THE POLITICAL SCENE

BLOWING UP THE SENATE

Will Bush's judicial nominees win with the "nuclear option"?

BY JEFFREY TOOBIN

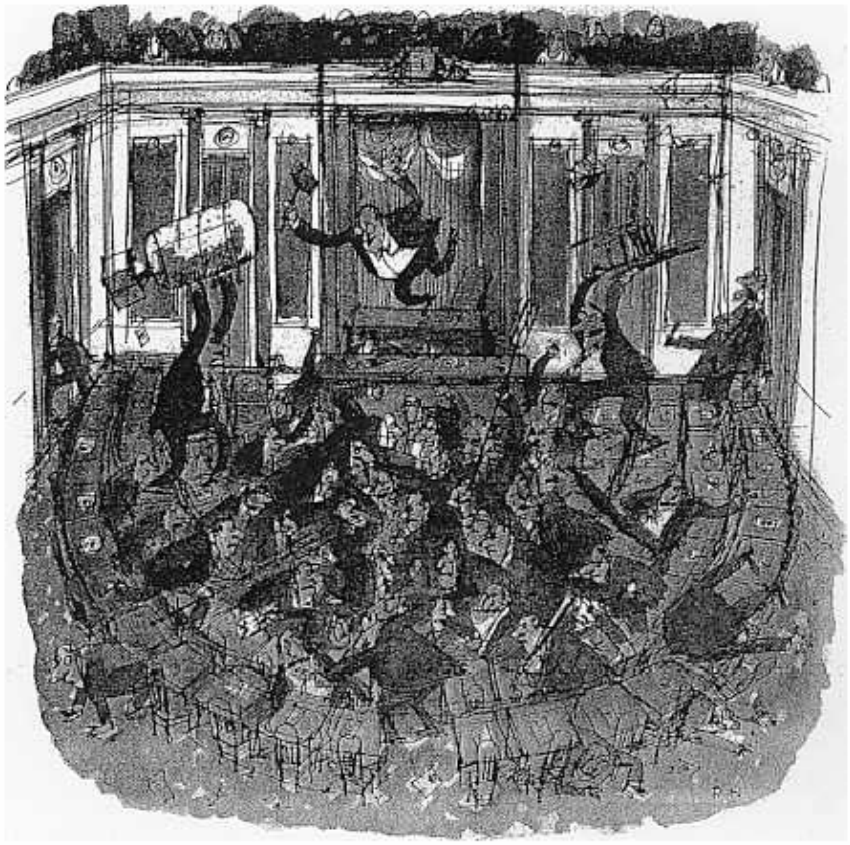
Most popular histories of Congress include an exchange, very likely apocryphal, in which Washington and Jefferson discuss the difference between the House and the Senate. "Why did you pour that coffee into your saucer?" Washington asks. "To cool it," Jefferson replies. "Even so," Washington says, "we pour legislation into the senatorial saucer to cool it." For Joseph Biden, the Delaware Democrat and a senator since 1973, the Senate remains a place where "you can always slow things down and make sure that a minority gets a voice," he said recently. And, he added, "the chance to filibuster"—using extended debate in order to block legislation—"is what makes the difference between this body and the other one." It takes three-fifths of the Senate—or sixty senators—to break a filibuster. (The cloture rule, as it is known, has been in effect since 1917; before 1975, it took a two-thirds vote to end a debate.) But the filibuster rule may soon be altered in a dramatic way, and the Senate itself may change along with it.

The precipitating factor is a continuing controversy over President Bush's judicial selections. Although more than two hundred of Bush's nominees were approved by the Senate in the past four years, Democrats used the filibuster to stop ten appellate-court choices. As a result, some Republicans are pushing to alter the Senate's rules so that a simple majority could cut off debate on judicial nominees. With the Senate now split fifty-five to forty-four (with one independent) in favor of the Republicans, the change could render the Democrats almost powerless to stop Bush's choices, including nominees to the United States Supreme Court. The magnitude of this transformation of the rules is suggested by the nickname it has acquired within the Senate: the "nuclear option."

The man at the center of the controversy over judicial nominations is Senator Arlen Specter, who also, as it happens, reflects the broader transformation of the Senate itself. Specter, of Pennsylvania, was elected in 1980. These days, in his office overlooking the Supreme Court, he surveys, not happily, the current state of his party—especially the disappearance of moderates like him. "We had a lot of senators," he said. "We could go on and on and on," and he named, as examples of this group, Bob Packwood, Mark Hatfield, Lowell Weicker, Charles Mathias, and John Heinz. "And we don't have them now. So it's not good for the Party, and it's not good for the country. It's not good for the Party because you need balance. You need to be a national party." Since 1980, the year of the Ronald Reagan landslide, moderate Republicans have been a vanishing species.

