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The Broken Branch: How Congress Is Failing America and How to Get It Back on Track

Norman Ornstein and Thomas E. Mann Tuesday, June 27, 2006

Excerpts From *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track*

On Aug. 1, Oxford University Press will release "The Broken Branch: How Congress Is Failing America and How to Get It Back on Track" (part of the Institutions of American Democracy Series), written by Thomas Mann of the Brookings Institution and the American Enterprise Institute's Norman Ornstein (a contributing writer for Roll Call). What follows are excerpts from the book, printed with permission from the publisher.

The Decline in Institutional Identity

When he wrote his pathbreaking book on the U.S. Senate in 1960, Donald Matthews examined the norms prevalent in the institution; high among them was "institutional patriotism." Senators were intensely loyal to the Senate as an institution; they identified first as senators rather than as partisans or through their ideology, and they were fiercely protective of their prerogatives vis-à-vis the president or the House of Representatives. The rules and procedures of the Senate were a key to its unique role as the world's greatest deliberative body; and even those who were frustrated by them and by their application, especially when an intense minority thwarted the will of the majority, were respectful of their centrality to the Senate itself.

Norms are not laws. Many individual senators in the 1950s and 1960s, such as Paul Douglas and Wayne Morse, took on the institution, thumbing their noses at what they saw as outdated concepts that upheld an unacceptable status quo. Their successors in the body included such liberals as Jim Abourezk and Howard Metzenbaum and

conservatives James Allen and Jesse Helms. But it was obvious to us from the moment we each entered the Senate's environs in 1969 that these kinds of senators were the exception, not the rule. Most senators wore their pride in being in the Senate on their sleeves. Nothing short of a challenge to the primacy and integrity of the body itself could unite them across all conceivable lines.

Moreover, most House members had a heavy dose of institutional patriotism, often accompanied by a contempt, borne in part by jealousy, for the Senate as the so-called upper body. House members and leaders took immense pride in their status as the people's chamber, the first of our constitutional institutions mentioned in Article 1 of the Constitution, and in their legislative craftsmanship and expertise.

Senators, in their view, were dilettantes, even if many of their House colleagues yearned to make the move to the other side of the Capitol – only one senator in modern times, Claude Pepper of Florida, had made the reverse move, and that not out of choice but driven by his Senate defeat. When an average member of the House was elected to the Senate, the typical line used by his former colleagues was that the move had increased the IQ in both chambers.

During the 1970s and 1980s, we participated regularly in orientations for newly elected members of Congress, put on by our two institutions and the Congressional Research Service of the Library of Congress as well as the Harvard University Institute of Politics. Successive classes of freshmen would come in and prepare to take office; their incredible pride at joining the House or Senate, being part of history as an exclusive and small group of people ever to have served, was palpable. During much of that era, Rep. Bill Frenzel (R-Minn.), a first-rate lawmaker and member of the House Ways and Means Committee, would join with his wife, Ruthie, to address the new members and their spouses. He would urge them to move their families to Washington; he believed their time in the House would be the greatest experience of their lives and was something they should share with their families.

By the early 1990s, that appeal fell increasingly on deaf ears. Many members shrank from the idea of moving families to Washington, and not only because the anti-Washington political climate of the period made it politically unattractive. Our conversations with the new members revealed a different mindset. Many viewed Washington as an insidious place and were fearful that the more time they spent there,

the greater the likelihood that they would catch the virus that caused Potomac Fever. The pride that members of both houses had in their institutions gave way to a skepticism. New and returning members increasingly saw their service in Congress not as a great and joyful time of their lives but as an unpleasant duty, like taking castor oil or serving in the trenches in France in World War I – something to endure, not savor, for the greater good of achieving a policy revolution in the country or winning the tribal war against the enemy in the other party. A number had run on a pledge of limiting their own terms to avoid the fever and to convey their distaste for Washington and congressional careerism.

The reaction of new members has been matched by the growing indifference of committee and party leaders to the history and independent role of their own institutions and by a widespread acceptance by congressional leaders that the ends justify the means.

One small but meaningful example of this is the House Historian. The historian's office was created in 1983 and was ably filled by historian Ray Smock until January 1995, when he was fired by incoming Speaker Newt Gingrich. Gingrich then moved to appoint Christina Jeffrey, a political scientist from Kennesaw State College in Georgia. Jeffrey lasted a few days – when controversial comments she had made several years earlier caused enough of an outcry that Gingrich fired her. He did not replace her, and the post of House Historian stood vacant for a full decade, with neither Gingrich nor his successor, Speaker Dennis Hastert, interested enough to fill the job or energize the office. Finally, in 2005, Hastert appointed the veteran historian and author Robert Remini from his home state of Illinois to fill the position. But the decade-long indifference to the importance of the history of the House underscored the decline in institutional identity in the House.

