United States Senate
Republican Policy Committee
Jon Kyl, Chairman

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The Judges Debate: A Summary

On the morning of November 14, 2003, the Senate completed the longest continuous debate on judicial nominations in United States history.[1] Senators spoke for more than 39 hours, straight through two nights, with no quorum calls. Nearly every Republican Senator participated, as 46 Republicans spoke on the floor and two others presided in the late night or early morning hours. The public crowded into the Senate Gallery through the days and nights, and cable networks and broadcast radio ran regular excerpts from the debate at all hours.[2] Through the duration, Republican Senators focused the Senate's attention on one issue: the abuse of Senate rules to prevent a simple up-or-down vote on judicial nominees.

The marathon debate examined many substantive issues relating to the obstruction of nominees, the constitutional implications, and the impact on the administration of justice. Senators also discussed the merits of the filibustered nominees, a discussion that was marred by an unfortunate number of personal attacks against the nominees themselves. Although Democrats frequently argued that the debate was a "waste of time" and an "obstruction" of other Senate business, Senator Talent provided the obvious response: "What you cannot do is filibuster and then complain about obstruction" [*Cong. Rec*., S14671].

This paper summarizes the major areas of discussion from the debate.

Focusing on the Obstruction of Votes on Judicial Nominees

The primary topic of the debate was the minority party's abuse of the right to debate to block up-or-down votes on several judicial nominees. Republican Senators, joined by Senator Miller, focused on the fundamental unfairness of denying an up-or-down vote to a judicial nominee after the nomination has been approved by the Judiciary Committee and placed on the Executive Calendar. As Chairman Hatch said, "Vote them up or vote them down. But just vote" [S14709]. Or, as Senator Allen phrased it, "I ask my colleagues to show some guts. Stand up and vote yes or no" [S14602]. Republicans attempted more than 15 times to gain unanimous consent to a time

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[1] See, e.g., "All Night Senate Sessions Since 1915." *Associated Press*. 12 November 2003.

[2] As of December 16, 2003, 315 editorials in 130 newspapers m from 38 States and the District of Columbia have decried Democrats' use of the filibuster to block President Bush's judicial nominees and/or have called for the immediate confirmation of those nominees. Only 54 editorials in 24 separate newspapers have argued that filibuster should block these nominees or that Senators need more information before voting up-or-down. See list of editorials available at http://rpc.senate.gov/releases/2003/Working%20Editorial%20Chart.htm and hard copies of editorials on file with Senate Republican Policy Committee.

certain to vote on the nominees, but a Democrat objected in every case. As the obstruction mounted, it became clear that the filibuster — defined aptly by Senator Sessions as "a continuous success by less than a majority of the Senators to stop progress to a vote in an action or a matter" [S14569] — would succeed, at least for now.

Democrats Defend Obstruction: Is "168-4" Good Enough for the Constitution?

Filibustering Senators' most basic argument amounted to, "What's the big deal?" Their common refrain was along the lines expressed by Senator Schumer: "[W]e have supported and confirmed 168 judges whom President Bush has sent us. We have blocked 4" [S14533]. Or, as Senator Durbin said, "98 percent of this President's nominees have been approved" [14539]. Democrats parroted these themes throughout the debate, arguing that because they had "only" refused to vote on the nominations of Miguel Estrada, Priscilla Owen, William Pryor, and Charles Pickering, the American people should applaud them for their discretion. They charged that President Bush and Senate Republicans were bullying the minority by asking that longstanding Senate practice — permitting an up-or-down vote on any judicial nominee who reaches the Senate floor — be followed.

