

## Conservative and Republican Concern and Opposition to the “Nuclear Option”

### **Excerpts From ‘The Broken Branch’ [on the nuclear option]**

Thomas Mann, *Roll Call*, June 27, 2006

[http://www.rollcall.com/issues/51\\_144/hill\\_bookshelf/14009-1.html](http://www.rollcall.com/issues/51_144/hill_bookshelf/14009-1.html)

*On Aug. 1, Oxford University Press will release “The Broken Branch: How Congress Is Failing America and How to Get It Back on Track” (part of the Institutions of American Democracy Series), written by Thomas Mann of the Brookings Institution and the American Enterprise Institute’s Norman Ornstein (a contributing writer for Roll Call). What follows are excerpts from the book, printed with permission from the publisher.*

### **The Nuclear Option**

Nothing underscores more the indifference to institution — and the decline in Senate pride — than the flap over Rule XXII and the filibuster when it came to President Bush’s judicial nominations in 2003-2005. Unlimited debate defines the uniqueness of the Senate.

That tradition was shaken to the core in 2005 over judicial nominations. In the modern age of partisan parity and ideological polarization, few issues have had the impact and high stakes of federal judicial nominations. As the Congress has more frequently found itself stymied on controversial issues, one way out has been to pass the buck on to the courts, allowing policy decisions to be resolved through litigation. This has been true, for example, on many environmental matters in such areas as clean air. As left and right have found themselves losing on issues in the legislature, they have been more inclined to refuse to accept defeat and try to reverse the outcomes in the courts. As judges have been given more opportunities, they have not shrunk from a larger policy role, whether or not they label themselves strict constructionists.

As a consequence, the battles in the Senate over judges, including even district court and appeals court judges, have become more acrimonious and routine.

Majority Leader Bill Frist seized on an issue that had been raised in 2003 and began building an aggressive public case for a radical change in Senate procedures — dubbed the “nuclear option” by Senator Lott — to prohibit the filibuster on judicial appointments.

Senate rules and precedents were clear: the Senate is a continuing body because every election involves only one-third of its members, and the rules are a constant, able to be changed only if two-thirds agree. Frist proposed a radical alternative: achieve the same result by making a parliamentary point of order that extended debate on a pending judicial confirmation is out of order. He would then have that point of order upheld by the president of the Senate (Vice President Dick Cheney) and follow with a vote of a simple majority upholding the ruling of the chair. Doing so would require ignoring or overruling the Senate Parliamentarian, since a constitutional point of order is itself debatable (and could be filibustered).

The ploy here was laid out by Senate rules guru Martin Gold, an adviser to Frist. While he and other former Republican Senate staff members built the case that such a move was consistent with Senate precedents, the argument was lame. There was no mistaking the purpose and potential consequences of the nuclear option. The Senate would by fiat overrule an established procedural principle to serve the immediate interests of the president and respond to the demands of a vocal constituency. And in so doing, it would establish a precedent that would threaten to change the essential character of the institution, making the Senate much more like the House.

In the end, a bipartisan group of old bulls, mavericks, and moderates — referred to as the Gang of 14 — pulled the Senate back from the brink. Their informal agreement, entirely self-enforcing, to oppose both the nuclear option and filibusters on judicial confirmations except under extraordinary circumstances forced a temporary de-escalation of the judicial arms race. How long it would last was far from certain.

There is a long-standing tradition in the Senate regarding judicial nominations. That tradition calls for a vigorous and independent Senate playing its role of advice and consent. Because they represent lifetime appointments that cannot and should not be easily rescinded, judicial nominations require higher hurdles than simple legislation, which can always be amended or repealed. Charles Krauthammer called the nuclear option “restoration.” It’s not even close. And the willingness of dozens of senators to apply it

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spoke volumes about their indifference to the body's essence when they confronted short-term political expedience.

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**George Will in *Newsweek* (December 6, 2004):**

<http://www.msnbc.msn.com/id/6596229/site/newsweek/>

The filibuster is an important defense of minority rights, enabling democratic government to measure and respect not merely numbers but also intensity in public controversies. Filibusters enable intense minorities to slow the governmental juggernaut. Conservatives, who do not think government is sufficiently inhibited, should cherish this blocking mechanism. And someone should puncture Republicans' current triumphalism by reminding them that someday they will again be in the minority.

The promiscuous use of filibusters, against policies as well as nominees, has trivialized the tactic. But filibusters do not forever deflect the path of democratic government. Try to name anything significant that an American majority has desired, strongly and protractedly, but has not received because of a filibuster.