Indifference to Reform

There were other signs as well. Our experiences in and around Congress have been wrapped up in a variety of reform movements – attempts by members and leaders to improve committee systems, ethics processes, campaigns and elections, congressional support agencies, congressional-executive relations, and so on. From our first efforts, in the late 1960s, through our involvement with the joint committee on congressional reform in the early 1990s, it was clear that many rank-and-file members, senior

lawmakers, and party leaders understood the need for periodic reform and tried to convince their colleagues that the upheaval that would result from institutional reform was worth the cost. They often failed, but they regularly tried.

In the past ten years, after a real sense in the first year of the Gingrich-led Republican Congress that they would clear the decks and implement sweeping change in the way Congress did business, there has been a complete expunging of any sense of need or desire for congressional reform – and worse. The modest movement in 1995, led by David Dreier, to implement the committee-system reforms recommended by the joint committee, was largely quashed by entrenched committee interests. That was the end of any effort to examine the committee system, reorganize jurisdictions, or streamline bloated assignments – such as a House Appropriations Committee with sixty-six members, an Armed Services Committee with sixty-two, or, most egregious, a Transportation and Infrastructure Committee with, count 'em, seventy-five members.

In neither house of Congress has there been anything like the efforts of the Bolling and Stevenson committees in the 1970s, the Quayle committee in the 1980s, and the joint committee exercise in the 1990s. The current leaders have expressed zero interest in reform – which means no interest in institutional well-being, maintenance, or renewal. Where there has been action, it has either been defensive or negative. In the defensive category, consider the reaction of the Speaker and the Senate Majority Leader to the new Department of Homeland Security (DHS). At first, neither leader suggested any reorganization within the House or Senate. After months of criticism, the Speaker moved to create a select committee on homeland security – one with a credible chair, Chris Cox of California, but with no substantive jurisdiction and stacked with the powerful chairs of committees, such as Judiciary and Transportation, whose only role on the committee was to protect their own turf from encroachment by the new panel. The Senate did nothing. Grudgingly, the House and then the Senate finally created subcommittees on homeland security to coordinate appropriations for the behemoth.

Belatedly, after the heralded 9/11 Commission recommended much more serious changes in the committee system, the two leaders acted – limply and inadequately. The House committee was made permanent, but with severe limits on its jurisdiction and the continuing presence of turf-conscious chairs from competing panels. The Senate renamed its Government Affairs Committee the Homeland Security and Governmental Affairs Committee and gave overall authorization jurisdiction over DHS to the panel –

but left jurisdiction over key areas, such as the Coast Guard, in other committees, consigning the HSGA committee at best to secondary status. Also responding to the 9/11 Commission, Congress in late 2004 changed the intelligence structure within the executive branch and created a new overall director of intelligence. At the same time, both houses addressed their own inadequacies in oversight of intelligence – but barely, falling far short of the constructive recommendations of the 9/11 Commission.

Disappearance of Oversight

In October 2005, John Dingell of Michigan reached the fifty-year mark for service in the House. We have known Dingell since we came to Washington – and suffered his wrath in the early 1990s when we proposed taking sizable chunks of jurisdiction away from his Energy and Commerce Committee. But we also watched Dingell operate through seven presidents, Democrats and Republicans, mostly as chairman of the committee, often as chair of its vaunted Oversight and Investigations subcommittee. There were times when we winced as he grilled bureaucrats mercilessly and excessively. But what we saw consistently was a man of the House who viewed his role, regardless of the occupant of the White House, as overseeing the executive branch and making sure that the laws were faithfully executed without bias or malfeasance. He made Democratic and Republican presidents alike uncomfortable, but the result was better execution of policy in a host of areas.

John Dingell is a unique figure on Capitol Hill. But during the 1980s and into the 1990s, he was not alone. Serious oversight was done by the Appropriations Committees in both houses and by a number of authorizing committees. When the Republicans took control of Congress, there was substantial aggressive oversight – for the period when Bill Clinton was president, that is – although the oversight of policy was accompanied by a near-obsession with investigation of scandal and allegations of scandal. But when George Bush became president, oversight largely disappeared. From homeland security to the conduct of the war in Iraq, from the torture issue uncovered by the Abu Ghraib revelations to the performance of the IRS, Congress has mostly ignored its responsibilities. The exceptions – for example, the bipartisan efforts in several areas by House Government Reform Committee Chair Tom Davis with his ranking member Henry Waxman – glaringly prove the rule.

