

## Biden: An Arrogant Grab for Power

*Sen. Joseph Biden (D-Del.) gave this speech during the Senate floor debate on May 23. Subheads have been added.*

Mr. President, my friends and colleagues, I have not been here as long as Senator Byrd, and no one fully understands the Senate as well as Senator Byrd, but I have been here for over three decades. This is the single most significant vote any one of us will cast in my 32 years in the Senate. I suspect the Senator would agree with that.

We should make no mistake. This nuclear option is ultimately an example of the arrogance of power. It is a fundamental power grab by the majority party, propelled by its extreme right and designed to change the reading of the Constitution, particularly as it relates to individual rights and property rights. It is nothing more or nothing less. Let me take a few moments to explain that.

Folks who want to see this change want to eliminate one of the procedural mechanisms designed for the express purpose of guaranteeing individual rights, and they also have a consequence, and would undermine the protections of a minority point of view in the heat of majority excess. We have been through these periods before in American history but never, to the best of my knowledge, has any party been so bold as to fundamentally attempt to change the structure of this body.

Why else would the majority party attempt one of the most fundamental changes in the 216-year history of this Senate, on the grounds that they are being denied 10 of 218 Federal judges, 3 of whom have stepped down? What shortsightedness, and what a price history will exact on those who support this radical move.

It is important we state frankly, if for no other reason than the historical record, why this is being done. The extreme right of the Republican Party is attempting to hijack the Federal courts by emasculating the courts' independence and changing one of the unique foundations of the Senate; that is, the requirement for the protection of the right of individual Senators to guarantee the independence of the Federal Judiciary.

This is being done in the name of fairness? Quite frankly, it is the ultimate act of unfairness to alter the unique responsibility of the Senate and to do so by breaking the very rules of the Senate.

### The 'Constitution in Exile' Movement

Mark my words, what is at stake here is not the politics of 2005, but the Federal Judiciary in the country in the year 2025. This is the single most significant vote, as I said earlier, that I

will have cast in my 32 years in the Senate. The extreme Republican right has made Federal appellate Judge Douglas Ginsburg's "Constitution in Exile" framework their top priority.

It is their purpose to reshape the Federal courts so as to guarantee a reading of the Constitution consistent with Judge Ginsburg's radical views of the Fifth Amendment's Taking Clause, the Nondelegation Doctrine, the 11th Amendment, and the 10th Amendment. I suspect some listening to me and some of the press will think I am exaggerating. I respectfully suggest they read Judge Ginsburg's ideas about the "Constitution in Exile." Read it and understand what is at work here.

If anyone doubts what I am saying, I suggest you ask yourself the rhetorical question, "Why, for the first time since 1789, is the Republican-controlled Senate attempting to change the rule of unlimited debate, eliminate it, as it relates to Federal judges for the circuit court or the Supreme Court?"

If you doubt what I said, please read what Judge Ginsburg has written and listen to what Michael Greve of the American Enterprise Institute has said: "I think what is really needed here is a fundamental intellectual assault on the entire New Deal edifice. We want to withdraw judicial support for the entire modern welfare state."

Read: Social Security, workmen's comp. Read: National Labor Relations Board. Read: FDA. Read: What all the by-product of that shift in constitutional philosophy that took place in the 1930s meant.

We are going to hear more about what I characterize as a radical view—maybe it is unfair to say radical—a fundamental view and what, at the least, must be characterized as a stark departure from current constitutional jurisprudence. Click on to the American Enterprise Institute website, [www.aei.org](http://www.aei.org). Read what they say. Read what the purpose is. It is not about seeking a conservative court or placing conservative Justices on the bench. The courts are already conservative.

Seven of the nine Supreme Court Justices appointed by Republican Presidents Nixon, Ford, Reagan, and Bush 1—seven of nine. Ten of 13 Federal circuit courts of appeal dominated by Republican appointees, appointed by Presidents Nixon, Ford, Reagan, Bush 1, and Bush 2; 58 percent of the circuit court judges appointed by Presidents Nixon, Ford, Reagan, Bush 1, or Bush 2. No, my friends and colleagues, this is not about building a conservative court. We already have a conservative court. This is about guaranteeing a Supreme Court made up of men and women such as those who sat on the Court in 1910 and 1920. Those who believe, as Justice Janice Rogers Brown of California does, that the Constitution has been in exile since the New Deal.

My friends and colleagues, the nuclear option is not an isolated instance. It is part of a broader plan to pack the court with fundamentalist judges and to cower existing conservative judges to toe the extreme party line.

You all heard what Tom DeLay said after the Federal courts refused to bend to the whip of the radical right in the Schiavo case. Mr. DeLay declared: "The time will come for

men responsible for this to answer for their behavior.”

