

By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on Executive Calendar No. 169, the nomination of Carolyn B. Kuhl, of California, to be United States Circuit Judge for the Ninth Circuit, shall be brought to a close.

The yeas and nays are required under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from North Carolina (Mr. EDWARDS), the Senator from Hawaii (Mr. INOUE), the Senator from Massachusetts (Mr. KERRY), and the Senator from Florida (Mr. NELSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote "nay."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 53, nays 43, as follows:

[Rollcall Vote No. 451 Ex.]

YEAS—53

Alexander	Dole	Miller
Allard	Domenici	Murkowski
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Brownback	Frist	Santorum
Bunning	Graham (SC)	Sessions
Burns	Grassley	Shelby
Campbell	Gregg	Smith
Chafee	Hagel	Snowe
Chambliss	Hatch	Specter
Cochran	Hutchison	Stevens
Coleman	Inhofe	Sununu
Collins	Kyl	Talent
Cornyn	Lott	Thomas
Craig	Lugar	Voinovich
Crapo	McCain	Warner
DeWine	McConnell	

NAYS—43

Akaka	Dodd	Levin
Baucus	Dorgan	Lieberman
Bayh	Durbin	Lincoln
Biden	Feingold	Mikulski
Bingaman	Feinstein	Murray
Boxer	Graham (FL)	Pryor
Breaux	Harkin	Reed
Byrd	Hollings	Reid
Cantwell	Jeffords	Rockefeller
Carper	Johnson	Sarbanes
Clinton	Kennedy	Schumer
Conrad	Kohl	Stabenow
Corzine	Landrieu	Wyden
Daschle	Lautenberg	
Dayton	Leahy	

NOT VOTING—4

Edwards	Kerry
Inouye	Nelson (FL)

The PRESIDING OFFICER. On this vote, the yeas are 53, the nays are 43. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

NOMINATION OF JANICE R. BROWN, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 455, the nomination of Janice R. Brown, of California, to be United States Circuit Judge for the District of Columbia Circuit.

Bill Frist, Orrin G. Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad R. Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

Mr. LEAHY. Mr. President, the opposition to Justice Brown for a lifetime position on the D.C. Circuit is deep and wide and is based on her record, both on and off the bench. As anyone who was watching C-SPAN last night and the night before would know, the Republicans are using the judicial nomination process in a manner that divides rather than unites. As the San Francisco Chronicle wrote, "Presidents typically shape the judiciary to reflect their own views. But with Charles Pickering, Priscilla Owens, William Pryor, Miguel Estrada and now Brown, Bush seems bent on stacking the bench with ideologues."

For this particular nominee, Janice Rogers Brown, the White House political operatives and ideologically driven selection staff reached out 3,000 miles to find a nominee who has repeatedly received negative ratings, who has been criticized by her Republican colleagues on the bench, and who has emerged from the Senate Judiciary Committee on a party-line vote. As Justice Brown's home State newspaper, the San Francisco Chronicle, wrote: "naming Janice Rogers Brown to the U.S. Circuit Court of Appeals for the D.C. Circuit, President Bush has again chosen a contrarian with a judicial philosophy that lies well outside the bounds of the mainstream." Even the Washington Post, which has been very sympathetic to this Administration and, in particular, to its court-packing efforts on the D.C. Circuit, has written that Janice Rogers Brown "is one of the most unapologetically ideological nominees" in many years.

As the nominee herself conceded at the end of her confirmation hearing, she was "treated with great courtesy" by the Members of the Judiciary Committee. Thereafter, this was a nomination rushed out of the Committee last week before the ink was dry on non-responsive answers to Senators' questions, and during Senate floor debate on another highly divisive judicial nominee, before a full Committee debate could be held. The District of Columbia Circuit is too important to the rights of all Americans to be left to judges whose ideological bias would lead them to gut the environmental protections, workplace protections, consumer protections and other government regulations authorized by Congress to protect all Americans.

In my statement at the outset of her confirmation hearing less than one month ago, I urged partisans to end the ugly game of contending that any criticism of the record of a Bush judicial nominee had to be motivated by bigotry. I asked that the right-wing tactic of smears and name calling subside and that we not see the race card dealt from the shameful deck of unfounded charges that stalwarts of this President's most extreme nominees have come to rely upon as they further inject partisanship and politics into the appointment of Federal judges. I noted that I expected that those who ultimately decided to support Justice Brown, even though they oppose affirmative action, would do so because they believed she would be a fair Federal judge. I suggested that those who opposed her because they retained serious doubt about her nomination and are concerned that she was selected on ideological grounds, could oppose her nomination for principled reasons having nothing to do with race. I urged that we focus on substance at the hearing and in this process.

