Ted Kennedy's Floor Speech on the Nuclear Option

May 11, 2005

ñAmerica has stood for fairness, opportunity and justice. Generation, after generation, our nation has been able, often with intense debates, to give greater meaning to these values in the lives of our citizens.

But what we have seen in recent years is a breach of these values in order to reward the powerful at the expense of average Americans.

Those in power passed massive tax breaks for the wealthy and short-changed everyone else.

They granted sweetheart deals to Halliburton Corporation in Iraq while our troops went without armor.

They let the polluters write the pollution rules for our water and our air.

They let the oil industry write the energy policy in secret meetings in the White House.

Two weeks ago, over the opposition of every Democrat in the House and Senate, they forced through a federal budget that preserves corporate tax loopholes at the expense of college aid, and slashes Medicaid for poor mothers to pay for tax breaks for millionaires.

They twisted arms for three and a half hours in the dead of night on the floor of the House to pass a so-called Medicare reform that rewards HMOs and drug companies at the expense of senior citizens and the disabled.

They broke the ethics rules of the House of Representatives, then changed the rules to avoid investigation.

They want to break the promise of Social Security to our citizens by privatizing it, handing it over to Wall Street, and cutting benefits for middle-income Americans.

Now, Republican leaders want to break the Senate to get their way ï this time with the nationôs courts.

We have blocked only the very few who are so far out of the mainstream that they have no place in our federal judiciary. And yes, we have filibustered those nominees to protect America from their extremism.

Yet, Republicans propose to scuttle the Senate rules that have protected our constitution and our citizens for more than two centuries ï in a crusade to give right-wing activist judges lifetime appointments.

They want to break the rules to put judges on our courts who are friendly to polluters and hostile to clean water and clean air.

They want to break the rules to confirm judges hostile to civil rights, to disability rights, to womenôs rights, and to workersô rights.

They even want to break the rules to confirm judges who condone torture.

The nation's founders understood that those in power might believe rules don't apply to them. That's why they put in place a democracy that preserves our rights and freedoms through checks and balances. These checks and balances protect mainstream values by preventing one party from arrogantly imposing its extreme views on the nation.

The Constitution grants the President a check on Congress by allowing him to veto any measure that he believes crosses the line.

It establishes an independent judiciary with lifetime appointments and irreducible salaries, so they will be immune to political pressures and can serve as a valuable check against illegal or unconstitutional actions by the President or Congress.

It gives the President and the Senate the shared duty of appointing qualified judges, as a check against a President who tries to take over the courts.

The founders deliberately designed the Senate to be a special additional check. It is smaller than the House. It has six year terms ï the House has two, and Presidents four . Our terms are staggeredð at least 2/3 of us are veterans of a previous Congress. We have unique powers over treaties, appointments, and impeachments, and full power over our own rules, so we can be more deliberate. The Senate was meant to check an overreaching Executive ï or an overreaching House, and resist public fads. We have repeatedly played this stabilizing role, especially when an overreaching Chief Executive threatened the independence of the judiciary.

Thomas Jefferson, at the peak of his popularity and with his party controlling Congress, pushed the Senate to remove a Supreme Court Justice whose decisions Jefferson disagreed with, but the Senate said ñno.ò

Franklin Roosevelt tried to expand the Supreme Court, so that he could pack it with Justices who would support his views. Again, a Senateð under his partyôs control ï said ñno.ò

Richard Nixon, having lost one Supreme Court nomination battle to a bi-partisan coalition, dared us to reject a second, even worse candidate. But a bipartisan Senate majority honored the foundersô trust by saying ñno.ò

Throughout our history, the Senate, has structured its processes to reflect its unique powers. For such irreversible steps as conferring lifetime judicial authority, it has given its minority the ability to protect our republic from the combined tyranny of a willful Executive Branch and an equally willful and like-minded small majority of Senators. Thus we allow the minority to speak as long as necessary to stimulate debate and compromise, and to prevent actions that threaten the balance of powers, or seriously offend a substantial minority of Senators.

