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The "Memorandum of Understanding": A Senate Compromise on Judicial Filibusters

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Summary

Since at least the mid-1990s, there has been an increase in White House-Senate struggles over judicial nominees, especially involving appellate court justices. Tensions between the two Senate parties rose so high in May 2005 that the majority leader indicated that he might employ a procedural maneuver — the so-called "nuclear" or "constitutional" option — to end judicial filibusters by a majority rather than a supermajority vote of the Senate. The use of this maneuver was averted, at least for the time being, by a "memorandum of understanding" signed by seven Democratic and seven Republican senators. The memorandum suggested in part that the seven Republicans would not vote for the nuclear or constitutional option; the seven Democrats agreed not to filibuster judicial nominees except under "extraordinary circumstances."

From the beginning of the Constitution, battles over judicial nominees have occurred in the Senate. President George Washington's 1795 choice of John Rutledge to be Chief Justice of the U.S. Supreme Court was not approved by the Senate. In fact, between "1789 and 1894, 22 of 81 Supreme Court nominees failed to reach the bench as a result of being either rejected, withdrawn, or left unacted upon by the Senate."[1] From 1894 to 1967, only one Supreme Court nominee — John Parker in 1930 — was turned down by the Senate. Nineteen sixty-eight witnessed what arguably was the first Senate filibuster of a Supreme Court nominee (Abe Fortas).[2]

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[1] Rutgers Professor David Greenberg, "The Judge Wars," July 6, 2005, p. 1. See [http://slate.msn.com]

[2] President Johnson named Supreme Court Justice Abe Fortas to replace the retiring Earl Warren as Chief Justice of the Supreme Court. In addition to extended debate against Fortas, his ethical problems also contributed to his eventual resignation from the Court in 1969. Former GOP Senator Robert Griffin, Mich., who led the opposition to Fortas, said that the debate over Fortas consumed only four days and could hardly be considered a filibuster. "When is a filibuster, Mr. President? ... There have been no dilatory quorum calls or other dilatory tactics employed." See

(continued...)

The Fortas nomination did not spark the intense confirmation struggle that occurred in 1987 when President Reagan named Robert Bork to serve on the Supreme Court. Bork's nomination fight even gave rise to a made-up verb — "to bork" — which means to attack judicial nominees by launching a negative public campaign against them. Opponents of Bork, however, said it was concern about the nominee's constitutional views that contributed to their opposition. The Senate rejected Bork by a 58 to 42 vote. Equally controversial was the senior President Bush's 1991 nomination of Clarence Thomas, who was narrowly approved (52 to 48) by the Senate. Law professor Anita Hill, who previously worked for Thomas, charged that he had sexually harassed her on the job. The charges and countercharges played out on national television as people watched the dramatic testimony of Hill and Thomas.

The Bork and Thomas nominations underscore how contentious the confirmation process for judgeships has become in recent years, with no apparent letup in sight. For example, when the 104th Congress (1995-1997) convened, Republicans were in control and Democrat Bill Clinton was in the White House. The ideological chasm between the parties was large and legislative-executive tensions were often much in evidence between the GOP-controlled Senate and President Clinton. The result: more than 60 of Clinton's judicial candidates never received hearings or waited years before the Senate took any action on their nominations.[3] On the other hand, the nomination and approval of Supreme Court Justices Ruth Bader Ginsburg and Stephen Breyer by President Clinton were accompanied by little partisan rancor.

During the brief period from June 2001 to November 2002 when Democrats held the Senate because a senator switched parties, they blocked several of President George W. Bush's judicial nominees. Republicans regained control of the Senate following the November 2002 elections and expanded their hold in the aftermath of the November 2004 elections. The 108th and 109th Congresses witnessed an escalation of judicial strife as the two sides battled either to approve or block judicial nominees submitted by the President.