Specter's election, last year, to his fif term showed how estranged he h: grown from much of his own party. In : abrasive Republican primary, one which Bush campaigned for him, Spect barely defeated a conservative challenge but he won by eleven per cent in the ger eral election, in a state carried by Joh Kerry. On November 3rd, the day aft the election, a reporter asked Specte about possible Supreme Court nominee an issue that had fresh importance be cause Specter, a longtime member of th Senate Judiciary Committee, was finall in line to become its chairman and thu the steward of Bush's judicial appoint ments. Repeating a view that he had ex pressed many times, Specter said that h regarded the protection of abortion rights established by Roe v. Wade, as "inviolate," and he suggested that "nobody can be confirmed today" who disagrees with that opinion. Virtually overnight, the conservative groups that had supported the primary challenge against Specter, such as Focus on the Family, demanded that he be denied the chairmanship.

The criticism had a personal dimen-



If the G.O.P. changes the filibuster rule, the Senate itself may be greatly transformed.

sion, too. Charm has played little role in Specter's political career; he has an air of superiority that hovers just short of a perpetual sneer, which he isn't afraid to inflict on senatorial colleagues or on his staff. (To see Specter walk through his office, where I met with him recently, is to watch his underlings cower.) His abundant self-confidence was first on view during his days as a staff lawyer on the Warren Commission, where he championed the "single-bullet theory" for the assassination of John F. Kennedy. (The theory—upon which the possibility of a lone gunman depends—supposes that one bullet struck President Kennedy before travelling onward to inflict multiple wounds on Governor John Connally.) During his tenure on the Judiciary Committee, Specter has been at the center of several major battles. In 1987, he voted against President Reagan's nomination of Robert Bork to the Supreme Court; four years later, though, he was one of Clarence Thomas's principal supporters, and at one point accused Anita Hill of committing perjury during her testimony.

Not surprisingly, more than a few people, especially in the conservative base of the Republican Party, enjoyed the thought of making Specter's life uncomfortable. On November 17th, he was forced to ask his colleagues for the Judiciary chairmanship. After separate meetings with the Senate leadership and with other Republicans on the Judiciary Committee, Specter was told that he could assume the chairmanship—on several conditions. At a press conference the next day, Specter made those conditions public. Introduced by Orrin Hatch, of Utah, who was barred by term limits from continuing as Judiciary chairman, Specter recited the provisions of the deal. "I have not and would not use a litmus test to deny confirmation to pro-life nominees," Specter said, in the weary monotone of a Soviet prisoner forced to confess his ideological errors. "I have voted for all of President Bush's judicial nominees in committee and on the floor, and I have no reason to believe that I'll be unable to support any individual President Bush finds worthy of nomination."

I had been in Specter's office the previous day and had asked him whether he supported the change in the filibuster rule. He was noncommittal, saying, "If the Republican caucus decides to consider it, I'll give it some serious thought." Overnight, apparently, he had. At the press conference, Specter said he would use his "best efforts to stop any future filibusters. . . . If a rule change is necessary to avoid filibusters, there are relevant recent precedents to secure rule changes with fifty-one votes."

On the Judiciary Committee, the chairman remains on a kind of extended probation. "Everyone who pays attention knows that Senator Specter comes from a state and a segment of the Party that are to the left of the President and the Republican caucus," John Cornyn, a conservative first-term senator from Texas, said. (In his outer office, Specter has three photographs of himself with Bill Clinton, while the television in Cornyn's space is tuned to Fox News.) "People are looking very closely to see what he is really going to do. I have been pretty pleased from what I've seen of Senator Specter's performance so far."

The controversy effectively neutralized Specter as a possible impediment to Bush's judicial nominees; the rules of the Senate remained another obstacle. A vote of two-thirds of the Senate is required to end a filibuster against a rules change. But, as one delves into those rules, they look less like fixed laws and more like accommodations of a shifting power structure.

Changing the Senate's rules on judicial filibustering was first addressed in 2003, during the successful Democratic filibuster against Miguel Estrada, whom Bush had nominated to the United States Court of Appeals for the District of Columbia Circuit. Ted Stevens, a Republican Senate veteran from Alaska, was complaining in the cloakroom that the Democratic tactic should simply be declared out of order, and, soon enough, a group of Republican aides began to talk about changing the rules. It was understood at once that such a change would be explosive; Senator Trent Lott, the former Majority Leader, came up with "nuclear option," and the term stuck.

