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A Test for Bush's Republican Majority

The "Filibuster"-Debate in the U.S. Senate

Michael Kolkmann

Six months after the re-election of President George W. Bush many observers wonder whether and to what extent the Republican majorities on Capitol Hill are reliable and durable. The issue gained significance following the battle about the confirmation of several judges that were nominated by Bush to the Federal bench; Democratic Senators opposed these nominations and tried to block them by using the parliamentary instrument of the filibuster. A bipartisan agreement brokered by moderate Senators and signed on 23 May 2005 temporarily resolved the explosive divisiveness and conflict potential of the judicial nominations. The filibuster debate was the first and potentially foremost test for President Bush to determine how far he can count on his legislative majority in Congress in the upcoming legislative battles.

The debate got heated when Democrats blocked the confirmation of seven judicial nominees by Bush using the parliamentary instrument of the filibuster. A filibuster is typically an extremely long speech that is used primarily to stall the legislative process and thus derail a particular piece of legislation or a nomination introduced by the executive. The filibuster is possible because the legislative process in the Senate is governed by relatively liberal and flexible rules—compared to the House of Representatives. There is no limit in terms of time or content to speeches made by Senators. 60 votes are necessary to end a filibuster. This seems to be out of reach for the Republicans under Majority Leader Bill Frist from Tennessee, since the current 55 Republican Senators usually do not vote in a uniform

bloc. The filibuster debate presented a serious challenge for President Bush, because a successful filibuster would have slowed down or even prevented Senate action on Bush's reform initiatives for his second term.

Use of the "Nuclear Option"?

Republicans could decide to suspend the rules guiding the floor proceedings of the U.S. Senate. It would take a Republican majority of just 51 votes to change the filibuster rule, thus eliminating the traditional requirement of a Two-Thirds-majority when changing Senate rules. This step is called "nuclear option" because the consequences for the political atmosphere in Washington would be extremely negative.

The filibuster has been subject to criticism, because it gives small minorities, sometimes even single Senators, unproportionally large political leverage to slow down and ultimately disrupt the parliamentary business of the Senate. The opponents of the filibuster rule criticize that a minority of just 41 Senators can influence the business of the entire chamber, prevent decisions and therefore negate the system of *checks and balances* spelled out in the U.S. constitution.

The Senate Democrats announced in late April their intention to interrupt all business in the Senate as long as the Republicans intend to use the “nuclear option,” since they perceive such a step as an “abuse of power” by the Republicans. From the Democratic perspective, this step would, however, entail a significant risk of being regarded by the public as obstructionists. The Democratic Minority Leader, Harry Reid from Nevada, switched to a different, more nuanced strategy in early May; this time implying that the Democrats would introduce a dozen controversial bills into the parliamentary proceedings of the Senate and getting the Senate to vote on these bills, thereby forcing their Republican counterparts to confront a number of unpopular legislative choices: either to vote against publicly popular measures like raising the minimum wage or better benefits for war veterans in order to secure a fast vote on the judicial nominees or to vote for these measures and, at the same time, risk a serious delay in dealing with Bush’s judicial nominees.

Compromise Reached by Moderate Senators

In mid-May 2005, President Bush renewed his calls for bi-partisan support of the judges he had already nominated in his first term and asked the Senate to “give these extraordinarily qualified nominees the up-or-down votes they deserve without further delay.” While the public debate on the use of the “nuclear option” got even

more heated, 14 Senators from both sides of the aisle worked feverishly behind the scenes to strike a bi-partisan deal. On the evening of 23 May 2005, following days of intense debates, both sides signed an agreement that would prevent the use of the “nuclear option” for the time being. The compromise reached contained the following elements:

- ▶ The Senate gets to vote on three of the seven candidates nominated by President Bush. So far, two judges have already been confirmed by the Senate by a simple majority vote.
- ▶ The Democrats maintain the right to block two other nominations in the future by using the filibuster.
- ▶ Two further nominations are dead, since they won’t get a vote on the U.S. Senate floor. The names of these two candidates are not mentioned in the bi-partisan agreement.
- ▶ The White House is called upon to cooperate more closely with the members of the U.S. Senate in the future in order to prevent any disagreements concerning future judicial nominations. This is a demand that has repeatedly been made by Democratic Senators in the past.
- ▶ Finally, the possibility to block future nominations, even a Supreme Court nomination, remains untouched in “extraordinary circumstances.”

Possible Political Consequences

The dilemma between the necessity to guard the political rights of the minority party as well as the right of the majority party to implement its political ideas is as old as the American republic itself. The bipartisan agreement reached by the moderate members of the U.S. Senate secures the prerogative of the Senate to give “advise and consent” to all judicial nominations made by the executive branch of government. From the Republicans’ point of view, a controversy with the Democrats concerning the use of the filibuster or even a blockade of the Senate’s parliamentary

business would have threatened any opportunities for political cooperation between both sides in the upcoming weeks and months. This might help to explain why the White House mostly kept a low profile during the filibuster debate. The administration refrained from public comments and stressed that the filibuster was a problem that had to be resolved by the Senators themselves. Behind the scenes, however, White House staffers seem to have pushed Republican Senators to make sure that all judges nominated by President Bush would get up-or-down-votes on the floor of the U.S. Senate. If the Republican side failed to get the judges confirmed, so the Administration's argument, the Republicans on Capitol Hill risked to endanger their re-election prospects and therefore the Republican parliamentary majorities in both the House of Representatives and the Senate in November 2006, because voters would associate the Republicans exclusively with the very public debate on the Terry Schiavo case, the repeated ethics lapses by Republican Majority Leader in the House, Tom DeLay, and the debate over the use of the filibuster.