Lacking control of committees or the floor agenda, the minority Democrats were "compelled to use the more incendiary weapon of the filibuster to stop the Bush nominees they oppose. But the result has been the same: frustration in the White House and more acrimony in Congress."[4] As one commentator noted, what distinguishes the judicial battles of the Clinton and Bush presidencies from those of earlier eras is that they have come "to resemble political blood feuds, in which each side seeks to avenge the earlier assaults by the other side."[5]

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[2] (...continued)
Congressional Record, vol. 114, Oct. 1, 1968, p. 28930, and Charles Babington, "Filibuster Precedent? Democrats Point to '68 and Fortas," *Washington Post*, March 18, 2005, p. A3.

[3] CRS Report 98-510, *Judicial Nominations by President Clinton During the 103rd-106th Congresses*, by Denis Steven Rutkus.

[4] Ronald Brownstein, "To End Battle Over Judicial Picks, Each Side Must Lay Down Arms," *Los Angeles Times*, Feb. 21, 2005, p. A8.

[5] Helen Dewar, "Polarized Politics, Confirmation Chaos," *Washington Post*, May 11, 2003, p. (continued...)

The wrangling over judges has been especially contentious for circuit court nominees. Perhaps the best example occurred during the 108th Congress when the Senate voted unsuccessfully seven times to invoke cloture (closure of debate) on Miguel Estrada's nomination to the D.C. Circuit Court of Appeals. Several factors help to explain the recent Senate battles over circuit court nominees. First, both parties understand that, although the Supreme Court is viewed as the "court of last resort," it only decides about 80 cases each year (a decade ago the number was 107). Today, the 13 "regional appeals courts decide more than 63,000 cases each year."[6] The circuit courts, remarked a law professor, are "the Supreme Courts for their region."[7] Second, circuits courts, especially the D.C. Circuit Court of Appeals, are recruiting grounds for Supreme Court nominees. For example, three of the nine members of today's Supreme Court — Antonin Scalia, Ruth Bader Ginsburg, and Clarence Thomas — served previously on the D.C. Circuit Court. Finally, the contests over circuit court nominees are perceived by many to be a warmup for potential battles involving Supreme Court vacancies.

Frustration in the 109th Senate continued to mount over the confirmation of judges. The majority leader and minority leader conducted extensive negotiations during the spring of 2005 to reconcile their fundamental disagreements over how judicial nominees are to be considered by the Senate. The majority leader, for example, proposed that after 100 hours of debate every nominee should receive an up-or-down vote by the Senate.[8] The minority leader opposed any curb on the right to filibuster unacceptable judicial nominees. Looming over these discussions was the majority leader's warning that, barring some accord between the two sides, he would use a parliamentary maneuver — dubbed the "nuclear" or "constitutional" option — to end judicial filibusters. Talks between the two party leaders broke off on May 16, 2005, with the majority leader indicating that the nuclear or constitutional option would be employed before the Memorial Day recess.[9]

The "Nuclear" or "Constitutional" Option: A Summary. The "nuclear" or "constitutional" option is a controversial procedure that would establish by majority vote a new and binding Senate precedent to end judicial filibusters.[10] In the current polarized Senate, proponents of an up-or-down vote on judicial nominees recognize that they are unlikely to attain the 60 votes required under Senate Rule XXII to terminate judicial

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[5] (...continued)
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[6] Warren Richey, "Conservatives Near Lock on US Courts," *Christian Science Monitor*, April 14, 2004, p. 10.

[7] Elizabeth Palmer, "Appellate Courts at Center of Fight for Control of Judiciary," *CQ Weekly*, Feb. 23, 2002, p. 534.

[8] "Viewpoint," *Roll Call*, May 17, 2005, p. 4.

[9] Shailagh Murray and Dan Balz, "Democrats, GOP End Talks on Filibuster," *Washington Post*, May 17, 2005, p. A1.

[10] Because the word "nuclear" implies that something catastrophic might occur in the Senate, Republicans prefer to call the procedural maneuver the "constitutional" option to underscore their view that the Constitution requires only a majority vote to confirm judicial nominees. Senate Democrats emphasize that the Constitution neither requires an up-or-down vote on nominees nor even that they be voted upon.

filibusters and thus win up-or-down votes on judicial nominees. Nor do they have the votes to amend that rule, which requires a two-thirds vote to end a filibuster on any proposed change to Senate rules. The parliamentary issue they face is that the inherited or "entrenched" procedures of the Senate have the practical effect of thwarting their ability to end judicial filibusters on nominees who ostensibly enjoy majority support of the chamber's membership. By contrast, opponents of up-or — down votes on controversial nominees contend that the President wants the Senate to be a "rubber stamp" and approve candidates whom many lawmakers believe are outside the judicial mainstream.