Even current conservative Supreme Court Justices are looking over their shoulder, with one extremist recalling the despicable slogan of Joseph Stalin—and I am not making this up—in reference to a Reagan Republican appointee, Justice Kennedy, when he said: “No man, no problem”—absent his presence, we have no problem.

Let me remind you, as I said, Justice Kennedy was appointed by President Reagan.

Have they never heard of the independence of the judiciary—as fundamental a part of our constitutional system of checks and balances as there is today; which is literally the envy of the entire world, and the fear of the extremist part of the world? An independent judiciary is their greatest fear.

### Why Are the Radicals Focussing on the Court?

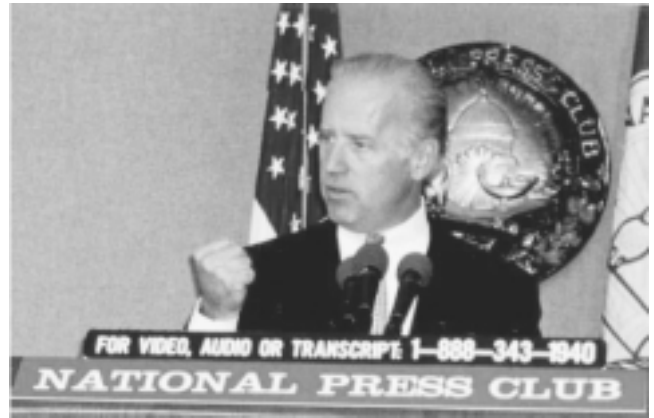
Why are radicals focussing on the court? Well, first of all, it is their time to be in absolute political control. It is like, why did Willy Sutton rob banks? He said: Because that is where the money is. Why try it now—for the first time in history—to eliminate extended debate? Well, because they control every lever of the Federal government. That is the very reason why we have the filibuster rule. So when one party, when one interest controls all levers of government, one man or one woman can stand on the floor of the Senate and resist, if need be, the passions of the moment.

But there is a second reason why they are focusing on the courts. That is because they have been unable to get their agenda passed through the legislative bodies. Think about it. With all the talk about how they represent the majority of the American people, none of their agenda has passed as it relates to the Fifth Amendment, as it relates to zoning laws, as it relates to the ability of Federal agencies, such as the Food and Drug Administration, the Environmental Protection Agency, to do their jobs.

Read what they write when they write about the Nondelegation Doctrine. That simply means, we in the Congress, as they read the Constitution, cannot delegate to the Environmental Protection Agency the authority to set limits on how much of a percentage of carcinogens can be admitted into the air or admitted into the water. They insist that we, the Senate, have to vote on every one of those rules, that we, the Senate and the House, with the ability of the President to veto, would have to vote on any and all drugs that are approved or not approved.

If you think I am exaggerating, look at these websites. These are not a bunch of wackos. These are a bunch of very bright, very smart, very well-educated intellectuals who see these Federal restraints as a restraint upon competition, a restraint upon growth, a restraint upon the powerful.

The American people see what is going on. They are too smart, and they are too practical. They might not know the meaning of the Nondelegation Doctrine; they might not know the clause of the Fifth Amendment relating to property; they may not know the meaning of the 10th and 11th Amendments



*Sen. Joseph Biden, speaking before the accord was reached: “This nuclear option . . . is a fundamental power grab by the majority party, propelled by its extreme right and designed to change the reading of the Constitution.”*

as interpreted by Judge Ginsburg and others, but they know that the strength of our country lies in common sense and our common pragmatism, which is antithetical to the poisons of the extremes on either side.

The American people will soon learn that Justice Janice Rogers Brown—one of the nominees who we are not allowing to be confirmed, one of the ostensible reasons for this nuclear option being employed—has decried the Supreme Court’s “socialist revolution of 1937.” Read: Social Security. Read what they write and listen to what they say. The very year that a 5-to-4 Court upheld the constitutionality of Social Security against a strong challenge—1937—Social Security almost failed, by one vote.

It was challenged in the Supreme Court as being confiscatory. People argued then that a government has no right to demand that everyone pay into the system, no right to demand that every employer pay into the system. Some of you may agree with that. It is a legitimate argument, but one rejected by the Supreme Court in 1937, that Justice Brown refers to as the “socialist revolution of 1937.”

If it had not been for some of the things they had already done, nobody would believe what I am saying here. These guys mean what they say. The American people are going to soon learn that one of the leaders of the Constitutional Exile school, the group that wants to reinstate the Constitution as it existed in 1920, said of another filibustered judge, William Pryor, that “Pryor is the key to this puzzle. There’s nobody like him. I think he’s sensational. He gets almost all of it.”

That is the reason why I oppose him. “He gets all of it.” And you are about to get all of it if they prevail. We will not have to debate about Social Security on this floor.

