nominations in the Senate and adhere to the Constitution. Our Founding Fathers knew what they were doing. We should not change the Constitution without going through the appropriate amending process, which has not been done.

We have unanimous consent for two more speakers, which we intend to continue to hold.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

JUDICIAL NOMINATIONS

Mrs. MURRAY. Mr. President, I come to the floor to talk about the Senate's deliberations on some of the administration's judicial nominees. It is clear this is a debate about basic American values. In drafting the Constitution, the Framers wanted the Senate to provide advice and consent on nominees who came before it to ensure that these very rights and values were protected. I believe, as a Senator, I have a responsibility to stand up for those values on behalf of my constituents in Washington State.

Many activists today are complaining that certain Senators are attacking religious or conservative values. I must argue that it is others—not Democratic Senators exercising their rights—who are pursuing a nomination strategy that attacks basic values outlined in the Constitution.

Our democracy values debate and dissension. Our democracy values the importance of checks and balances. Our democracy values an independent judiciary. But with the nuclear option and the rhetorical assault being launched at Democratic Senators by activists around the country, among others, we see those values under attack.

The nuclear option is an assault on the American people and many of the things we hold dear. It is an attempt to impose on the country, through lifetime appointments, the extreme values held by a few at the cost of the many. It is the tyranny of the majority personified. Confirming these nominees by becoming a rubber stamp for the administration would be an affront to the 200-year-old system of checks and balances, and at the same time it would be an affront to the values I promised to defend when I came to the Senate.

Building and maintaining a democracy is not easy, but our system and the rights and values it holds dear are the envy of the world. In fact, the entire world looks at us as the model for government. It is our values they want to look to. We must protect them not only for us but for those fledgling democracies.

I just returned from a bipartisan trip to Israel, Iraq, Georgia, and the Ukraine, where we saw leaders who were trying to write constitutions, trying to write laws, trying to write policies. They were all working very hard to assure even those who did not vote in the majority that they would have a voice. The challenges were varied in each country. They faced everything from protecting against terrorists to charging people for the first time for electricity, to reforming wholly corrupt institutions. Making sure that democracy survives means having debates, bringing people to the table, and making tough decisions.

In each case, the importance of not disenfranchising any group of people also rings true. So how we in this country accomplish the goal of sustaining a strong democracy and ensuring the participation of all people is very important.

Elections are the foundation of our democracy. They determine the direction of our country. But an election loss does not mean you lose your voice or you lose your place at the table. That is what we must do to keep our democracy strong. That is why we are fighting so hard to keep our voice.

Recently, we have heard a lot from the other side about attacks on faith and on values. In fact, some are trying to say our motive in this debate is somehow antifaith. I argue the opposite is true. We have faith in our values, in American values. We have faith that these values can and must be upheld. It is not an ideological battle between Republicans and Democrats. It is about keeping faith with the values and the ideals our country stands for. Having values and having faith in those values requires that we make sure those without a voice are represented. Speaking up for those in poverty to make sure they are fed is a faith-based value. Making sure there is equal opportunity and justice for the least among us is a faith-based value. Fighting for human rights and taking care of the environment are faith-based values. To now say those of us who stick up for minority rights are antifaith is frightening and it is wrong.

I hope those who have decided to make this into a faith-antifaith debate will reconsider. This should be about democracy. It should be about the protection of an independent judiciary, and it should be about the rights of minorities.

Mr. President, our system of government, of checks and balances, and our values are under attack by this transparent grab for power. They are, with their words and potential actions, attempting to dismantle this system despite the clear intent of the Framers and the weight of history and precedent. They think they know better. I think not.

Mr. President, there is even news this morning that our friends on the other side are unwilling to come to the table to compromise to avoid this crisis. I want to take a second to praise our leader, Senator REID, for his effort to find a reasonable conclusion before the nuclear bomb is dropped.

Unfortunately for him, for all of us on this side of the aisle, and for this institution, that plea has been rejected.

First, yesterday we saw that Karl Rove, one of the President's top advisers, said there would be no deal. Now, in this morning's papers, we read the leadership on the other side of the aisle is falling into line and saying, ''No deal.''

By rejecting the deal, Republicans are now saying that three nominees—three total nominees—are so important that they must break with the more than 200 years of tradition and 200 years of precedent. We have heard day after day on the floor—even a few moments ago—that this is the most important issue facing this body today.

Well, we have record-high gas prices and deficits, we have 45 million uninsured Americans, and we have far too many veterans without the health care they need and deserve. All the other side is talking about is doing away with the checks and balances so they can get radicals on the bench.

If the other side wants to continue on this destructive course and ignore those real needs of the American people, they can. But this Senator and my colleagues will continue to fight this abuse of power and do the work the people sent us here to do.

It is a sad day when one side refuses to come to the table to negotiate a way out of this impasse. It is even sadder that they refuse to accept our excellent confirmation record in blind pursuit of confirming the most radical of their choices.

Although we have been able to confirm 205 nominees that President Bush sent forward, there are a few that are far outside some basic values.

Let's start close to home with President Bush's nominee to the Ninth Circuit Court. To that court, which overseas appeals from my home State of Washington and five other States, President Bush has nominated William Myers. Mr. Myers is a lifelong lobbyist and anti-environmental activist. He is opposed by over 175 environmental, labor, civil, and women's disability rights organizations. He even drew opposition from Native American organizations and from the National Wildlife Federation. This is a man who has never tried a jury case, who has an anti-environmental record stretching back to his days as a Bush Interior Department official and industry lobbyist. He even received the lowest possible rating from the ABA.

Mr. President, in the Pacific Northwest and in regions around this great country, we hold our environmental values dear. I am not willing to hand a lifetime appointment to such a vehement advocate against the people's interests. This is the perfect example of the check our Framers had in mind when they drafted our Constitution. We can, and we must, use it.

That is just one example of a nominee looking to attack basic values. Bill Pryor, a nominee to the Eleventh Circuit, opposes basic individual liberties and freedoms. He called Roe v. Wade the ''worst abomination of constitutional law in history.''

Janice Rogers Brown, nominated to the DC Circuit Court, called 1937—that was the year this Government enacted many of the New Deal's programs to help lift our country out of the deep depression—''the triumph of our own socialist revolution.'' Mr. President, her disdain for worker and consumer protection values and principles is clear in decision after decision.

Nominee Priscilla Owen's narrow constitutional view was so far outside the mainstream that then-Texas Supreme Court Judge and now Attorney General Alberto Gonzales said that to accept it would be ''an unconscionable act of judicial activism.''

Mr. President, time and time again, these nominees have sided against the American people and the values we hold dear. They have taken extreme positions that run counter to mainstream values. Not one of these nominees has the experience or the temperament to administer justice in an impartial way to the citizens that they would serve.

Today it is fashionable for some of my colleagues on the other side of the aisle to disparage what they call activist judges. But this power grab reveals their true motivation. They want activists on the bench to interpret the law in a way that undermines important American values. We will not let them.

We have a responsibility to stand up and say no to these extreme nominees. But to know that, you don't need to listen to me; just look back at the great Founders of our democracy.

The Framers, in those amazing years when our country was founded, took great care in creating our new democracy. They wrote into the Constitution the Senate's role in the nomination process. They wrote and they spoke about protecting the minority against the tyranny of the majority. Their words ring true today.

James Madison, in his famous Federalist No. 10, warned against the superior force of an overbearing majority or, as he called it, a ''dangerous vice.'' He said:

> The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice.

Years prior, John Adams wrote, in 1776, on the specific need for an independent judiciary and checks and balances. He said:

> The dignity and stability of government in all its branches, the morals of the people and every blessing of society, depends so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checked upon that. The judges, therefore, should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man or body of men.

Mr. President, I shudder at the thought of what these great thinkers and Founders of our democracy would say to this attempted abuse of power in the Senate. I think one of the best interpretations of those thoughts was offered to this body by Robert Caro, the great Senate historian, in a letter in 2003. He talked about the need for the Senate to maintain its history and traditions, despite popular pressures of the day, and of the important role debate and dissension plays in any discussion of judicial nominees. In particular, he wrote of his concern for the preservation of Senate tradition in the face of attempted changes by a majority run wild.

In part, he said:

> In short, two centuries of history rebut any suggestion that either the language or intent of the Constitution prohibits or counsels against the use of extended debate to resist Presidential authority. To the contrary, the Nation's Founders depended on the Senate's members to stand up to a popular and powerful President. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role providing both advice and consent to the President. That shared authority was basic to the balance of powers among the branches.
>
> I am . . . attempting to say as strongly as I can that in considering any modification, Senators should realize that they are not dealing with the particular dispute of the moment, but with the fundamental character of the Senate of the United States, and with the deeper issue of the balance of power between majority and minority rights.

Mr. President, protection of minority rights has been a fundamental principle since the infancy of this democracy. It should not—in fact, it cannot—be laid to rest here in this Chamber.

I know many people are out there wondering why we are spending so much time talking about Senate rules and judicial nominations. They are wondering why I am talking about nominees and being on the floor quoting Madison and Adams. They are wondering what this means to them.

Let me make it clear. This debate is about whether we want a clean, healthy environment and the ability to enforce laws to protect it fairly. This debate is about whether we want to protect essential rights and liberties. This debate is about whether we want free and open Government. This debate is about preserving equal protection under the law. This debate is about whether we want to preserve the independent judiciary, whether we want to defend our Constitution, and whether we want to stand up for the values of the American public.

Mr. President, these values are too precious to be abdicated. Trusting in them, we will not let the Republicans trample our rights and those of millions of Americans we are here to represent. We will stand and say, yes, to democracy; yes, to an independent judiciary; yes, to minority rights; and, no, to this unbelievable abuse of power.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. GRAHAM). The Senator from Delaware is recognized.

Mr. BIDEN. Mr. President, I rise today to speak at some length, if time will permit me, about the same subject my friend from Washington State so eloquently addressed. My colleagues know that although when I speak, I sometimes get very passionate, I have not very often, in past years, risen to the floor for any extended period of time. I do that today because so much is at stake.

For over 200 years, the Senate has embodied the brilliance of our Founding Fathers in creating an intricate system of checks and balances among the three branches of Government. This system has served two critical purposes, both allowing the Senate to act as an independent, restraining force on the excesses of the executive branch, and protecting minority rights within the Senate itself. The Framers used this dual system of checks and balances to underscore the independent nature of the Senate and its members.

The Framers sought not to ensure simple majority rule, but to allow minority views—whether they are conservative, liberal, or moderate—to have an enduring role in the Senate in order to check the excesses of the majority. This system is now being tested in the extreme.

I believe the proposed course of action we are hearing about these days is one that has the potential to do more damage to this system than anything that has occurred since I have become a Senator.

History will judge us harshly, in my view, if we eliminate over 200 years of precedent and procedure in this body and, I might add, doing it by breaking a second rule of the Senate, and that is changing the rules of the Senate by a mere majority vote.

When examining the Senate's proper role in our system of Government generally and in the process of judicial nominations specifically, we should begin, in my view, but not end with our Founding Fathers. As any grade school student knows, our Government is one that was infused by the Framers with checks and balances.

I should have said at the outset that I owe special thanks—and I will list them—to a group of constitutional scholars and law professors in some of our great universities and law schools for editing this speech for me and for helping me write this speech because I think it may be one of the most important speeches for historical purposes that I will have given in the 32 years since I have been in the Senate.

When examining the Senate's proper role in our system of Government and in the process of judicial nominations, as I said, we have to look at what our

Founders thought about when they talked about checks and balances.

The theoretical underpinning of this system can be found in Federalist 51 where the architect of our Constitution, James Madison, advanced his famous theory that the Constitution set up a system in which ''ambition must be made to counteract ambition.''

''Ambition must be made to counteract ambition.'' As Madison notes, this is because ''[The] great security against a gradual concentration of the several powers in the same department consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments by the other.''

Our Founders made the conscious decision to set up a system of government that was different from the English parliamentary system—the system, by the way, with which they were the most familiar. The Founders reacted viscerally to the aggrandizement of power in any one branch or any person, even in a person or body elected by the majority of the citizens of this country.

