which filibusters are utilized only on a portion of the Executive calendar. The Executive calendar is that part of our business in which the Senate deals under the Constitution with the executive business of the President with the Senate.

We are suggesting our rules should contemplate that when the Constitution gives the President business to conduct with the Senate and says the Senate should give its advice and consent on the President's nominations, the Senate's rules should not prohibit the President from getting a vote.

All we are asking, not that these nominations be all unanimously approved or automatically accepted, is the President get a vote up or down on his nominees.

It is my hope we will not have to get to the point where on the Senate floor we have a protracted and bitter battle. We have an opportunity to discuss these matters among ourselves and try to do what the American people expect of us, and that is to bring more comity to the Senate in our individual relations among each other.

I believe there is room for finding a compromise that can resolve this issue in a way that will bring dignity and respect to the Senate and will enable us to fulfill the spirit of what the Constitution contemplates when it says the Senate should provide its advice and consent to the nominations of the President.

Mr. President, I thank you for my time, and I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator from Kansas is recognized.

Mr. BROWNBACK. Mr. President, how much time remains in morning business on this side?

The PRESIDING OFFICER. There is 6 minutes 25 seconds remaining.

Mr. BROWNBACK. Mr. President, I yield myself such of that time as I may consume.

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

Mr. BROWNBACK. Mr. President, I am going to follow on the presentation of my colleague from Idaho on the issue of judges because it is the pending issue before the Senate. We are on the highway bill, and it is important legislation, but this issue is what has captured the attention of this body, the executive branch, and people across the country: the problem of getting judges approved.

My colleague from Idaho well portrayed some of the nominees and what is taking place. I will point out a couple of common issues. I serve on the Judiciary Committee. We have had these individuals in front of us, in some cases, for 4 years. They are well known to this body, to the people here, and they have been fully vetted. The reason they are at this point in getting through is they are extremely well qualified. There may be philosophical differences with them, but if they are allowed to have a vote, they will be confirmed because they are well qualified. If they were not well qualified, if they were outside of the mainstream of judicial thought, they would not be confirmed and we would not be debating this issue.

We have the Democratic Party deciding: OK, we are going to stop them. Actually, they are well qualified and we cannot stop them on a majority vote; we are going to stop them on a filibuster and require a supermajority vote.

They have taken that tactic. It is unprecedented. They have taken that tactic which is within the rules of the Senate.

I want to point out what is going to happen if they persist in that tactic because then they put it back on us or the President to take action in response.

We can say we are not going to do anything, we are just going to let an unprecedented filibuster take over, to which a lot of us are saying that is not right, that is not our job. This may force the President to do a whole group of recess appointments, a right he has under the Constitution. He has been waiting for 4 years for some of these nominees. He would rather not do that, I am sure. I have not talked with him, but I am sure he would rather not do that. He can say: If you are not going to let my judges through, you are supposed to give advice and consent, and if you are not going to give advice and consent, then this is the action I have to take. Or it is going to force us to change the filibuster rule on the issue of judges because of the unprecedented use and requirement of a supermajority.

What I am pointing out is, while the Democrats can take this tactic, it is going to force a response which would be legal by a Republican majority in the Senate, by the President, but all of which is unsatisfactory and not right. We ought to be voting on these judges.

We have seen the numbers. I think if the numbers were not so extreme, we would not feel so forced into a corner, but the numbers are extreme. The Senate has accumulated the worst circuit court confirmation record in modern times, thanks to this partisan obstruction. Only 35 of President Bush's 52 circuit court nominees were confirmed, which is a confirmation rate of 67 percent. In comparison, President Johnson's confirmation record in his first term in office was 95 percent, as were 93 percent of President Carter's nominees.

The other side may point to the district court, the trier of fact, level of confirmations. Yes, those are there, but the circuit courts are the ones that get to review and interpret the law, and we are trying to get judges who will interpret and not write the laws.

A number of people are willing to allow judges to write laws. I am not one of those. That is our job. That is my constitutional role, that is my constitutional requirement, and the oath I took to the Constitution to write the laws and not to pass them off to the judiciary or to say: Well, it is too tough for us, let's let it pass through there.

Plus, what irritates so many people is the use of the judiciary in so many areas that are so personal and deeply felt within this society. People are saying this is not right, this is something that should come in front of legislative bodies. Maybe it will take several election cycles for the body politic to get in a position to resolve these issues, and that is fine, it should take time on these major issues before us.

Also, I do not want to just focus on the numbers. We should remember these nominees are not some sort of political prop. These are good people with careers and commitment to public service, the quality and depth of which is enviable.

Also, I note that a solid majority of people agree strongly with the President's position that he should pick judges who strictly interpret the law rather than legislating from the bench, what the judges think the law should be. Ignoring this mandate, some in this body, spurred on perhaps by outside interest groups, are threatening yet again to filibuster these judge nominees.

We are now embarking on a dangerous area if we talk about changing the role of the judiciary in this society and blocking nominees because they are going to stay with the interpretation of the law and not write law. I

think we should be thinking long and hard before we go with judges and give a license for them to be more expansive in their role in the legislating arena. That is wrong. It is not in the Constitution. It is not the division of powers. We should have judges who strictly interpret. That is what these nominees are about and much of the base of this fight is about.

I urge my colleagues on the other side of the aisle to think about what they will force in response by this tactic, and there will be a response to this tactic. I do not think it is wise for this body to move toward that route.

I thank the Chair for this time. I yield the floor and yield back the remainder of time.

