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## Documentation

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# U.S. Senators Speak Out Against Nuclear Option

### Sen. Joseph Biden

*Senator Biden (D-N.J.) made the following remarks on ABC's "This Week With George Stephanopoulos," on April 24.*

**Stephanopoulos:** He [Senate Majority Leader Bill Frist] also says, Senator Biden, that never in 214 years, never in the history of the United States Senate had a judicial nominee with majority support been denied an up-or-down vote until two years ago. Your response?

**Biden:** That's not true. There was an attempt to deny, there was a filibuster against Justice Fortas. Justice Fortas of the Supreme Court of the United States. It was ultimately that Justice Fortas ended up withdrawing. There was a filibuster. It lasted for, I think, 24 hours over a period of five days. That's simply not true, number one.

Factually, let's put in perspective what we're talking about here, George. The President of the United States has sent up 215 judicial nominees. We have confirmed 205 of the 215.

And the fact is, seven of the ten that were stopped, three had to do with a Michigan fight. Seven of the ten that were stopped are justices like Justice Janice Brown of the Supreme Court of the state of California who says, she calls the Supreme Court decisions in 1937 the decisions of a socialist revolution in 1937.

She talks about needing to do away with the New Deal. She raises questions, as does the leading architect, the leading supporter at the American Enterprise Institute of the constitutionality of the Social Security system and so on.

These are judges, the seven who were stopped—they're not about abortion. One of them, the issue came up about parental consent. The other six have extremely radical views about the so-called Takings Clause, the non-delegation doctrine.

And if you read what they've written and you read what others have written about those issues, you're talking about stopping the ability of county zoning facilities to be able to tell you you can't build a factory in the middle of a neighborhood unless you compensate the factory. This is radical stuff. . . .



### Sen. Robert C. Byrd

*From Senator Byrd's (D-W.Va.) remarks at a forum by the Center for American Progress on April 25:*

"That 150 lawyers should do business together [in the U.S. Congress] ought not to be expected." Those are the words of Thomas Jefferson.

Now comes the so-called nuclear option, or constitutional option, to prove him right. This poisoned pill, euphemistically designated "the nuclear option," has been around a long time—since 1917, in fact, the year the cloture rule was adopted by the U.S. Senate. It required no genius of Brobdingnagian proportions to conjure up this witch's brew. All that it takes is 1) to have the chair wired; 2) to have a majority of 51 votes to back the chair's ruling; and 3) a determined ruthlessness to execute the power grab. . . .



The filibuster is the final bulwark preventing a President from stacking the courts (as FDR tried to do in 1937) if his political party holds a majority in the Senate. Without the ability by a minority to defeat cloture by a supermajority vote, that slim wall holding back the waters of destruction of a fair and independent judiciary, ruptures. Other liberties enumerated in the bill of rights can then also be washed away by a President who stacks the courts to reflect a political agenda. Freedom of speech, freedom of religion, all could be gone, wiped out by a partisan court, beholden to one man: the President.

The threat of the so-called "nuclear option" puts us on a dangerous course. Yet, incredibly, today we stand right on the brink, maybe only days away, from destroying the checks and balances of our Constitution. What has happened to the quality of leadership in this country that would allow us to even consider provoking a Constitutional crisis of such major proportions? Where is the gentle art of compromise? . . . As I have said earlier, the nuclear option has been around for years. It could have been employed at any time. Yet, no leader of either party chose to go down that path because the consequences are so dire. Why have we arrived at such a dangerous impasse? . . .

