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Senate Forced to Become Moderate

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Senate leaders have been threatening war over a handful of judicial nominees. Most Americans have not understood the details of this war, but they have grasped that each side had become more partisan.

The threatened "nuclear" or "constitutional" option involved the following scenario. A controversial judicial nomination would be brought before the Senate floor. Under the rules of the Senate, debate would proceed for up to 30 hours. When the majority, the Republicans, moved to end debate and put the nomination up for a vote, the minority, the Democrats, would invoke their right to extend debate, or filibuster.

The filibuster, made famous by the movie "Mr. Smith Goes to Washington," in its classic form involves stalling action on a controversial matter as senators debate endlessly, or filibuster. Senate rules require 60 senators agree to end debate, or invoke "cloture."

The so-called nuclear option would have amended the filibuster rule through procedural maneuvers allowing debate to be ended with a majority vote. To counter, the Democrats threatened to exploit parliamentary procedure to slow down the business of the Senate, except for the legislative business which they supported.

This showdown was avoided because on Monday night, 14 senators compromised. They agreed not to filibuster the nominations of Janice Brown, William Pryor and Priscilla Owen.

As to future judicial nominees, they promised to "exercise their responsibilities" under the Constitution "in good faith," and filibuster only under "extraordinary circumstances." They would oppose any changes to the rules of the Senate "in light of the spirit and continuing commitments."

They advised the president to consult with the Senate when making nominations. "Such a return to the early practices," concludes the memorandum, "may well serve to reduce ... rancor."

What does this compromise mean?

First, the practice that a super-majority Senate vote is required to approve the president's judicial nominees has been upheld -- at least for this session of Congress. (The agreement states that it is only for the current session of Congress.)
A change to a majority consent rule, Republicans argued, was a constitutional option, because the text of the Constitution does not require super-majority approval of judicial nominees. The Constitution requires a super-majority vote only when it approves treaties and overrides the president's veto.

The inference is that super-majority approval should not be required for judicial nominations. In addition, some have argued that the Senate practice of requiring super-majority votes is harmful because it decreases the diversity of judges on the federal bench.

To these arguments, the Bipartisan 14 countered that a super-majority vote for judicial nominations is appropriate, but only in "extraordinary circumstances."

What does "extraordinary circumstances" mean?

Extraordinary circumstances could be interpreted as covering any nomination to the U.S. Supreme Court. Admittedly, this is a controversial interpretation, which at least one of the Bipartisan 14, Sen. Lindsey Graham, R-S.C., has begun to rebut in media interviews.

Nonetheless, Graham's is only one interpretation. The agreement states that each senator will use "his or her own discretion and judgment" as to what "extraordinary circumstances" means.

Here is the argument that could be made that any Supreme Court nomination is "extraordinary":

First, such vacancies are rare. President Bush has not had the opportunity to nominate any justice to the Supreme Court. By contrast, he has now nominated and gained the Senate's consent on more than 200 judicial appointments.

Second, given the key role a justice plays in determining what is constitutional law and how closely divided the court is, each nomination to the Supreme Court is "extraordinary." The Supreme Court "makes" constitutional law, ruling in Roe v. Wade that there is a constitutional right to an abortion, and in Lawrence v. Texas that same-sex couples have a constitutional right to consensual sex in the privacy of their home.

Because the votes on these outcomes have been close, each justice's view is pivotal. It is appropriate that at this level of importance each Supreme Court nominee receive the kind of scrutiny that a super-majority vote requires.

Because the meaning of "extraordinary circumstances" is unresolved, this issue will be settled politically, most likely when Bush has the opportunity to nominate a Supreme Court justice.

The opportunity to filibuster under extraordinary circumstances applies to lower court nominees as well. The bipartisan senators "make no commitment" as to two nominees, William Myers and Henry Saad. The senators did not detail their objections, but by singling out these two, the compromise makes clear that the minority party could filibuster these candidates.

Thus, the compromise keeps in place the Senate tradition of closely scrutinizing judicial nominees to ensure that they are competent and possess judicial temperament.

Finally, the compromise vigorously reasserts the senators' institutional role as a "check and balance" on judicial appointments. The Senate, according to the Bipartisan 14, must be consulted by the president in future judicial nominations.
The Constitution states that the Senate must provide "advice and consent," not just "consent." In the past, Bush might have consulted mainly the Senate leadership. Now, he should seek counsel as well from the bipartisan senators who have vowed to exercise their own judgment on judicial nominations.

After all is said and done, one thing remains clear. Politics will continue to be a part of judicial nominations. If anyone won, it was the moderates. This compromise nudged the politics of judicial nominations closer to where most Americans are.