As Republicans explained in a variety of ways, it is no answer to the filibustering of four judges to say that Democrats had allowed others to receive votes. Senator Hutchison said, "I think it is important that we do not say, 'well, 98 percent of the time we adhere to the Constitution.' We need to adhere to the Constitution 100 percent of the time" [S14542]. Other Senators expanded on this point. Senator Coleman, for example, asked, "if there were 172 newspapers in the United States and I said 168 of them are going to have freedom of the press, but not the other 4, where would we be?" [S14584; see also S14719]. Senator Allard noted that in some areas of life, 98 percent is woefully inadequate: "if we would only accept a 98 percent success rate, say, on flight safety, there would be 1,740 flights a day that would not land safely. Five hundred major organ transplants would be performed incorrectly and more than 4 billion letters would be mishandled by the U.S. Postal Service this year" [S14628]. And Senator Chambliss evoked approving titters from the Senate Gallery when he challenged the filibusterers' main argument: "If I told my wife that I was faithful 98 percent of the time, she wouldn't be all that happy with me" [S14574]. The key point, expressed repeatedly, was that a refusal to do one's duty — to vote on a nomination on the floor — is not made less troubling by its superficial infrequency.

Several Senators pointed out that, even on its own terms, the "168-4" figure is misleading. *First*, it ignores the concentration of the filibusters for nominations to the courts of appeals — the courts that provide the final review on the vast majority of federal cases.[3] There, filibustering Senators had blocked four (now six) nominees by filibuster, while allowing 29 nominees to receive the up-or-down votes to which they were entitled. Because at least six additional court of appeals filibusters have been threatened, the real comparison is 29-12 [Talent, S14588, 14670; Gregg, 14635; Bond, 14754]. *Second*, many Senators explained that a more appropriate metric would be "2372-0" — the number of judicial nominees who have been confirmed since the advent of the modern cloture rule in 1949, versus the total number of nominees filibustered until Miguel Estrada met that fate in early 2003 [Hatch, 14704; Santorum, 14594; L. Graham, 14723; Coleman, 14585].

[3] For the past several years the Supreme Court has granting review and deciding well under 100 cases per year. See charts and analysis at www.appellate.net.

Finally, regardless of the most relevant ratio, Senator Cornyn observed, "Where I come from, we don't treat people as statistics" [S14605]. The question ought to be whether an individual nominee received the fair and respectful treatment that any nominee to the federal courts deserves.

Democrats' Constitutional Rewrite — an Actual 60-Vote Requirement?

Some Democrats seemed to recognize the momentousness of the debate and realized that they needed to reconcile their obstruction with the Constitution's mandates. Indeed, perhaps the most astounding part of the 39-plus hour debate was the claim that the Senate *satisfies* the Constitution when a minority blocks an up-or-down vote on a nominee altogether [Leahy, S14688; Kennedy, S 14673].

These arguments are worth highlighting, given that they do not appear to have been uttered on the Senate floor prior to this Congress. Senator Kennedy announced that the Constitution *contemplates* a supermajority vote requirement: "The Founders did not say, and did not mean that 'the President can appoint whomever he wants to the Federal courts, as long as he gets a bare Senate majority to consent.' If we did adopt a rule that allowed the President to do so, the Founding Fathers would look down on us and say, 'Shame!'" [S14673]. Senator Kennedy left vague just how the Advice and Consent clause should work if it did not rely upon a simple majority vote — could the Senate require 75 votes? Unanimity? On the other hand, Senator Johnson was quite clear. His argument, unprecedented though it may be, was refreshingly direct: "The Democratic Party is insisting that one should not go to a lifetime Federal bench unless there is a generally broad consensus, bipartisan consensus, not unanimous but a broad consensus, of at least 60 votes that that person deserves to sit on the bench . . ." [S14744].

At no point in Senate history has a supermajority been required to confirm a judicial nominee. Neither Senator Kennedy nor Johnson cited any supporting evidence from the Founding era or the past 214 years of Senate history to support such a rule. And indeed, both Senator Kennedy and Johnson have voted for judicial nominees whom the Senate confirmed with fewer than 60 votes. [See Confirmation of Richard Paez, 59-39, Roll Call Vote #40 (106th Cong.; 2nd Sess.); Confirmation of William Fletcher, 57-41, Roll Call Vote #309 (105th Cong., 2nd Sess.); Confirmation of Susan Mollway, 56-34, Roll Call Vote #166 (105th Cong.; 2nd Sess.).] The *Congressional Record* shows no evidence of any Senator challenging the legality of those confirmations, including Senators Johnson and Kennedy.