Under the system the Founders created, they made sure that no longer would any one person or one body be able to run roughshod over everyone else. They wanted to allow the sovereign people—not the sovereign Government, the sovereign people—to pursue a strategy of divide and conquer and, in the process, to protect the few against the excesses of the many which they would witness in the French Revolution.

The independence of the judiciary was vital to the success of that venture. As Federalist 78 notes:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution.

Our Founders felt strongly that judges should exercise independent judgment and not be beholden to any one person or one body. John Adams, in 1776, stated:

> The dignity and stability of government in all its branches, the morals of the people, and every blessing of society, depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.

Adams continues:

> The judges, therefore, should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness and attention; their minds should not be distracted with jarring interests; they should not be dependent upon any one man or any body of men.

In order to ensure that judicial independence, the very independence of which Adams spoke, the Founders did not give the appointment power to any one person or body, although it is instructive for us, as we debate this issue in determining the respective authority of the Senate and the Executive, it is important to note that for much of the Constitutional Convention, the power of judicial appointment was solely—solely—vested in the hands of the legislature. For the numerous votes taken about how to resolve this issue, never did the Founders conclude that it should start with the Executive and be within the power of the Executive. James Madison, for instance, was ''not satisfied with referring the appointment to the Executive;'' instead, he was ''rather inclined to give it to the Senatorial branch'' which he envisioned as a group ''sufficiently stable and independent'' to provide ''deliberative judgments.''

It was widely agreed that the Senate ''would be composed of men nearly equal to the Executive and would, of course, have on the whole more wisdom'' than the Executive. It is very important to point out that they felt ''it would be less easy for candidates''—referring to candidates to the bench—''to intrigue with [the Senators], more than with the Executive.''

In fact, during the drafting of the Constitution, four separate attempts were made to include Presidential involvement in judicial appointments, but because of the widespread fear of Presidential power, they all failed. There continued to be proponents of Presidential involvement, however, and finally, at the eleventh hour, the appointment power was divided and shared, as a consequence of the Connecticut Compromise I will speak to in a minute, between the two institutions, the President and the Senate.

In the end, the Founders set up a system in which the President nominates and the Senate has the power to give or withhold—or withhold—its ''advice and consent.'' The role of ''advice and consent'' was not understood to be purely formal. The Framers clearly contemplated a substantive role on the part of the Senate in checking the President.

This bifurcation of roles makes a lot of sense, for how best can we ensure that an independent judiciary is beholden to no one man or no one group than by requiring two separate and wholly independent entities to sign off before a judge takes the bench?

There is a Latin proverb which translates to ''Who will guard the guardians?'' Our judges guard our rights, and our Founders were smart enough to put both the President and the Senate, acting independently, in charge of guarding our judicial guardians. Who will guard the guardians?

As a Senator, I regard this not as just a right but as a solemn duty and responsibility, one that transcends the partisan disputes of any day or any decade. The importance of multiple checks in determining who our judges would be was not lost on our Founders, even on those who were very much in favor of a strong Executive.

For example, Alexander Hamilton, probably the strongest advocate for a stronger Executive, wrote:

> The possibility of rejection [by the Senate] would be a strong motive to [take] care in proposing [nominations. The President] . . . would be both ashamed and afraid to bring forward . . . candidates who had no other merit, than that . . . of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instrument of his pleasure.

Hamilton also rebutted the argument that the Senate's rejection of nominees would give it an improper influence over the President, as some here have suggested, by stating:

> If by influencing the President be meant restraining him, this is precisely what must have been intended. And it has been shown that the restraint would be salutary.

The end result of our Founders was a system in which both the President and the Senate had significant roles, a system in which the Senate was constitutionally required to exercise independent judgment, not simply to rubberstamp the President's desires.

As Senator William Maclay said:

> [W]hoever attends strictly to the Constitution of the United States will readily observe that the part assigned to the Senate was an important one—no less that of being the great check, the regulator and corrector, or, if I may so speak, the balance of this government. . . .The approbation of the Senate was certainly meant to guard against the mistakes of the President in his appointments to office . . . The depriving power should be the same as the appointing power.

The Founders gave us a system in which the Senate was to play a significant and substantive role in judicial nominations. They also provided us guidance on what type of legislative body they envisioned. In this new type of governance system they set up in 1789 where power would be separated and would check other power, the Founders envisioned a special unique role for the Senate that does not exist anywhere else in governance or in any parliamentary system.

There is the oft-repeated discussion between two of our most distinguished Founding Fathers, Thomas Jefferson and George Washington. Reportedly, at a breakfast that Jefferson was having with Washington upon returning from Paris, because he was not here when the Constitution was written, Jefferson was somewhat upset that there was a bicameral legislative body, that a Senate was set up. He asked Washington: Why did you do this, set up a Senate? And Washington looked at Jefferson as they were having tea and said: Why did you pour that tea into your saucer? And Jefferson responded: To cool it.

I might note parenthetically that was the purpose of a saucer originally. It was not to keep the tablecloth clean.

Jefferson responded: To cool it, and Washington then sagely stated: Even so, we pour legislation into the senatorial saucer to cool it.

The Senate was designed to play this independent and, I might emphasize, moderating—a word not heard here very often—moderating and reflective role in our Government. But what aspects of the Senate led it to become this saucer, cooling the passions of the

day for the betterment of America's long-term future? First, the Founders certainly did not envision the Senate as a body of unadulterated majoritarianism. In fact, James Madison and other Founders were amply concerned about the majority's ability, as they put it, ''to oppress the minority.'' It was in this vein the Senate was set up ''first to protect the people against their rulers; secondly, to protect the people against the transient impressions into which they themselves might be led. . . .The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch.''

Structurally, the Founders set up a ''different type of legislature'' by ensuring that each citizen—now here is an important point, and if anybody in this Chamber understands this, the Presiding Officer does—the Founders set up this different type of legislative body by ensuring that each citizen did not have an equal say in the functioning of the Senate—that sounds outrageous, to ensure they did not have an equal say—but that each State did have an equal say. In fact, for over a century, Senators were not originally chosen by the people, as the Presiding Officer knows, and it was not until 1913 that they were elected by the people as opposed to selected by their State legislative bodies.

Today, Mr. President, you and I do stand directly before the people of our State for election, but the Senate remains to this day a legislative body that does not reflect the simple popular majority because representation is by States.

That means someone from Maine has over 25 times as much effective voting power in this body as the Senator from California. An interesting little fact, and I do not say this to say anything other than how the system works, there are more desks on that side of the aisle. That side has 55. Does that side of the aisle realize this side of the aisle, with 45 desks, represents more Americans than they do? If we add up all the people represented by the Republican Party in the Senate, they add up to fewer people than the Democratic Party represents in the Senate. We represent the majority of the American people, but in this Chamber it is irrelevant and it should be because this was never intended in any sense to be a majoritarian institution.

This distinctive quality of the Senate was part of that Great Compromise without which we would not have a Constitution referred to as the Connecticut Compromise. Edmund Randolph, who served as the first Attorney General of the United States and would later be Secretary of State, represented Virginia at the Constitutional Convention, and in that context he argued for fully proportionate representation in the debates over the proper form of the legislative branch, but ultimately he agreed to the Connecticut Compromise. After reflection, that so seldom happens among our colleagues, myself included, he realized his first position was incorrect and he stated:

> The general object was to provide a cure for the evils under which the United States labored; that in tracing these evils to their origin every man—

Referring to every man who agreed to the compromise—

> had found it in the turbulence and follies of democracy; that some check therefore was to be sought against this tendency of our Governments; and that a good Senate seemed most likely to answer this purpose.

So the Founders quite intentionally designed the Senate with these distinctive features.

Specifically, article 1, section 5 of the Constitution states that each House may determine its own rules for its own proceedings. Precisely: ''Each House may determine the Rules of its Proceedings.'' The text contains no limitations or conditions. This clause plainly vests the Senate with plenary power to devise its internal rules as it sees fit, and the filibuster was just one of those procedural rules of the many rules that vest a minority within the Senate with the potential to have a final say over the Senate's business.

It was clear from the start that the Senate would be a different type of legislative body; it would be a consensus body that respects the rights of minorities, even the extreme minority power of a single Senator because that single Senator can represent a single and whole State. The way it is played out in practice was through the right of unlimited debate.

I find it fascinating, we are talking about the limitation of a right that has already limited the original right of the Founding Fathers. The fact was there was no way to cut off debate for the first decades of this Republic.

Joseph Story, famous justice and probably one of the best known arbiters of the Constitution in American history, his remark about the importance of the right of debate was ''the next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant, or ineffectual.'' And that goes to the very heart of what made the Senate different.

In the Senate, each individual Senator was more than a number to be counted on the way to a majority vote, something I think some of us have forgotten. Daniel Webster put it this way:

> This is a Senate of equals, of men of individual honor and personal character, and of absolute independence. We know no masters, we acknowledge no dictators. This is a hall for mutual consultation and discussion; not an arena for the exhibition of champions.

Extended debate, the filibuster, was a means to reach a more modest and moderate result to achieve compromise and common ground to allow Senators, as Webster had put it, to be men—and now men and women—of absolute independence.

Until 1917, there was no method to cut off debate in the Senate, to bring any measure to a vote, legislative or nomination—none, except unanimous consent. Unanimous consent was required up until 1917 to get a vote on a judge, on a bill, on anything on the Executive Calendar. The Senate was a place where minority rights flourished completely, totally unchecked, a place for unlimited rights of debate for each and every Senator.

In part this can be understood as a recognition of our federal system of government in which we were not just a community of individuals but we were also a community of sovereign States. Through the Senate, each State, through their two Senators, had a right to extensive debate and full consideration of its views.

For much of the Senate's history, until less than 100 years ago, to close off debate required not just two-thirds of the votes, but it required all of the votes. The Senate's history is replete with examples of situations in which a committed minority flexed its ''right to debate'' muscles. In fact, there was a filibuster over the location of the Capitol of the United States in the First Congress. But what about how this tradition of allowing unlimited debate and respect for minority rights played out in the nomination context, as opposed to the legislative process?

First, the text of the Constitution makes no distinction whatsoever between nominations and legislation. Nonetheless, those who are pushing the nuclear option seem to suggest that while respect for minority rights has a long and respected tradition on the legislative side of our business, things were somehow completely different when it came to considering nominations. In fact, it is the exact opposite.

The history of the Senate shows, and I will point to it now, that previous Senates certainly did not view that to be the case. While it is my personal belief that the Senate should be more judicious in the use of the filibuster, that is not how it has always been. For example, a number of President Monroe's nominations never reached the floor by the end of his administration and were defeated by delay, in spite of his popularity and his party's control of the Senate.

Furthermore, President Adams had a number of judicial nominations blocked from getting to the floor. More than 1,300 appointments by President Taft were filibustered. President Wilson also suffered from the filibusters of his nominees.

Not only does past practice show no distinction between legislation and judicial nominations in regards to the recognition of minority rights, the formal rules of the Senate have never recognized such a distinction, except for a 30-year stretch in the Senate history, 1917 to 1949, when legislation was made subject to cloture but nominations were not. Do my colleagues hear this? All of those who think a judge is more entitled to a vote than legislation, in 1917 it was decided that absolute unlimited debate should be curtailed, and

there needs to be a two-thirds vote to cut off debate in order to bring legislation to the floor.

But there was no change with regard to judicial nominees. There was a requirement of unanimous consent to get a nominee voted on. So much for the argument that the Constitution leans toward demanding a vote on nominations more than on legislation. It flies in the face of the facts, the history of America and the intent of our Framers. This fact in itself certainly undercuts the claim that there has been, by tradition, the insulating of judicial nominees from filibusters.

In both its rules and its practices, the Senate has long recognized the exercise of minority rights with respect to nominations. And it should come as no surprise that in periods where the electorate is split very evenly, as it is now, the filibustering of nominations was used extensively. For example, my good friend Senator HATCH who is on the Senate floor—as my mother would say, God love him, because she likes him so much, and I like him, too—he may remember when I was chairman of the Judiciary Committee back in the bad old days when the Democrats controlled the Senate during President Clinton's first 2 years in office, a time when the Democrats controlled both the Presidency and the Senate but nonetheless the country remained very divided, numerous filibusters resulted, even in cases not involving the judiciary.