Consider homeland security. To any student of organizational behavior, governmental or otherwise, and especially to students of mergers and reorganizations, it comes as no shock that, since its inception, the Department of Homeland Security has been beset by a series of management problems, a lack of consistent focus, and a failure to sort out its numerous responsibilities. This was evident long before the scathing White House report on the institutional failures surrounding Hurricane Katrina.

The department has had a near-revolving door in its top management team, major problems integrating agencies, and less-than-stellar success creating an integrated and functional information management system for the department, much less coordinating its computers with others in such places as the FBI.

The failures in oversight here are particularly crushing. No one other than Congress can ride herd over a massive new department like DHS, prodding the nascent conglomeration to make sure that when mad cow disease looms or self-initiated "Minutemen" patrol the border that the Animal and Plant Inspection Service and the Immigration and Naturalization Service, both now part of the new department and charged with their new priority of homeland security, can concurrently handle the responsibilities in the old areas for which they still have the burden. The same, of course, is true of the Federal Emergency Management Agency (FEMA), which lost its robust independent status when it was subsumed into DHS and had mass confusion about its role in dealing with domestic emergencies as well as preparing for a catastrophe precipitated by a terrorist attack.

However, for three years after the creation of the department, there was no significant oversight – nothing to make sure that all the preexisting functions of the twenty-two components of the new department were maintained while the new functions were added. The House committee, under Chris Cox, tried at times to assume that job. Knowing the relative powerlessness of the House select committee, which had no legislative jurisdiction and no control over the budget or actions of the department, top officials at DHS treated it with indifference or contempt or a combination thereof. The lack of a committee in the Senate – or any entity committed to general oversight of the area or specific authorization of DHS – meant there was no serious oversight of the department. The problem was perversely compounded by the incessant demands of a gaggle of committees and subcommittees (as many as eighty-eight of them) to grab a piece of homeland security jurisdiction and political cachet and cover by demanding

that the DHS Secretary or other top official testify before them. The top management of the agency had to spend huge chunks of time at Congress but almost no time participating in a serious examination of the department's functions and performance.

One result, tragically, was the abject failure of DHS and its emergency management unit, FEMA, after the catastrophe of Hurricane Katrina. Ornstein wrote soon afterward:

The performance of the federal government in the Hurricane Katrina disaster – the policy wing of the federal government, not the dedicated employees – has been abysmal. Sen. David Vitter (R-La.) was right: The grade should be an F. But the failures … are a symptom of the bigger fiasco, one that should leave all of us furious – and nervous. And in that fiasco, Congress stands front and center in the line of miscreants.

On 9/11, the inability of firefighters and police in New York to work their radios contributed to the loss of many lives. At the Pentagon, the inability of emergency workers from Montgomery and Prince George's counties in Maryland and Fairfax and Arlington counties in Virginia to communicate with each other made the response there much more difficult.

Now, four years have passed. A few metropolitan areas, on their own and without adequate federal assistance, have acted to make their own radio systems interoperable. The broader problems? They're the same, in essence, as they were before and during 9/11.

On 9/11, it became obvious that the resources and training available to the nation's first responders – fire, police, emergency medical technicians, public health clinics and so on – were woefully inadequate to deal with the new threats, not to mention larger natural disasters. No capability for dealing with chemical or biological threats, not enough gas masks (or appropriate ones), no training to deal with the collapse of large buildings. Four years later, regrettably, we can say the same thing. Instead of allocating the resources necessary to deal with these problems, we have in fact cut them in many areas.

On 9/11, a new set of broad threats emerged: the international network of terrorists out to kill as many of us as it could. The threat had existed beforehand, but suddenly it took on a new magnitude. The Hart-Rudman Commission, understanding this threat, had recommended prior to 9/11 the creation of a new Department of Homeland Security to

bring together agencies and bureaus with other missions to incorporate the new missions of combating the terrorist threats and responding to a disaster that terrorists could bring – disasters of a different form and magnitude than a natural catastrophe, but with many similar characteristics.

Four years after 9/11, we have a DHS, and it's much larger than the Hart-Rudman Commission had envisioned. Its bureaucracy is still reeling from the task of integrating more than twenty separate entities into one – the largest reorganization in federal government history. When Katrina struck, DHS was not the centerpiece of federal response that its outside framers had foreseen, but rather a bloated bureaucracy that was unable for days to figure out what to do, and which produced a leaderless response that only compounded the tragedy.