Demonstrating the Unprecedented Nature of the Judicial Filibuster

Democrats and Republicans agree that until Miguel Estrada asked the President to withdraw his name in September 2003, no circuit court nominee had ever been withdrawn or defeated for confirmation due to the refusal of a minority to permit an up-or-down vote on the Senate floor. Some Democrats argued that a filibuster had defeated the 1968 nomination of Abe Fortas to be Chief Justice, but Republicans presented historical evidence showing that the Fortas affair was, in fact, no precedent at all. Faced with this evidence, filibustering Senators began equating cloture votes with filibusters and treating Committee procedures as identical to filibusters. Republicans addressed these arguments in a straightforward manner, repeatedly offering the historical evidence that proved the uniqueness of the current obstruction.

Cloture Votes are not Filibusters

Democrats' first strategy to dodge the lack of historical precedent was to argue that precedent *did* exist because there had been cloture votes for some judicial nominees [e.g., Durbin, S14545]. Some filibustering Senators displayed a chart showing past cloture votes for judges currently serving on the bench — such as Stephen Breyer, Richard Paez, Martha Berzon, and others — and then argued that if a cloture vote was "necessary," then a filibuster must have been present [Id]. Curiously, no Democrat pointed to any extended debate on these nominees, or any statements by the minority party's leaders that they were "filibustering" a nominee.

Several Republican Senators explained that a cloture vote in and of itself says nothing about the existence or nonexistence of a filibuster. A cloture vote is merely a procedural device to move ahead to an up-or-down vote, explained Senator Craig [S14559]. On the other hand, the *result* of the cloture vote can signal that a filibuster does exist — or it can just signal that 41 Senators want more time to consider the merits of a nominee, as was the case when initial cloture votes for Stephen Breyer and William Rehnquist failed.[4] Both nominees were confirmed soon after these cloture votes; indeed, as Senator Schumer was forced to concede, until Miguel Estrada asked the President to withdraw his nomination in September 2003, every circuit court nominee ever subjected to a cloture vote ultimately was confirmed by the Senate on an up-or-down vote [Cornyn-Schumer exchange, S14558].

Other Senators explained that, while a small minority of Senators had wanted to filibuster judicial nominees in the past, a bipartisan supermajority of the Senate had heretofore acted responsibly and blocked those efforts. For example, Senator Lott explained how, when serving as Majority Leader, he and Chairman Hatch had worked together to prevent filibusters of President Clinton's judicial nominees [S14664]. Senator Lott noted that he had filed for cloture *himself* to ensure that those nominees received up-or-down votes, and that the Republican conference's consensus was that it would be improper to abuse the Senate rules this way [Id]. This commitment to up-or-down votes is best illustrated by Senator Lott's votes *for* cloture for the controversial Paez and Berzon nominations in 2000, but *against* their confirmations. (Compare Roll Call Votes #36 and 38 (Berzon) and #37 and #40 (Paez).)

Fortas Was Not Defeated by a Filibuster

Democrats especially objected to Republicans' demonstration that President Johnson's withdrawal of Abe Fortas's nomination to be Chief Justice was *not* a filibuster [e.g., Leahy, S14637]. Senators Hutchison and Craig each took the floor to read a recent letter from former Senator Robert Griffin to Senator Cornyn (R-MI) [Hutchison, S14637; Craig, S14559-61]. Senator Griffin had helped lead the opposition to then-Justice Fortas on the floor of the Senate. In his letter to Senator Cornyn, former Senator Griffin explained that the opposition to Justice Fortas's elevation was bipartisan, and that it was grounded in concerns about the judge's ethics. He also explained that the Senate debate had been underway for only four days when President Johnson withdrew the nomination. A single cloture petition was filed, resulting in a 45-43 vote — less than the 67 votes then required to cut off debate. Senator Griffin explained that this early cloture vote was not

[4] For more information on all previous cloture votes for judicial nominees, see *Denying Mr. Estrada an Up-or-Down Vote Would Set a Dangerous Precedent*, published by the Senate Republican Policy Committee on February 10, 2003, and available at http://rpc.senate.gov/_files/JUDICIARYsd021003.pdf.

evidence of a filibuster — indeed, he showed that during the 1968 debate, he personally had protested that cloture had been filed prematurely. Senator Griffin instead concludes that the 45-43 cloture vote demonstrated that Justice Fortas *lacked the 51 votes he needed for confirmation*, and that this was why the President withdrew the nomination — not because of a "filibuster." [See Craig, S14560, for text of letter].