I remind my friends, for example, that the nomination of Dr. Henry Foster for Surgeon General, Sam Brown to be ambassador to the Conference on Cooperation and Security in Europe, Janet Napolitano to be U.S. attorney in the District of Arizona, and Ricki Tigert for the Federal Deposit Insurance Corporation head, were all filibustered. We controlled the Senate, the House, the Presidency, but the Nation was nonetheless divided.

Some may counter that there should be a difference between how judicial nominees should be treated versus the treatment accorded executive branch nominees, the Cabinet, and the rest. Constitutional text, historical practice and principle all run contrary to that proposition.

On the textual point, we only have one appointments clause. It is also instructive to look at a few historical examples. In 1881, Republican President Rutherford B. Hayes nominated Stanley Matthews to the Supreme Court. A filibuster was mounted, but the Republican majority in the Senate was unable to break the filibuster, and Stanley Matthews' Supreme Court nomination failed without getting a vote.

In 1968, the filibuster to block both Justice Abe Fortas from becoming Chief Justice and Fifth Circuit Court Judge Homer Thornberry to occupy the seat that Justice Fortas was vacating was one where the Democrats controlled the Senate, and the Republicans filibustered. The leader of that successful filibuster effort against Justice Fortas was Republican Senator Robert Griffin from Michigan. In commenting on the Senate's rejection of President George Washington's nomination of John Rutledge to be Chief Justice of the Supreme Court, the Republican Senator who mounted a successful filibuster against Fortas on the floor—translated, Fortas never got a vote, even though he was a sitting Supreme Court Justice about to be elevated to Chief Justice—what did the Senator from Michigan who led that fight say about the first fight in the Senate?

> That action in 1795 said to the President then in office and to future Presidents: ''Don't expect the Senate to be a rubberstamp. We have an independent coequal responsibility in the appointing process; and we intend to exercise that responsibility, as those who drafted the Constitution so clearly intended.''

There is also a very important difference between judicial and executive nominees that argued for greater Senate scrutiny of judicial nominees. It should be noted that legislation is not forever. Judicial appointments are for the life of the candidate.

Of course, no President has unlimited authority, even related to his own Cabinet. But when you look at judges, they serve for life.

An interesting fact that differentiates us from the 1800s, when these filibusters took place, and 1968, when they took place: The average time a Federal judge spends on the bench, if appointed in the last 10 years from today, has increased from 15 years to 24 years. That means that on average, every judge we vote for will be on that bench for a quarter century. Since the impeachment clause is fortunately not often used, the only opportunity the Senate has to have its say is in this process.

The nuclear option was so named because it would cause widespread bedlam and dysfunction throughout the Senate, as the minority party, my party, has pledged to render its vigorous protest. But I do not want to dwell on those immediate consequences which, I agree with my Senate Judiciary Committee chairman, would be dramatic. He said:

> If we come to the nuclear option the Senate will be in turmoil and the Judiciary Committee will be in hell.

However serious the immediate consequences may be, and however much such dysfunction would make both parties look juvenile and incompetent, the more important consequence is the long-term deterioration of the Senate. Put simply, the nuclear option threatens the fundamental bulwark of the constitutional design. Specifically, the nuclear option is a double-barreled assault on this institution. First, requiring only a bare majority of Senators to confirm a judicial nominee is completely contrary to the history and intent of the Senate. The nuclear option also upsets a tradition and history that says we are not going to change the rules of the Senate by a majority vote. It breaks the rule to change the rule. If we go down this path of the nuclear option, we will be left with a much different system from what our Founders intended and from how the Senate has functioned throughout its history.

The Senate has always been a place where the structure and rules permit fast-moving partisan agendas to be slowed down; where hotheads could cool and where consensus was given a second chance, if not a third and a fourth.

While 90 percent of the business is conducted by unanimous consent in this body, those items that do involve a difference of opinion, including judicial nominations, must at least gain the consent of 60 percent of its Members in order to have that item become law. This is not a procedural quirk. It is not an accident of history. It is what differentiates the Senate from the House of Representatives and the English Parliament.

President Lyndon Johnson, the ''Master of the Senate,'' put it this way:

> In this country, a majority may govern but it does not rule. The genius of our constitutional and representative government is the multitude of safeguards provided to protect minority interests.

And it is not just leaders from the Democratic Party who understand the importance of protecting minority rights. Former Senate Majority Leader Howard Baker wrote in 1993 that compromising the filibuster:

> would topple one of the pillars of American Democracy: the protection of minority rights from majority rule. The Senate is the only body in the federal government where these minority rights are fully and specifically protected.

Put simply, the ''nuclear option'' would eviscerate the Senate and turn it into the House of Representatives. It is not only a bad idea, it upsets the Constitutional design and it disserves the country. No longer would the Senate be that ''different kind of legislative body'' that the Founders intended. No longer would the Senate be the ''saucer'' to cool the passions of the immediate majority.

Without the filibuster, more than 40 Senators would lack the means by which to encourage compromise in the process of appointing judges. Without the filibuster, the majority would transform this body into nothing more than a rubber stamp for every judicial nomination.

The Senate needs the threat of filibuster to force a President to appoint judges who will occupy the sensible center rather than those who cater to the whim of a temporary majority. And here is why—it is a yes or no vote; you can't amend a nomination.

With legislation, you can tinker around the edges and modify a bill to make it more palatable. You can't do that with a judge. You either vote for all of him or her, or none. So only by the threat of filibuster can we obtain compromise when it comes to judges.

We, as Senators, collectively need to remember that it is our institutional duty to check any Presidential attempt to take over the Judiciary. As the Congressional Research Service, the independent and non-partisan research arm of Congress, stated, the ''nuclear option'' would:

. . . strengthen the executive branch's hand in the selection of federal judges.

This shouldn't be a partisan issue, but an institutional one. Will the Senate aid and abet in the erosion of its Article I power by conceding to another branch greater influence over our courts? As Senator Stennis once said to me in the face of an audacious claim by President Nixon:

Are we the President's men or the Senate's?

He resolved that in a caucus by speaking to us as only John Stennis could, saying:

I am a Senate man, not the President's man.

Too many people here forget that.

Earlier, I explained that for much of the Senate's history, a single Senator could stop legislation or a nomination dead in its tracks. More recent changes to the Senate Rules now require only ⅗ of the Senate, rather than all of its Members, to end debate. Proponents of the ''nuclear option'' argue that their proposal is simply the latest iteration of a growing trend towards majoritarianism in the Senate. God save us from that fate, if it is true.

I strongly disagree. Even a cursory review of these previous changes to the Senate Rules on unlimited debate show that these previous mechanisms to invoke cloture always respected minority rights.

The ''nuclear option'' completely eviscerates minority rights. It is not simply a change in degree but a change in kind. It is a discontinuous action that is a sea change, fundamentally restructuring what the Senate is all about.

It would change the Senate from a body that protects minority rights to one that is purely majoritarian. Thus, rather than simply being the next logical step in accommodating the Senate Rules to the demands of legislative and policy modernity, the ''nuclear option'' is a leap off the institutional precipice.

And so here we collectively stand—on the edge of the most important procedural change during my 32-year Senate career, and one of the most important ever considered in the Senate; a change that would effectively destroy the Senate's independence in providing advice and consent.

I ask unanimous consent to be able to continue for another 15 minutes.

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

Mr. BIDEN. The ''nuclear option'' would gut the very essence and core of what the Senate is about as an institution—flying directly in the face of our Founders who deliberately rejected a parliamentary system. A current debate, over a particular set of issues, should not be permitted to destroy what history has bestowed on us.

And the stakes are much, much higher than the contemporary controversy over the judiciary. Robert Caro, the noted author on Senate history, wrote the following in a letter to the Chairman and Ranking Member of the Senate Committee on Rules and Administration:

[I]n considering any modification [to the right of extended debate in the Senate Senators should realize they are dealing not with the particular dispute of the moment, but with the fundamental character of the Senate of the United States, and with the deeper issue of the balance between majority and minority rights . . ., you need only look at what happened when the Senate gradually surrendered more and more of its power over international affairs to learn the lesson that once you surrender power, you never get it back.

The fight over the nuclear option is not just about the procedure for confirming judges. It is also, fundamentally, about the integrity of the Senate. Put simply, the ''nuclear option'' changes the rules midstream. Once the Senate starts changing the rules outside of its own rules, which is what the nuclear option does, there is nothing to stop a temporary majority from doing so whenever a particular rule would pose an obstacle.

It is a little akin to us agreeing to work together on a field. I don't have to sit down and agree with you that we are going to divide up this field, but I say, OK, I will share my rights in this field with you. But here is the deal we agree to at the start. Any change in the agreements we make about how to run this field have to be by a supermajority. OK? Because that way I am giving up rights—which all the Founders did in this body, this Constitution—rights of my people, for a whole government. But if you are going to change those rules with a pure majority vote, then I would have never gotten into the deal in the first place.

I suffer from teaching constitutional law for the last 13 years, an advanced class on constitutional law at Widener University, a seminar on Saturday morning, and I teach this clause. I point out the essence of our limited constitutional government, which is so different than every other, is that it is based on the consent of the governed. The governed would never have given consent in 1789 if they knew the outfit they were giving the consent to would be able, by a simple majority, to alter their say in their governance.

The Senate is a continuing body, meaning the rules of the Senate continue from one session to the next. Specifically, rule V provides:

The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

I say to my colleague from North Carolina, on the floor, I say to my colleague from South Carolina, I say to my colleague from Utah: If you vote for this ''nuclear option'' you are about to break faith with the American people and the sacred commitment that was made on how to change the rules.

Senate rule XXII allows only a rule change with two-thirds votes. The ''continuing body'' system is unlike many other legislative bodies and is part of what makes the Senate different and allows it to avoid being captured by the temporary passions of the moment. It makes it different from the House of Representatives, which comes up with new rules each and every Congress from scratch.

The ''nuclear option'' doesn't propose to change the judicial filibuster rule by securing a two-thirds vote, as required under the existing rules. It would change the rule with only a bare majority. In fact, as pointed out recently by a group of legal scholars:

On at least 3 separate occasions, the Senate has expressly rejected the argument that a simple majority has the authority claimed by the proponents of the [nuclear option].

One historical incident is particularly enlightening. In 1925, the Senate overwhelmingly refused to agree to then-Vice President Dawes' suggestion that the Senate adopt a proposal for amending its rules identical to the nuclear option.

On this occasion, an informal poll was taken of the Senate. It indicated over 80 percent of the Senators were opposed to such a radical step.

Let me be very clear. Never before have Senate rules been changed except by following the procedures laid out in the Senate rules. Never once in the history of the Senate.

The Congressional Research Service directly points out that there is no previous precedent for changing the Senate rules in this way.

The ''nuclear option'' uses an ultra-vires mechanism that has never before been used in the Senate—''Employment of the [nuclear option] would require the chair to overturn previous precedent.

The Senate Parliamentarian, the nonpartisan expert on the Senate's procedural rules—who is hired by the majority—has reportedly said that Republicans will have to overrule him to employ the ''nuclear option''.

Adopting the ''nuclear option'' would send a terrible message about the malleability of Senate rules. No longer would they be the framework that each party works within.

I've been in the Senate for a long time, and there are plenty of times I would have loved to change this rule or that rule to pass a bill or to confirm a nominee I felt strongly about.

But I didn't, and it was understood that the option of doing so just wasn't on the table.

You fought political battles; you fought hard; but you fought them within the strictures and requirements of the Senate rules. Despite the short-term pain, that understanding has served both parties well, and provided long-term gain.

Adopting the ''nuclear option'' would change this fundamental understanding and unbroken practice of

what the Senate is all about. Senators would start thinking about changing other rules when they became ''inconvienent.'' Instead of two-thirds of the vote to change a rule, you'd now have precedent that it only takes a bare majority. Altering Senate rules to help in one political fight or another could become standard operating procedure, which, in my view, would be disastrous.