My plea went unheeded, so that, first, I must, again, briefly respond to the partisan smears and name-calling that I have been hearing from the other side of the aisle. We have heard the ridiculous charges that we are opposing Justice Brown because of her gender or her race. My opposition to this nominee has nothing to do with her race; it is has nothing to do with her gender. It is about what kind of a lifetime appointment to the District of Columbia Circuit I fear she would be.

If Democrats were making decisions based on the gender of the nominee, would we have confirmed 33 judges nominated by President Bush who are women, including seven to the Courts of Appeal? Would we have worked so hard during the Clinton years to increase gender diversity on the bench and fight for votes for Bonnie Campbell, Elena Kagan and the scores of women nominees who were blocked and delayed by anonymous Republican holds? Would we be urging President Bush to work with us to find outstanding women judges and lawyers to increase gender diversity on the Federal bench? Do our critics really contend that Senators MIKULSKI, FEINSTEIN, BOXER, MURRAY, LANDRIEU, LINCOLN, CANTWELL, CLINTON, and STABENOW are anti-woman, or that Senators KENNEDY, BIDEN, HARKIN, REID or any other Democratic Senators would discriminate against women? This is a smokescreen, intended to obscure this nominee's stark record.

If Democrats were making decisions based on the race of the nominee, why would we have voted to confirm 13 African-American judges nominated by President Bush, including all four of the other African Americans nominated by President Bush to the appellate courts? Would we have confirmed Lavenski Smith to the 8th Circuit? Would we have fought so hard for two

Congresses to confirm Roger Gregory and integrate the 4th Circuit? Would we have worked with Senator EDWARDS to confirm Allyson Duncan to the 4th Circuit? For that matter, would we have been so outraged at the Republicans' treatment of Justice Ronnie White, Judge Beatty, Judge Wynn, Kathleen McCree Lewis and so many outstanding African-American judges and lawyers who the Republicans blocked from confirmation during the Clinton years? These claims of racism are irresponsible and false. These ploys are wrong, and they should stop.

In fact, the list of the African-American organizations and individuals who oppose Justice Rogers Brown's nomination is one of the most troubling indications that this is another divisive, ideologically driven nomination. Are we to believe that the 39 members of the Congressional Black Caucus are racist? Members of the Congressional Black Caucus include the respected congressional delegate from the District of Columbia ELEANOR HOLMES NORTON, the chair of the Congressional Black Caucus, the Honorable ELIJAH CUMMINGS, and such distinguished Americans as Representatives CHARLES RANGEL and JOHN CONYERS. In addition the Nation's oldest and largest association of predominantly African-American lawyers and judges, the National Bar Association, and its State counterpart, the California Association of Black Lawyers both oppose this nomination.

The foremost national civil rights organization, the Leadership Conference on Civil Rights opposes this nomination. The women of Delta Sigma Theta oppose this nomination. Dr. Dorothy Height, Dr. Joseph Lowery and Julian Bond have spoken out against this nomination.

Justice Brown has a lengthy record, of opinions, of speeches and of writings. She has very strong opinions, and there is little mystery about her views, even though she sought to moderate them when she appeared before the Judiciary Committee.

I come to my decision after reviewing Justice Brown's record—her judicial opinions, her speeches and writings—and considering her testimony and oral and written answers provided to the Senate Judiciary Committee.

Now, Justice Brown's supporters will say we are opposing Justice Brown because her viewpoint is different than ours on social issues. But my opposition is not about whether Justice Brown would vote like me if she were a member of the United States Senate on issues of importance. This is not about her position on choice. This is not about one dissent or one speech. This is about Justice Brown's approach to the law—an approach which she has consistently used to promote her own ideological agenda, an extreme agenda that is out of the mainstream. Her approach does not entitle her to a lifetime appointment to this very important appellate court.

Janice Rogers Brown's approach to the law can be best described as a "jurisprudence of convenience." What do I mean by that? Justice Brown has proven herself to be a results-oriented, agenda-driven judge whose respect for precedent and rules of judicial interpretation change depending on the subject matter before her and the results she wants to reach.

While Justice Brown's approach to the law has been inconsistent—she has taken whatever approach she needs to in order to get to a result she desires—the results which she has worked toward have been very consistent—throughout her public record. Some of Brown's supporters, and in fact Justice Brown herself, have tried to detract attention from the ideas she has expressed in speeches—while she was a member of the bench—claiming they are "just speeches." Well, that is a hard distinction to follow when Justice Brown's comments to groups across the country over the last 10 years repeated the same themes—in fact, sometimes even the same words—as she has written in her opinions.