The current filibustering Senators did not deny that a majority of the Senate never registered its support for Justice Fortas's nomination. And they did not show that President Johnson withdrew the nomination due to a perceived filibuster versus a lack of majority support. This history stands in contrast to the situation today, where a bipartisan majority of Senators repeatedly has voted to proceed to up-or-down votes.

A Delay in Committee is not Equivalent to a Filibuster

In another effort to dodge the "unprecedented" stamp, many Democrats claimed every nominee had a right to a hearing and vote in the Judiciary Committee, and that if the nominees did not clear the committee process, then a "filibuster" had occurred. Some Senators displayed a floor poster purporting to identify 63 Clinton nominees who were withdrawn or returned to the President without making it out of the Judiciary Committee when Senate Republicans were in charge [e.g., Boxer S14563]. Democrats drew a parallel, arguing that it was wrong to complain about "only four" nominees who were being filibustered today when these other nominees did not make it through the confirmation process [Clinton, S14642]. Indeed, Senator Harkin expressly claimed that when a nominee fails to clear the Judiciary Committee, that failure is "morally" the same as a floor filibuster by a minority [14614].

Republicans addressed this argument by clarifying the factual record and explaining why committee delays are different in principle. First, on the facts, Republicans explained that the bulk of the Clinton nominations listed in Democrats' floor chart had expired at the end of the 106th Congress in January 2001. As Senator Nickles explained, "When people are nominated in the last year or the last few months of an administration, a lot of times they don't get confirmed. That is not a filibuster" [S14617]. To illustrate this fact, Senators noted that when the first President Bush left office in 1993, 54 judicial nominations expired without action in the Democrat-controlled Judiciary Committee [Crapo, S14629; Sessions, 14663]. As for those nominees who were nominated earlier yet received no hearings or votes, Senator Sessions and others explained that some nominees do not clear the Judiciary Committee as a result of problems found during the background check that are not aired in public out of respect for the nominees' reputations [e.g., S14688]. Committee delays may also occur due to insufficient consultation [Hatch, S 2314 (February 12, 2003)].

Second, on the principle, Republican Senators explained that there is an important legal difference between such a "committee hold" placed on a nominee while pending in committee — a hold voluntarily respected by the committee chairman — versus a filibuster on the floor supported by a minority of Senators. The actions of a committee chairman, who acts as the agent of the Senate majority, are the acts of the Senate majority itself. As Senator Cornyn explained when challenged by Senator Harkin to "morally" distinguish a committee hold (or committee inaction) from a filibuster — "The answer is: The line of moral demarcation is the Constitution and majority rule" [S14637]. Senator Crapo reinforced this point, noting that "if the committee does not act on these nominees [but] if the majority of the Senate wants to bring them forward, there is a discharge

petition that can bring them forward" [S14629]. The Chairman of the Judiciary Committee serves at the pleasure of a majority of Senators, so his actions as Chairman necessarily are the will of a majority of Senators unless a majority of Senators demonstrates otherwise.

Senate Democrats Have Called These Filibusters "Unprecedented"

Democrats' protests that their filibusters were not unprecedented was especially confusing given that the Democratic Senate Campaign Committee has been seeking donations *because* the filibusters are "unprecedented." Senate Republicans exposed a November 3, 2003, fundraising e-mail sent by the DSCC Chairman, Senator Corzine, seeking contributions by arguing that Democrats' "filibusters" of President Bush's nominees were an "unprecedented" effort to "save our courts" [Cornyn, S14601, S14605; L. Graham, S14573-74, S14724, S14730]. As Senator Lindsey Graham explained, "This e-mail is totally in contradiction of what has been said on the Senate floor. The e-mail says that Senate Democrats have launched an unprecedented effort. If you have listened to everybody for the last 33 hours, this is just business as usual. The e-mail is the best evidence of what is going on over there" [S14753].