The Congressional Research Service has stated that adopting the ''nuclear option'' would set a precedent that could apply to virtually all Senate business. It would ultimately threaten both parties, not just one. The Service report states:

> The presence of such a precedent might, in principle, enable a voting majority of the Senate to alter any procedure at-will by raising a point of order . . . by such means, a voting majority might subsequently impose limitations on the consideration of any item of business, prohibiting debate or amendment to any desired degree. Such a majority might even alter applicable procedures from one item of business to the next, from one form of proceeding to a contrary one, depending on immediate objects.

Just as the struggle over the ''nuclear option'' is about constitutional law and Senate history, it is also about something much more simple and fundamental—playing by the rules.

I reiterate that I think Senator FRIST and his allies think they are acting on the basis of principle and commitment, but I regret to say they are also threatening to unilaterally change the rules in the middle of the game. Imagine a baseball team with a five-run lead after eight innings unilaterally declaring that the ninth inning will consist of one out per team.

Would the fans—for either side—stand for that? If there is one thing this country stands for it's fair play—not tilting the playing field in favor of one side or the other, not changing the rules unilaterally. We play by the rules, and we win or lose by the rules.

That quintessentially American trait is abandoned in the ''nuclear option.'' Republican Senators as well as Democratic ones have benefited from minority protections. Much more importantly, American citizens have benefited from the Senate's check on the excesses of the majority.

But this is not just about games, and playing them the right way. This is about a more ethereal concept—justice. In his groundbreaking philosophical treatise, A Theory of Justice, the philosopher John Rawls points to the importance of what he calls procedural justice.

Relying on this predecessors such as Immanuel Kant, Thomas Hobbes, Jean Jacques Rousseau, and John Locke, Rawls argues that, in activities as diverse as cutting a birthday cake and conducting a criminal trial, it is the procedure that makes the outcome just. An outcome is just if it has been arrived at through a fair procedure.

This principle undergirds our legal system, including criminal and civil trials. Moreover it is at the very core of our Constitution. The term ''due process of law'' appears not once but twice in our Constitution, because our predecessors recognized the vital importance of setting proper procedures—proper rules—and abiding by them.

It is also the bedrock principle we Senators rely on in accepting outcomes with which we may disagree. We know the debate was conducted fairly—the game was played by the rules. A decision to change the Senate's rules in violation of those very same rules abandons the procedural justice that legitimates everything we do.

It is interesting to ask ourselves what's different about now, why are we at this precipice where the ''nuclear option'' is actually being seriously debated and very well might be utilized? Why have we reached this point when such a seemingly radical rule change is being seriously considered by a majority of Senators? It's a good question, and I don't have an easy answer.

We have avoided such fights in the past largely because cooler heads have prevailed and accommodation was the watchword.

As Senator Sam Ervin used to say—the separation of powers should not, as President Woodrow Wilson warned, become an invitation for warfare between the two branches.

Throughout this country's history—whether during times of war or political division, for example—Presidents have sometimes extended an olive branch across the aisle. Past Presidents have in these circumstances made bipartisan appointments, selecting nominees who were consensus candidates and often members of the other party.

President Clinton had two Supreme Court nominees, and the left was pushing us as hard as the right is pushing you. What did he do? I spent several hours with him consulting on it. He picked two people on his watch who got 90 or so votes. Moderate, mainstream appointments. He did not appoint Scalias. He did not appoint Thomases. He appointed people acceptable to the Republicans because he was wise enough to know, even though he was President, we were still a divided Nation.

History provides ample examples. During the midst of the Civil War, President Lincoln selected members of the opposition Democratic party for key positions, naming Stephen Field to the Supreme Court in 1863 and Andrew Johnson as his Vice Presidential candidate in 1864.

On the brink of American entrance into WWII, President Roosevelt likewise selected members of the opposition Republican party, elevating Harlan Fiske Stone to be Chief Justice and naming Henry Stimson as Secretary of War.

Other 20th Century Presidents followed suit. In 1945, President Truman named Republican Senator Harold Burton to the Supreme Court. In 1956, President Eisenhower named Democrat William Brennan to the Supreme Court. What has happened to us? What have we become?

Does anyone not understand this Nation is divided red and blue and what it needs is a purple heart and not a red heart or a blue heart.

Lest any of my colleagues think these examples are merely culled from the dusty pages of history, let me remind them that the Senate has witnessed recent examples of consensus appointments during times of close political division. As I already mentioned, President Clinton followed this historic practice during vacancies to the Supreme Court a decade ago.

As explained by my friend, the Senior Senator from Utah, who was then the ranking member of the Senate Judiciary Committee, President Clinton consulted with him and the Republican Caucus during the High Court vacancies in 1993 and 1994. The result was President Clinton's selection of two outstanding and consensus nominees—Ruth Bader Ginsburg and Stephen Breyer—both of whom were confirmed overwhelmingly by the Senate, by votes of 97–3 and 87–9, respectively.

Indeed, the last two vacancies to the Supreme Court are text book examples of the executive branch working in cooperative and collegial fashion with its Senate counterpart to secure consensus appointments, thus averting an ideological showdown. The two constitutional partners given roles in the nomination process engaged in a consultative process that respected the rights and obligations of both branches as an institutional matter, while also producing outstanding nominees who were highly respected by both parties.

To be sure, a careful review of our Nation's history does not always provide the examples of consultation, comity, or consensus in the nomination process. Presidents of both parties have at times attempted to appoint nominees—or remove them once confirmed—over the objections of the Senate, including in some instances where the Senate was composed of a majority of the President's own party. And sometimes the Senate has had to stand strong and toe the line against imperialist Presidential leanings.

Our first President, George Washington, saw one of his nominees to the Supreme Court rejected by this Senate in 1795. The Senate voted 14 to 10 to reject the nomination of John Rutledge of South Carolina to be Chief Justice. What is historically instructive, I believe, is that while the Senate was dominated by the Federalists, President Washington's party, 13 of the 14 Senators who rejected the Rutledge nomination were Federalists.

The Senate also stood firm in the 1805 impeachment of Supreme Court Justice Samuel Chase. President Jefferson's party had majorities in both the House and the Senate, and Jefferson set his sights on the Supreme

Court. Specifically, he wanted to remove Justice Chase, a committed Federalist and frequent Jefferson critic, from the Court.

Jefferson was able to convince the House to impeach Justice Chase on a party-line vote, and the President had enough members of his party in the Senate to convict him. But members of the President's own party stood up to their President; the Senate as an institution stood up against executive overreaching. Justice Chase was not convicted, and the independence of the judiciary was preserved.

The Senate again stood firm in the 1937 court-packing plan by President Franklin Roosevelt.

This particular example of Senate resolve is instructive for today's debates, so let me describe it in some detail. It was the summer of 1937 and President Roosevelt had just come off a landslide victory over Alf Landon, and he had a Congress made up of solid New Dealers. But the ''nine old men'' of the Supreme Court were thwarting his economic agenda, overturning law after law overwhelmingly passed by the Congress and from statehouses across the country.

In this environment, President Roosevelt unveiled his court-packing plan—he wanted to increase the number of Justices on the court to 15, allowing himself to nominate these additional judges. In an act of great courage, Roosevelt's own party stood up against this institutional power grab. They did not agree with the judicial activism of the Supreme Court, but they believed that Roosevelt was wrong to seek to defy established traditions as a way of stopping that activism.

In May 1937, the Senate Judiciary Committee—a committee controlled by the Democrats and supportive of his political ends—issued a stinging rebuke. They put out a report condemning Roosevelt's plan, arguing it was an effort ''to punish the justices'' and that executive branch attempts to dominate the judiciary lead inevitably to autocratic dominance, ''the very thing against which the American Colonies revolted, and to prevent which the Constitution was in every particular framed.''

Our predecessors in the Senate showed courage that day and stood up to their President as a coequal institution. And they did so not to thwart the agenda of the President, which in fact many agreed with; they did it to preserve our system's checks and balances; they did it to ensure the integrity of the system. When the Founders created a ''different kind of legislative body'' in the Senate, they envisioned a bulwark against unilateral power—it worked back then and I hope that it works now.

The noted historian Arthur Schlesinger, Jr., has argued that in a parliamentary system President Roosevelt's effort to pack the court would have succeeded. Schlesinger writes: ''The court bill couldn't have failed if we had had a parliamentary system in 1937.'' A parliamentary legislature would have gone ahead with their President, that's what they do, but the Founders envisioned a different kind of legislature, an independent institution that would think for itself. In the end, Roosevelt's plan failed because Democrats in Congress thought court-packing was dangerous, even if they would have supported the newly-constituted court's rulings. The institution acted as an institution.

In summary, then, what do the Senate's action of 1795, 1805, and 1937 share in common? I believe they are examples of this body acting at its finest, demonstrating its constitutional role as an independent check on the President, even popularly elected Presidents of the same political party.

One final note from our Senate history. Even when the Senate's rules have been changed in the past to limit extended debate, it has been done with great care, remarkable hesitancy, and by virtual consensus. Take what occurred during the Senate's two most important previous changes to the filibuster rule: the 1917 creation of cloture and the 1975 lowering of the cloture threshold.

First, let's examine 1917. On the eve of the United States' entry into WWI, with American personnel and vessels in great danger on the high seas, President Wilson asked that Congress authorize the arming of American merchant vessels. Over three-fourths of the Senate agreed with this proposal on the merits, but a tiny minority opposed it. With American lives and property at grave risk, the Senate still took over 2 months to come to the point of determining to change its rules to permit cloture.

When they did so, they did it by virtual consensus, and in a supremely bipartisan manner. A conference committee composed equally of Democrats and Republicans, each named to the committee by their party leadership, drafted and proposed the new rule. It was then adopted by an overwhelming vote of 76–3.

In 1975, I was part of a bipartisan effort to lower the threshold for cloture from two-thirds to three-fifths. Many of us were reacting against the filibustering for so many years of vital civil rights legislation. Civil rights is an issue I feel passionately about and was a strong impetus for me seeking public office in the first place. Don't get me wrong—I was not calling the shots back in 1975; I was a junior Senator having been in the chamber for only 2 years.

But I will make no bones about it—for about two weeks in 1975—I was part of a slim bipartisan majority that supported jettisoning established Senate rules and ending debate on a rules change by a simple majority.

The rule change on the table in 1975 was not to eliminate the filibuster in its entirety, which is what the current ''nuclear option'' would do for judicial nominations; rather it was to change from the then-existing two-thirds cloture requirement to three-fifths. It was a change in degree, not a fundamental restructuring of the Senate to completely do away with minority rights.

The rule change was also attempted at the beginning of the Senate session and applied across the board, as opposed to the change currently on the table, brought up mid-session concerning only a very small subset of the Senate's business. Nonetheless, my decision to support cutting off debate on a rules change by a simple majority vote was misguided.

I carefully listened to the debate in 1975 and learned much from my senior colleagues. In particular, I remember Senator Mansfield being a principled voice against the effort to break the rules to amend the rules.

Senator Mansfield stood on this floor and said the following:

> [T]he fact that I can and do support [changing the cloture threshold from ⅔ to ⅗] does not mean that I condone or support the route taken or the methods being used to reach the objective of Senate rule 22. The present motion to invoke cloture by a simple majority, if it succeeds would alter the concept of the Senate so drastically that I cannot under any circumstances find any justification for it. The proponents of this motion would disregard the rules which have governed the Senate over the years, over the decades, simply by stating that the rules do not exist. They insist that their position is right and any means used are, therefore, proper. I cannot agree.

Senator Mansfield's eloquent defense of the Senate's institutional character and respect for its rules rings as true today as it did 30 years ago. Senator Mansfield's courage and conviction in that emotionally charged time is further evidence, I believe, of why he is one of the giants of the Senate.

In the end, cooler heads prevailed and the Senate came together in a way only the Senate can. I changed my mind; I along with my Senate colleagues. We reversed ourselves and changed the cloture rule but only by following the rules. Ultimately, over ¾ of the voting Senators—a bipartisan group—voted to end debate. In fact, the deal that was struck called for reducing the required cloture threshold from ⅔ to ⅗; but it retained the higher ⅔ threshold for any future rules changes.

Now I understand that passions today are running high on both sides of the ''nuclear option'' issue, and I can relate to my current Republican colleagues. I agree with my distinguished Judiciary Committee Chairman that neither side has clean hands in the escalating judicial wars.