For appointments, where the Senateôs ñadvice and consentò is a constitutional prerogative, there has never been a constitutional right, or a right under the Rules, to a floor vote on a nomination that would allow a bare majority to reflexively rubber-stamp the Presidentôs choice. In fact, until 1917, the Senate had no limit on debate, and countless nominees, including judges, not only failed to receive Senate consent but failed to receive the ñup or downò vote that some pretend has been available as a matter of right.

The 1917 cloture rule permitted debate to be ended on legislation if 2/3 of the Senate so voted, but did not apply to nominations. In 1949, the rule was extended to all issues, including nominations. Still, there was no ñright to an up-or-down vote on the floorò on a matter, because there remained many different ways to prevent it from ever reaching the floor.

In 1975, the 2/3 rule for cloture was reduced to 3/5, but the basic rule remained: the only floor vote you have ña right toò is a floor vote on cloture, and if you lose that vote, the matter does not go forward unless a later cloture vote succeeds or until the opponents relent. That has been the practice since the first cloture rule 88 years ago. Everyone knows that is the rule.

Just 19 years after cloture became available for nominations, Senate Republicans led a filibuster against President Johnsonôs nomination of Abe Fortas as Chief Justice. The Senate Historian describes it accurately on the Senate website: ñOctober 1, 1968: Filibuster Derails Supreme Court Appointment.ò

Some try to rewrite the history of that filibuster. But three of us know what happened in 1968ð we were Senators then. President Johnson, one of the best vote counters in history, would not have sent us the Fortas nomination if he was not completely confident that a majority of the Senate would support it.

The Judiciary Committee reported the Fortas nomination favorably, but its Republican opponents, knowing that they still lacked the votes to defeat the nomination outright, launched a filibuster on the floor, attacking the nominee on a number of different fronts, in an effort to attract his supporters. Ultimately, cloture failed, and President Johnson withdrew the nomination.

We may never know what the final vote would have been if there had been no filibuster. But there can be no doubt that there was a filibuster of a Supreme Court nomination, and

the Republicans who led it intended to prevent an up-or-down vote on the nomination. There may have been a majority in support of the nomination when the process started, but the Senate rules at that time provided no way for the majority to curtail the minorityôs right to continue debate unless 2/3 of the Senate voted to do so. The cloture vote made clear there would never be a floor vote on the nomination, unless the filibuster ended.

In fact a bare Senate majority canôt silence the minority on any bill or treaty or nomination, least of all on judicial nominees, whom the Framers were determined to keep independent, an independence assured by the Senateôs joint role in their appointment. For us to relinquish any part of our power over judicial appointments, while leaving that power intact for non-judicial nominations and for all legislation, is not only irrational, it is bizarrely backward.

Certainly, this is no time to reduce the ability of the Senate as a whole, or individual Senators, to assure judicial independence. We need independent courts more than ever. We know that activist groups and their supporters in Congress are putting heavy and well-organized pressure on the courts:

ï They want to restrict rights and liberties in the name of national security,
ï They want to subordinate individual interests to powerful economic interests,
ï They want to intrude government into sacrosanct areas of family and religion.
ï They want to reverse longstanding precedents that allow the nation to realize its full potential.

When one party controls the levers of power in both the White House and Congress, and that party feels beholden to a narrow ideological portion of its base, the independence of the courts is crucial. Despite its razor-thin victory last year, following its especially narrow victory in the election in 2000, which was decided by a 5-4 vote by the Supreme Court, the Republican party evidently believes it has absolute power. House Republicans yield to the White House, bending House rules to the breaking point to give the President his way. The President personally picked the Senate majority leader and through him seeks to impose unprecedented strict party discipline on Republican Senators.

Now the President wants to pack key appellate courts, in a trial run for doing the same to the Supreme Court, with activist ideological judges he knows could not possibly command a bipartisan consensus in the Senate. It is clear from their records and their resumes that they have been selected precisely because the most radical forces on the Republican right believe they will advance their ideological agenda on the bench.