So the radical right makes its power play now, when they control all political centers of power, however temporarily. The radicals push through the nuclear option and then pack the courts with unimpeded judges who, by current estimations, will serve an average of 25 years. The right is focussed

on packing the courts, because their agenda is so radical that they are unwilling to come directly to you, the American people, and tell you what they intend.

Without the filibuster, President Bush will send over more and more judges of this nature, with perhaps three or four Supreme Court nominations. And there will be nothing—*nothing*—that any moderate Republican friends and I will be able to do about it.

Judges who will influence the rights of average Americans: the ability to sue your HMO that denies you your rights; the ability to keep strip clubs out of your neighborhood—because they make zoning laws unconstitutional—without you paying to keep the person from building; the ability to protect the land your kids play on, the water they drink, the air they breathe, and the privacy of your family in your own home.

Remember, many of my colleagues say there is no such thing as a right to privacy in any iteration under the Constitution of the United States of America. Fortunately, we have had a majority of judges who disagreed with that over the past 70 years. But hang on, folks. The fight over judges, at bottom, is not about abortion and not about God; it is about giving greater power to the already powerful. The fight is about maintaining our civil rights protections, about workplace safety and worker protections, about effective oversight of financial markets, and protecting against insider trading. It is about Social Security. What is really at stake in this debate is, point blank, the shape of our constitutional system for the next generation.

## Emasculating the Senate Into a Parliament

The nuclear option is a twofer. It excises, friends, our courts and, at the same time, emasculates the Senate. Put simply, the nuclear option would transform the Senate from the so-called cooling saucer our Founding Fathers talked about, to cool the passions of the day, to a pure majoritarian body like a Parliament. We have heard a lot in recent weeks about the rights of the majority and obstructionism. But the Senate is not meant to be a place of pure majoritarianism.

Is majority rule what you really want? Do my Republican colleagues really want majority rule in this Senate? Let me remind you, 44 of us Democrats represent 161 million people. One hundred sixty-one million Americans voted for these 44 Democrats. Do you know how many Americans voted for the 55 of you? One hundred thirty-one million. If this were about pure majorities, my party represents more people in America than the Republican Party does. But that is not what it is about. Wyoming, the home state of the Vice President, the President of this body, gets one Senator for every 246,000 citizens; California, gets one Senator for 17 million Americans. More Americans voted for Vice President Gore than they did Governor Bush. By majoritarian logic, Vice President Gore won the election.

Republicans control the Senate, and they have decided they are going to change the rule. At its core, the filibuster is

not about stopping a nominee or a bill, it is about compromise and moderation. That is why the Founders put unlimited debate in. When you have to—and I have never conducted a filibuster—but if I did, the purpose would be that you have to deal with me as one Senator. It does not mean I get my way. It means you may have to compromise. You may have to see my side of the argument. That is what it is about, engendering compromise and moderation.

Ladies and gentlemen, the nuclear option extinguishes the power of independents and moderates in this Senate. That is it. They are done. Moderates are important only if you need to get 60 votes to satisfy cloture. They are much less important if you need only 50 votes. I understand the frustration of our Republican colleagues. I have been here 32 years, most of the time in the majority. Whenever you are in the majority, it is frustrating to see the other side block a bill or a nominee you support. I have walked in your shoes, and I get it.

I get it so much that what brought me to the Senate was the fight for civil rights. My state, to its great shame, was segregated by law, was a slave state. I came here to fight it. But even I understood, with all the passion I felt as a 29-year-old kid running for the Senate, the purpose—the *purpose*—of extended debate. Getting rid of the filibuster has long-term consequences. If there is one thing I have learned in my years here: Once you change the rules and surrender the Senate's institutional power, you never get it back. And we are about to break the rules to change the rules.

I do not want to hear about “fair play” from my friends. Under our rules, you are required to get two-thirds of the votes to change the rules. Watch what happens when the majority leader stands up and says to the Vice President—if we go forward with this—he calls the question. One of us, I expect our leader, on the Democratic side, will stand up and say: Parliamentary inquiry, Mr. President. Is this parliamentarily appropriate? In every other case since I have been here, for 32 years, the Presiding Officer leans down to the Parliamentarian and says: What is the rule, Mr. Parliamentarian? The Parliamentarian turns and tells them.

Hold your breath, Parliamentarian. He is not going to look to you because he knows what you would say. He would say: This is not parliamentarily appropriate. You cannot change the Senate rules by a pure majority vote.

So if any of you think I am exaggerating, watch on television, watch when this happens, and watch the Vice President ignore—he is not required to look to an unelected officer, but that has been the practice for 218 years. He will not look down and say: What is the ruling? He will make the ruling, which is a lie, a lie about the rule.

Isn't what is really going on here, that the majority does not want to hear what others have to say, even if it is the truth? Senator Moynihan, my good friend who I served with for years, said: You are entitled to your own opinion but not your own facts.