**Former Senators Jim McClure (R-ID) and Malcolm Wallop (R-WY) in the *Wall Street Journal* (March 15, 2005):**

[www.wallstreetjournal.com](http://www.wallstreetjournal.com)

“Conservatives, in and out of the Senate, are now being assured that this extraordinary approach will not be applied to the legislative filibuster, which, in the not-so-distant past, was our only defense against the excesses of a bipartisan liberalism. There are several problems with that argument. First and foremost, as a matter of principle, we should not accept the contrary-to-fact assertion that the Senate and its rules do not continue from election to election.

Second, setting aside principle -- ouch! -- it is naive to think that what is done to the judicial filibuster will not later be done to its legislative counterpart, whether by a majority leader named Reid, or Clinton, or Kennedy.

Third, even if a senator were that naive, he or she should take a broader look at Senate procedure. The very reasons being given for allowing a 51-vote majority to shut off debate on judges apply equally well -- in fact, they apply more aptly -- to the rest of the executive calendar, of which judicial nominations are only one part. That includes all executive branch nominations, even military promotions.

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**Former Senator Alan Simpson (R-WY) in an appearance on NPR's *The Connection* (April 26, 2005):**

[http://www.theconnection.org/shows/2005/04/20050426\\_b\\_main.asp](http://www.theconnection.org/shows/2005/04/20050426_b_main.asp) (audio)

[http://judgingthefuture.net/2005/05/a\\_little\\_good\\_a.php](http://judgingthefuture.net/2005/05/a_little_good_a.php) (transcript)

“They [Republicans] will be out of power one day, and there'll be tears as big as golf balls streaming down their cheeks as they look and say “we put this in motion and we're sitting here immobilized, neutered in this game.” I can promise you.”

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“But there isn’t a question in my mind that when the Republicans go out of power and they, they’re looking for a protection of minority rights, they’re going to be alarmed and saddened. So when they pull the trigger, the boomerang may not come back for a few years but when it does it will get them right in the back of the neck.”

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**Former Senator Bill Armstrong (R-CO) quoted in Roll Call (April 25, 2005):**

<http://www.rollcall.com>

“Having served in the majority and in the minority, I know that it’s worthwhile to have the minority empowered. As a conservative, I think there is a value to having a constraint on the majority.”

**Former Senator David Durenberger (R-MN) writing in the Minneapolis Star-Tribune (with former Vice-President Walter Mondale) (May 5, 2005):**

<http://www.startribune.com/stories/1519/5385977.html> (registration required)

“The American people should know that the proposed repeal of the filibuster rule for judicial nominees by majority vote will profoundly and permanently undermine the purpose of the U.S. Senate as it has stood since Thomas Jefferson first wrote the Senate’s rules.”

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**Former Senator Charles “Mac” Matthias (R-MD) writing in the Washington Post (May 12, 2005):**

<http://www.washingtonpost.com/wp-dyn/content/article/2005/05/11/AR2005051101764.html>

“Make no mistake about it: If the Senate ever creates the precedent that, at any time, its rules are what 51 senators say they are -- without debate -- then the value of a senator’s voice, vote and views, and the clout of his state, will be diminished.”

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**Former Congressman Mickey Edwards (R-OK) quoted in the Washington Post (May 10, 2005):**

<http://www.washingtonpost.com/wp-dyn/content/article/2005/05/09/AR2005050901126.html>

“It’s a total disavowal of the basic framework of the system of government. It’s much more efficient [for Bush], but our government was not designed to be efficient.”

“Every president grabs for more power. What’s different to me is the acquiescence of Congress.”

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**Ed Rollins (former aide to Presidents Nixon, Ford, Reagan and H.W. Bush) quoted in the *Denver Post* (April 10, 2005):**

<http://www.denverpost.com/Stories/0,1413,36%257E28203%257E2808623,00.html?search=filter>

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"The latest gambits - DeLay's proposed inquisition of the federal judiciary and Majority Leader Bill Frist's planned attempt to change the legislative rule on filibusters to ram conservative judicial nominees through the Senate - could further polarize and alienate Americans, says Rollins."

"If Republicans change the filibuster rule, there will be nothing that gets done in this town for two years,' Rollins predicts."

"The country is not as concerned about judges as it is about Congress showing some fiscal responsibility and doing what it is supposed to do,' he says."

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**David Hoppe (former Chief of Staff to Sen. Lott (R-MS)) in an appearance on *The Journal Editorial Report* on PBS (April 1, 2005):**

<http://www.pbs.org/wnet/journaleditorialreport/040105/briefing.html>

[T]he system is broken. The question is, how do you try and fix the system. I keep going back, as I consider this, to a line from the play A MAN FOR ALL SEASONS, "Richard, after you've cut down all the trees, where will you hide when the devil comes after you?"

That's the problem with the nuclear option, because it will not stop there. The next step when somebody needs it will be to get rid of the filibuster on legislative issues. Say a president seven, eight years in the future decides that his national health care program just has to be done, and they've got the might to make right of 51 senators. Should they get rid of the filibuster on legislative items? That's the way we're headed here if we do it this way.