The compromise hammered out by the moderate Senators is a blow to Republican Majority Leader Frist. Supported by numerous conservative groups outside Congress, he one-sidedly focused on an all-or-nothing strategy. By stressing the goal of using the "nuclear option" too strongly and too narrowly he had foregone the option of more tactical flexibility. This came to haunt him when he realized he might not get the necessary 51 votes to implement the "nuclear option." It is too early to tell whether he runs the risk of becoming an early lame duck in the year leading up to the election of 2006, since he announced last year that he will not seek re-election in 2006. He might have great difficulty representing his political priorities in pursuing his party's presidential nomination in 2008 and to act as an effective Republican Majority Leader at the same time.

Generally, the filibuster agreement reached by the moderate Senators is too vague to end the debate on the filibuster issue once and for all. It will depend on the Democrats and their definition of "extraordinary circumstances" that are a prerequisite to the future use of the filibuster to determine whether the agreement can guide coming judicial nomination battles. The Republicans themselves will have to determine under what conditions they will not accept the definition of "extraordinary circumstances." Every single one of the 14 Senators who signed the bipartisan agreement, can declare the agreement void by invoking "extraordinary circumstances."

It is safe to assume that the filibuster debate will be on the agenda again, once President Bush nominates new controversial judges, which he is expected to do in the coming months. Should the Supreme Court's Chief Justice, William Rehnquist, retire later this summer due to health reasons, as many political observers expect, Democrats will not yet be too alarmed, because in all probability one conservative judge would be replaced by another. Replacing a liberal judge with a conservative judge, however, would be a completely different scenario, because this development would tip the balance of the Court to the right, both in terms of content and politics. Many significant Supreme Court decisions over the last years and decades were cast by a 5:4 majority. With a new, more conservative majority on the bench these decisions could be reconsidered and eventually readjusted.

Chances of Future Cooperation

The Bush administration has not prevailed in the filibuster debate, since it could not manage to get Senate votes on every single judicial nominee. Moreover, the instrument of the filibuster remains intact and can be invoked in extraordinary circumstances by Senators in the future. The chances for passing central items of the second-term reform agenda of President Bush—whose

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public support, according to public opinion polls has dipped to unprecedented lows in recent weeks—have only marginally increased. The filibuster debate has demonstrated that Bush cannot automatically count on the support of his party's parliamentary majorities.

Senators and House Members, who have to win the majority vote in their districts, will not restrain themselves in the upcoming election campaign 2006. On the contrary, they will put the interests of their constituencies first, to take priority over those of their party or party leaders. The personal and district's interests are too diverse to ensure that both parties can count on a European-style party discipline among their members.

A currently rather heterogeneous Republican parliamentary group now faces a uniform Democratic caucus. It will be difficult for President Bush in the near future to win Democratic votes for his reform agenda. More so than in his first term, Bush will have to fight for support in Congress. During his first four years in office, it was sufficient for Bush to present a rather general outline of his political projects, while leaving the legislative details and the fight for necessary votes to the Republican leadership teams in Congress. Now, Bush will have to invest more energy, time and incentives if he wants to put to good use the political capital that he earned through his reelection. Five policy areas in particular will present major conflict potential for Bush in dealing with Congress:

- ▶ In recent weeks, the Democrats repeatedly blocked the confirmation of John Bolton as the new U.S. Ambassador to the United Nations. In addition, some Republican Senators have expressed their reservations about Bolton's nomination as well. A final vote on his confirmation is expected for mid- to end-June; the vote is currently too close to call.
- ▶ The reform and privatization of Social Security is the centerpiece of Bush's reform agenda for his second term. To pass his—as yet still largely unspecified—

reform bill, Bush is in need of several Democratic votes, because he cannot count on support from all Republican Senators and Members.

- ▶ In late May, 50 House Republicans joined a majority of Democrats in voting for the lifting of federal restrictions concerning stem cell research. This issue poses such a big challenge to Bush that he has already announced his veto, should the bill pass the Senate as well. It would be Bush's first legislative veto in his four and a half years in office. Such a veto could only be overridden by a two-third majority in both congressional chambers.
- ▶ In the near future, Congress will also have to take up the issue of the Central American Free Trade Agreement (CAFTA), a trade agreement between the U.S., the Dominican Republic and five central American countries. CAFTA is seen as an important step towards a Free Trade Agreement of the Americas (FTAA) that could cover all of Latin America and the U.S. Severe reservations against the trade agreement exist among Congress members of both political parties.

The most important test for Bush's Republican majorities in Congress however are the above-mentioned upcoming nominations to the Supreme Court nomination. The debate over the congressional confirmation of judicial nominees and the use of the parliamentary instrument of the filibuster, therefore, will continue to contain huge conflict potential for the congressional agenda in the current legislative session, for the midterm election in November 2006 and, finally, for the presidential election in 2008.