

Daily Journal

Daily Journal

May 10, 2005

Article

GOP Might Not Have Votes to Block Filibuster

By Brent Kendall

As the Senate inches closer to a possible "nuclear" showdown over President Bush's stalled judicial nominees, it appears far from certain that Senate Majority Leader Bill Frist, R-Tenn., has the necessary votes to do away with Democratic filibusters of judicial candidates.

Frist, who leads the 55 Republicans in the 100-member Senate, cannot lose more than five of his GOP colleagues if he wants to successfully employ the so-called "nuclear option," a controversial and much-discussed parliamentary tactic that would outlaw filibusters on judicial nominees and force yes-or-no votes on the candidates blocked by Democrats.

The maneuver has been labeled nuclear because it likely would lead to chaos and gridlock in the Senate. Frist and other supporters prefer to call their plan the "constitutional option."

Democrats have used the filibuster to indefinitely delay 10 appellate court nominations they view as extreme. As he began his second term, President Bush renominated seven of those candidates, including California Supreme Court Justice Janice Rogers Brown, a nominee for the U.S. Court of Appeals for the District of Columbia Circuit.

Republicans have been unable to garner the 60 votes required to end the filibusters and bring the nominations up for final confirmation votes, even though the GOP likely has the 51 votes to confirm most, if not all, of the disputed nominees.

If Frist can secure 50 Republican votes in favor of the nuclear option, Vice President Dick Cheney, as president of the Senate, could step in and cast a tie-breaking vote to outlaw the filibusters.

But two Republicans, Sens. John McCain of Arizona and Lincoln Chafee of Rhode Island,

have said they oppose the nuclear option, and a third GOP senator, Olympia Snowe of Maine, almost certainly will vote against it.

Snowe has not made a definitive public declaration, but she told The New York Times recently there would not be "any surprise" in her vote. Snowe has previously expressed skepticism about the rule change, and observers believe she would not vote for it.

"If your instincts are where most reporters' are, then you're probably right," said Snowe spokeswoman Antonia Ferrier.

Snowe's no vote would leave Frist with just two votes to spare, and a number of other Republicans have expressed reservations about outlawing filibusters on judicial nominations. These include:

- **Susan Collins, Maine** - Collins has criticized Democrats for blocking Bush's nominees, but has said the nuclear option would "poison the atmosphere" in the Senate. Frist might have hurt his chances with Collins last week after sending an e-mail to her and all other Republican senators that praised an anti-filibuster ad campaign that targeted Collins and other uncommitted senators.

Sean Rushton, executive director of the Committee for Justice, which supports the ban on judicial-nominee filibusters, said Collins remains "gettable," but added that he was skeptical she would support the rule change. A Collins spokeswoman did not return a call for comment.

- **Lisa Murkowski, Alaska** - Murkowski wrote editorials last week for Alaska newspapers warning that the nuclear option would lead to Senate gridlock and hinder progress on a number of legislative initiatives important to her state.

Her spokeswoman, Kristin Pugh, said Murkowski remains undecided, but wants Republican leaders to work toward a compromise.

• **Chuck Hagel, Nebraska** - Last Sunday on ABC's program, "This Week," Hagel said, "You can't give up a minority rights tool in the interest of the country like the filibuster." However, Hagel also said he believed strongly that presidents deserved votes on their nominees. He said senators on both sides should find a way to come to an agreement.

• **John Warner, Virginia** - A long-time member of the Senate, Warner has refrained from taking a public position on the issue. In a January statement, Warner said, "I tend to be a traditionalist, and the right of unlimited debate has been a hallmark of the Senate since its inception. Without question, though, I am strongly opposed to the use of the filibuster to block judicial nominations."

Other question marks for the GOP include Sens. Arlen Specter, R-Pa.; Richard Lugar, R-Ind.; and John Sununu, R-N.H.

"I think they're right at the tipping point in terms of numbers," said Norman Ornstein, a congressional scholar at the American Enterprise Institute, a conservative think tank.

Ornstein, who opposes the nuclear option, said that in addition to McCain, Chafee and Snowe, "You've got a half dozen others out there who know better. I think it's very, very close."

The latest reports of a possible compromise surfaced Monday in the Capitol Hill publication Roll Call, which reported that a bipartisan coalition of at least a dozen senators were close to a deal.

The publication reported that Sens. Trent Lott, R-Miss., and Ben Nelson, D-Neb., were working on an agreement where at least six Republicans would oppose the nuclear option, while at least six Democrats - enough to break the filibusters - would allow votes on four of the seven blocked nominees, while pledging to support up-or-down judicial votes on future nominees, except in extreme circumstances.

"There is no deal," Lott spokeswoman Susan Irby said in response to the article. A representative for Nelson did not return a call

for comment.

Ornstein said he heard from "a couple" of senators last week that a deal was in the works.

"My guess is, even Frist will breathe a sigh of relief if you get these moderates kind of taking [the conflict] out of his hands," Ornstein said.

He added that a vote on the nuclear option would be "an excruciatingly difficult" one for senators if it ever came to the floor.

"If Frist prevailed and they changed the rules this way, it really does have long-term implications for the nature of the Senate," he said. "And in that context, these are votes that become part of your historical record. They tend to define you in terms of your career in the Senate."

Senate Majority Whip Mitch McConnell, R-Ky., said last month that the GOP had the votes to deploy the nuclear option.

Rushton, of the Committee for Justice, shared that assessment.

"We are fairly comfortable with where we are now," Rushton said, but added that he was not taking anything for granted.

Rushton's group and others are urging Frist to force a vote on the tactic, no matter what. He said it would be a greater defeat if Frist decided not to call the vote than for the majority leader to force a vote and lose it.

Rushton said there would be "hell to pay" for Republican senators who voted against outlawing the filibusters.

Glenn Sugameli, senior legislative counsel for the environmental public-interest law firm Earthjustice, which opposes the nuclear option, said he did not think Frist currently had enough support for the maneuver.

"I think it's certainly true that they don't have the votes now," Sugameli said. "I think Frist is assuming people will fall in line."

"He's kind of in a box now," Sugameli said of Frist.

"The bottom line is, if he had the votes, he would have done it already," he said.