I also understand the frustration of my Republican colleagues—especially those who are relatively new to this Chamber—that a minority of Senators can have such power in this body.

For me, the lesson from my 1975 experience, which I believe strongly applies to the dispute today, is that the Senate ought not act rashly by changing its rules to satisfy a strong-willed majority acting in the heat of the moment.

Today, as in 1975, the solution to what some have called a potential constitutional crisis lies in the deliberate and thoughtful effort by a bipartisan majority of Senators to heed the wisdom of those who established the carefully crafted system of checks and balances protecting the rights of the minority. It's one thing to change Senate rules at the margins and in degrees, it's quite another to overturn them.

Federalist No. 1 emphasizes that Americans have a unique opportunity—to choose a form of government by ''reflection and choice'':

It has been frequently remarked that it seems to have been reserved to the people of this country . . . to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

We need to understand that this is a question posed at the time of the founding and also a question posed to us today. At the time of the founding, it was a question about whether America would be able to choose well in determining our form of government.

We know from the experience of the last 225 years that the founding generation chose well. As a question posed to citizens and to Senators of today, it is a question about whether we will be able to preserve the form of government they chose.

The Framers created the Senate as a unique legislative body designed to protect against the excesses of any temporary majority, including with respect to judicial nominations; and they left all of us the responsibility of guaranteeing an independent Federal judiciary, one price of which is that it sometimes reaches results Senators do not like.

It is up to us to preserve these precious guarantees. Our history, our American sense of fair play, and our Constitution demand it.

I would ask my colleagues who are considering supporting the ''nuclear option''—those who propose to ''jump off the precipice''—whether they believe that history will judge them favorably.

In so many instances throughout this esteemed body's past, our forefathers came together and stepped back from the cliff. In each case, the actions of those statesmen preserved and strengthened the Senate, to the betterment of the health of our constitutional republic and to all of our advantage.

Our careers in the Senate will one day end—as we are only the Senate's temporary officeholders—but the Senate itself will go on.

Will historians studying the actions taken in the spring of 2005 look upon the current Members of this Senate as statesmen who placed the institution of the United States Senate above party and politics?

Or will historians see us as politicians bending to the will of the Executive and to political exigency?

I, for one, am comfortable with the role I will play in this upcoming historic moment.

I hope all my colleagues feel the same.

Mr. President, on behalf of Senator BYRD, I ask unanimous consent to have printed in the RECORD a speech against the nuclear option delivered earlier this week by Senator BYRD to the Center for American Progress.

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

UPHOLDING THE TRADITION OF FREEDOM OF SPEECH—APRIL 25, 2005

''That 150 lawyers should do business together (in the U.S. Congress) ought not to be expected.'' Those are the words of Thomas Jefferson.

Now comes the so-called Nuclear Option, or Constitutional Option to prove him right. You know, I liked Jefferson, but I always thought he borrowed some of my best stuff for that declaration he wrote. This poisoned pill, euphemistically designated ''the nuclear option'', has been around a long time—since 1917, in fact, the year the cloture rule was adopted by the U.S. Senate. It required no genius of Brobdingnagian proportions to conjure up this witch's brew. All that it takes is (1) to have the chair wired; (2) to have a majority of 51 votes to back the chair's ruling; and (3) a determined ruthlessness to execute the power grab.

Over the 88 years since 1917, however, no White House and no party in control of the Senate has ever resorted to the use of this draconian weapon in order to achieve its goal. Until now. Why now? It is because a determined minority in the Senate has refused to confirm only 10 of over 200 nominees to federal judgeships submitted by President George Bush during this first term as President. Since his reelection, President Bush has resubmitted 7 of the 10 nominees who failed to be confirmed in his first term. Hence, a heavy-handed move is about to be made to change the rules by disregarding the standing rules of the Senate that have governed freedom of speech and debate in the Senate for over 200 years. The filibuster must go, they say.

Obstructive tactics in a legislative forum, although not always known as filibusters, are of ancient origin. Plutarch reported that, while Caesar was on sojourn in Spain, the election of Consuls was approaching. ''He applied to the Senate for permission to stand candidate,'' but Cato strongly opposed his request and ''attempted to prevent his success by gaining time; with which view he spun at the debate till it was too late to conclude upon anything that day.'' Hey, the filibuster has only been around 2,064 years, since circa 59 B.C.!

Filibusters were also a problem in the British Parliament. In 19th century England, even the members of the Cabinet accepted the tactics of obstruction as an appropriate weapon to defeat House of Commons' initiatives that were not acceptable to the government. In this country, experience with protracted debate began early. In the first session of the First Congress, for example, there was a lengthy discussion regarding the permanent site for the location of the Capitol. Fisher Ames, a member of the House from Massachusetts, complained that ''the minority . . . makes every exertion to . . . delay the business.''

Senator William Maclay of Pennsylvania complained that ''every endeavor was used to waste time, . . . '' Long speeches and other obstructionist tactics were more characteristic of the House than of the Senate in the early years.

There have been successful filibusters that have benefited the country. For example, in March 1911, Senator Owen of Oklahoma filibustered a measure granting statehood to New Mexico, arguing that Arizona should also be a state. President Taft opposed the inclusion of Arizona's statehood because a provision of Arizona's state constitution permitted the recall of judges. Arizona later attained statehood, at least in part because Senators took time to make the case the year before. Another example occurred in July 1937, when a Senate filibuster blocked FDR's Supreme Court-packing plan until public opinion turned against the plan.

Freedom of speech and debate is enshrined in Article I, Section 6, of the U.S. Constitution. The roots run deep. Before the British Parliament would proclaim William III and Mary as king and queen of England, they were required to swear allegiance to the British Declaration of Rights, which they did on February 13, 1689. They were then declared joint sovereigns by the House of Commons. The declaration was converted into the English Bill of Rights by statute on December 16, 1689, the 9th Article of which guarantees freedom of speech and debate in Parliament in words similar to those in our own Constitution, Article I, Section 6.

So now, for the first time in the 217 years since 1789, the tradition of freedom of speech and debate in the Senate is under a serious threat of extinction by the majority party through resort to the nuclear option.

Marty Gold, deservedly respected for his knowledge of the Senate rules and precedents, and opponents of free speech and debate claim that, during my tenure as Majority Leader in the United States Senate, I established precedents that now justify a proposal for a misguided attempt to end debate on a judicial nomination by a simple majority vote, rather than by a 3/5s vote of all Senators duly chosen and sworn as required by Paragraph 2 of Senate Rule XXII. Their claims are false. Utterly false!

Proponents of the so-called ''nuclear option'' cite several instances in which they inaccurately allege that I ''blazed a procedural path'' toward an inappropriate change in Senate rules. They are dead wrong. Dead wrong! They draw analogies where none exist and create cockeyed comparisons that fail to withstand even the slightest intellectual scrutiny. My detailed response to these false claims and allegations appears in the March 20, 2005, edition of the Congressional Record. But, simply put, no action of mine ever denied a minority of the Senate a right to full debate on the final disposition of a measure or matter pending before the Senate. Not in 1977, not in 1979, not in 1980, not in 1987—the dates cited by critics as grounds for the nuclear option. In none of the instances cited by those who threaten to invoke the nuclear option did my participation in any action deny the minority in the Senate, regardless of party, its right to debate the real matter at hand.

Now why can't reasonable Senators on both sides of the aisle act in the best interests of the Senate, the Constitution, and the country by working together to find a way to avoid this procedural Armageddon? President Gerald Ford always said that he believed in friendly compromise and called compromise ''the oil that makes governments go.''

When I was a mere lad in southern West Virginia, I once accidentally threw a wooden airplane I had crafted through the glass of a window in a neighbor's house. The neighbor's name was Mr. Arch Smith. He was angry, and I was scared. Into the house I went to plead with Mr. Smith not to tell my Dad. I

knew that a belt thrashing awaited me if he did. I promised to pay Mr. Smith .35 cents for the windowpane if he would stay mum about the accident. I would raise the .35 cents by running errands for a friendly lady next door. We struck a deal. We compromised. And my dad never learned of the incident until after I had paid my debt. That compromise saved me a licking, and paid for Mr. Smith's broken window. The sweet art of compromise solved our dispute.

Of course, the Senate itself is the result of a compromise which solved a dispute. The Senate answered the plea of the smaller states for equality and a forum where they could have equal representation and minority views could be heard. Because of that famous action, the Great Compromise of July 16, 1787, the Senate and the House balance each other, reflecting majority rule and minority rights like halves of the same apple in our Republic, and achieving a delicate balance—a finely tuned, exquisitely honed accommodation of tensions which has endured for over 200 years. To paraphrase the words of James Madison, the Republic has been structured to, ''guard against the cabals of a few . . .,'' as well as against the ''confusion of a multitude . . .''

The Constitution, under Article II, Section 2, requires a President to submit his selection of Federal judges, members of his own cabinet, and certain other high-ranking officials to the Senate for its ''advice and consent.'' The Framers allowed the Executive only to propose. It was left to the Senate to dispose. There is no stipulation in the Constitution as to how the Senate is to express its advice or give its consent. President Bush incorrectly maintains that each nominee for a federal judgeship is entitled to an up or down vote. The Constitution doesn't say that. It doesn't even say that there has to be a vote with respect to the giving of ''its consent.'' The Senate can refuse to confirm a nominee simply by saying nothing and doing nothing. In Section 2, Article II, it says, '' . . . and by and with the advice and consent of the Senate, [He] shall appoint ambassadors . . . Judges of the Supreme Court, and all other Officers of the United States. . . .''

Just as in Article I concerning the setting of Senate rules, Article II allows the Senate the freedom to determine how it will use its advice and consent powers. The choice of the Senate as the single entity to work with the President on the selection of life-tenured federal judges seems strongly to indicate the Framer's desire for scrutiny by the House of Congress uniquely designed for the protection of minority views. The Framers could have selected the majoritarian House of Representatives for such a duty. They did not. In fact, they totally excluded the House. They made a conscious decision to delegate the ''advice and consent'' function to the United States Senate.

But, suppose the President's party controls the Senate, and therefore controls the votes of a majority in the Senate? Where then, is the check on Presidential power? The filibuster is the minority's strongest tool in providing the Constitutional curb on raw Presidential power when it comes to nominations and the federal courts. Of course, the President's party could occupy 60 seats in the Senate, and that would be enough to break any filibuster except when amending the rules. But, 60 votes is a high threshold, and does provide an effective check on the abuse of power. Why would we ever want to eliminate this important check on Presidential power? Haven't we always had a healthy suspicion of too much power in the hands of a King or any President regardless of party affiliation? The filibuster is the final bulwark preventing a President from stacking the courts (as FDR tried to do in 1937) if his political party holds a majority in the Senate. Without the ability by a minority to defeat cloture by a supermajority vote, that slim wall holding back the waters of destruction of a fair and independent judiciary, ruptures. Other liberties enumerated in the bill of rights can then also be washed away by a President who stacks the courts to reflect a political agenda. Freedom of speech, freedom of religion, all could be gone, wiped out by a partisan court, beholden to one man: the President.

The threat of the so-called ''nuclear option'' puts us on a dangerous course. Yet, incredibly, today we stand right on the brink, maybe only days away, from destroying the checks and balances of our Constitution. What has happened to the quality of leadership in this country that would allow us to even consider provoking a Constitutional crisis of such major proportions? Where is the gentle art of compromise? Edmund Burke said, ''All government—indeed, every human benefit and enjoyment, every virtue and every prudent act—is founded on compromise and barter.'' As I have said earlier, the nuclear option has been around for years. It could have been employed at anytime. Yet, no leader of either party chose to go down that path because the consequences are so dire. Why have we arrived at such a dangerous impasse?