The idea of creating such a department was a solid one; the magnitude and form of such a department was more debatable. But it was never debated. After vehemently resisting the idea of a department for almost nine months, the president turned around virtually overnight and embraced it, unveiling a plan much more sweeping than the original, and which had been hatched in secrecy by several key administration aides working in the situation room to ensure confidentiality. The normal debate and deliberative process that would have questioned the sweep of the reorganization plan and its breakneck pace was absent. Absent, too, was the notion of starting with a new Department of Border Security and moving in increments to something grander.

When the Department of Homeland Security bill came to Congress, it ended up facing one and only one serious area of controversy and deliberation: the question of sweeping civil service changes to eliminate many of the regular protections for the 70,000 DHS employees. That issue became a political tool – a major campaign point in the 2002 elections – even as the larger and important questions of what kind of department, and how to fulfill all the real and serious government functions, were ignored.

Much of the failure to implement the changes needed over the past four years can be laid at the feet of Congress and its leaders.

Why? The most logical explanation, reinforced by the comments made to us by many members of Congress, is that lack of institutional identity. Members of the majority party, including the leaders of Congress, see themselves as field lieutenants in the president's army far more than they do as members of a separate and independent branch of government. Serious oversight almost inevitably means criticism of performance – and this Congress has shied away from anything that would criticize its own administration.

One result has been that executive agencies that once viewed Congress with at least some trepidation because of its oversight activities now tend to view Congress with contempt. Consider the Senate Armed Services Committee hearing in May 2004 on torture in the Abu Ghraib prison. During Senator John McCain's tough questioning, Secretary of Defense Donald Rumsfeld said that the military brass with him had prepared a thorough chart. When one of the generals said they had forgotten to bring it, Rumsfeld said, "Oh my." As Ornstein wrote in Roll Call at the time:

Could anything more clearly demonstrate the contempt this department has for Congress? This was not a routine authorization hearing – this was a hearing testing the very core reputation of the Defense Department and the military. And they forgot the key chart!

How could this happen? I think the answer is rooted in a larger problem, and it is fundamentally a problem of and for Congress. The White House, the Defense Department, and a whole lot of other departments and agencies have no fear of Congress, because Congress has shown no appetite to do any serious or tough oversight, to use the power of the purse or the power of pointed public hearings to put the fear of God into them. …

The House and Senate Armed Services committees have held a lot of hearings since we prepared to go into Iraq and since we went in. How many have dealt with the military takeover and occupation of Iraq? Less than a handful. … How many were tough and tough-minded, pushing Rumsfeld, Deputy Secretary Paul Wolfowitz, Joint Chiefs Chairman Richard Myers or other military and Defense Department figures to justify their actions or inactions? Even fewer.

It is hard not to like and admire Senate Armed Forces Chairman John Warner (R-Va.). He is smart, decent, and a true patriot. But he has seen his role far more in terms of defending and explaining the administration than in providing penetrating public criticism. The larger problem of this Congress, which to be sure is far more true in the House than in the Senate, is that the Republican majority has gone out of its way to avoid serious criticism or tough challenges to its own administration. The idea of public hearings to really dig into policy and administrative failures is abhorrent to Congressional leaders and most committee chairmen. They are doing it now only reluctantly, only out of necessity, and bending over backwards to minimize the damage.

The administration, for its part, knows its Congressional party well. It has demanded fealty, ignored Congress when it can get away with it, and when challenged by Congress, usually offers the back of its hand. Sen. Dick Lugar (R-Ind.) and the Foreign Relations Committee have tried to explore the key foreign policy issues in depth and have found neither cooperation nor openness from the White House, but rather attempts to marginalize the panel. It is so interesting that the two most prominent administration figures with Congressional backgrounds – Vice President Cheney, who was his party's Whip, and Secretary Rumsfeld, a key Congressional reformer in his greener days – have little if any sympathy for an independent and critical role for Congress.

The two Appropriations committees have shown a little more appetite for searching questions and tough oversight, fitting their long traditions and pedigrees, but they are better than other panels only by comparison. Appropriators have only become exorcised when it became clear to them that Defense officials were putting together tons of military construction projects that had not been appropriated by them and were a direct challenge to their core responsibilities.

To be sure, the failure to ask tough questions of the military, or to challenge decisions made during wartime, is not new to Congress and not limited to Republicans. Richard Russell, a legend in the Senate (and a Democrat), never used the gavel of the Armed Services Committee to raise any of the tough issues about Vietnam that he did in private. Had he done so, we might have conducted that war in a much better fashion.

The Democrats who ran the Senate in 2001-2002 did not exactly distinguish themselves with penetrating oversight on Iraq and defense. But the lack of any strong sense of independent legislative authority, and the pervasive sense of Congress as a subsidiary body to the presidency, is much stronger in this Republican Congress than I have seen it in three and a half decades, and unusual in American history.