This cloakroom conversation has evolved into a full-fledged proposal, complete with an intellectual pedigree. Several Republican senators told me that they had spent part of the Christmas recess reading the draft of a law-review article co-written by Martin B. Gold, an expert

on Senate procedures, who served as an aide to Bill Frist after he became Majority Leader. The article, "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster," which was recently published by the *Harvard Journal of Law & Public Policy*, is a step-by-step guide to changing the Senate rules.

According to Gold's scenario, in an extended debate over a judicial nominee a senator could raise a point of order that "any further debate is dilatory and not in order." If the Presiding Officer of the Senate—Vice-President Dick Cheney—sustained the point of order, Gold wrote, "he would set a new, binding Senate precedent allowing Senators to cut off debate." Democrats could challenge the Vice-President, but it takes only a majority vote to sustain a ruling by the Presiding Officer. The Republicans, with their majority, could both cut off debate on a nominee and establish a precedent that would apply to all future judicial nominations. (A legal challenge by Democrats would almost surely fail, because courts generally defer to the other branches of government on matters concerning their internal operations.) Henceforth, then, filibusters on judges would be impossible.

Republicans have started to call the tactic the "constitutional option." In part, this is simply marketing, but the name also reflects the opinion of Orrin Hatch, among others, that the Republicans' action has a basis in the Constitution, as well as in the Senate rules. With nearly three decades in the Senate, Hatch, who is seventy, may be the nation's best-known Utahan, even though his Midwestern accent betrays his roots, in Pittsburgh. He was for many years rumored to be a possible Republican appointee to the Supreme Court, and has become instead the unofficial lead constitutional lawyer for Senate Republicans. "The Founding Fathers knew how to create a supermajority requirement when they wanted to," he told me. "They did it with amending the Constitution, they did it with ratifying treaties, which both require two-thirds of the Senate. And just a few lines below that they said 'advice and consent' on judges—no supermajority requirement. By using filibusters on the judges, the Democrats have essentially imposed a supermajority requirement, and we are entitled to stop them. This would not affect filibusters on legislation, which could still take place." Charles Grassley, an Iowa Republican, who also supports the change, said, "Filibusters are designed so that the minority can bring about compromise on legislation. You can always change the words of a bill or the dollars involved. But you can't compromise a Presidential nomination. It's yes or no. So filibusters on nominations are an abuse of our function under the Constitution to advise and consent."

Hatch didn't want to wait until the next filibuster to change the rules. "I have recommended that we go to the constitutional option early in the game," he said. "The worst way to do it is during a Supreme Court nomination, and then it becomes all politics. Let's do it now."

The escalation in parliamentary warfare began during Bush's first term, when Democrats took an uncharacteristically aggressive tack in opposing some of his nominees to the federal appellate courts. "The standard that was used before—it's likely it will be used again—was that if the Democrats on the Judiciary Committee vote unanimously against a nominee, then the recommendation to the caucus will be to oppose the nominee, including through the use of the filibuster," Richard Durbin, the Illinois senator and assistant Majority Leader, said. "That is what led to the ten who were not confirmed." These filibusters were especially controversial because Senate Republicans certainly would have confirmed the nominees if they had received a straight up-or-down vote. "Every one of these nominees had a majority," Hatch said. "This has caused a tremendous amount of angst."

The Democratic judicial filibusters of the past several years lacked any of the accoutrements of the great marathons of the Senate's past—no men in suits dozing on cots in the cloakrooms, no recitations of poetry (or recipes) to pass the hours in debate. (In 1957, Strom Thurmond gave the longest speech in Senate history—twenty-four hours and eighteen minutes, as part of his unsuccessful effort to stop the passage of the Civil Rights Act.) During the past two years, Democrats simply announced that they planned to filibuster against certain nominees, and the Republicans agreed to move on to other business. According to one Republican Senate aide, "The Democrats could keep one or two of their people on the floor, talking all night, and they could request a quorum anytime they wanted. We'd have to keep fifty-one of our people there all night, and our people wouldn't do it. Some of them are old. Some are sick. And it wouldn't break the filibuster anyway. That's why the filibuster is so effective."

