

## Filibuster Deal Evaded Key Question on High Court Nominees

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The fragile compromise that averted a Senate showdown over judicial filibusters last week deliberately left unanswered the crucial issue likely to be at the heart of a debate over a future Supreme Court vacancy: Can Democrats filibuster a nominee on the grounds that he or she is too conservative without triggering the "nuclear option"?

Republicans have argued that, if Priscilla R. Owen, Janice Rogers Brown and William H. Pryor Jr. -- three of President Bush's nominees to the appellate courts who had been attacked by Democrats as out of the mainstream philosophically -- were suddenly given a filibuster-proof stamp of approval by the agreement, then no Bush nominee for a Supreme Court vacancy should face the threat of a filibuster because of judicial philosophy.

Whether that criterion falls outside the bounds of the "extraordinary circumstances" cited in the agreement as the only basis for judicial filibusters can be answered only by the seven Democrats and seven Republicans in the "Gang of 14" who negotiated and signed the agreement. The group, however, consciously avoided any serious bargaining on that critical point during their week of face-to-face discussions.

"We did not get into a definition of 'extraordinary' because we knew if we tried to do that we never would reach an agreement," Sen. Mike DeWine (R-Ohio) said in an interview.

That the Gang of 14 would deliberately avoid discussions on an issue that had pushed the Senate to the brink of a crisis underscores why the agreement has been interpreted so differently by groups on opposite sides of the battle and why its longevity depends on the ability of the bipartisan group to remain cohesive as others attempt to pick the agreement apart.

Bush may have the utmost power to ensure its durability or its demise, depending on how he acts when faced with a vacancy on the Supreme Court, which, given the health of Chief Justice William H. Rehnquist, could come in the next month.

A mainstream conservative nominee would be likely to face opposition from many Democrats but probably not the kind of resistance that would trigger pressure for a filibuster. A nominee as conservative as Brown could trigger all-out war, with the Democrats' allies on the left pushing to use any means necessary to block confirmation.

The Gang of 14 specifically urged Bush to consult with Republicans and Democrats before choosing judicial nominees as a way "to reduce the rancor" that has built up over the confirmation process. Up to now, the president has done little consulting with Democrats on his nominations. Sen. John W. Warner (R-Va.), who with Sen. Robert C. Byrd (D-W.Va.) penned the "advice and consent" paragraphs in the agreement, said that Bush's chances of winning bipartisan approval of a Supreme Court nominee may hinge on his willingness to consult across party lines. "That's what the Constitution says," Warner said on MSNBC's "Hardball" last week. "It is very clean."

The biggest gap in interpretation of the agreement centers on the nuclear option itself. The morning after the Gang of 14 announced its deal, Senate Minority Leader Harry M. Reid (D-Nev.) took to the Senate floor to

declare: "It took the nuclear option off the table. It is gone for our lifetime." Moments earlier, Senate Majority Leader Bill Frist (R-Tenn.) offered the opposite view. "Let me be clear," he said. "The nuclear option remains on the table. It remains an option. I will not hesitate to use it, if necessary."

The reality is that neither leader will be the ultimate arbiter of the future of the nuclear option. After their own negotiations broke down, the two leaders found themselves on the sidelines, watching along with other senators as the moderates negotiated. Both leaders were kept informed, but neither was a party to the final deal and neither has the ability to determine how it is implemented, if the Gang of 14 continues to remain cohesive and united.

DeWine and Sen. Lindsey O. Graham (R-S.C.) have disputed the assertion by Reid and other Democrats that the nuclear option is off the table. DeWine said he explicitly raised the issue just before the group announced the deal on Monday night. "I said at the end, 'Make sure I understand this now, that . . . if any member of this group thinks the judge is filibustered under circumstances that are not extraordinary, that member has the right to vote at any time for the constitutional option.' Everyone in the room understood that."

Sen. Mark Pryor (D-Ark.), another member of the group, concurred, saying that while he hopes the nuclear option is gone for the duration of the 109th Congress, circumstances could bring it back. "I really think Senator DeWine and Senator Graham have it right," he said.

The key will be whether Pryor and the others can work together on controversial nominees. "We don't know what's coming down the pike," Pryor said. "We don't know if the Supreme Court is going to be a huge battle. . . . We do know that we trust each other enough so that when controversial nominations come, we will sit down and talk about those and try to work through those."

A statement from Sen. Joseph I. Lieberman (D-Conn.) on the future of the nuclear option offered enough ambiguity on whether judicial philosophy constitutes grounds for a filibuster to illustrate why, even within the Gang of 14, the future could be difficult. The statement came in response to a question about whether Reid or DeWine and Graham were properly interpreting the group's deal.

"Our agreement is based on mutual trust and respect among the 14 senators," Lieberman said. "We have the shared intention that the Democratic signers will not filibuster, except in extraordinary circumstances, and that the Republican signers will not invoke the nuclear option. I'm confident that the agreement will be honored and stand the test of time."