In these circumstances, we Senators have not only the right, but the obligation, to use every power at our disposal, within the Senate's rules and traditions, to focus the attention of the Senate and the nation, and ultimately the President, on the overreaching abuse of power by the White House and the Republican majority. That's what our Senate powers and our Senate rules are meant to do. That's what checks and balances are all about. That's why the filibuster exists.

The Republican argument to the contrary is irrational, incomprehensible and hypocritical: ï They say that if we dare to use the well-established Senate rules to preserve the independence of the courts, then they are entitled to break the Senate rules to stop us. ï They assert ï and this is the keystone of their argumentð that we are abusing the filibuster by actually using it, even on a very few nominations. ï They seem to say itôs permissible to filibuster if you already have a majority of Senators with you ï that is, if you donôt need to filibuster. But itôs not permissible to filibuster if you are in the minority ï which is, of course, the only time you need to filibuster. ï They say you are permitted to filibuster if you donôt have the votes to prevent cloture, but are not permitted to do so if you do have the votes to prevent cloture. ï In short, their argument seems to be that you are allowed to filibuster only when you donôt need it or canôt make it stick. In a word, their argument is absurd.

The fact is, the Republicans showed in 1968 how the filibuster can be used to change minds when you donôt start with enough votes, whether it is Senatorsô minds, citizensô minds, or just the Presidentôs mind.

During the Bush years, the filibuster has been used as an exceptional tool against a small number of judicial nominationsð 10 out of 218, in contrast to nearly 70 judicial nominations blocked from a floor vote by other Republican tactics during the Clinton Administration.

But hereôs the most important reason the Republican arguments make no sense: it is the President, not the Senate, who determines how often the filibuster is used.

Whenever President Bush decides heôd rather pick a fight than pick a judge, then he is likely to be creating the need to filibuster. There is no need for a filibuster if the President takes the ñadviceò of the Senate seriously, under the ñadvice and consentò clause of the constitution, when he nominates lifetime judges for important courts. President Clinton did so with Senator Hatch, the Republican chairman of the Senate Judiciary Committee at the time, on his nominations of Justice Ginsburg and Justice Breyer in the 1990ôs, and other Presidents have done so throughout history.

Those who do not like the filibuster should take their complaints to the other end of Pennsylvania Avenue, where the real responsibility lies.

The claim that filibustering judges is unconstitutional is without a shred of support in the constitution or in history. The Republican leadership seems to be on the verge of abandoning that claim.

The recent compromise suggested by Senator Frist would allow the practice to continue for legislation, and for all cabinet and other executive branch appointments, and even for lifetime federal district judges. None of these categories is constitutionally distinguishable from federal appellate court nominations and Supreme Court nominations under the Senate rules. If anything, Article III lifetime appellate judges deserve the filibusterôs extra insulation from executive abuse even more than short-term cabinet and

diplomatic appointments, let alone legislative actions that can be reversed by future legislation.

In short, neither the Constitution, nor Senate Rules, nor Senate precedents, nor American history, provide any justification for selectively nullifying the use of the filibuster. Equally important, neither the Constitution nor the Rules nor the precedents nor history provide any permissible means for a bare majority of the Senate to take that radical step without breaking or ignoring clear provisions of applicable Senate Rules and unquestioned precedents.

Here are some of the rules and precedents that the executive will have to ask its allies in the Senate to break or ignore, in order to turn the Senate into a rubber stamp for nominations:

ï First, they will have to see that the Vice President himself is presiding over the Senate, so that no real Senator needs to endure the embarrassment of publicly violating the Senateôs rules and precedents and overriding the Senate Parliamentarian, the way our presiding officer will have to do; ï Next, they will have to break Paragraph 1 of Rule V, which requires 1 dayôs specific written notice if a Senator intends to try to suspend or change any rule; ï Then they will have to break paragraph 2 of Rule V, which provides that the Senate Rules remain in force from Congress to Congress, unless they are changed in accordance with the existing rules; ï Then they will have to break paragraph 2 of Rule XXII, which requires a motion signed by 16 Senators, a two-day wait and a 3/5 vote to close debate on the nomination itself; ï They will also have to break Rule XXIIôs requirement of a petition, a wait, and a 2/3 vote to stop debate on a Rules change; ï Then, since they pretend to be proceeding on a constitutional basis, they will have to break the invariable rule of practice that constitutional issues must not be decided by the presiding officer but must be referred by the Presiding officer to the entire Senate for full debate and decision; ï Throughout the process they will have to ignore, or intentionally give incorrect answers to, proper parliamentary inquiries which, if answered in good faith and in accordance with the expert advice of the parliamentarian, would make clear that they are breaking the rules; ï **Eventually, when their repeated rule-breaking is called into question, they will blatantly, and in dire violation of the norms and mutuality of the Senate, try to ignore the Minority Leader and other Senators who are seeking recognition to make lawful motions or pose legitimate inquiries or make proper objections.**

By this time, all pretense of comity, all sense of mutual respect and fairness, all of the normal courtesies that allow the Senate to proceed expeditiously on any business at all will have been destroyed by the pre-emptive Republican nuclear strike on the Senate floor.

To accomplish their goal of using a bare majority vote to escape the rule requiring 60 votes to cut off debate, those participating in this charade will, even before the vote, already have terminated the normal functioning of the Senate. They will have broken the Senate compact of comity, and will have launched a preemptive nuclear war. **The battle**

begins when the perpetrators openly, intentionally and repeatedly, break clear rules and precedents of the Senate, refuse to follow the advice of the Parliamentarian, and commit the unpardonable sin of refusing to recognize the minority leader.

Their hollow defenses to all these points demonstrate the weakness of their case: They claim, ñWe are only breaking the rules with respect to judicial nominations; we promise not to do so on other nominations or on legislation.ò No one seriously believes that. Having used the nuclear option to salvage a handful of activist judges, they will not hesitate to use it to salvage some bill vital to the credit card industry, or the oil industry or the pharmaceutical industry, or Wall Street, or any other special interest. In other words, the Senate majority will always be able to get its way, and the Senate our founders created will no longer exist. It will be an echo chamber to the House, where the tyranny of the majority is so rampant today.

Our Republican colleagues also claim that ñSenate Democrats have previously used majority votes to change the rulesò, so they can do it too. That spurious claim depends entirely on a pseudo-scholarly article by two Republican staffers, who happen, unintentionally to have provided enough facts to rebut the claim. As Senator Byrd and other experts on the rules have shown, the instances they rely on do not involve breaking the rules or changing the rules. They were narrow and minor interpretations to fill gaps in existing rules, but always consistent with the underlying rules and their purposes, and always in keeping with the regular procedures of the Senate. They never allowed debate on any nomination or bill to be cut off without the required cloture vote.

The Nuclear Option, in contrast, involves major changes in the essence of key rules, without following the required procedures for changing the rules.

Why would our Republican colleagues try to do this? The simplest answer is that they will do it because they think they can get away with it.

Obviously, their party is also being driven by an irresponsible fringe force that does not care about the credibility of their party or the institutional interests of the Senate or the future of our checks and balances form of government. They were the ones who compelled their leaders on both sides of the Hill to intrude in the tragic case of Terri Schiavo. The overwhelmingly hostile reaction to that fiasco should be enough to encourage the White House not to go down such paths again, especially after Stanley Birch, a conservative appointee of the first President Bush, on a conservative federal circuit court of appeals, excoriated Congress for its unconstitutional interference with the courts, and particularly excoriated Republican opponents of judicial activism for hypocritically pushing their own corrosive brand of judicial activism.