In *Santa Monica Beach v. Superior Court of L.A. County*, Justice Brown wrote of the demise of the Lochner era, claiming "the 'revolution of 1937' ended the era of economic substantive due process but it did not dampen the court's penchant for rewriting the Constitution." Similarly, in a speech to the Federalist Society, she said of the year 1937—it "marks the triumph of our own socialist revolution."

In *San Remo Hotel v. City and County of San Francisco*, Justice Brown wrote, "(t)urning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the legitimacy of the government." Similarly, two years earlier, she told an audience at the Institute for Justice, "If we can invoke no ultimate limits on the power of government, a democracy is inevitably transformed into a kleptocracy—a license to steal, a warrant for oppression."

As Berkeley Law School Professor Stephen Barnett pointed out about Justice Brown's "apparent claim that these are 'just speeches' that exist in an entirely different world from her judicial opinions," "that defense not only is implausible but trivializes the judicial role." I agree with Professor Barnett on this and understand his determination to oppose her nomination. Justice Brown's provocative speeches are disturbing in their own right, and they are made more so by their reprise in her opinions.

Justice Brown now says that she will "follow the law." However, in a judicial dissent, she wrote, "We cannot simply cloak ourselves in the doctrine of stare decisis."

One of the examples of Justice Brown's results-oriented jurisprudence can be seen in the way she has disregarded precedent in her opinions in order to expand the rights of corporations and property owners, at the ex-

pense of workers and individuals who have been the victims of discrimination. In several dissents, Justice Brown called for overturning an exception to at-will employment, long recognized by the California Supreme Court, that was created to protect workers from discrimination. She has repeatedly argued for overturning precedent to provide more leeway for corporations against attempts to stop the sale of cigarettes to minors, prevent consumer fraud, and prevent the exclusion of women and homosexuals.

Justice Brown has also been inconsistent in the application of rules of judicial interpretation—again depending on the result that she wants to reach in order to fulfill her extremist ideological agenda.

These legal trends—her disregard for precedent, her inconsistency in judicial interpretation, and her tendency to inject her personal opinions into her judicial opinions—lead to no other conclusion but that Janice Rogers Brown is—in the true sense of the words—a judicial activist.

When it is needed to reach a conclusion that meets her own ideological beliefs, Justice Brown stresses the need for deference to the legislature and the electorate. However, when the laws—as passed by legislators and voters—are different than laws she believes are necessary, she has advocated for judicial activism.

One stark example springs to mind: In order to support her view that judges should be able to limit damages in employment discrimination cases, she concluded that "creativity" was a permissible judicial practice and that all judges "make law."

Justice Brown's approach to the law has led to many opinions which are very disturbing. She has repeatedly and consistently advocated turning back the clock 100 years to return to an era where worker protection laws were found unconstitutional. She has attacked the New Deal, an era which created Social Security and labor standards, by saying it "inoculated the Federal Constitution with a kind of underground collectivist mentality."

And she has repeatedly opposed protections against discrimination of individuals—in their jobs and in their homes. Justice Brown's recent claims that her words do not mean what they say are simply unconvincing.

There is one more aspect of Justice Brown's nomination which is extremely disturbing. That has to do with the court for which she was nominated. She is being considered for a position on the premier administrative law court in the Nation—a court that is charged with overseeing the actions of Federal agencies that are responsible for worker protections, environmental protections, consumer safeguards, and civil rights protections.

I am concerned about her ability to be a fair arbitrator on this court. Justice Brown has made no secret of her disdain for government. She has said,

"where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies."

How can someone who believes it is not the "job of government to take care of" the American people be entrusted to make fair and neutral decisions when faced with the responsibility of interpreting the powers of the Federal Government and the breadth of regulatory statutes? Justice Brown responded to this question at her hearing by calling on us to review her record as a judge to see that she does not "hate Government." Well, I did review her record. And, what I found was disturbing: She has used her position on and off the bench to argue for the dismantling of government from the inside out.

It is no small irony that this President, who spoke of being a uniter but has used his position to send judicial nominations that divide the Senate and the country, and who spoke with disdain of "judicial activism," has nominated several of the most consummate judicial activists ever chosen by any President. None of the President's nominees is more in the mold of judicial activist than this nominee, Janice Rogers Brown.

I am voting against Justice Brown's nomination today because the American people deserve judges who will interpret the law fairly and objectively. Janice Rogers Brown is a confirmed and committed judicial activist who has a consistent record of using her position as a member of the court to advocate for her personal belief. We must not enable her to bring her "jurisprudence of convenience" to one of the most important courts in the Nation.

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

The question is, Is it the sense of the Senate that debate on the nomination of Janice R. Brown, of California, to be United States Circuit Judge for the District of Columbia Circuit, shall be brought to a close?

The yeas and nays are mandatory under the rule. The clerk will call the roll.