These examples are illustrative of the pattern that has developed in recent years. Initially, a centralization of political control in the Congress, and the marginalization of committees, contributed to a sharp reduction in congressional oversight of the executive. UCLA political scientist Joel Aberbach reports that the number of oversight hearings – excluding the appropriations committees – dropped from 782 during the first six months of 1983 to 287 during a comparable period in 1997. The falloff in the Senate between 1983 and 1997 was just as striking: from 429 to 175.

That decline was then reinforced and exacerbated with the return of unified party government. The Republican Congress had even less incentive to oversee an executive controlled by its own party.

The problem in the Senate goes beyond obsequiousness to the executive to maddening passive deference to the House. Anyone who hung around the Senate through the past several decades would have seen its members' intense pride in the heritage and trappings of the body almost as part of its institutional DNA. Thus, to watch the Senate disregard that heritage and its honor over the past few years has been particularly jarring. The attitude in the body during debate on bankruptcy – bowing to the take-it-or-leave-it demands of the House to pass the bill the House wanted without change – has been more typical than not; the Senate has frequently bent to threats from the House, and on such key issues as the Medicare prescription drug bill and the energy bill even cast aside its own rules to allow the House to bar elected Senate members of the conference committees from full participation.

Tolerance of Executive Secrecy

The passivity and indifference of Congress and its leaders to their independent and assertive role fit perfectly with the Bush administration's assertive and protective attitude toward executive power and its aversion to sharing information with Congress and the public. Two months after Bush took office, White House Counsel Alberto

Gonzales blocked the release of 68,000 pages of records from the Reagan presidency, which were scheduled to be made public under terms set by the Presidential Records Act of 1978 (PRA). Later that year the president issued an executive order that granted former presidents, vice presidents, or their representatives designated by family members, the right to block the release of documents "reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors." The order also directed the Justice Department to litigate on behalf of any such claims.

Early on the administration also revealed its hand with respect to the Federal Advisory Committee Act, which established openness requirements for advisory bodies to the executive, and the Freedom of Information Act, which provides for public access to government documents. The administration rebuffed attempts by several members of Congress to use the Federal Advisory Committee Act to force Vice President Cheney to divulge information about his energy task force, a working group of industry lobbyists and government officials to formulate national energy policy. Bush officials argued that the Federal Advisory Committee Act was unconstitutional in that it authorized "extreme interference" and "unwarranted intrusion" into executive responsibility.

The Government Accountability Office (GAO) sued the Vice President on behalf of Congress – on its own, and not with any imprimatur from the Speaker or Senate Majority Leader – for access to the information, but the administration prevailed in the courts. It also successfully defended its position in related suits brought by the Sierra Club and Judicial Watch. Exemptions from the Federal Advisory Committee Act were written into the Homeland Security Act, the Medicare prescription drug law, the FY2004 Defense authorization bill, the President's Commission to Strengthen Social Security, and the President's Commission on Intelligence on Weapons of Mass Destruction. In 2003 the Office of Management and Budget issued a ruling that agencies could avoid the requirements of the Federal Advisory Committee Act if they hired contractors to manage advisory committees.

The Bush administration also found inappropriately burdensome requests for information under the Freedom of Information Act. In an October 2001 directive planned well before September 11, Attorney General John Ashcroft announced a new policy for handling these requests. The Clinton administration had established a "foreseeable harm" standard for the release of Freedom of Information Act documents

– agencies would have to make records public whenever possible as long as no foreseeable harm existed for their release. Ashcroft changed this standard to one of a "sound legal basis" so that agencies could withhold information so long as there was any legal basis to do so. The attorney general directed agencies to release information only after "full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated." The memo also stated that "you can be assured that the Department of Justice will defend your decisions [in court]."

In addition to resisting congressional and public access to information under the Presidential Records Act, the Federal Advisory Committee Act, and the Freedom of Information Act, the administration substantially increased, relative to previous presidencies, the number of documents it classified (while decreasing the number it declassified); blocked the release of documents and briefs requested as part of congressional investigations of the terrorist attacks; refused a House committee request for numbers adjusted for undercounting in the 2000 census; invoked executive privilege in denying Congress access to information concerning the FBI misuse of organized crime informants in Boston; was unwilling to share information on missile defense systems with the Senate subcommittee that oversees the project; delayed sending to Congress full cost estimates of the Medicare drug bill before it was signed into law; denied the Senate Governmental Affairs Committee information about undisclosed meetings between Enron executives and top administration officials; and restricted access by Congress to environmental records. And the administration engaged in many battles – with Congress and in the courts – over what information it had to release concerning the handling of terrorist detainees and enemy combatants.