Given many Democrats' insistence that their filibuster was *not* unprecedented, it was especially important for Republicans to ensure that the Senate had the benefit of past statements by current Democrat Senators demanding up-or-down votes or condemning the mere prospect of a filibuster. Typical of those past statements is that of the Senior Senator from Vermont, who a few years ago said, "I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported … . [T]he Senate should do its duty. If we don't like somebody the President nominates, vote him or her down" [L. Graham, S14724 (quoting *Congressional Record*, June 18, 1998)]. Republicans ensured that the record was complete, and drew the Senate's attention to similar statements that would seem to support invocation of cloture for these judicial nominees — including statements by Senators Daschle [S14535, S14568, S14605, S14637, S14692], Feinstein [S14568], Kennedy [S14605, S14675, S14692], Boxer [S14568], Kohl [S14655-56], Harkin [S14605, S14631, S14637], Sarbanes [S14665], Dorgan [S14631], Murray [S14658], Reed [S14596], and Lieberman [S14637].

Explaining Why This Unprecedented Obstruction Matters

Having established that these filibusters are without precedent in Senate history, Republicans also explained why this obstruction of judicial nominations deserves the attention of the nation. First, they examined how filibustering Senators were undermining the Constitution's advice and consent requirement. Second, they showed that by delaying the confirmation process indefinitely, the minority party was ensuring that Americans suffered with a slower court system. And third, Senators warned that the confirmation process had so degenerated that it would be difficult to find good men and women to serve.

Explaining How the Constitution is Being Undermined

Several Republicans explained how the Constitution will be undermined if a minority of Senators succeed in altering the constitutional standard for confirmation of judicial nominees. Senators expressed concern about the effects on the balance of power between the President and the Senate if the vote requirement for confirmation moves from 51 to 60 as some Democrats desire. Senator Schumer and others expressly claimed that the filibusters were designed to encourage

additional "consultation" from the President [S14533; Bingaman, S14602]. However, Senators Bunning and McConnell in particular showed that the White House consulted the Michigan Senators extensively on the Sixth Circuit nominees currently being delayed by those same Senators [S14617]. Thus, while the minority party insists on Presidential "consultation," it then makes absolute demands backed by a filibuster threat — an untenable approach that can only weaken the Presidency [Hatch, 14535]. As Senator Talent explained, "[Some Democrats] want a co-Presidency … [but] we have one President. He makes the nominations" [14588]. In light of these efforts, Senator Warner therefore summed up the stakes as "the survivability of the coequal stature of the three branches" [S14685].

Some Senators also emphasized the basic constitutional incongruity of demanding a supermajority before a judicial nominee can be confirmed. Senator Lott explained, "A minority of Senators have literally rewritten the Constitution to engraft a supermajority rule into the confirmation process, a requirement that completely contradicts the intent, spirit and language of the Constitution" [S 14662]. Senator Lott, joined by several other Senators, pointed out that the Founders expressly provided for those narrow circumstances when a supermajority Senate vote was required:

- ratification of a Treaty;
- override of a presidential veto;
- conviction in a case of impeachment;
- passage of a constitutional amendment;
- and expulsion of a Member.

[Id]. In addition, later "amendments to the Constitution have added two other supermajority requirements: one, a post-Civil War disqualification rule for serving in Congress; and another regarding a determination of whether a President is disabled" [Id]. Adding an effective supermajority requirement for judges, Republican Senators argued, "completely contravenes the Constitution" [Lott, S14662; see also, e.g., Crapo, S14629; Gregg, S14635; Sessions, S14540; and Cornyn, S14542].