Reaction to recent decisions handed down by Federal Courts has fueled the drive toward this act of self destruction. Many citizens, religious people, angered by a feeling of years of exclusion from our political process, are deeply frustrated. I am in sympathy with such feelings. I do not agree with many of the decisions which have come from the courts concerning prayer in school, and prohibitions on the public display of religious items. For example, relating to freedom of religion, Article I states: ''Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .'' In my opinion, the courts have not given equal weight to both of these clauses but have stressed the first clause while not giving enough weight to the second clause ''or prohibiting the free exercise thereof;. . . .'' I have always believed that this country was founded by men and women of strong faith, and that their intent was not to suppress religion in the life of our nation, but to ensure that the government favored no one religion over another. I understand the extreme anger of many good people who decry the nature of our popular culture, with its overt emphasis on sex, violence, profanity, and materialism. They have every right to seek some sort of remedy. But these frustrations, as great as they are, must not be allowed to destroy crucial institutional mechanisms which protect minority rights, and curb the power of an overreaching President. Yet, that is exactly what is about to happen, with this very misdirected attack on the filibuster.

The outlook for compromise is dim. The debate has reached a fever pitch and political polarization is at levels I have never seen. Democrats have overreached. Republicans have overreacted. And the White House has poured salt in the wound by sending the same contentious nominations right back to the Senate as if there were not a country full of qualified and talented judges from which to choose. Our two great political parties are not having a national debate. We are simply shouting at each other. I have heard statements of late which cause me to shudder—such things as, ''Democrats hate America,'' or ''Democrats hate people of faith,'' or ''Republicans want to eliminate separation of Church and State.'' Thinking Americans would ordinarily shun such extreme and ridiculous rhetoric. Yet, vituperation and extremism continue to rage on all sides. There have even been overt attempts to physically threaten and intimidate Federal judges. When the nation becomes this divided, when the spin becomes this mean, the destruction of basic principles which have been our guide for more than two centuries looms straight ahead. Moreover, the trashing and trampling of comity leaves ugly scars sure to fester and linger. How can we recover from the venom spewed by this dangerous political ploy and get on with the people's business, especially if the nuclear trigger is actually pulled?

At such times as these, the character of the leaders of this country is sorely tested. Our best leaders search for ways to avert such crises, not ways to accelerate the plunge toward the brink. Overheated partisan rhetoric is always available, although these days it seems to come especially cheap, but the great majority of our people want a healthy two-party system and leaders who know how to work together, despite serious differences.

The current uproar serves only to underscore the mounting number of problems not being addressed by this government. Over forty five million persons in our country, some 15% of our population cannot afford health care insurance. Our infant mortality rate is the second highest of the major industrialized countries of the world. Our deficits are skyrocketing. Poverty in these United States is rising, with 34 million people or 12.4% of the population living below the poverty line. Our veterans lack adequate medical care after they have risked life and limb for all of us. Our education system produces 8th graders ranked 19th out of38 countries in the world in math, and 12th graders ranked 19th out of 21 countries in both math and science. Yet, we debate and seek solutions to none of these critical problems, and instead focus all energy on the frenzy over the selection of judges, and seek as an antidote to our frustration, the preposterous solution of permanently crippling freedom of speech and debate and the right of a minority to dissent in the United States Senate.

It is very important to remember that the Senate has formalized ways of considering changes to our rules. Changes require 67 votes to curtail a filibuster of rules changes. If this nuclear option is employed in the way most frequently discussed, i.e. a ruling from the chair that a supermajority requirement for cloture on a filibuster in respect to amending the rules is unconstitutional, if sustained by 51 votes, cloture will require only a simple majority vote with respect to federal judgeships. There is nothing, then, except good sense, which seems to be in very short supply, to prevent majority cloture of any filibuster on any measure or matter, whether on the legislative or the executive calendar. Think of that! Rules going back for over 200 years and beyond, with roots in the early British Parliament, can be swept away by a simple majority vote. Because of demagoguery, lack of leadership, raw ambition, hysteria, and a state of brutal political warfare that wants no truce and brooks no peacemakers, we may destroy the U.S. Senate, leaving in our wake a President able to select and intimidate the courts like a King, and a system of government finally and irretrievably lost in a last pathetic footnote to Ben Franklin's rejoinder for the ages, ''a Republic, if you can keep it.'' This is scary!

I suspect that at least part of what all of this dangerous sound and fury is about can be explained by the advanced ages of several Supreme Court Justices, and rumors of the Chief Justice's coming retirement due to ill health. The White House does not want a filibuster in the Senate to derail a future choice for the Supreme Court.

Let me step into the brink and propose something that might calm some waters. In the 105th Congress, Senator ARLEN SPECTER and I introduced S. Res. 146, a bill which would establish an advisory role for the Senate in the selection of Supreme Court Justices. Except for a very limited ''floating'' of names shortly before the President sends up a nomination for the Supreme Court, no one gets to weigh in on the choices until after they are made. As in so many instances in Washington, broad consultation is nonexistent. In the case of potential occupants for the Federal Bench, that is a recipe for instant polarization before hearings on nominees are even held. Everyone quickly takes sides, and the steam mounts like in an overheated pressure cooker until the lid is about to blow off.

Therein lies the source of some of the fighting over the make-up of the Courts—no prior consultation, so, in effect, no ''advice'' independent of the White House. Our bill aims to release some of that steam in this way. The Senate Judiciary Committee would establish a pool of possible Supreme Court nominees for the President to consider, based on suggestions from Federal and State judges, distinguished lawyers, law professors, and others with a similar level of insight into the suitability of individuals for appointment to the Supreme Court.

Such a pool would fulfill the Senate's ''advice'' function under Article II, Section 2. In other words, everyone could get their ''oar'' into the prospective judicial waters. The President would of course be free to ignore the pool if he chose to do so. But, the ''advice'' required by the Constitution would be formally available, and the President would know that the individuals in the pool had received a bipartisan nod from the Senate Committee required to do the vetting. Such a pool might even be expanded to include all nominees for our federal judiciary.

Perhaps letting the Senate in on the judicial ''take off'' as well as the landing can help in the future to heal some of the anger which dominates the discussion of the Federal Courts these days.

But for now, like many of you, I simply hope and pray that cooler heads will prevail, and compromise (that fading art) will prevent us from heading over the cliff. There are, at least some efforts in that direction, but time is very short. In just a few days we may see the unbelievable come to pass—one man, the President, able to select the third, unelected branch of government, including the court of last resort, the Supreme Court; the Senate of the United States relegated to a second House of Representatives with six year terms; free speech and unfettered debate rejected; and the Constitutional checks and balances in sad and sorry tatters. Shame! What a shame!

In closing, let us remember the words spoken by Vice President Aaron Burr in 1805 when he addressed the Senate for the last time:

This House is a sanctuary; a citadel of law, of order, and of liberty; and it is here—it is here, in this exalted refuge; here, if anywhere, will resistance be made to the storms of political phrensy and the silent arts of corruption; and if the Constitution be destined ever to perish by the sacrilegious hands of the demagogue or the usurper, which God avert, its expiring agonies will be witnessed on this floor.

Ladies and gentlemen, the clock is running and the hour of fulfillment of Vice President Burr's prophesy is virtually at hand.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. I ask unanimous consent we be extended an extra 15 minutes, as well.

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

JUDICIAL NOMINATIONS

Mr. HATCH. The Senator from Delaware a few minutes ago claimed we have never changed our procedures by majority vote. Four times the distinguished Senator from West Virginia led this body to do exactly that when he was acting as majority leader—in 1977, 1979, 1980, and 1987. Using a ruling from the Chair and a majority of all the Senate, a simple majority, we changed procedure relating to both legislation and nominations. The record has to be made clear.

All we are asking is the 214-year tradition of the Senate that judicial nominees not be filibustered be followed. That has been the tradition of the Senate up until President Bush became President. All we are asking is that every one of these qualified nominees who have reached the floor receive an up-or-down vote. That is all we are asking.

These are highly qualified nominees. The ABA has ruled they are qualified in every case. They all have a majority bipartisan vote in their favor. If our colleagues on the other side do not want to vote for them, they can vote against them. That will be their right. I would fight always to maintain that right. But give them a vote, vote up or down. That is what we have always done for 214 years before this President became President.

The actions of our colleagues on the other side amount to changing that 214-year traditional history of this Senate.

By the way, we never called this the nuclear option. It was called the nuclear option by the Democrats. We called it the constitutional option because the Constitution says the President has the right to appoint and nominate these people for judicial positions. We have the right to advise and—it is sometimes left off in this body—consent, which means a vote up and down.

That is what I think our colleagues ignore. This is a dangerous thing. I call it the constitutional option, or I call it the Byrd option because our distinguished friend, the Senator from West Virginia, is the one who used this four times.

If politics is a medicine, an effective prescription gives an accurate diagnosis. I take a step back and offer a diagnosis of our current struggle over how to conduct the judicial confirmation process. I hope this will bring a few pieces together, connect some dots, and provide a little perspective.

The first principle is every judicial nomination reaching the Senate deserves an up-or-down vote.

This principle has constitutional roots, historical precedent, and citizen support. I begin with the Constitution because that is where we should always begin. The Constitution is the supreme law of the land. Along with the Declaration of Independence, it is one of the foundational organic laws of the United States. It is the charter that each of us, as Senators, swears an oath before God to preserve, protect, and defend.

That Constitution separates the three branches of Government, assigning legislation to us in the legislative branch, and assigning appointments to the President in the executive branch. We have heard that the Constitutional Convention considered other arrangements for appointing judges. That may be, but the Constitutional Convention rejected those arrangements. Rejected ideas do not govern us. The Constitution does. And the Constitution makes the President, in Alexander Hamilton's words, the ''principal agent'' in appointments, while the Senate is a check on that power.

Giving judicial nominations reaching the floor an up-or-down vote, that is, exercising our role of advice and consent through voting on nominations, helps us resist the temptation of turning our check on the President's power into a force that can destroy the President's power and upset the Constitution's balance.

Historically, we have followed this standard of everybody who reaches the floor getting an up-or-down vote. When Republicans ran the Senate under President Clinton, we gave each of his judicial nominations reaching the floor a final confirmation decision, an up-or-down vote. We took cloture votes, that is, votes to end debate, on four of the hundreds of nominees reaching us here. All four were confirmed. As a matter of fact, we confirmed 377 judges nominated by President Clinton, almost the same number as the all-time confirmation champion, and that was Ronald Reagan, who got 382. But Ronald Reagan had 6 years of a Republican Senate to help him. President Clinton only had 2 years of a Democrat Senate to help him. Yet, with the aid of the Republicans on the Judiciary Committee and in this body, he got 377 approved.

In fact, even on the most controversial appeals court nominations by President Clinton, the Republican leadership used cloture votes to prevent filibusters and ensure up-or-down votes, exactly the opposite of how cloture votes are being used during President Bush's Presidency.

This principle that every judicial nomination reaching the Senate floor deserves an up-or-down vote not only has constitutional roots and historical precedent, it also has citizen support. I saw in the Washington Post yesterday a poll framed in partisan terms, asking whether Senate rules should be changed ''to make it easier for the Republicans to confirm Bush's judicial nominees.''

With all due respect, this question could easily have been written in the Democrats' new public relations war room. I am actually surprised that such a biased question did not get even more than 66-percent support.

A more balanced, neutral, fair poll was released yesterday, asking whether

Senate procedures should make sure that the full Senate votes up or down on every judicial nomination of any President. The results, not surprisingly, were exactly the opposite of the biased poll, with 64 percent of Americans, including 59 percent of moderates and almost half of all liberals, embracing this commonsense, fair, and traditional standard.

The second aspect of this diagnosis is that the judicial nominees being denied this traditional up-or-down vote are highly qualified men and women, with majority, bipartisan support.

Last week, I addressed how opponents of President Bush's nominees play games with words such as ''extremist.'' Just as they want to talk about a judicial appointment process the Constitution did not establish, these critics want to talk about everything but what these nominees would do on the bench. We know, from abundant testimony by those who know these nominees best, that no matter how provocative their speeches off the bench or strongly held beliefs in their hearts and minds, these nominees are or would be fair, impartial, and even-handed on the bench.

Yet they are called extremists. All 10 of them—there are only 7 remaining—but all 10 of them had qualified ratings, and most well qualified, the highest rating of the American Bar Association. By the way, that was considered the ''gold standard'' during the Clinton years by our friends on the other side.

Now this is the real standard.

It is hard to believe we are actually arguing about whether we should vote on judicial nominations and whether highly qualified nominees, with majority support—bipartisan, majority support—should be confirmed. Yet the third part of this diagnosis is that Senate Democrats are trying to change our tradition of giving judicial nominations reaching the Senate floor an up-or-down vote. Senators, of course, are free to vote against them for any reason. We must, of course, have a full and vigorous debate about these nominees and their qualifications.