The legislative clerk called the roll.

Mr. REID. I announce that the Senator from North Carolina (Mr. EDWARDS), the Senator from Hawaii (Mr. INOUE), the Senator from Massachusetts (Mr. KERRY), and the Senator from Florida (Mr. NELSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote "nay."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 53, nays 43, as follows:

[Rollcall Vote No. 452 Ex.]

YEAS—53

Alexander  
Allard  
Allen  
Bennett  
Bond  
Brownback  
Bunning  
Burns  
Campbell  
Chafee  
Chambliss  
Cochran  
Coleman  
Collins  
Cornyn  
Craig  
Crapo  
DeWine

Dole  
Domenici  
Ensign  
Enzi  
Fitzgerald  
Frist  
Graham (SC)  
Grassley  
Gregg  
Hagel  
Hatch  
Hutchison  
Inhofe  
Kyl  
Lott  
Lugar  
McCain  
McConnell

Miller  
Murkowski  
Nelson (NE)  
Nickles  
Roberts  
Santorum  
Sessions  
Shelby  
Smith  
Snowe  
Specter  
Stevens  
Sununu  
Talent  
Thomas  
Voinovich  
Warner

NAYS—43

Akaka  
Baucus  
Bayh  
Biden  
Bingaman  
Boxer  
Breau  
Byrd  
Cantwell  
Carper  
Clinton  
Conrad  
Corzine  
Daschle  
Dayton

Dodd  
Dorgan  
Durbin  
Feingold  
Feinstein  
Graham (FL)  
Harkin  
Hollings  
Jeffords  
Johnson  
Kennedy  
Kohl  
Landrieu  
Lautenberg  
Leahy

Levin  
Lieberman  
Lincoln  
Mikulski  
Murray  
Pryor  
Reed  
Reid  
Rockefeller  
Sarbanes  
Schumer  
Stabenow  
Wyden

NOT VOTING—4

Edwards  
Inouye

Kerry  
Nelson (FL)

The motion was rejected.

The PRESIDING OFFICER. On this vote, the yeas are 53, the nays are 43. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

Mr. STEVENS. Mr. President, I move to reconsider the vote.

Mr. BOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

LEGISLATIVE SESSION

Mr. STEVENS. Mr. President, I ask unanimous consent the Senate return to legislative session.

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

MORNING BUSINESS

Mr. STEVENS. Mr. President, I ask unanimous consent we proceed to a period for morning business with Senators permitted to speak therein for up to 10 minutes.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The PRESIDING OFFICER. The Senator from Washington.

THE UNEMPLOYMENT PROBLEM IN AMERICA

Ms. CANTWELL. Mr. President, we just completed 30 hours of debate on judicial nominees, an obviously important debate for all Members who participated. But it is time for us to address the unemployment problem in America, and the fact that this body

cannot adjourn for the year without passing an unemployment benefit extension.

Many of my colleagues will remember last year we were at this same point, when unemployment benefits were going to expire in December. We had a debate about whether that was necessary to do by the time we adjourned. I can tell you that not a lot has changed in Washington State. We still have 7.6-percent unemployment and a very high level at the national level, at 6 percent. Americans want to know whether they are going to have an extension of those benefits.

During the Bush and Clinton administrations we extended unemployment benefits for an extension of over 30 weeks during that time period because we thought it was important to make sure people were covered. During the economic downturn, unemployment benefits are a stimulus. For every dollar spent on unemployment benefits it generates \$2.15 as far as the economy—that is mortgage payments that can be made, health care benefits that can be extended.

While my colleagues think last year's solution of coming back in January and fixing this unemployment benefit problem was a solution, I guarantee it was not. Adjourning from here without expanding unemployment benefits is like putting a lump of coal in the stockings of Americans at Christmas-time.

There were individuals in my State who, because of the failure of us acting, really did make economic choices about their future. I had a constituent who took a big chunk out of her pension program at a 30-percent penalty, basically trading her long-term economic future off for short-term returns because we hadn't given her a commitment on unemployment benefits.

UNANIMOUS CONSENT REQUEST—S. 1853

I ask unanimous consent the Senate proceed to legislative session and the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment benefit insurance for displaced workers, and that the Senate proceed to its immediate consideration, that the bill be read a third time and passed, and the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection? The Senator from Nevada.

Mr. ENSIGN. Reserving the right to object, I ask unanimous consent that I may ask the Senator from Washington a question while reserving my right to object.

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

Mr. ENSIGN. Mr. President, in asking this question, is the Senator from Washington aware, back in 1993 when the Democrats controlled the House, the Senate, and the White House the rate of unemployment was higher than it is today and that every Democrat in the House and the Senate and the President signed a bill to terminate the program when the unemployment rate