Democrats' responses to this history were varied and contradictory. Most simply ignored the argument while some claimed a new supermajority requirement was consistent with the Constitution [Kennedy, S14673; Johnson, S14744]. Some said that the Senate has the right to set its own rules, and even claimed that the Constitution "sets no standard to limit the Senate's discretion in formulating such rules" [Dodd, S14766]. Yet this argument must be incorrect because no Senate rule can contravene the Constitution itself. *United States v. Ballin*, 144 U.S. 1, 5 (1892) ("The Constitution empowers each house to determine the rules of its proceedings. It may not by its rules violate constitutional constraints or violate fundamental rights … ."). The Constitution, not the preferences of a Senate minority — nor even those of a majority — is the supreme law of the land.

Exposing the Filibusters' Harm to the Administration of Justice

At the time of the debate, there were 22 judicial emergencies nationwide, 12 of them on the circuit courts of appeals [Kyl, S14561]. Republicans explained that any such judicial emergency —

defined by the nonpartisan Judicial Conference — is unacceptable given the importance of the courts to the economy, the public safety, and the overall administration of justice [Kyl, S14561; Roberts, 14623]. Senator Roberts said, "Taxpayers spend $5.1 billion for the Federal judiciary every year. The American people are paying for fully staffed courts and are getting obstructionism and vacant benches" [S14623]. Senators Enzi and Allard explained that by failing to confirm nominees and allowing judicial emergencies to persist, the Senate forces parties to litigation to pay higher attorney fees, and that those higher fees especially hurt our nation's small businesses [Enzi, S14691; Allard, S14631]. Senator McConnell gave concrete examples of individuals who had suffered in the Sixth Circuit because of judicial delays [S14616]. And in response to the charge that nobody "cares" about vacancies in the courts [Schumer, S14604; Durbin, S14751], Senator Chambliss responded:

> Let me tell you who else cares. That criminal defendant who is sitting in jail and who is having to wait longer than he ought to wait because we do not have Federal judges on the bench, he or she cares. That plaintiff or defendant in a civil lawsuit who is having to sit and wait and wait for justice, whatever that justice may be, on either side of the appellate case, he cares because he is not getting his case served.

[S14755]. Democrats' only response was to note that the overall court vacancy rate has recently dipped [Dorgan, S14633; Kohl, S14653]. But as with the "168-4" mantra heard throughout the debate, a statistic of this sort is designed to obscure the real human costs of the filibuster. The Judicial Conference data are clear that courts are backlogged; filibustering judicial nominees only exacerbates that problem [Craig, 14655; Kyl, 14561-62].

Expressing Concern that Good Nominees Will Be Unwilling to Serve

Many Senators warned the Senate of the long-term harm to the judiciary if the filibuster becomes a common tactic. "There is no question in my mind that many deserving and well-qualified people will refuse the call of public service after watching the kangaroo court they might now face in getting confirmed," said Senator Campbell [S14690]. Senator Cochran agreed: "If we are unable to prohibit this practice by a change in the Senate rules, we will find it harder than ever before to attract talented and well-qualified candidates to serve in the Federal judiciary" [S14661]. And Senators were especially concerned that the personal attacks that have become so common in the judicial confirmation process — calling nominees "mean" and "selfish" [Cornyn (citing Schumer speech), S14601] or "lemons" that deserve to be rejected [Clinton, S14642] — will cause many to turn away from public service [Cornyn, S14542].

Attacking the Filibustered Nominees

Unfortunately, many filibustering Senators appeared to have concluded that they could justify their decision to refuse to vote by mocking and disparaging the men and women whom the President has nominated. Republicans devoted several hours to demonstrate the nominees' long histories of public service and devotion to American constitutional values, but some Senators still insisted on attacking the nominees on a personal and professional basis. Indeed, the most common refrain from Democrats regarding the pending judicial nominees was that they are "extreme" and "out of the mainstream." Indeed, the word "extreme," used as a characterization of a nominee,

appears no fewer than 115 times in the *Congressional Record* pages devoted to the 39-plus hour debate. But this characterization, unfair that it is, paled in comparison to the insults heaped upon the nominees again and again throughout the debate:

- The nominees are mere "lemons" [Clinton, S14642], and "absolutely beyond the pale" [Johnson, S14660].

- The nominees are little more than "hot right wing judges" [Schumer, S14565] who held "extreme points of view" [Sarbanes, S14667].

