Senators Speak Out

Killing Filibuster a Move to Dictatorship

Nov. 23—*Of the many condemnations of the efforts to remove the right of filibuster from the United States Senate, the following three stand out due to their clarity, and the credentials of their authors. The first, excerpted from a speech on the Senate floor by West Virginia Democrat Robert C. Byrd (d. 2010), was from March 1, 2005, when the Cheney-Bush Administration was threatening to ram through the "nuclear option" to eliminate the right of filibuster of Presidential judicial appointments. Senator Byrd was known as the "conscience of the Senate" for his devotion to the U.S. Constitution.*

The second set of excerpts comes from none other than Vice President Joe Biden, himself a 36-year veteran of the Senate, who prepared a written outline of remarks he made to that body on April 27, 2005, also in the context of the drive by the Republican administration to ride roughshod over the Senate filibuster rules.

The third set of excerpts comes from the current chairman of the Senate Armed Service Committee, Sen. Carl Levin (D-Mich.), who was one of the three Democrats to oppose the elimination of the filibuster this week.

Robert C. Byrd

…The so-called nuclear option purports to be directed solely at the Senate's advice and consent prerogatives regarding federal judges. But, the claim that no right exists to filibuster judges aims an arrow straight at the heart of the Senate's long tradition of unlimited debate.

The Framers of the Constitution envisioned the Senate as a kind of executive council; a small body of legislators, featuring longer terms, designed to insulate members from the passions of the day.

The Senate was to serve as a check on the Executive Branch, particularly in the areas of appointments and treaties, where, under the Constitution, the Senate passes judgement absent the House of Representatives. James Madison wanted to grant the Senate the power to select judicial appointees with the Executive relegated to the sidelines. But a compromise brought the present arrangement; appointees selected by the Executive, with the advice and consent of the Senate. Note that nowhere in the Constitution is a vote on appointments mandated.

When it comes to the Senate, numbers can deceive. The Senate was never intended to be a majoritarian body. That was the role of the House of Representatives, with its membership based on the populations of states. The Great Compromise of July 16, 1787, satisfied the need for smaller states to have equal status in one House of Congress: the Senate.

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Sen. Robert Byrd (in 2005):"Hitler never abandoned the cloak of legality.… Instead, he turned the law inside out and made illegality legal. And that is what the nuclear option seeks to do to Rule XXII of the Standing Rules of the Senate."

The Senate, with its two members per state, regardless of population is, then, the forum of the states. Indeed, in the last Congress, 52 members, a majority, representing the 26 smallest states accounted for just 17.06% of the U.S. population. In other words, a majority in the Senate does not necessarily represent a majority of the population. The Senate is intended for deliberation not point scoring. It is a place designed from its inception, as expressive of minority views. Even 60 Senators, the number required for cloture, would represent just 24% of the population, if they happened to all hail from the 30 smallest states. Unfettered debate, the right to be heard at length, is the means by which we perpetuate the equality of the states.

…Free and open debate on the Senate floor ensures citizens a say in their government. The American people are heard, through their Senators, before their money is spent, before their civil liberties are curtailed, or before a judicial nominee is confirmed for a lifetime appointment. We are the guardians, the stewards, the protectors of our people. Our voices are their voices.

If we restrain debate on judges today, what will be next: the rights of the elderly to receive Social Security; the rights of the handicapped to be treated fairly; the

rights of the poor to obtain a decent education? Will all debate soon fall before majority rule?

Will the majority someday trample on the rights of lumber companies to harvest timber, or the rights of mining companies to mine silver, coal, or iron ore? What about the rights of energy companies to drill for new sources of oil and gas? How will the insurance, banking, and securities industries fare when a majority can move against their interests and prevail by a simple majority vote? What about farmers who can be forced to lose their subsidies, or Western Senators who will no longer be able to stop a majority determined to wrest control of ranchers precious water or grazing rights? With no right of debate, what will forestall plain muscle and mob rule?

Many times in our history we have taken up arms to protect a minority against the tyrannical majority in other lands. We, unlike Nazi Germany or Mussolini's Italy, have never stopped being a nation of laws, not of men.

But witness how men with motives and a majority can manipulate law to cruel and unjust ends. Historian Alan Bullock writes that Hitler's dictatorship rested on the constitutional foundation of a single law, the Enabling Law. Hitler needed a two-thirds vote to pass that law, and he cajoled his opposition in the Reichstag to support it. Bullock writes that Hitler was prepared to promise anything to get his bill through, with the appearances of legality preserved intact. And he succeeded.

Hitler's originality lay in his realization that effective revolutions, in modern conditions, are carried out with, and not against, the power of the State: the correct order of events was first to secure access to that power and then begin his revolution. Hitler never abandoned the cloak of legality; he recognized the enormous psychological value of having the law on his side. Instead, he turned the law inside out and made illegality legal.