While this behavior by the Bush administration justly earned it a reputation for secrecy, it was entirely consistent with its view of executive prerogatives. At times it was difficult to discern its motivations for denying information to Congress, the 9/11 Commission, and the public. Surely avoiding political embarrassment factored in to some of its decisions. And the net effect of its actions to avoid transparency in executive decision making, as former Senator Daniel Patrick Moynihan argued in attacking secrecy in government, may well have done more harm than good to the country. But at least President Bush defended his branch of government and acted in a way he thought would leave a stronger institution for his successors.

Sadly, the same cannot be said of Congress during Bush's tenure in the White House. What we were struck by during this period was how supine the first branch of government was in responding to the president's aggressive denial of information that Congress thought was essential to its work. Members of both parties were quite open with us about the utterly dismissive attitude, indeed the contempt, with which Bush and Cheney greeted such requests from Congress. National security briefings were often considered a complete waste of time by members; reading the morning newspaper was much more informative. Yet again party trumped institution.

The minority Democrats had political, as well as institutional, incentives to demand such information, and they often did so with gusto. But without support from the majority, they had little chance of prevailing in battles with the executive. Individual Republican senators and representatives fought for the release of critical information, but they seldom had the support of their leadership or their colleagues. Such Republican Senate committee chairs as Charles Grassley and Susan Collins were often deeply frustrated by the resistance of the administration to their requests for information. Senators John McCain and Lindsay Graham fought many battles, unpopular with their party colleagues, to garner the information they felt was essential to conduct responsible congressional oversight of the wars in Afghanistan and Iraq.

In the House, former Government Reform Committee Chair Dan Burton had to subpoena documents related to his investigation of the FBI and threaten to sue the Justice Department before the administration relented. Representative Chris Shays, while chairing the Subcommittee on National Security, Emerging Threats and International Relations, encountered stonewalling in response to his request to the Defense Department, with ranking Democrat Henry Waxman, for audits of the Development Fund for Iraq, which finances the rebuilding of the war-torn country. Unfortunately, these efforts are exceptions to the general rule, "Don't do anything to embarrass the president." Hardly the vigorous defense of institutional interests planned by the Framers.

The Nuclear Option

Nothing underscores more the indifference to institution – and the decline in Senate pride – than the flap over Rule XXII and the filibuster when it came to President Bush's judicial nominations in 2003-2005. Unlimited debate defines the uniqueness of the

Senate. As discussed in chapter 2, from its early days, the Senate had no way to stop debate. The "filibuster" as we know it – and the supermajority requirement for cloture – was actually a reform to expedite action, not to block it. Prior to 1917, there was, in effect, no limit on debate in the Senate. Any one senator, or any small group of senators, could keep debate going indefinitely.

That ability was a part of the unique role of the Senate, which was designed by the framers to slow the process and add to its deliberative nature. Just as the Senate itself is not representative of the majority of the country – senators from small states, which collectively represent a fraction of the overall population of the country, command a majority of votes in the body – the Senate's unique legislative procedures, including its reliance on unanimous consent and its tradition of sensitivity to minority viewpoints via unlimited debate, are extensions of the framers' conservative views on governance. The rules change that provided some limits on debate – creating a hurdle in that it required two-thirds of senators present and voting to end debate and proceed to a vote – was urged upon the Senate by then-President Woodrow Wilson and instituted after a handful of senators blocked action to arm merchant ships prior to American entry into World War I. The two-thirds rule remained in effect until 1975, when frustration over the use of filibusters led to a lowering of the bar to sixty senators.That is where it stands today – with one deliberate exception. Debate on any change in the Senate rules can only be halted by votes of two-thirds of senators present and voting – a clear sign of the determination of the Senate to preserve its longtime rules and practices. Real filibusters, by which the Senate comes to a screeching halt and debates around the clock to try to overcome the objections of intense minorities, are a thing of the past. Most middle-aged Americans remember them from the 1950s and early 1960s, when the filibuster was employed by Southerners trying to block civil rights legislation for blacks. Since then, filibusters have worked more as a threat than a reality – senators declare their opposition to a bill or a nomination, and the body works to pass a cloture motion, requiring sixty votes, to halt debate after one hundred hours.

But the tradition of the filibuster, the nod to the importance of each individual senator and to the centrality of minority rights and viewpoints in our constitutional system, has been central to the Senate for more than two centuries.