Republicans claimed that the use of the filibuster against judicial nominees who had majority support on the floor was unprecedented—a charge that had some elements of truth. Before 2000, there had been a handful of filibusters on judicial nominees, but only in extraordinary circumstances. In 1968, Republicans used one to head off Lyndon Johnson's nomination of Abe Fortas as Chief Justice, although Fortas might not have been confirmed anyway. Other kinds of obstruction, however, have become increasingly common. Republicans controlled the Senate for six of President Clinton's eight years in office, and during that time the Judiciary Committee blocked more than sixty of his judicial nominees from reaching the floor, where many of them would have been confirmed. A substantial number of these nominees never made it out of committee. "The Republicans did plenty of obstruction of Clinton's judicial nominees in the nineteen-nineties, but they did it in a different way," Sarah Binder, a professor at George Washington University and the co-author of a book on filibustering, said. "The Republicans just didn't need filibusters."

Democrats assert that, by confirming more than two hundred of Bush's nominees, they have produced for this President a better per-term average of confirmations than those for Presidents Clinton, Reagan, or George H. W. Bush. Hatch called Democratic complaints "total bullcorn," and went on, "Ronald

Reagan was the all-time confirmation champion, with three hundred and eighty-two federal judges. He had six years of a Republican Senate to help him. Guess how many Bill Clinton had with only two years of a Democratic Senate? Three hundred and seventy-seven. Not bad at all. I always gave their nominees a fair shake."

Both parties, in any case, have continued to ratchet up the partisanship. "Let me tell you how we did it in the Reagan Administration," Biden, who chaired the Judiciary Committee for several of those years, said. "They came to me and told me whom they were going to nominate, and I'd say, 'You're going to have a problem with this one or that one'—maybe a dozen out of the hundreds of judges that Reagan appointed. And I'd say, 'If you want to push that guy, all the others will wait in line behind him.' And the problems generally were removed. We did business that way for years, and it worked. Now this crowd wants to shove everything down our throats. They don't pull back on anybody. So we escalated with the filibusters. And they escalate with the nuclear option."

"What the hell? We could use an idiot.

The decision of whether, and when, to push the rules change will rest largely with Bill Frist, the Republican leader. Most Majority Leaders tend to be long-serving Senate insiders, but Frist, a heart surgeon from Nashville, is only in his second term. (The job became available when Trent Lott had to step down, in December, 2002, because he made favorable comments about the 1948 Presidential campaign of the segregationist Strom Thurmond.) Frist has announced that he plans to leave the Senate in 2006, presumably to begin a run for President in 2008. "He believes that there is no issue that is more closely identified with him personally than judicial filibusters," a Frist aide told me.

Frist has been moving toward a showdown with Democrats over the issue. In May, 2003, Frist and Senator Zell Miller, a conservative Georgia Democrat, proposed a compromise of sorts, in which debate on judges could be ended on a sliding scale: the first attempt would require sixty votes, then fifty-seven, and so on until a simple majority would suffice. (Democrats threatened to filibuster the proposal, effectively killing it.) Then, on November 12, 2004, Frist gave an uncharacteristically fiery speech to the Federalist Society, the conservative lawyers' organization, denouncing judicial filibusters. "This filibuster is nothing less than a formula for tyranny by the minority," Frist said. On January 4th, in a speech on the Senate floor, Frist declared that he would bring one of the President's judicial nominees to the floor sometime in February, and he would see to it that there was an up-or-down vote. Frist also said that he does "not acquiesce to carrying over all the rules from the last Congress." Frist was taunting the Democrats, saying, "Some, I know, have suggested that the filibusters of the last Congress are reason enough to offer a procedural change today, right here and right now, but at this moment I do not choose that path." Bush gave an implicit endorsement to the change in his State of the Union address, insisting, to huge applause on the G.O.P. side of the chamber, "Every judicial nominee deserves an up-or-down vote."

Frist has the sympathetic half smile of a doctor making a house call. In his splendid Senate office, he conveys earnestness more than passion. "I'm here for twelve years in the Senate, and I'm sticking to that," he told me. "And the time limit has made me focus on the big things, the big core values, while I'm here. To me, it is crystal clear that the change in the Democrats' behavior, the use of the filibuster the way they have, is an affront to the advise-and-consent power of our Constitution."

Frist has a strong political motive to embrace the change. His allies believe that in 2008 Republican-primary voters will reward him both for defying Senate Democrats and for confirming some conservative judges. "Frist knows he is seen as a bit of a compromiser," his aide said. "He understands that this will nail it down with the base. Frist is not an institutional 'Senate guy.' He has no illusion about the Senate being the world's greatest deliberative body. To him, it's a place to get things done."