And that is what the nuclear option seeks to do to Rule XXII of the Standing Rules of the Senate.

Joseph Biden

In his outline for a floor statement, to be made on April 27, 2005, which he entitled "Jumping Off the Precipice," Sen. Joe Biden provided a cogent summary of the dangers of the "nuclear option."

Part 1: The Founders, History, and Tradition

Checks and Balances: The Senate's Role in the Confirmation Process. Our Founders made a conscious decision to set up a system of government that was different than the English parliamentary system. They wanted a system of checks and balances in order to protect against the excesses of any temporary majority. With respect to judicial nominations, the Founders set up 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.

The Senate's International Functioning: How and Why the Senate is Different. The Senate was designed to play the independent, moderating, and reflective role in our government; to be the "cooling saucer." The Senate would be a different type of legislative body; it would be a consensus body that respected the rights of the minority. The way this played out in practice was through the right of extended debate. Extended debate—the filibuster—was a means to reach a more moderate result, to achieve compromise and common ground, to allow Senators, as Daniel Webster had put it, to be men "of absolute independence. . . ."

Part II: The Current Double-Fisted Assault on the Senate

However serious the immediate consequences of the "nuclear option," the more important consequences is the long-term deterioration of the Senate. Put simply, the "nuclear option" threatens a fundamental bulwark of our constitutional design; it is antithetical to the system of governance our Founders gave us and would cause irreparable harm beyond the immediate political aftermath. No partisan disagreement, however passionate, can possibly justify that harm.

Assault 1—Substance: The End of Minority Right. The "nuclear option" would eviscerate the Senate and turn it into the House of Representatives; no longer would the Senate be that "different kind of legislative body" that the Founders intended. 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 rubberstamp for every judicial nomination. The "nuclear option" is not simply a change in degree but a change in kind. It is a discontinuous action that is a seachange, fundamentally restructuring what the Senate is all about—a change from a body that protects minority rights to one that is purely majoritarian. 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.

Assault 2—Procedure: Changing the Senate Rules Outside the Senate Rules. The fight over the "nuclear option" is not just about the procedure for confirming judges. It's also fundamentally about the integrity of the United States Senate. Put simply, the "nuclear option" changes the rules of the game mid-play. Once the Senate starts changing its rules *outside* out its rules—which is what the "nuclear option" does and something never done before in the history of the Republic—there's nothing to stop a temporary majority from doing so whenever a particular rule would pose an obstacle to their political agenda. This is a slippery slope toward the undoing of the United States Senate.

Carl Levin

Since its creation, the United States Senate has been uniquely committed to protecting the rights of minorities. It has done so in part through its rules governing debate. Its rules protect the right of members to speak until a super-majority is ready to end debate and to proceed to a vote on the matter before it. Matters are then decided by a majority vote, except for treaties, veto overrides and certain points of order.

Of particular importance in protecting minority rights is Senate Rule 22, which requires a supermajority of two-thirds of Senators to end debate on any proposal to amend the Senate Rules. In the past, a few Senate majorities, frustrated by their inability to get certain bills and nominations to a vote, have threatened to ignore this two-thirds requirement and instead to change one or more debate rules by a simple majority. Because that step would change the Senate into a legislative body where the majority can, whenever it wishes, change the rules, it has been dubbed the "nuclear option."

Arguments about the nuclear option are not new. This question has been debated for decades. Confronting the same question in 1949, Senator Arthur Vandenberg, a giant of the Senate and one of my predecessors from Michigan, said that if the majority can change the rules at will, "there are no rules except the transient, unregulated wishes of a majority of whatever quorum is temporarily in control of the Senate." Changing the rules, in violation of the rules, by a simple majority vote is not a one-time action. If a Senate majority demonstrates it can make such a change once, there are no rules that bind a majority, and all future

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Sen. Carl Levin (in 2005): "Pursuing the nuclear option in this manner removes an important check on majority overreach which is central to our system of government."

majorities will feel free to exercise the same power, not just on judges and executive appointments but on legislation.

We have avoided taking those nuclear steps in the past, sometimes barely. And I am glad that we avoided the possible use of the nuclear option again earlier this year when our leaders agreed on a path allowing the Senate to proceed to a vote on the President's nominees for several unfilled vacancies in his administration.

Today, we once again are moving down a destructive path. The issue is not whether to change the rules. I support changing the rules to allow a President to get a vote on nominees to executive and most judicial positions. This is not about the ends, but means. Pursuing the nuclear option in this manner removes an important check on majority overreach which is central to our system of government. As Senator Vandenberg warned us, if a Senate majority decides to pursue its aims unrestrained by the rules, we will have sacrificed a professed vital principle for the sake of momentary gain.

…In the short term, judges will be confirmed who should be confirmed. But when the precedent is set that a majority can change the rules at will on judges, that precedent will be used to change the rules on consideration of legislation, and down the road, the hard-won protections and benefits for our people's health and welfare will be less secure.