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'Nuking' Free Speech

By Robert Byrd

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A "nuclear option" is targeting the Senate. No, this isn't some terrorist plot. Rather, some in the Senate are considering dropping a legislative bomb that threatens the rights to dissent, to unlimited debate and to freedom of speech.

President Bush has renominated 20 men and women to the federal bench, seven of whom the Senate rejected last year. To force a vote on these nominees, some senators are hoping to launch a parliamentary weapon aimed at the heart of open and extended debate. By a simple majority vote, a Senate filibuster on judicial appointments would be "nuked" for all time.

It starts with shutting off debate on judges, but it won't end there. This nuclear option could rob a senator of the right to speak out against an overreaching executive branch or a wrongheaded policy. It could destroy the Senate's very essence -- the constitutional privilege of free speech and debate.

To understand the danger, one needs to understand the Senate. The Framers created an institution designed not for speed or efficiency but as a place where mature wisdom would reside. They intended the Senate to be the stabilizer, the fence, the check on attempts at tyranny. To carry out that role, an individual senator has the right to speak, perhaps without limit, in order to expose an issue or draw attention to new or differing viewpoints. But this legislative nuclear option would mute dissent and gag opposition voices.

We have heard the president call for an up-or-down vote on his judicial nominees. But nowhere in the Constitution is an up-or-down vote -- or even a vote at all -- guaranteed, and the president cannot reinterpret our nation's founding document to achieve his political goals. Those who disagree with the president in this matter will be labeled "obstructionists," but nothing could be further from the truth.

A federal judge is selected for a lifetime appointment. Senators must apply their best judgment to each selection. If a senator believes a nominee should not be confirmed, that senator has a duty not to consent to confirmation. Yet, for the temporary goal of confirming a handful of objectionable judicial nominees, those pushing the nuclear option would callously trample on freedom of speech and debate.

If senators are denied their right to free speech on judicial nominations, an attack on extended debate on all other matters cannot be far behind. This would mean no leverage for the minority to effect compromise, and no bargaining power for individual senators as they strive to represent the people of their states.

Yes, Americans believe in majority rule, but we also believe in minority rights. Our liberties can be truly secure only in a forum of open debate where minority views can be freely discussed. Leave it to the House to be the majoritarian body. Let the Senate continue to be the one in which a minority can have the freedom to protect a majority from its own folly.

The writer is a Democratic senator from West Virginia and former majority leader.

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Senate Remarks: Stopping a Strike at the Heart of the Senate



Senator Byrd delivered the remarks below warning the Senate and the American people about a procedural effort being considered by some Senators to shut off debate and shut down minority voices and opinions. Byrd believes that such an effort strikes at the very heart of the Senate -- the freedom of speech and debate.

In 1939, one of the most famous American movies of all time, "Mr. Smith Goes to Washington," hit the box office. Initially received with a combination of lavish praise and angry blasts, the film went on to win numerous awards, and to inspire millions around the globe. The director, the legendary Frank Capra, in his autobiography "Frank Capra: The Name Above the Title," cites this moving review of the film, appearing in "The Hollywood Reporter," November 4, 1942:

Frank Capra's "Mr. Smith Goes to Washington," chosen by French Theaters as the final English language film to be shown before the recent Nazi-ordered countrywide ban on American and British films went into effect, was roundly cheered...

Storms of spontaneous applause broke out at the sequence when, under the Abraham Lincoln monument in the Capital, the word, "Liberty," appeared on the screen and the Stars and Stripes began fluttering over the head of the great Emancipator in the cause of liberty.

Similarly cheers and acclamation punctuated the famous speech of the young senator on man's rights and dignity.

'It was... as though the joys, suffering, love and hatred, the hopes and wishes of an entire people who value freedom above everything, found expression for the last time....

For those who may not have seen it, "Mr. Smith" is the fictional story of one young Senator's crusade against forces of corruption, and his

lengthy filibuster for the values he holds dear.

My, how times have changed. These days Smith would be called “an obstructionist.” Rumor has it that there is a plot afoot in the Senate to curtail the right of extended debate in this hallowed chamber, not in accordance with its rules, mind you, but by fiat from the Chair.

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. 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.

In fact, it was 1917, before any curtailing of debate was attempted, which means that from 1806 to 1917, some 111 years, the Senate

rejected any limits to debate. Democracy flourished along with the filibuster. The first actual cloture rule in 1917, was enacted in response to a filibuster by those who opposed U.S. intervention in World War I.

But, even after its enactment, the Senate was slow to embrace cloture, understanding the pitfalls of muzzling debate. In 1949, the 1917 cloture rule was modified to make cloture more difficult to invoke, not less, mandating that the number needed to stop debate would be not two-thirds of those present and voting, but two-thirds of all Senators.

Indeed, from 1919 to 1962, the Senate voted on cloture petitions only 27 times and invoked cloture just four times over those 43 years.