The PRESIDING OFFICER. The majority time has expired.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

TRANSPORTATION EQUITY ACT: A LEGACY FOR USERS

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of H.R. 3, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 3) to authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

Pending:

Inhofe amendment No. 605, to provide a complete Substitute.

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

Mr. GREGG. Mr. President, the highway bill which is presently before us comes to us pursuant to a budget agreement that was passed last Friday morning. In fact, I guess it was passed about 1 a.m. Friday morning. That budget agreement had in it language that said there would be $284 billion spent on highways under this highway agreement. It also had language in it referencing something which is called a reserve fund which essentially says if legitimate offsets could be found, and if they were determined to be legitimate by the chairman of the Budget Committee, then that number could be increased by the amount of those legitimate offsets.

Initially, when the bill was brought forward it was brought forward at $284 billion. It was brought out of committee at $284 billion. On Monday during the wrapup session, by unanimous consent, that bill, which had already been subject to a substitute, was hit with another substitute that had 1,300 pages in it. Within those 1,300 pages—and they are not absolutely sure of this number yet—somewhere in the vicinity of $11.5 billion of new spending out of the highway trust fund. That in and of itself was inconsistent with the budget resolution that had been passed last Friday in that it was $11.5 billion over that resolution and was therefore out of kilter relative to the allocation given to the committee, the Public Works Committee.

In addition, within those 1,300 pages which were submitted by substitute, by unanimous consent, on Monday night, one legislative day after the budget had been passed, were representations that the offsets had been placed in to pay for the $11.5 billion. There was no referral of those offsets to the Budget Committee as was required under the law that had just been passed on the prior legislative day in the reserve fund of that law. In fact, the offsets as represented first were offsets which would apply to the general fund, not to the highway fund, and therefore created a violation of the Budget Act. But second were offsets which do not pass what we might refer to as the ''straight face'' test. In other words, they were not legitimate offsets. In fact, one of the offsets which was referred to has been used 14 times in the last 2½ years—14 times. Yet it was referred to with a straight face, although I am sure there was a smile behind it, as a legitimate offset.

It would be humorous were it not for the fact that it adds a $11.5 billion burden to the taxpayers, which on the prior Friday we had said we were not going to do to the taxpayers. So the bill as presently pending under the substitute, as put forward on Monday night, the 1,300 pages which are so extensive that CBO, which is the scorekeeper around here, has even had trouble figuring out what is in it, that bill is presently in violation, or that substitute is in violation of the Budget Act. It is quite simply unequivocally, unquestionably a budget buster.

One must ask the very obvious question that when the Senate passes a budget on Friday of the legislative week, if on the Monday of the next week, which amounts to the next legislative day, if that next Monday you are going to by unanimous consent, late in the afternoon, during wrapup, put forward a substitute which includes in it a budget-busting expansion of spending with a euphemistic and illusory statement of offsets—self-serving, also, by the way—if we are at all serious as a Congress about disciplining ourselves when it comes to protecting the American taxpayer relative to the rate of growth of the Federal Government and Government expenditures. It would appear that if this substitute is allowed to survive in its present form, with this additional money being spent, which exceeds significantly what was agreed to in a budget that was passed the day before, the answer to that question would have to be, regrettably, no, we are not.

In addition to that problem, there is the issue of the President. Now, rolling the Budget Committee around here is sort of good entertainment, and it happens, unfortunately, too regularly. But rolling the President of the United States, and especially when the party of the President of the United States decides to roll the President of the United States, is something a little more significant. The President has said 284 is the number, the President has said even if there are offsets, 284 is the number and we are not going above that number. Yet a bill is reported to the floor that met that number with the clear, obvious understanding now that it was going to be gamed, that 284 number was going to be ignored. And now we have a bill that is probably 295, 296, maybe 300. We are just not sure. We are talking billions, folks, just to put it in context. That is not $296. That is $296 billion, which is a lot of money.

So the President has made it very clear—he has made it clear in his press conference, his administration has made it clear, the director of OMB has made it clear, and in an agreement with the House leadership there was a clear understanding the highway bill would spend $284 billion, not $296 billion, whether it was offset or not. Yet that position of the President is being—well, it is being more than ignored. It is being run over by a bulldozer or maybe a cement mixer or maybe a paver. But in any event it is being run over. And that seems a little bit inappropriate, slightly inappropriate to me. Since the President has decided to try to exercise some fiscal discipline, it would seem that we as a party that allegedly is a party of fiscal discipline would follow his lead rather than try to run him over.

So you have two problems. You have the problem of a Republican Senate running over a Republican President because we want to spend more money—or at least some Members of the Senate do—and then you have the Republican Senate running over the Republican budget because some members want to spend more money. Then you have this gamesmanship, I guess would be the best term for it, which occurred on Monday night when you take 1,300 pages and throw it in under unanimous consent and put in it language which raises spending by $11.5 billion and has these proposed offsets which do not pass the straight face test.

So you wonder about that and you have to ask yourself where are we really going if we can't even discipline ourselves on something like this. You have to remember this bill did not start out at 284. It started out 2 years ago at, I think it was 219, maybe it was 220, maybe it was 230. It was in that range. Then last year, through another sleight of hand dealing with the funding mechanism, we shifted—we didn't but some did—$15 billion or $18 billion—I do not recall exactly—out of the general account over to the highway account claiming that there was no revenue impact, that this was an offset, of course, putting an $18 billion hole in the general fund in exchange for covering up with the extra spending