Sadly, with Dr. Fristôs encouragement and support, the same rabble rousers recently accused us of blocking nominees because they are ñpeople of faith,ò thus suggesting that the 208 judges whom we have not blocked are not ñpeople of faith.ò Clearly these activist ideologues do not agree with the founders about the need for judicial independence, for the separation of powers or for the separation of church and state. They have no respect

for history, no respect for checks and balances, no respect for the role of the Senate. They simply want as many judges as possible who will follow their instructions.

Fortunately, the vast majority of Americans' share our commitment to basic fairness. They agree that there must be fair rules, that we should not unilaterally abandon or break those rules in the middle of the game, and that we should protect the minority's rights in the Senate.

Even in the dark days of the governmentôs failure to respond to the civil rights revolution, half a century ago, the Senate never tried to allow a bare majority to silence a substantial minority. Yet that is exactly what Republicans want to do now. There is simply no crisis which justifies such a drastic and destructive action.

Who are the nominees the Republican leadership wants confirmed so desperately that they are willing to break the rules to change the rules?

President Bush has said he wants judges who will follow the law, not try to re-write it. But his actions tell a different story. The contested nominees have records that make clear they would push the agenda of a narrow far-right fringe, rather than protect rights important to all Americans.

Priscilla Owen, Janice Rogers Brown, William Myers, Terrence Boyle, and William Pryor would erase much of the countryôs hard-fought progress toward equality and opportunity. Their values ï favoring big business over the needs of families, destroying environmental protections, and turning back the clock on civil rights ï are not mainstream values.

As a Texas Supreme Court Justice, Priscilla Owen has shown clear hostility to fundamental rights, particularly on issues of major importance to workers, consumers, victims of discrimination, and women. Neither the facts, nor the law, nor established legal precedents, stop her from reaching her desired result.

Even many newspapers that endorsed her campaign for the Texas Supreme Court now oppose her confirmation after seeing how poorly she served as a judge. The Houston Chronicle wrote that Justice Owen ñtoo often contorts rulings to conform to her particular conservative outlook.ò The paper also noted that ñItôs saying something that Owen is a regular dissenter on a Texas Supreme Court made up mostly of other conservative Republicans.ò

Her own colleagues on the conservative Texas Supreme Court have repeatedly accused her of the same thing. They clearly state that Justice Owen puts her own views above the law, even when the law is crystal clear. Justice Owens former colleague on the Texas Supreme Court, our new Attorney General Alberto Gonzales, has said she was guilty of ñan unconscionable act of judicial activism.ò

In another case, Justice Gonzales joined a majority opinion that criticized Justice Owen for ñdisregarding the procedural limitations in the statute,ò and ñtaking a position even more extremeò than was argued by the defendant in the case.

For the very important D.C. Circuit, the President has nominated another extreme right-wing candidate. Janice Rogers Brownôs record on the California Supreme Court makes clear that ï like Priscilla Owen ï sheôs a judicial activist who will roll back basic rights. When she joined the California Supreme Court, the California State Bar Judicial Nominees Evaluation Commission had rated her ñnot qualified,ò and insensitive to established legal precedentò when she served on the state court of appeals.

All Americans, wherever they live, should be concerned about such a nomination to this vital court, which interprets federal laws that protect our civil liberties, workersô safety, and our ability to breathe clean air and drink clean water in their communities. Only the D.C. Circuit can review the national air quality standards under the Clean Air Act and national drinking water standards under the Safe Drinking Water Act.
This court also hears the lions share of cases involving rights of employees under the Occupational Safety and Health Act and the National Labor Relations Act.

Yet Janice Rogers Browns record shows a deep hostility to civil rights, to workersô rights, to consumer protection, and to a wide variety of governmental actions in many other areas ï the very issues that predominate in the D.C. Circuit.

Perhaps most disturbing is the contempt she has repeatedly expressed for the very idea of democratic self-government. She has stated that, ñwhere government moves in, community retreats [and] civil society disintegrates.ò She has said that government leads to ñfamilies under siege, war in the streets.ò In her view, when government advances . . . freedom is imperiled [and] civilization itself jeopardized.ò

Janice Rogers Brown has also written opinions that would undermine civil rights. She has held, for example, that the First Amendment prevents courts from granting injunctions against racial slurs in the workplace, even when those slurs are so pervasive that they create a hostile work environment in violation of federal job discrimination laws.