On January 4, 1957, Senator William Ezra Jenner of Indiana spoke in opposition to invoking cloture by majority vote. He stated with conviction:

We may have a duty to legislate, but we also have a duty to inform and deliberate. In the past quarter century we have seen a phenomenal growth in the power of the executive branch. If this continues at such a fast pace, our system of checks and balances will be destroyed. One of the main bulwarks against this growing power is free debate in the Senate . . . So long as there is free debate, men of courage and understanding will rise to defend against potential dictators. . . The Senate today is one place where, no matter what else may exist, there is still a chance to be heard, an opportunity to speak, the duty to examine, and the obligation to protect. It is one of the few refuges of democracy. Minorities have an illustrious past, full of suffering, torture, smear, and even death. Jesus Christ was killed by a majority; Columbus was smeared; and Christians have been tortured. Had the United States Senate existed during those trying times, I am sure these people would have found an advocate. Nowhere else can any political, social, or religious group, finding itself under sustained attack, receive a better refuge.

Senator Jenner was right. The Senate was deliberately conceived to be what he called a “better refuge,” meaning one styled as guardian of the rights of the minority.

The Senate is the “watchdog” because majorities can be wrong, and

filibusters can highlight injustices. History is full of examples.

In March 1911, Senator Robert Owen of Oklahoma filibustered the New Mexico statehood bill, arguing that Arizona should also be allowed to become a state. President Taft opposed the inclusion of Arizona's statehood in the bill because Arizona's state constitution allowed the recall of judges. Arizona attained statehood a year later, at least in part because Senator Owen and the minority took time to make their point the year before.

In 1914, a Republican minority led a 10-day filibuster of a bill that would have appropriated more than \$50,000,000 for rivers and harbors. On an issue near and dear to the hearts of our current majority, Republican opponents spoke until members of the Commerce Committee agreed to cut the appropriations by more than half.

Perhaps more directly relevant to our discussion of the "nuclear option" are the seven days in 1937, from July 6 to 13 of that year, when the Senate blocked Franklin Roosevelt's Supreme Court-packing plan.

Earlier that year, in February 1937, FDR sent the Congress a bill drastically reorganizing the judiciary. The Senate Judiciary Committee rejected the bill, calling it "an invasion of judicial power such as has never before been attempted in this country" and finding it "essential to the continuance of our constitutional democracy that the judiciary be completely independent of both the executive and legislative branches of the Government." The committee recommended the rejection of the court-packing bill, calling it "a needless, futile, and utterly dangerous abandonment of constitutional principle. . . without precedent and without justification."

What followed was an extended debate on the Senate Floor lasting for seven days until the Majority Leader, Joseph T. Robinson of Arkansas, a supporter of the plan, suffered a heart attack and died on July 14. Eight days later, by a vote of 70 to 20, the Senate sent the judicial reform bill back to committee, where FDR's controversial, court-packing language was finally stripped. A determined, vocal group of Senators properly prevented a powerful President from corrupting our nation's judiciary.

Free and open debate on the Senate floor ensures citizens a say in their government. The American people are heard, through their Senator, 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.

It seeks to alter the rules by sidestepping the rules, thus making the impermissible the rule. Employing the "nuclear option", engaging a

pernicious, procedural maneuver to serve immediate partisan goals, risks violating our nation's core democratic values and poisoning the Senate's deliberative process.

For the temporary gain of a hand-full of "out of the mainstream" judges, some in the Senate are ready to callously incinerate each Senator's right of extended debate. Note that I said each Senator. For the damage will devastate not just the minority party. It will cripple the ability of each member to do what each was sent here to do -- represent the people of his or her state. Without the filibuster or the threat of extended debate, there exists no leverage with which to bargain for the offering of an amendment. All force to effect compromise between the two political parties is lost. Demands for hearings can languish. The President can simply rule, almost by Executive Order if his party controls both houses of Congress, and Majority Rule reins supreme. In such a world, the Minority is crushed; the power of dissenting views diminished; and freedom of speech attenuated. The uniquely American concept of the independent individual, asserting his or her own views, proclaiming personal dignity through the courage of free speech will, forever, have been blighted. And the American spirit, that stubborn, feisty, contrarian, and glorious urge to loudly disagree, and proclaim, despite all opposition, what is honest and true, will be sorely manacled.

Yes, we believe in Majority rule, but we thrive because the minority can challenge, agitate, and question. We must never become a nation cowed by fear, sheeplike in our submission to the power of any majority demanding absolute control.

Generations of men and women have lived, fought and died for the right to map their own destiny, think their own thoughts, and speak their minds. If we start, here, in this Senate, to chip away at that essential mark of freedom -- here of all places, in a body designed to guarantee the power of even a single individual through the device of extended debate -- we are on the road to refuting the Preamble to our own Constitution and the very principles upon which it rests.

In the eloquent, homespun words of that illustrious, obstructionist, Senator Smith, " Liberty is too precious to get buried in books. Men ought to hold it up in front of them every day of their lives, and say, 'I am free -- to think -- to speak. My ancestors couldn't. I can. My children will.'"

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