Frist's enthusiasm may not be enough to get the fifty Republican votes he needs to change the rules. On February 10th, Frist told the Washington *Times* that he had fifty-one votes, but a few days later, to me, he said, "I'm not going to talk about vote counts." Senator John McCain, of Arizona, seems likely to oppose the idea. "We Republicans are not blameless here," McCain told me. "For all intents and purposes, we filibustered Clinton's judges, by not letting them out of committee. Making this change would put us on a slippery slope to getting rid of the filibuster altogether. It's not called 'nuclear' for nothing." Several other Republican senators also expressed reservations about the idea, often using similar language. Chuck Hagel, from Nebraska, said that he was undecided, and added, "I think the judges deserve up-or-down votes, but the filibuster is an important tool for the minority in the Senate." Susan Collins, a moderate from Maine, who is also undecided, said, "It's wrong for the Democrats to filibuster judges, but I'm concerned about the effect on the work of the Senate if the constitutional, a.k.a. nu-

clear, option is pursued." John Sununu, a first-termer from New Hampshire, and Lamar Alexander, Frist's junior colleague from Tennessee, have not made up their minds, either. Even Lindsey Graham, a Republican from South Carolina who supports the rules change, seemed to speak for many when he said, "Nobody wants to blow the place up."

That—or something close to it—is what Democrats are threatening. "On both sides of the aisle, even among a good number of Republicans who are quite conservative, they know the nuclear option dramatically changes this place," said Charles Schumer, the New York Democrat, who has been a leader for his party on judicial confirmations. "It makes the Senate into the House of Representatives. We are no longer the cooling saucer. The whole idea of the Senate is you need a greater degree of bipartisanship, comity, than in the House. And there are many conservative senators, particularly the ones who've been around a long time, who will not change that." As Richard Durbin put it, "Several of the Republican members have been in the minority, and they know they will not be in the majority forever. They don't want to do this to the institution." But on every important vote of the past four years the Republicans have ultimately rallied to support the President.

The possibility of a Democratic retaliation—the Party's own attempt at all-out war—is real. Even without the filibuster, Senate rules give a minority the chance to make life miserable for the majority. A single member can gum up the legislative machinery, as Tom Daschle, the South Dakota Democrat, who was his party's leader for a decade in the Senate, explained. "The Senate runs on 'unanimous consent,'" Daschle said. "It takes unanimous consent to stop the reading of bills, the reading of every amendment. On any given day, there are fifteen or twenty nominations and a half-dozen bills that have been signed off for unanimous consent. The vast work of the Senate is done that way. But any individual senator can insist that every bill be read, every vote be taken, and bring the whole place to a stop." Daschle also doubted that the limitations on filibustering would in the future be applied only to judicial nominations. "Within ten years, there'd be rules that you can't filibuster tax cuts," he said.

Last November, Daschle became the first party leader in a half century to be defeated for reëlection. In a strongly Republican state, he lost a close race to John Thune, a telegenic former congressman, who made effective use of the fact that Daschle had once referred to himself as a District of Columbia resident. But another of Thune's arguments was that Daschle had become the "obstructionist-in-chief." Daschle's defeat may make a strategy based on tying up the Senate appear less than promising for the Democrats.

Specter has done his best to try to avoid a confrontation. He plans to bring up some of Bush's less controversial judicial nominees first, in an attempt to build momentum for compromise. But on February 14th Bush formally resubmitted to the Senate seven nominees whom the Democrats had filibustered in the previous two years. The confrontation may be delayed, but now, clearly, it can't be avoided. Specter's appetite for a fight may be lessened for personal reasons. On February 16th, he announced that he had Hodgkin's disease. Last week, Specter told the Washington *Post*, "If we go to the nuclear option . . . the Senate will be in turmoil and the Judiciary Committee will be hell."

One day outside the Senate chamber, I saw John Warner in an uncharacteristic pose for a politician. He had squeezed himself up against one of the old stone walls in an attempt to remain out of camera range while another senator talked to the press. In the first few years following his election in 1978, Warner was known more for being Elizabeth Taylor's sixth husband than for any legislative achievements. (The marriage lasted from 1976 to 1982.) But Warner, who is now seventy-eight, patiently moved up through the ranks, and today chairs the Armed Services Committee and is an important source of institutional memory for the Senate. "When I came to the Senate, I studied the history of the filibuster," he told me, "and unlimited debate has been an essential part of what we do since the inception of the body. Of course, the Democrats have pushed too hard and stopped too many judges, and I still don't know what I'll do if this thing comes up for a vote. I'm worried about it, and I'm worried about what's happening to the Senate. You see, I'm a traditionalist. That's my party."