

A likely script for the 'nuclear option'

What to expect in looming Senate showdown

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The "nuclear option" will have a long fuse.

If all goes as planned, Senate Majority Leader Bill Frist (R-Tenn.) will rise after several days of debate beginning today over one of President Bush's judicial nominees and call for an end to Democrats' delaying tactics. The presiding officer will then rule in his favor.

Democrats will protest the ruling and ask for a vote to overturn it. The Republican leader will seek to table that appeal. If Frist and the GOP majority prevail, more than half a century of precedents will be overturned, allowing the Republicans to force a vote on a nomination with a simple majority instead of three-fifths of the Senate.

Republicans hold 55 of the seats in the chamber, and until now they have needed 60 votes to end debate and force a vote. But Republicans believe they have figured out how to use the chamber's rules so that only a simple majority -- 51 votes -- is required to force an up-or-down vote.

To get there, Republicans will have to evade a requirement that they have a two-thirds vote -- 67 of 100 senators -- to change the chamber's rules. Republicans will argue that they are attempting to set a precedent, not change the Senate rules, to disallow the use of filibusters as a delaying tactic on judicial nominations. And by doing so, they say, they are returning to a more traditional concept of majority rule.

" 'Advise and consent' does not say, 'A supermajority is required,' " Sen. Kay Bailey Hutchison (R-Tex.) said at a news conference yesterday in front of a backdrop that had a logo repeating "Fair Up or Down Vote" 72 times.

But Democrats contend that the Republicans are essentially breaking the rules to change the rules. "If there were ever an example of an abuse of power, this is it," said Senate Minority Leader Harry M. Reid (D-Nev.). "The filibuster is the last check we have against the abuse of power in Washington."

Slow the deliberative process

The rule change Frist is seeking to bar the use of the filibuster for judicial nominations has been dubbed the "nuclear option" because of its potential to disrupt the Senate and shatter what little comity remains between Republicans and Democrats.

Historically, Senate rules were designed to protect the interests of the minority and to slow the deliberative process. In fashioning those rules, the Senate set a much higher threshold for changes than a simple majority vote.

Democratic complaints that in this case Republicans are trying to circumvent the rules have been buttressed by some of the independent bureaucracy of Congress.

A report last month by the nonpartisan Congressional Research Service asserted that "the point of a 'nuclear' or 'constitutional' option is to achieve changes in Senate procedure by using means that lie outside the Senate's normal rules of procedure."

Also, some Democrats have advanced evidence that the GOP gambit lacks support from the Senate parliamentarian, the official who typically rules on what is allowable under the chamber's rules and precedents.

Reid told reporters last month that the parliamentarian, Alan S. Frumin, had told him that he opposed the Republicans' plan and that "if they do this, they will have to overrule him."

Frumin, who was appointed by Republican leaders in 2001, has not been granting interviews. But a senior Republican Senate aide confirmed that Frist does not plan to consult Frumin at the time the nuclear option is deployed. "He has nothing to do with this," the aide said. "He's a staffer, and we don't have to ask his opinion."

'Constitutional option'

Here's what Republican aides and officials say is most likely to happen:

At 9:30 a.m. today, the Senate will begin debating Bush's nomination of Priscilla R. Owen, an abortion opponent on the Texas Supreme Court who was nominated to the U.S. Court of Appeals for the 5th Circuit, based in New Orleans.

On Thursday or Friday, Frist and other Republican senators are likely to file a motion seeking cloture, or an end to debate. One session day must pass before a vote to end debate, so a vote would be held and Republicans would expect to get fewer than 60 votes to confirm Owen.

Frist aides say he has not decided exactly what would occur next. But the scenario most widely expected among senators in both parties is that he would seek a ruling from the chair -- Vice President Cheney, if it looked as if the vote was going to be close -- that filibustering judicial nominations is out of order. Assuming the chair agreed, Reid would then object and ask that the ruling of the chair be tabled. Most Republicans would then vote against the Democratic motion, upholding the ruling. Then the Senate would move to a vote on Owen, and a precedent will have been set that it takes 51 votes, not 60, to cut off debate on a judicial nomination.

A virtual script for what could happen next is included in an article published last fall in the Harvard Journal of Law & Public Policy by Martin B. Gold, a partner at Covington & Burling who is a former floor adviser to Frist, and Dimple Gupta, a former Justice Department lawyer who was hired in March by Senate Judiciary Committee Chairman Arlen Specter (R-Pa.).

In making their case, the authors pointed to the ways that Sen. Robert C. Byrd (D-W.Va.) used similar tactics to lower requirements for certain legislative actions from a supermajority to a simple majority when he served twice as majority leader, in the 1970s and 1980s.

"The reason for calling it 'the constitutional option' is that it's an exercise of the Senate's constitutional power of self-governance," Gold said. "The Senate sets precedents all the time, and it sets them by majority vote."

Fred Graham, who was chief counsel of a Senate Judiciary subcommittee during a classic filibuster during the 1960s and now is chief anchor and managing editor of the Court TV cable channel, said existing rules allow Republicans to accomplish what they have promised.

"If Bill Frist asks for a ruling from the chair from Dick Cheney, of course Cheney will rule in his favor," Graham said. "What are the Democrats going to do, appeal to the Supreme Court? There's no place for them to go. That's the power of the majority."

Staff writer Charles Babington contributed to this report.

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