That tradition was shaken to the core in 2005 over judicial nominations. In the modern age of partisan parity and ideological polarization, few issues have had the impact and high stakes of federal judicial nominations. As the Congress has more frequently found itself stymied on controversial issues, one way out has been to pass the buck on to the courts, allowing policy decisions to be resolved through litigation. This has been true, for example, on many environmental matters in such areas as clean air. As left and right have found themselves losing on issues in the legislature, they have been more inclined to refuse to accept defeat and try to reverse the outcomes in the courts. As judges have been given more opportunities, they have not shrunk from a larger policy role, whether or not they label themselves strict constructionists.

As a consequence, the battles in the Senate over judges, including even district court and appeals court judges, have become more acrimonious and routine. During George W. Bush's first term, Senate Democrats employed many of the tactics used by Republicans under Clinton to challenge his judicial nominees. Most of the conflict occurred with circuit court appointments. Bush won confirmation of 87 percent of his district court nominees but only 53 percent of his circuit court appointees between 2001 and 2004 (slightly better than Clinton's record on the former, slightly worse on the latter). Prior to the May 2001 change in the Senate majority, when Jim Jeffords of Vermont moved from Republican to independent status and gave the Democrats a one-vote opportunity to take the helm, Judiciary Committee Chairman Orrin Hatch had scheduled no hearings on the president's judicial nominees. When Patrick Leahy took over as committee chair, he reinstituted the ABA review of nominees, which further delayed their consideration. The summer recess, September 11 attacks, and anthrax-laced letters sent to the Senate, including Leahy's office, kept them waiting in the queue.

More serious obstacles were looming, however. Leahy complained that Bush, unlike Clinton, refused to negotiate with the chairman of the Judiciary Committee; nor would the president work with home-state senators of judicial nominees. Democrats considered several of his nominees especially provocative. In March 2002, the Judiciary Committee rejected a nomination for the first time in Bush's term – that of Charles Pickering – on strict party lines. The battle was joined once again, with the parties simply switching positions and arguments. Now it was the Republicans who denounced Senate obstructionism and lamented the vacancy crisis on the federal bench while

Democrats pointed to the large number and percentage of district court nominees confirmed and criticized some of the Bush appointees as being out of the mainstream. The most controversial nominees were bottled up in the Senate Judiciary Committee during the months leading up to the election and never brought to a vote, although several were confirmed in the post-election session when it was apparent that the Republicans would return to the majority in January. A week before the election, President Bush presented a proposal to "Ensure Timely Consideration of Judicial Nominees," which included mandating a ninety-day-or-less window between a presidential nomination and a Judiciary Committee hearing as well as an up-or-down vote in the Senate.

The return of unified Republican government with the 2002 elections did little to diminish the acrimony. Both sides spoiled for a fight. The president resubmitted thirty nominations that were not confirmed by the Senate during the 107th Congress, including Priscilla Owen, Charles Pickering, and Miguel Estrada. Encouraged by an alliance of liberal interest groups, the now minority Senate Democrats – no longer able to block the most controversial nominees in committee – resorted to the filibuster. While not without precedent, the systematic use of filibusters to defeat nominees with majority support in committee and on the floor was clearly an escalation of the war over the courts. In February, Democrats successfully filibustered the confirmation of Miguel Estrada to the District of Columbia Court of Appeals. Later in the year they blocked William Pryor and Priscilla Owen from being seated on the appeals court. Although many noncontroversial nominees were confirmed during 2003, leading to a very low vacancy rate (39 out of 859 seats), the political struggle over the courts intensified. In early 2004 the president made a recess appointment of William Pryor to the 11th Circuit Court of Appeals. Later in the year, Michigan's two Democratic senators blocked three Bush nominees, admitting that their move was also retaliation for Republicans blocking Clinton's appointees to those same seats for years, keeping the slots vacant for the time when their president could fill them.

That struggle further intensified after Bush was reelected in 2004 and Republicans picked up four seats in the Senate – increasing their majority to fifty-five, but leaving them still five short of a so-called filibuster-proof margin. Bush quickly resubmitted his most controversial court nominations, those that had been successfully filibustered by the Democrats.

No effort was made by the White House to negotiate a settlement with Senate Democrats on the disputed nominees. Instead, Majority Leader Bill Frist seized on an issue that had been raised in 2003 and began building an aggressive public case for a radical change in Senate procedures – dubbed the "nuclear option" by Senator Lott – to prohibit the filibuster on judicial appointments.

