had now is 27. It is down to 18. This is hard work. It is tons of work. My wife Julie and her family also raised sled dogs. It is really hard work, particularly in the cold, interior Alaska winters. And it is also dangerous, as Rod can attest.

In 2000, when competing for the first time in the 200-mile Tustumena 200 Sled Dog Race on the Kenai Peninsula, he took a wrong turn. It was snowing hard. It was difficult to see. The trail got obliterated. And he couldn't figure out how to get back on the trail. So he staked his dogs and hunkered down on a ridge to build camp. He had some candy, Reese's Pieces, dried lamb for the dogs. He had a cooker, thermos, some fuel, some twigs. He had bunny boots, fortunately, but not a parka.

He spent his days exploring, going as far as he dared to try to find the trail at night. At night, he could hear the helicopters above, looking for Rod, but they couldn't see him through the cloud cover.

What was going on turned out to be one of the largest land search and rescue missions in Alaska history, trying to find Rod Boyce, the intrepid editor of the News-Miner. But he didn't know that. He just knew that his days were ticking away. Rod's wife Julie was worried sick, of course, but kept it together throughout. On the sixth day—sixth day—almost a week, when the sky cleared, he headed out again and a snow machine came his way. ''I think I am the guy you're looking for,'' he told the driver, Ron Poston. Ron gave him a candy bar and a ride to safety.

That night, he and his wife celebrated with a beer and a cheeseburger. His feet were in bad shape, but otherwise he was unharmed. When he made it back to the newsroom, his fellow reporters put up markers that led from his parking space into the building in case he got lost again. He thought it was pretty funny.

On January 22, Rod Boyce left the News-Miner to take a job as a science writer and public information officer at the very cool and esteemed Geophysical Institute at the University of Alaska Fairbanks. He spends his days now writing about Tsunamis and the skies and the heavens. He said:

It is a nerd's dream . . . I had a good 35-year run in newspapers and was very fortunate to experience the things that I did and interact with all sorts of public officials and regular folks on the street. I got to see them at their highs and lows, their tragedies and their happiest moments.

He still has hopes for local news. ''A local news outlet can tie a local community together and that is super important. I hope that never changes,'' said Rod.

Me, too, Rod. Here is to local journalism. Here is to the mighty Fairbanks News-Miner, and here is to Rod Boyce. Thank you for being the guy behind the headlines all these many years. Thank you for keeping our communities and interior connected, and congratulations on perhaps one of the biggest awards you have ever received, our Alaskan of the Week.

I yield the floor.

The PRESIDING OFFICER (Mr. MURPHY). The majority leader.

MEASURE READ THE FIRST TIME—H.R. 1868

Mr. SCHUMER. Mr. President, I understand that there is a bill at the desk, and I ask for its first reading.

The PRESIDING OFFICER. The clerk will read the bill by title for the first time.

The bill clerk read as follows:

A bill (H.R. 1868), to prevent across-the-board direct spending cuts, and for other purposes.

Mr. SCHUMER. I now ask for a second reading and, in order to place the bill on the calendar under the provisions of rule XIV, I object to my own request.

The PRESIDING OFFICER. Objection being heard, the bill will be read on the next legislative day.

The PRESIDING OFFICER. The Senator from Nebraska.

FILIBUSTER

Mr. SASSE. 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 super-majority. 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.

Thank you.

ADJOURNMENT UNTIL 10 A.M. TOMORROW

The PRESIDING OFFICER. Under the previous order, the Senate stands adjourned until 10 a.m. tomorrow.

Thereupon, the Senate, at 11:03 p.m., adjourned until Thursday, March 25, 2021, at 10 a.m.

NOMINATIONS

Executive nominations received by the Senate:

FEDERAL TRADE COMMISSION

LINA M. KHAN, OF NEW YORK, TO BE A FEDERAL TRADE COMMISSIONER FOR THE UNEXPIRED TERM OF SEVEN YEARS FROM SEPTEMBER 26, 2017, VICE JOSEPH SIMONS.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

BILL NELSON, OF FLORIDA, TO BE ADMINISTRATOR OF THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, VICE JAMES BRIDENSTINE.

CONFIRMATIONS

Executive nominations confirmed by the Senate March 24, 2021:

DEPARTMENT OF ENERGY

DAVID TURK, OF MARYLAND, TO BE DEPUTY SECRETARY OF ENERGY.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

RACHEL LELAND LEVINE, OF PENNSYLVANIA, TO BE AN ASSISTANT SECRETARY OF HEALTH AND HUMAN SERVICES.