President Bush has selected William Myers for the important Ninth Circuit court of appeals. Mr. Myers is a long-time mining and cattle industry lobbyist. He has compared federal laws protecting the environment to ñthe tyrannical actions of King Georgeò over the American colonies. He has denounced our environmental laws as ñregulatory excesses.ò In the Interior Department, he served his corporate clients instead of the public interest. As Solicitor of Interior, he tried to give public land worth millions of dollars to corporate interests. He issued an opinion clearing the way for mining on land sacred to Native Americans, without consulting the tribes affected by his decision ï although he took the time to meet personally with the mining company that stood to profit from his opinion.

William Myers is a particularly inappropriate choice for the Ninth Circuit, which contains many of Americaôs most precious natural resources and national parks, including the Grand Canyon and Yosemite National Park, and which is home to many Native American tribes.

The nomination of Terrence Boyle is still pending in the Judiciary Committee. By all appearances, he was chosen for his radical views, not his qualifications. His decisions as a trial judge have been reversed or criticized on appeal more than 150 times, far more than any other district judge nominated to a circuit court by President Bush. The Supreme Court unanimously reversed him in a voting rights case, in which Justice Clarence Thomas wrote that he had ignored established legal standards.

In fact, he has made serious mistakes in cases that matter most to Americansô daily lives. Time and again, the conservative Fourth Circuit has ruled that Judge Boyle improperly dismissed cases asking protection for individual rights, such as the right to free speech, or the right of free association, or the right to be free from discrimination, or the right to a fair and lawful sentence in a criminal case.

Itôs no wonder that his nomination is opposed by a broad coalition of organizations nationally and in his home state of North Carolina representing law enforcement officers, workers, and victims of discrimination.

Last, but by no means least disturbing, the President has re-nominated William Pryor to the Court of Appeals for the Eleventh Circuit. Mr. Pryor is no true ñconservative.ò He has pushed a radical agenda contrary to much of the Supreme Courtôs jurisprudence over the last forty years, and at odds with important precedents that have made our country a fairer nation.

Mr. Pryor has fought aggressively to undermine the power of Congress to protect civil rights and individual rights. Heôs tried to cut back on the Family and Medical Leave Act, the Americans with Disabilities Act, and the Clean Water Act. Heôs been contemptuously dismissive of claims of racial bias in the application of the death penalty. Heôs relentlessly advocated its use, even for persons with mental retardation. Heôs even ridiculed the current Supreme Court justices, calling them ñnine octogenarian lawyers who happen to sit on the Supreme Court.ò He canôt even get his facts right. Only two of the nine justices are 80 years old or older.

Mr. Pryor has criticized Section 5 of the Voting Rights Act, which helps ensure that all Americans can vote, regardless of their race or ethnic background. Heôs even called the Voting Rights Act, which has been repeatedly upheld by the Supreme Court, ñan affront to federalism.ò His hostility to voting rights belongs in another era ï not on a federal court. As Alabamaôs Attorney General, in a case involving a disabled man forced to crawl up the courthouse stairs to reach the courtroom, Mr. Pryor argued that the disabled have no fundamental right to attend their own public court proceedings. His nomination was rushed through the Committee despite serious questions about his ethics and even his candor before the Committee.

History will judge us harshly in the Senate if we donôt stand tall against the brazen abuses of power demonstrated by these nominees.

Many well-qualified, fair-minded nominees could be quickly confirmed if the Bush Administration would give up its right-wing litmus test. Why, when there are so many qualified Republican attorneys, would the President choose nominees whose records raise so much doubt about whether they will follow the law? Why force an all-out battle over a few right-wing nominees, when the nation has so many more pressing problems, such as national security, the economy, education, and health care?ò

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