Senate rules and precedents were clear: the Senate is a continuing body because every election involves only one-third of its members, and the rules are a constant, able to be changed only if two-thirds agree. Frist proposed a radical alternative: achieve the same result by making a parliamentary point of order that extended debate on a pending judicial confirmation is out of order. He would then have that point of order upheld by the president of the Senate (Vice President Dick Cheney) and follow with a vote of a simple majority upholding the ruling of the chair. Doing so would require ignoring or overruling the Senate Parliamentarian, since a constitutional point of order is itself debatable (and could be filibustered).

The ploy here was laid out by Senate rules guru Martin Gold, an adviser to Frist. While he and other former Republican Senate staff members built the case that such a move was consistent with Senate precedents, the argument was lame. There was no mistaking the purpose and potential consequences of the nuclear option. The Senate would by fiat overrule an established procedural principle to serve the immediate interests of the president and respond to the demands of a vocal constituency. And in so doing, it would establish a precedent that would threaten to change the essential character of the institution, making the Senate much more like the House.

This was at many levels a struggle over arcane procedural chess moves. But it became a major political issue. A vigorous public debate ensued, featuring television ads run by groups on both sides of the debate, all of whom saw this battle as critical to the upcoming struggle to fill expected vacancies on the Supreme Court. Proponents of the nuclear option argued that never before had filibusters been used to block judicial nominations. Columnist Charles Krauthammer wrote, "One of the great traditions, customs and unwritten rules of the Senate is that you do not filibuster judicial nominees." He called the threats by Democrats to filibuster several of the Bush nominees "historically unprecedented" and "radical," saying they have "unilaterally shattered one of the longest-running traditions in parliamentary history." Frist, in a USA Today op/ed, said there had been a 214-year-old tradition of having up-or-down

votes in the Senate on judicial nominations. He added that, since President Bill Clinton's judicial nominees only required fifty-one votes, "why should George W. Bush's be treated differently?"

Here was the reality: For more than two hundred years, hundreds of judicial nominees at all levels had their nominations buried, killed, or asphyxiated by the Senate, either by one individual, a committee, or a small group of senators, before the nominations ever got anywhere near the floor. To be sure, most were not filibustered in the "Mr. Smith" sense, or in the modern and direct version.

Consider the history of Supreme Court nominations – the most visible and prized of all. Of the 154 nominations to the Supreme Court between 1789 and 2002, thirty-four were not confirmed. Of these, eleven were rejected by a vote of the full Senate. The remaining twenty-three were postponed, referred to a committee from which they never emerged, reported from committee but not acted on, or, in a few cases, withdrawn by the president when the going got tough. At least seven nominations were killed because of objections by home-state senators. Five others were reported to the Judiciary Committee (which was created in 1816) and never made it out. And, of course, there was the case of Abe Fortas, whose nomination by Lyndon Johnson to be chief justice was filibustered in 1968 until other problems forced Fortas to withdraw.

As for other levels of judicial nominations, there is a long-standing tradition, exercised countless times, giving one or two senators from the home state a veto power over district court nominees. (This is the unwritten rule, incidentally, that was shattered by Orrin Hatch, then the Judiciary chairman, when Clinton was president.) This "blue slip" power was applied less frequently to appeals court nominees, but many in the past were killed far short of a vote on the Senate floor. Why weren't more of them filibustered? Because it was easy enough to kill most of the controversial ones without resorting to a filibuster.

Some retired conservative Republican senators, including Malcolm Wallop of Wyoming, understood this history and the implications of an abrupt change in the rules and deplored the move. But as Frist moved closer and closer to detonating the nuclear option, the silence of Republican pillars of the institution – Thad Cochran, Pete Domenici, and Dick Lugar – was deafening. Lugar warned that the consequences of

pulling the nuclear trigger could be severe and backfire against Republicans and conservatives, but he then said that if the Republican leader asked him for support to do so, he would give it.

As many of us thought and wrote at the time, if they won't defend their institution, who will? In the end, a bipartisan group of old bulls, mavericks, and moderates – referred to as the Gang of 14 – pulled the Senate back from the brink. Their informal agreement, entirely self-enforcing, to oppose both the nuclear option and filibusters on judicial confirmations except under extraordinary circumstances forced a temporary de-escalation of the judicial arms race. How long it would last was far from certain.

There is a long-standing tradition in the Senate regarding judicial nominations. That tradition calls for a vigorous and independent Senate playing its role of advice and consent. Because they represent lifetime appointments that cannot and should not be easily rescinded, judicial nominations require higher hurdles than simple legislation, which can always be amended or repealed. Charles Krauthammer called the nuclear option "restoration." It's not even close. And the willingness of dozens of senators to apply it spoke volumes about their indifference to the body's essence when they confronted short-term political expedience.