- These nominees are "so far right [that] they would roll back the hands of time" and "will not protect the health of the people, the privacy of the people, the safety of the people" [Boxer, S14684].

- The nominees have "records of extremism" [Kohl, S14655] and enjoy the support only of a "far right, militant, extreme minority" [Schumer, S14643].

- The Senate learned of off-the-floor allegations by the Senator Corzine's Democratic Senate Campaign Committee that the filibustered nominees are "zealously devoted to advancing corporate interests" [Levin (quoting Corzine e-mail), S14729]

- Senator Schumer's public statements that the nominees are "mean people" who are full of "selfishness, and narrowmindedness" were noted, and went unexplained and unanswered by the Senator from New York [Cornyn (citing press reports of Schumer speech), S14601].

Senator Grassley attempted to cool down the rhetoric, calling on the filibusterers to "stop spooking people about the qualifications and ability of these nominees to be good federal judges" [S14684]. And Senator Cornyn said, "These are honorable men and women who have been chosen by the President to serve in positions of important public service, and they deserve to be treated better than the nominees we are talking about today have been treated" [Cornyn, S14605], but these efforts appear to have fallen on deaf ears.

Many Senators of both parties wondered why the men and women nominated to these courts could be so misrepresented. How could Justice Brown be "out of the mainstream" when she had received 76 percent of the vote in her last retention election in California [Hatch, S14707]? Do the filibusterers believe that the 84 percent of Texans who reelected Justice Owen are themselves "extreme" [Cornyn, S14606]? And what of Alabama Attorney General Bill Pryor, who received 59 percent of the vote in his recent election [Sessions, S14653]? Senator Miller recounted the nominees' backgrounds and the strong support each nominee has from his or her communities, and then declared:

> These are the faces of America, men and women who pulled themselves up, who worked hard, who played by the rules, and excelled in the field of law, and now all of their hard work and

> success has landed them in the doorway of the Senate, and each one of them is having that door slammed in their faces.

[S14759]. And Senator Cornyn protested, "It is wrong to treat [these nominees] as common criminals. It is wrong to treat them as a caricature of their true selves. It is wrong to call them names. We can disagree with them. We can have a great debate. But ultimately, we need to treat them respectfully" [S14605].

Looking to the Future

Republicans gazed upon the reordering of the judicial nominations process with little optimism. They saw that by using the filibuster weapon, Democrats had encouraged a future Republican minority to pay back Democrats for breaking this new ground — creating a "downward spiral" and "trend of retaliation," as Senator Dole called it [S14676]. Senator Lindsey Graham agreed, and predicted that special interest groups would be emboldened to cobble together 41 Senators to block nominees [S4574]. He explained:

> You are giving them a green light to manufacture controversies, to go after people in a personal way, and we are going to rue the day we did that. The left is doing it today. The right will do it tomorrow. We are unleashing special interest forces. We should be deterring them. Right now we are emboldening them, and the country will be worse for the wear."

[S14761]. Senator Santorum delivered a post-mortem to the debate in which he said, "Let me assure you, my colleagues on the other side of the aisle, let me assure you we are not just eliminating those on the right, because what is good for the goose is good for the gander" [S14787]. Senator Santorum spoke with sadness as he recounted the previous 39 hours of debate, and concluded, "When you twist and contort the law, it becomes the law for everybody. It is twisted and contorted in its ugliest sense, but it is there for all to see and there for all to use. Rest assured, it will be used" [Id].

Conclusion

As the 39-hour debate progressed, Democrats relented in labeling it a "waste of time" and instead acknowledged that the discussion was "robust" [Cantwell, S14625], "interesting," and "important" [Dorgan, S14750]. Senator Santorum took a longer view, and summed up the debate as follows: "Now the standard will be that you have to have 60 percent of the Senate in order to be a Federal judge. We have made that the rule. So the 214-year history is now gone" [S14786]. But given the national attention provided by this debate, it still may be possible to prove Senator Santorum's prediction wrong — and begin to restore the judicial confirmation process that has well served the nation since its founding.