The critics, however, do not want to have that debate. Democrats in this body and the leftwing interest groups that, to a certain extent, seem to control them, want only to seize what they cannot win through the fair, traditional system. Beginning in the 108th Congress, for the first time in American history, they are now using the filibuster not to debate but to defeat majority-supported judicial nominations.

They are trying to rig the confirmation process, to pry us away from our tradition that respected the separation of powers, and force us into a brave, new world which turns the judicial appointment process inside out. They want to turn our check on the President's appointment power into a force that hijacks that power altogether. That would be serious and constitutionally suspect if a Senate majority did it. It is even more serious when, as we see today, a minority of Senators—all partisan Senators—tries to capture the process.

For 2 years now, we have heard claims that these filibusters are nothing new, that they have been part and parcel of how the Senate has long done its confirmation business. While some questions in this debate may be subjective and complex, this is not one of them. The current filibusters target bipartisan, majority-supported judicial nominations, and they defeat them by preventing confirmation votes. Either that happened before the 108th Congress or it did not.

Let us look at what our Democratic colleagues have claimed. On March 11, 2003, the distinguished Senator from Vermont displayed here on the Senate floor a chart titled: ''Republican Filibusters of Nominees.'' He said his list proved that Republicans have ''succeeded in blocking many nominees by cloture votes.'' Anyone can look it up for him or herself. The whole chart is right there on page S3442 of the CONGRESSIONAL RECORD.

It turns out only 6 of the 19 names on the chart were judicial nominations, that the Senate actually confirmed 5 of those 6, and the other one did not have majority support. And there was a real question whether that was a filibuster raised, not in the least sense by the person who conducted the debate on the Republican side, Senator Robert Griffin, who had an impeccably honest—and still does—an impeccably honest reputation. He said there was never a desire to filibuster Justice Fortas. He said they wanted 2 more days of debate to make their case. But, he said, they had enough votes to defeat him up and down. Now, he was here on the Senate floor. He knew it. He led the fight. And the votes were bipartisan, almost equal. It turns out, again, that only 6 of the 19 names on the chart were judicial nominations, that the Senate actually confirmed 5 of them, and the only one they did not was Justice Fortas, because Lyndon Johnson pulled him, not wanting to be embarrassed.

Far from justifying today's filibusters, the chart of the distinguished Senator from Vermont proved no precedent exists at all.

On November 12, 2003, the Senator from Vermont tried again, this time with a list of what he claimed were Clinton appeals court nominees supposedly blocked by Republicans. Once again, the list included nominations the Senate confirmed—every one of them. How can a confirmed nomination be called a blocked nomination? It cannot. Not a single nomination on Senator LEAHY's list is similar to the nominations being filibustered today.

That same day, November 12, 2003, the distinguished Senator from Illinois, Mr. DURBIN, named 5 judicial nominations which he said had been filibustered. Once again, not one of them is a precedent for filibusters happening today. You would think no one with a straight face would claim that ending debate and confirming nominations is somehow precedent for not ending debate and refusing to confirm nominations.

On April 15, 2005, the distinguished assistant minority leader, Senator DURBIN, expanded his previous list, now offering us 12 examples of what he said were judicial nominations requiring at least 60 votes for cloture to end a filibuster. I addressed this in more detail last week. Not one—not one—of those 12 of Senator DURBIN's supposed precedents is any precedent at all.

The first nomination on his list occurred in 1881, 36 years before we even had a cloture rule in the Senate. In fact, if we truly did what he apparently wants us to do, and treated his listed examples as a confirmation guide, we would vigorously debate judicial nominations, invoke cloture if we needed to, and then vote on the confirmations. That is what happened.

This game continued as recently as 2 months ago. On Monday, April 25, on CNN's ''Crossfire'' program, the leader of a prominent leftwing group claimed that more than 30 nominations—here is the list—had been filibustered. I have this list right here in my right hand. It is titled: ''Filibusters of Nominations.'' It lists 13 judicial nominations out of the 30, and not one of them is at all like the filibusters being conducted today—not one. We did not even take a cloture vote on two of them. We invoked cloture on eight of them. We confirmed 12 of the 13. And the one we did not, did not have majority support, the Fortas nomination, but had bipartisan opposition.

Accepting such fraudulent arguments requires believing that ending debate on judicial nominations is the same as not ending debate, that confirming judicial nominations is the same as not confirming them, and that judicial nominations without majority support are the same as those with majority support. As you can see, the liberal propaganda machine has been working overtime.

In addition to these bizarre claims I described, they worked to turn what was once common sense and accepted fairness into something that sounds sinister and unseemly. They manufacture nasty phrases such as ''court packing'' and ominous warnings about ''one-party rule.'' Now, we are told, preventing up-or-down votes on even majority-supported judicial nominations is the only way to prevent our entire constitutional order from imploding. The sky is falling, and we are all about to slide into the abyss.

The purveyors of this fantasy would have us look to President Franklin Delano Roosevelt who, they tell us, wanted to pack the Supreme Court. The Senate rejected his legislative proposal to expand the Court so he could appoint more Justices. By taking this stand, the storytellers say, the Senate kept one-party rule from packing the Court.

Well, as Paul Harvey might say: Here is the rest of the story.

The Senate, even though dominated by President Roosevelt's own party, did not support this legislative plan. And it turns out President Roosevelt did not need any legislative innovations to pack the Supreme Court. He packed it all right, doing it the old-fashioned way, by appointing eight out of nine Justices in 6 years. Mind you, during the 75th to the 77th Congress, Democrats outnumbered Republicans by an average of 70 to 20. Now, that is one-party rule.

In those years, from 1937 to 1943, our cloture rule applied only to bills. This meant that ending debate on other things, such as nominations, required unanimous consent. A single Senator in that tiny, beleaguered minority could conduct a filibuster of President Roosevelt's nominations and thwart the real court packing that was in full swing.

Now, if the filibuster were the only thing preventing one-party rule from packing the courts, and the filibuster were so easily used, surely there must be in history filibusters of President Roosevelt's Supreme Court nominations. If the warnings, frantic pleas, and hysterical fundraising appeals we hear today make any sense at all, the filibuster would certainly have been used in FDR's time.

I hate to burst anyone's bubble, but there were no filibusters, not even by a single Senator, not against a single nominee. In fact, FDR's 8 Supreme Court nominees were confirmed in an average of 13 days, and 6 of the 8 were confirmed without even a rollcall vote.

So if this is to protect the minority, why has it not ever happened before President Bush became President? Even when we look at the very examples and stories the other side uses, we see no support for using the filibuster against majority-supported judicial nominations.

Last week, here on the Senate floor, the distinguished Senator from Illinois repeated a selective version of this FDR story and asked what would happen today in a Senate dominated by the President's party. He asked:

Will they rise in the tradition of Franklin Roosevelt's Senate?

Well, I hope we do. I hope the Senate does exactly what Franklin Roosevelt's Senate did, by debating and voting on the President's judicial nominations. Franklin Roosevelt's Senate did not use the filibuster, even when the minority was much smaller and the filibuster much easier to use, and this Senate should not do so, either.

Finally, the fourth piece to this diagnosis of our current situation is that Senate Democrats have threatened to shut down the Senate if the majority moves us back to the tradition—the 214-year tradition—of debating and voting on judicial nominations.

To avoid what most Americans believe Senators come to Washington to do—debate and vote—we are now threatened with a party policy of open obstruction, a nuclear option of shutting down the Senate, at least to anything but what they agree to. I said a few minutes ago that the Constitution's separation of powers assigns legislative business to Congress and executive business, including appointments, to the President. Some Senators on the other side of the aisle are saying if they cannot hijack what is not theirs, they will destroy what is theirs. If they cannot abandon Senate tradition and use the filibuster to defeat majority-supported judicial nominations, they will undercut and disable the legislative process. And they call us radical.

The Constitution gives the power of nomination and appointment to the President. The Senate provides a check on that power. I believe we must preserve the system of separated powers and checks and balances and resist those who would radically alter that system, turning the Senate's check on the President's power into a force that can overwhelm the President's power.

Every judicial nomination reaching the Senate floor deserves an up-or-down vote. I argued that during the Clinton years, and I prevailed as chairman of the Judiciary Committee. That principle has constitutional roots, historical precedent, and citizen support. President Bush has sent two highly qualified nominees that we know have bipartisan majority support. They deserve to be treated decently and, after a full and vigorous debate, given an up-or-down vote.

Our colleagues on the other side are trying to change our tradition. For the first time in more than two centuries, they want to use filibusters to block confirmation votes on judicial nominations here on the Senate floor. This radical innovation is not needed to prevent one-party rule from packing the courts. Republicans resisted using the filibuster under Roosevelt and Democrats should resist using it today.

Finally, all Americans should be most concerned with the threat of some of our colleagues on the other side. Because they are unable to seize control of a judicial appointment process that does not belong to the Senate, Democrats say they will shut down the legislative process that does belong to the Senate. This cannot stand. With all due respect, they need to get both their principles and their priorities in order.

Our former majority leader Bob Dole has a thoughtful column in today's New York Times also addressing Senate tradition and the prospect of returning to that tradition. No one loves this institution more than Senator Dole, and I think I am in that category, too.

I ask unanimous consent that his column be printed in the RECORD.

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

[From the New York Times, Apr. 27, 2005]

UP, DOWN OR OUT

(By Senator Bob Dole)

In the coming weeks, we may witness a vote in the United States Senate that will define the 109th Congress for the ages. This vote will not be about war and peace, the economy or the threat from terrorism. It will focus instead on procedure: whether the Senate should amend its own rules to ensure that nominees to the federal bench can be confirmed by a simple majority vote.

I have publicly urged caution in this matter. Amending the Senate rules over the objection of a substantial minority should be the option of last resort. I still hold out hope that the two Senate leaders will find a way to ensure that senators have the opportunity to fulfill their constitutional duty to offer ''advice and consent'' on the president's judicial nominees while protecting minority rights. Time has not yet run out.

But let's be honest: By creating a new threshold for the confirmation of judicial nominees, the Democratic minority has abandoned the tradition of mutual self-restraint that has long allowed the Senate to function as an institution.

This tradition has a bipartisan pedigree. When I was the Senate Republican leader, President Bill Clinton nominated two judges to the federal bench—H. Lee Sarokin and Rosemary Barkett—whose records, especially in criminal law, were particularly troubling to me and my Republican colleagues. Despite my misgivings, both received an up-or-down vote on the Senate floor and were confirmed. In fact, joined by 32 other Republicans, I voted to end debate on the nomination of Judge Sarokin. Then, in the very next roll call, I exercised my constitutional duty to offer ''advice and consent'' by voting against his nomination.

When I was a leader in the Senate, a judicial filibuster was not part of my procedural playbook. Asking a senator to filibuster a judicial nomination was considered an abrogation of some 200 years of Senate tradition.

To be fair, the Democrats have previously refrained from resorting to the filibuster even when confronted with controversial judicial nominees like Robert Bork and Clarence Thomas. Although these men were treated poorly, they were at least given the courtesy of an up-or-down vote on the Senate floor. At the time, filibustering their nominations was not considered a legitimate option by my Democratic colleagues—if it had been, Justice Thomas might not be on the Supreme Court today, since his nomination was approved with only 52 votes, eight short of the 60 votes needed to close debate.

That's why the current obstruction effort of the Democratic leadership is so extraordinary. President Bush has the lowest appellate-court confirmation rate of any modern president. Each of the 10 filibuster victims has been rated ''qualified'' or ''well qualified'' by the American Bar Association. Each has the support of a majority in the Senate. And each would now be serving on the federal bench if his or her nomination were subject to the traditional majority-vote standard.

This 60-vote standard for judicial nominees has the effect of arrogating power from the president to the Senate. Future presidents must now ask themselves whether their judicial nominees can secure the supermajority needed to break a potential filibuster. Political considerations will now become even more central to the judicial selection process. Is this what the framers intended?