There are various nuclear or constitutional option scenarios, but most involve a ruling by the presiding officer (Vice President Cheney could be in the chair to cast a tie-breaking vote) that could lead to a new precedent ending judicial filibusters. One parliamentary approach might proceed roughly as follows: (1) The majority leader would call up a controversial judicial nominee; (2) Debate on the candidate would continue for an unspecified but extended period of time; (3) A cloture motion would be filed at some point in the proceedings to end the debate; (4) The cloture vote on the controversial nominee is expected to fail. A Senator would then raise a point of order that further debate on the nominee is dilatory and must end within a certain period of time; (5) The presiding officer would sustain the point of order, which would establish a new Senate precedent; (6) However, it is expected that a Senator opposed to the chair's ruling would appeal the decision, which is a debatable motion; (7) Another Senator would offer a non-debatable motion to table the appeal, which would be voted on immediately and requires a simple majority for approval. Tabling the appeal upholds the presiding officer's decision and creates the most authoritative type of precedent: one established by vote of the Senate. This precedent would be used to stop future judicial filibusters.

Use of the nuclear or constitutional option, say its opponents, would trigger employment of various procedural devices (the parliamentary "fall out") to impede action on all but the most essential business of the Senate. They also stress that its use would, among other things, weaken the Senate's ability to check executive power, undermine the chamber's traditional respect for minority rights, and further heighten partisan acrimony. Opponents also suggest that advocates of the procedural maneuver may find themselves in the minority some day and need the filibuster to protect against the "tyranny of the majority." On the other hand, it is proponent's concern about a "tyranny of the minority" that could override these potential objections and trigger eventual use of the nuclear or constitutional option.

On May 18, the majority leader called up the controversial nomination of Priscilla Owen to be a federal circuit court judge. Her ascent to the court had been blocked for several years by judicial filibusters. Cloture was filed on her nomination, and the vote to invoke it was slated for May 24. The cloture vote was expected to fail. The majority leader would then employ the nuclear or constitutional option.[11] He never had a chance to execute the procedural maneuver, however. He was blocked by an accord reached by an ad hoc group of Senators: seven Democrats and seven Republicans.

[11] Shailagh Murray and Charles Babington, "Senate Leaders Prepare for Crucial Filibuster Vote," *Washington Post*, May 23, 2005, p. A1.

This bipartisan group of lawmakers had been meeting quietly for weeks, trying to come up with a compromise to break the judicial stalemate and avert use of the nuclear or constitutional option. Late in the afternoon of May 23, the 14 Senators signed a memorandum of understanding that ended the impending parliamentary showdown and produced at least a temporary cease-fire over judicial nominations. The agreement, which was to remain in effect through the end of the 109th Congress, has three principal features.[12]

A Bipartisan Agreement: The Memorandum of Understanding. The 14 Senators agreed to vote to invoke cloture on three of the five most controversial federal appellate court nominees, virtually assuring the three of Senate approval. Subsequently, all three were approved by the Senate — Owen (5th Circuit), Janice Rogers Brown (D.C. Circuit), and William Pryor (11th Circuit). The other two — William Myers (9th Circuit) and Henry Saad (6th Circuit) — would likely face unbreakable filibusters if they were brought to the floor. As of July 2005, they have not been confirmed.

Second, the seven Republicans promised not to support "any recommendation to or interpretation of the Rules of the Senate that would force a vote on a judicial nomination by means other than unanimous consent or Rule XXII." This feature effectively prevents the majority leader from using the nuclear or constitutional option and protects the minority's right to filibuster. In return, the seven Democrats agreed that judicial nominees "should only be filibustered under extraordinary circumstances, and each signatory must use his or her own discretion and judgment in determining whether such circumstances exist." This provision of the memorandum affects the minority party's ability (with its 44 Members plus one Independent supporter) to mobilize 41 backers to sustain a filibuster.