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**Christine Todd Whitman, Former Republican Governor of New Jersey and EPA Administrator speaking to Virginia Conservation Network as quoted in the Richmond Times-Dispatch (April 29, 2005):**

[http://www.timesdispatch.com/servlet/Satellite?pagename=RTD%2FMGArticle%2FRTD\\_BasicArticle&c=MGArticle&cid=1031782426426&path=Inews&s=1045855934842](http://www.timesdispatch.com/servlet/Satellite?pagename=RTD%2FMGArticle%2FRTD_BasicArticle&c=MGArticle&cid=1031782426426&path=Inews&s=1045855934842)

"Huge political mistake"

"[I]f the Senate's Democratic minority is stripped of the power to filibuster against Bush picks for the federal courts, it will be 'portrayed as Republicans trying to railroad through certain ideological justices.'"

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**Stephen Moore, President, Free Enterprise Fund, Founder and Past-President, Club for Growth writing in the *Washington Post* (with Wade Henderson, Leadership Conference on Civil Rights) (April 17, 2005):**

<http://www.washingtonpost.com/wp-dyn/articles/A57777-2005Apr15.html>

"What troubles us most is that the "nuclear option" could become a routine tactic for the majority party in the Senate to push legislation through with only a 51-vote requirement for passage. The Senate was

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always envisioned by the Founders to be the deliberative body in Congress, in which the heated emotions of the moment's debate could cool before new laws or judges were approved. The filibuster and the 60-vote cloture rule are nearly indispensable in facilitating full debate and strong consensus for legislative action.”

“Eviscerating the filibuster would violate the spirit of the Constitution and endanger our rights as individuals against excessive governmental power.”

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**Michael Hammond, Gun Owners of America (and former General Counsel to Senate Steering Committee [1978-89]) in *Kill the Filibuster?***

<http://www.gunowners.org/a031505a.htm>

“The reason the Second Amendment is still viable today is, in large part, because of the Senate filibuster.”

“If any Senate rule, at any time, can be eliminated, without debate, by fifty senators, the Senate rules — all of them — effectively become meaningless in any context in which they would matter. The legislative filibuster will die the first time it becomes important — perhaps in connection with Social Security reform, perhaps after the Democrats regain control of the Senate.”

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**Mark Mix, President of National Right-to-Work Committee (March 14, 2005):**

<http://www.right-to-work.org/content.php3?id=350>

“For Right to Work supporters, the filibuster rule has been and remains a vital safety net. We would be extremely foolhardy to stand by while anyone, regardless of how good their intentions, proceeds to tear holes in it.

And make no mistake. If a bare majority of senators vote now to eliminate judicial filibusters, legislative filibusters will not stand for long. If the Senate's presiding officer can rule, with the consent of 51 senators, that only a bare majority vote is needed to end debate on judicial nominees, then he can also rule that only a bare majority is needed to end debate on legislation.

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**Jim Boulet, Executive Director of English First, in his memo titled: *How Liberals Could Thrive in a Post-Nuclear-Option Senate [Oppose the Nuclear Option (web page title)]* (March 29, 2005):**

[http://www.englishfirst.org/nuclear\\_option/nuclear%20\\_option\\_memo32905.htm](http://www.englishfirst.org/nuclear_option/nuclear%20_option_memo32905.htm)

“[O]nce such a precedent is established, any legislation which commands the support of 51 but not 60 Senators could provoke a similar request for a ruling that requirements for a supermajority are not ‘in order.’”

“Keep in mind that much of the Democratic “wish list” involves sweeping new legislation which will be heavily supported by the mainstream media. The Republican agenda, by contrast, tends to involve incremental changes to existing programs.”

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**Linda Chavez, Syndicated Columnist, former Bush nominee for Labor Secretary writing in the Washington Times (April 29, 2005):**

<http://www.washingtontimes.com/functions/print.php?StoryID=20050428-095317-7482r>

“The more I think about it, the more I am convinced Republicans would make a mistake getting rid of the filibuster. Republicans won’t be in the majority forever, and they may rue the day they deprive themselves of the ability to block a candidate to some future Supreme Court. Worse, they may end up making themselves look like the heavies instead of forcing the Democrats to take center stage as the real fanatics. Let the filibuster stay -- and force the Democrats to actually use it.”

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**Judge Kenneth Starr, Former DC Circuit Judge, Former Independent Counsel, Dean, Pepperdine Law School on the CBS Evening News (May 9, 2005):**

<http://www6.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=574&topicId=10007217&docId=:279226796&isSearch=true>

“It may prove to have the kind of long-term boomerang effect, damage on the institution of the Senate that thoughtful senators may come to regret.”