The nuclear option abandons America's sense of fair play. It is the one thing this country stands for: not tilting the playing

field on the side of those who control and own the field.

I say to my friends on the Republican side: You may own the field right now, but you won't own it forever. I pray God when the Democrats take back control, we don't make the kind of naked power grab you are doing. But I am afraid you will teach my new colleagues the wrong lessons.

We are only in the Senate as temporary custodians of the Senate. The Senate will go on. Mark my words, history will judge this Republican majority harshly, if it makes this catastrophic move.

Mr. President, I ask unanimous consent that the full text of my statement as written be printed in the *Record*.

[There being no objection, the statement was ordered to be printed in the *Congressional Record*.]

## Bipartisan Senators: We Have Kept the Republic

*This May 23 press conference, announcing an agreement to prevent the "nuclear option," was addressed by Senators John Warner (R-Va.), John McCain (R-Ariz.), Joseph Lieberman (D-Conn.), Ben Nelson (D-Neb.), Olympia Snowe (D-Me.), Mark Pryor (D-Ak.), Mike DeWine (R-Ohio), Robert Byrd (D-W.V.), Mary Landrieu (D-La.), Susan Collins (R-Me.), Lindsey Graham (R-S.C.), and Ken Salazar (D-Colo.).*

**McCain:** We're here, 14 Republicans and Democrats, 7 on each side, to announce that we have reached an agreement to try to avert a crisis in the United States Senate and pull the institution back from a precipice that would have had, in the view of all 14 of us, lasting impact, damaging impact on the institution.

I'm grateful for the efforts of Senator Frist and Senator Reid to come to an agreement on this issue. We appreciate very much their leadership. And we all appreciate each other's involvement, but probably the two that I'd like to point out here that provided us with a beacon of where we should go, were Senator Byrd, our distinguished senior Democrat leader, and Senator Warner, who both were vital to this process.

You have before you the agreement and I won't go in the details of it. But basically, all 14 of us have pledged to vote for cloture for the judicial nominees Janice Rogers Brown, William Pryor, and Priscilla Owen.

The signatories make no commitment to vote for or against cloture on two judges, William Myers and Henry Saad. Future nominations will—the signatories will exercise their responsibilities and the nominees should only be filibustered under extraordinary circumstances.

And in light of this commitment and a continuing commitment, we will try to do everything in our power to prevent filibusters in the future.

This agreement is meant in the finest traditions of the

Senate; it was entered into with trust, respect, and mutual desire to see the institution of the Senate function in ways that protect the rights of the minority.

So I'm very pleased to stand here with my other colleagues tonight and I believe that that goodwill will prevail.

Nothing in this agreement prevents any individual Senator from exercising his or her individual rights.

I would like to ask Senator Nelson and Senator Pryor—but I want to, again, thank my colleagues. And I believe that most Americans would like for us to work these issues out rather than pursue the procedure that we have just departed from, I hope.

**Nelson:** Well, thank you very much, Senator.

And I, too, am very proud to be here with my colleagues tonight.

And I'm glad to say that we have been able to reach an agreement, if you will, make a deal for the future to deal with the Senate business in a way that will keep the faith, will certainly keep the faith of the Framers of our country and the Founding Fathers. It will retain the individual rights and responsibilities of each Senator.

I think it's a positive step for us to be able to set aside the nuclear option. It also gives as many judges as we possibly can under these circumstances an up-or-down vote.

So I think the good faith and the mutual trust that we have achieved here will carry over into this Senate on other business as well.

So, thank you to my colleagues. And you were asking just the other day how to handicap this. Well, I would have to say right now, it's 100%. Thank you.

**Pryor:** Let me just say a couple of very quick words. And first thing I want everybody here to know: We don't have a Thomas Jefferson in the bunch, OK? This came as a result of perspiration, not inspiration. As you know, we worked very, very hard to get here. It is in the finest traditions of the Senate and this agreement is based on trust. It's based on trust.

And I know that people here want to ask a million "what ifs." What if this? What if that? What about this person or that person, this circumstance?

Listen, there's a lot of hypotheticals. We don't know what is coming down in the future, but we do know that we trust each other.

The 14 of us have sat down, looked at each other, shaken hands, shared our hopes, our dreams, our fears, our frustrations, and this is based on trust.

And with that, what I would like to do is turn it over to Senator Warner for a brief word. And then he's going to introduce Senator Byrd.

**Warner:** No, I'd like to yield to Senator Byrd.

**Pryor:** Senator Byrd, come up—

**Byrd:** I'll wait my turn.

[crosstalk: Your turn is now! Your turn is whenever you want it.]

**Warner:** I would simply say, by way of introduction, we opened almost every meeting with Bob Byrd saying, "Coun-