Third, the accord sent a signal to the White House that the president should consult with Senate Democrats and Republicans on prospective judicial candidates.[13]

> We believe that, under Article II, Section 2, of the United States Constitution, the word "Advice" speaks to consultation between the Senate and the President with regard to the use of the President's power to make nominations. We encourage the Executive Branch of government to consult with members of the Senate, both Democratic and Republican, prior to submitting a judicial nomination to the Senate for consideration.

The memorandum of understanding aroused some consternation inside and outside the Senate, with many wondering whether it would remain in effect for long. "I don't know whether it's something that's here to stay, or just a passing moment," remarked a

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[12] See Keith Perine, "Bipartisan Deal Thwarts Frist's Plan," *CQ Today*, May 24, 2005, p. 1; Charles Babington and Shailagh Murray, "A Last-Minute Deal on Judicial Nominees," *The Washington Post*, May 24, 2005, p. A1; and Carl Hulse, "Bipartisan Group In Senate Averts Judge Showdown," *New York Times*, May 24, 2005, p. A1. The seven Democrats were: Robert C. Byrd, Ben Nelson, Mark Pryor, Mary Landrieu, Daniel Inouye, Joseph Lieberman, and Ken Salazar. The seven Republicans were: John Warner, John McCain, Mike DeWine, Lindsey Graham, Olympia Snowe, Susan Collins, and Lincoln Chafee.

[13] The terms of the accord can be found in the *Congressional Record*, daily edition, vol.151 (May 24, 2005), pp. S5830-S5831.

senator.[14] The majority leader, who saw his decision to use the nuclear or constitutional option circumvented by the agreement, stated that the "constitutional option remains on the table.... I will not hesitate to use it" to ensure an up-or-down vote on judicial nominees.[15] The minority leader contends that the nuclear or constitutional option is off-the-table. Whether the goal of the agreement will be achieved is unclear until it is subject to a likely test on a Supreme Court nomination.

Not surprisingly, soon after Justice Sandra Day O'Connor announced on July 1, 2005, that she would retire from the Supreme Court once her replacement was confirmed, there was considerable speculation in the press and media about the durability of the bipartisan pact. If President Bush nominated a controversial candidate, someone that many perceive to be out of the mainstream in terms of his or her judicial views, would that amount to "extraordinary circumstances" and trigger a filibuster? Signers of the accord have variable interpretations of the phrase. For example, one signer said: "In my mind, extraordinary circumstances would include not only extraordinary personal behavior but also extraordinary ideological positions."[16] Another stated: "Are they going to be activist? Their political philosophy [or ideology] may not bother me at all if they're not going to be activist."[17] Still another remarked: "Based on what we've done in the past with [Bush nominees since May 23, 2005], ideological attacks are not an 'extraordinary circumstance'."[18] To be sure, even if the group dissolves following President Bush's choice of Judge John Roberts to replace O'Connor, there is no certainty that the Senate would implement the nuclear or constitutional option.

To conclude, it is widely understood that the stakes are high in confirming judges to lifetime positions on the federal bench. As two scholars note: "Intense ideological disagreement coupled with the rising importance of a closely balanced federal bench, has brought the combatants in the wars of advice and consent to new tactics and new crises, as the two parties struggle to shape the future of the federal courts."[19]

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[14] Jim Drinkard and Kathy Kiely, "Compromise May Spread Beyond Filibuster Agreement," *USA Today*, May 25, 2005, p. A8.

[15] *Congressional Record*, daily edition, vol. 151 (May 24, 2005), p. S5816.

[16] Peter Baker and Charles Babington, "Are Nominee's Views Fair Game," *Washington Post*, July 6, 2005, p. A1.

[17] *Ibid.*, p. A4.

[18] Gail Russell Chaddock, "Senate Pact Shapes High-Court Fight,"*Christian Science Monitor*, July 5, 2005, p. 2.

[19] Sarah Binder and Forest Maltzmann, "Congress and the Politics of Judicial Appointments," in *Congress Reconsidered*, 8th ed., eds. Lawrence Dodd and Bruce Oppenheimer (Washington: CQ Press, 2005), p. 313.