It is very important to remember that the Senate has formalized ways of considering changes to our rules. Changes require 67 votes to curtail a filibuster of rules changes. If this nuclear option is employed in the way most frequently discussed—i.e., a ruling from the chair that a supermajority requirement for cloture on a filibuster in respect to amending the rules is unconstitutional, if sustained by 51 votes, cloture will require only a simple majority vote with respect to Federal judgeships. There is nothing, then, except good sense, which seems to be in very short supply,

to prevent majority cloture of any filibuster on any measure or matter, whether on the Legislative or the Executive calendar. Think of that! Rules going back for over 200 years and beyond, with roots in the early British Parliament, can be swept away by a simple majority vote. Because of demagoguery, lack of leadership, raw ambition, hysteria, and a state of brutal political warfare that wants no truce and brooks no peacemakers, we may destroy the U.S. Senate, leaving in our wake a President able to select and intimidate the courts like a King, and a system of government finally and irretrievably lost in a last pathetic footnote to Ben Franklin's rejoinder for the ages, "a Republic, if you can keep it." This is scary!

### Sen. Patrick Leahy

*Senator Leahy (D-Vt.) made the following statement on the Senate floor on April 22:*

Partisans these days are seeking to rekindle the flames of bigotry for short-term political gain. That is more than just wrong, it is despicable. To raise the specter of religious intolerance in order to try to turn our strong, independent Federal courts into an arm of a political party is an outrage. It is shocking that some would cavalierly destroy the independence of our Federal courts and with it the best protection Americans have of our freedoms. . . .



This week I renew my call to all Senators—and in particular to my friends on the other side of the aisle, the Republicans—to denounce the religious McCarthyism that is again pervading this debate. I am sad to see so many Senators stay silent when they should disavow these abuses. Why Republicans do not heed the clarion call that our former colleague, Sen. John Danforth, an Episcopalian priest, sounded a few weeks ago, I don't know.

The demagoguery and divisive politics being so cynically used by supporters of the President's most extreme judicial nominees needs to stop. These smears are lies and, like all lies, depend on the silence of others to live and to gain root. It is time for the silence to end. The Bush Administration has to accept responsibility for the smear campaign. They have to end it. This kind of religious smear campaign doesn't just hurt Democrats, it hurts the whole country. It hurts Christians and it hurts non-Christians. It hurts all of us, because the Constitution requires judges to apply the law, not their personal views.

Remember that all of us, no matter what our faith—and I am proud of mine—are able to practice our religion as we choose or not to practice a religion. The beauty of the First Amendment is we can practice any religion we wish

or none if we wish. It is a fundamental guarantee of our Constitution. The Constitution's prohibition against a religious test in Article VI is consistent with that fundamental freedom. . . .

Those who would try to drag us back into religious intolerance for short-term political gains subvert the Constitution and damage the country. There are those who say that we are against people of faith if we have opposed a handful of the President's nominees. By their false logic, the 205 judicial nominees nominated by President Bush whom Democratic Senators have helped to confirm would seem not to be people of faith, if that is our litmus test. Of course, that is as false and ridiculous on its face as are the slurs being insinuated against those who have opposed the few other nominees who have not been confirmed.

Those who hurl these false charges never mention that the same Senators they are slandering have supported hundreds of nominees who are people of faith. They never hesitate to stoke the flames of bigotry and to encourage their supporters to continue the smear in cyberspace or the pages of the newspapers or through direct mail or radio ads.

Maybe this slander is the only thing that tests well in their political polls so that even though untrue, it is the one thing they can agree upon. Sort of the equivalent of the weapons of mass destruction, the justification for attacking Iraq: It turned out it wasn't true, but it was certainly convenient.

Not only must this bogus religious test end, but Senators should denounce the launching of the so-called nuclear option, the Republicans' precedent-shattering proposal to destroy the Senate in one stroke while shifting more power over the Senate to the White House, to destroy the kind of checks and balances the Senate has historically had.

### Sen. Harry Reid

*From a speech by Minority Leader Reid (D-Utah) on the floor of the Senate on April 26:*

. . . Ninety-five percent of President Bush's nominees have been confirmed, but that isn't good enough. The Majority Leader wants to break the rules and turn the Senate into a rubber stamp for the President. Ultimately this is about removing the last check in Washington against complete abuse of power—the right to extended debate.



Once that last check is gone, the radical right will be able to place one of their own on the Supreme Court. This is all about the Supreme Court. . . . The radical right wants a different kind of Supreme Court—one that would roll back equality, liberty and the rights of all Americans. . . .