If the majority leader, Bill Frist, is unable to persuade the Democratic leadership to end its obstruction, he may move to change the Senate rules through majority vote. By

doing so, he will be acting in accordance with Article I of the Constitution (which gives Congress the power to set its own rules) and consistently with the tradition of altering these rules by establishing new precedents. Senator Frist was right this past weekend when he observed there is nothing ''radical'' about a procedural technique that gives senators the opportunity to vote on a nominee.

Although the Democrats don't like to admit it, in the past they have voted to end delaying tactics previously allowed under Senate rules or precedents. In fact, one of today's leading opponents of changing the Senate's rules, Senator Robert Byrd, was once a proponent of doing so, and on several occasions altered Senate rules through majoritarian means. I have great respect for Senator Byrd, but Senate Republicans are simply exploring the procedural road map that he himself helped create.

In the coming days, I hope changing the Senate's rules won't be necessary, but Senator Frist will be fully justified in doing so if he believes he has exhausted every effort at compromise. Of course, there is an easier solution to the impasse: Democrats can stop playing their obstruction game and let President Bush's judicial nominees receive what they are entitled to: an up-or-down vote on the floor of the world's greatest deliberative body.

Mr. HATCH. As our current majority leader Bill Frist put it a few days ago: I never thought it was a radical thing to ask Senators to vote. That is what we have traditionally done on judicial nominations that reach the floor, and that traditional standard should apply across the board no matter which party controls the White House and no matter which party controls the Senate. We should bind both parties, Republicans and Democrats, to do what is right.

That is the diagnosis, and I hope we see an effective cure soon so we can get back to doing the people's business.

I started off by saying one of the problems here is that every one of these Presidential nominees who reaches the floor should have an up-or-down vote, especially since they are listed as qualified by the American Bar Association, most of them well qualified, the highest rating you can have. They all have majority bipartisan support. We should not change 214 years of Senate tradition because some in this body don't like President Bush's nominees.

People such as Priscilla Owen—she broke through the glass ceiling for women in this country and became a major partner in a major law firm. Her last election to the Texas Supreme Court was over 75 percent. She had every editorial board in the State of Texas supporting her; 15 former State bar presidents supported her, most of whom were Democrats. Yet they have called her an extremist.

Janice Rogers Brown, a sharecropper's daughter, came up the hard way, put herself through college and law school as a single mother, worked in California State government in a variety of positions, wound up on the California Supreme Court where she wrote, at least in the last number of years, the majority of the majority opinions. She got reelected by 84 percent of the California voters, more votes than any other person running for the Supreme Court that year, including her colleagues. Yet she is called an extremist because she is a conservative African American.

It is very dangerous stuff to say this will create nuclear war because we want to continue 214 years of Senate tradition. That is dangerous stuff. It is the wrong stuff. We ought to give these people a simple, straightforward up-or-down vote.

I notice the distinguished Senator from North Carolina is waiting. I yield the floor.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from North Carolina.

Mr. DURBIN. Madam President, if the Senator will yield briefly for a unanimous consent request, I ask unanimous consent that when the Senator from North Carolina has completed her remarks, I be recognized.

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

The Senator from North Carolina.

Mrs. DOLE. Madam President, today I want to express my strong concern over the judicial nominations process. It is clear this process has completely broken down. Unfortunately, the rhetoric surrounding this important issue has become increasingly bitter over the past several weeks. Sharp words have been exchanged. The intentions of my fellow Republicans have been unfairly characterized and my colleagues on the other side of the aisle have even gone so far as to threaten to shut down the Government if the Senate were to exercise its constitutional right to set its own procedural rules. That is nuclear.

It is time to put aside the rhetoric for a moment and look at the facts. It is a fact that my Democratic colleagues have taken the unprecedented step of blocking not 1, not 2, but 10 nominees of President Bush to the Federal circuit courts of appeal. As a result, President Bush has the lowest appeals court confirmation rate for any first-term President since Franklin Roosevelt. It is a fact that each of these filibustered nominees has the support of a majority of Senators and each has received a rating of qualified or well qualified by the American Bar Association. It is a fact that today for the first time in our Nation's history, a President's nominees to the Federal bench are being required to receive a 60-vote supermajority rather than the traditional majority, the up-or-down vote, that has been the standard for 214 years. That is nuclear.

It is a fact that the ongoing filibuster of the President's nominees has prevented the Senate from fulfilling its constitutional duty to provide advice and consent to the appointment of men and women chosen to sit on our Nation's highest courts.

The former minority leader from South Dakota once lamented he found it simply baffling that a Senator would vote against even voting on a judicial nomination. I completely agree and note that every single one of President Clinton's judicial nominees who reached the Senate floor received an up-or-down vote. And contrary to what my friends across the aisle are so fond of saying, this includes the Paez and Berzon nominations to the Ninth Circuit.

By imposing a supermajority requirement for judicial nominees, the Democrats are disrupting the careful balance struck in the Constitution itself between Congress and the executive branch and allowing political considerations to play an even larger role in the confirmation process. They should heed the words of prominent Democratic legal advisor Professor Michael Gerhardt who, in another context, has written that a supermajority requirement for confirming judges would be ''problematic because it creates a presumption against confirmation, shifts the balance of power to the Senate, and enhances the power of special interests.''

For the last several weeks, instead of engaging in the hard work of compromise, some of my colleagues on the other side of the aisle have chosen to travel down the political road. We have seen pro-filibuster press conferences, other political events, and even an obstruction rally with the extreme liberal group MoveOn.Org. Liberal special interest groups are now spending millions of dollars across the country on television ads in support of judicial filibusters. One cannot help but reach the conclusion that these organizations, having failed to defeat President Bush at the ballot box in November, are now trying to advance their own liberal agenda through the only avenue left open to them—the Federal courts.

The judicial filibuster is their way of establishing a liberal litmus test. If you are not a liberal activist, you cannot serve on a Federal circuit court of appeals, or at least that is what the new standard appears to be.

Until now every judicial nominee with support from a majority of Senators was confirmed. The majority vote standard was used consistently throughout the 18th, 19th, and the 20th century for every President's nominees, Democrat or Republican, even Whig, until George W. Bush's judicial nominations were subjected to a 60-vote standard.

Let me emphasize one additional point. My friends across the aisle are well aware that no Republican—not one—is seeking to eliminate the ability of Senators to filibuster on legislative matters. We all recognize that the legislative filibuster has served an important function in our system of checks and balances. It is ironic, though, that nine of my Senate colleagues who are now working so hard to block President Bush's judicial nominees once advocated the elimination of the legislative filibuster. So who is playing politics?

I commend Majority Leader FRIST for his patience in trying to bring both sides together to develop a reasonable compromise on this difficult issue. Certainly no other majority leader has been faced with such unprecedented tactics in blocking the Senate's ability to fulfill its constitutional duty to provide advice and consent. I know Senator FRIST will continue to do what he feels is right for this body and for our country.

If he decides he is confronted with no other choice but to proceed with the constitutional option, I will fully support him. This approach is consistent with Senate precedent and has been employed in the past by some of the best parliamentary minds in this Chamber.

Our goal is to restore the practice, the tradition of 214 years, a simple majority vote for a President's nominees to the Federal bench.

I yield the floor.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is now 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. 567, to provide a complete substitute.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. INHOFE. Madam President, this is the third day we have been on a bill we have been working on for 2½ years. It is the same bill essentially that was passed last year by a margin of 76 to 21. We are anxious to get people to come down to the floor for amendments. I don't know of anyone coming down at this time. But I encourage all Members on both sides of the aisle to come down and utilize this time so we can get the amendments behind us.

I understand the Senator from Illinois has some comments he wishes to make. I yield to him some of our time at this time.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Madam President, I thank the chairman of the committee. Let me say I share his sense of urgency about the underlying bill. This is a bipartisan bill, a bill Democrats and Republicans want to see passed, a bill to finance the building of roads and bridges and airports, to finance mass transit in what is critical infrastructure for America's economy. I do not have an amendment to the bill, but if I did, I would offer it because I think those who have them should bring them to the floor so we can move and get it done before we take a recess next week. I urge my colleagues on the Democratic side to follow the admonition of the chairman.

What brings me to the floor was a statement made earlier by the Senator from Utah which made reference to me. Senator ORRIN HATCH and I are friends. We disagree on a lot of things.

We vote differently on a lot of issues and we debate furiously, but we get along fine. I think that is what life should be like and what the legislative process should be like. He made a reference earlier to this whole question of the nuclear option, to which I would like to return for a few moments.

First, what is the nuclear option? People who don't follow the Senate on a regular basis have to wonder are they using nuclear weapons on the floor of the Senate? What could it be? ''Nuclear Option'' was a phrase created by Republican Senator TRENT LOTT to describe a procedure that might be used to change the rules of the Senate. The reason Senator LOTT called it the nuclear option was because it is devastating in its impact to the tradition and rules of the Senate.

I will put it into context. The Senate was created to give the minority in the Senate, as well as in the United States, a voice. There are two Senators from every State, large and small. Two Senators from the smallest State have the same vote on the floor of the Senate as Senators from larger States, such as California, New York, Illinois, and Texas. That is the nature of the Senate. The rules of the Senate back that up. The rules of the Senate from the beginning said if any Senator stood up and objected, started a filibuster, the Senate would come to a stop. You think to yourself, how can you run a Senate if any Senator can stop the train? Well, it forces you, if you are going to move something forward in the Senate, to reach across the aisle to your colleagues, to compromise, to find bipartisanship, so that things move through in a regular way and in a bipartisan way. That is the nature of the filibuster.

Over the years, it has changed. You saw the movie ''Mr. Smith Goes to Washington,'' when Jimmy Stewart stood at his desk, with his idealism and his youth, arguing for his cause until he collapsed on the floor. He was exercising a filibuster because he believed in it so intensely. We have said over the years that you can do that to any nominee, bill, or law on the floor of the Senate; but if a large number of Senators, an extraordinary number of Senators, say it is time for the filibuster to end, it would end. The vote today is 60 votes. So if I am perplexed by an amendment offered by one of my colleagues, and I stand up to debate it and decide I am going to hold the floor of the Senate as long as my voice and body can hold out, I can do that, until such point as 60 colleagues, Democrats and Republicans, come together and say: Enough, we want to move to a vote. That is what it is all about.

So what has happened is the Republicans now control the House, Senate, and the White House. What they have said is they want to change the rules. They want to change the rules in the middle of the game because they don't like the fact that Democratic Senators have used the filibuster to stop 10 judicial nominees President Bush has sent to Congress, sent to the Senate.

Now, for the record, the President sent 215 nominees; 205 were approved and only 10 were not. Over 95 percent of the President's judicial nominees have gone through. We have the lowest vacancy rate on the Federal bench in modern memory. So we don't have outrageous vacancies that need to be filled quickly. We decided—those of us who voted for the filibusters—that these 10 nominees went way too far; their political views were inconsistent with the mainstream of America. They were not consistent with the feelings and values of families across the country on issues as diverse as the role of the Federal Government in protecting health and safety, which is an issue nominee Janice Rogers Brown takes a position on that is hard to believe. She has taken a position on a case—a famous case called the Lockner case—which would basically take away the power of the Federal Government to regulate areas of health and safety when it comes to consumers and the environment. It is a radical position.

And then another nominee, William Myers—my concern about him and the concern of many Senators is the fact that he has taken a radical position when it comes to our Nation's treasury and heritage, our natural and public lands. He has taken a position where he backs certain lobby groups, but there is one that we think is inconsistent with mainstream thinking in America. So there is an objection.

Other nominees have taken what we consider to be far-out positions that don't reflect the mainstream of America and we have objected, which is our right. Now the President says: Enough, I am tired of losing any nominee to the Senate. Don't we have 55 Republicans? Should we not get what we want?

He is not the first President who has felt that way. Thomas Jefferson felt that way. Thomas Jefferson, in the beginning of his second term, came to the Senate and said: I am sick and tired of the judges who have been appointed to the Supreme Court. I want to start impeaching them.

You know what Jefferson's party said? No, Mr. President, you are wrong. The Constitution is more important than your Presidential power. They said no to Thomas Jefferson.

Franklin Roosevelt did the same thing at the beginning of his second term. He was unhappy that his New Deal legislation was being rejected. He