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Amending Senate Rules at the Start of a New Congress, 1953-1975: An Analysis with an Afterword to 2015

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Summary

The filibuster (extended debate) is the Senate's most well-known procedure. Hollywood even highlighted its use in a famous 1939 movie entitled *Mr. Smith Goes to Washington*, starring actor Jimmy Stewart in the title role of Senator Jefferson Smith. Lengthy debate has many virtues (informing the public, for example) but the blocking potential of interminable debate has often made the filibuster a target for change by reform-minded Senators. Rule XXII requires 60 votes of Senators duly chosen and sworn to end debate on measures or motions—"except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting."

Real or threatened filibusters, along with cloture motions, have increased in recent Congresses. One consequence has been unsuccessful efforts by change-oriented Senators to amend Rule XXII without having to overcome the two-thirds supermajority hurdle. The contention of the reformers is that at the start of a new Congress, the Senate can amend its rules by majority vote—as the House does on its first day. They cite the U.S. Constitution (Article I, Section 5) as authority for their claim: "Each House may determine the Rules of its Proceedings," which implicitly means by majority vote, state the reformers.

Opponents reject the so-called "constitutional" option. They point out that the Senate has adopted rules and the Constitution says nothing about the vote required to adopt those rules. Moreover, they contend that the Senate is a "continuing body"—a quorum to conduct business is always present given the staggered terms of Senators—with continuing rules. The bottom line: a Senate majority can always amend the chamber's rules at any time during the two-year life of a Congress so long as the existing rules are observed, such as Rule XXII. Proponents of change refute that argument. They agree that a majority of the Members can change Senate rules at any time. Their concern is Rule XXII's two-thirds requirement for invoking cloture on proposals to amend Senate rules, which can prevent a majority from altering Senate rules.

From 1953 to 1975, initiatives to reform Rule XXII at the start of a new Congress were biennial rituals. They were instigated by Senators in each party frustrated by the chamber's inability to enact social and civil rights legislation because of opposition from other Members. The bulk of this report examines each Congress where reform actions occurred on "opening day," which could extend for days, weeks, or months. Most of the reform attempts failed, but two efforts were successful: in 1959 and 1975. An analysis of the successes and failures of this nearly quarter-century era of opening day reform efforts could inform contemporary efforts to revise Senate rules by examining the controversies, conditions, and circumstances that produced the various outcomes. The report discusses, for example, the roles of various Senate Presidents (the Vice President) and party leaders, as well as the procedural strategies used by opponents and proponents of amending Rule XXII by majority vote at the start of a new Congress.

The report also includes an "Afterword" that examines several subsequent and successful efforts to change Rule XXII in 1977, 1979, 1986, and 2013. The 2013 case is noteworthy because it created a new Senate precedent that allows majority cloture on most executive and judicial branch nominees. This precedential approach is sometimes called the "nuclear" option because of the likelihood of strong opposition and contentious parliamentary fallout from Senators opposed to its use on consequential measures or matters. In brief, the nuclear option indirectly "amends" Senate rules by majority vote through the creation of a new precedent that alters the application or interpretation of a chamber's rule, such as Rule XXII, without changing its formal text.

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Introduction

At the beginning of the 112th, 113th, and 114th Congresses—in 2011, 2013, and 2015 respectively—a number of reform-minded Senators unsuccessfully urged the Senate to adopt its rules on opening day by majority vote (as the House does on its first day) without having to overcome a supermajority hurdle required under existing procedures. For example, on January 6, 2015, a reform-minded Senator stated, "It has been the tradition at the beginning of many Congresses that a majority of the Senate has asserted its right to adopt or amend the rules. Just as Senators of both parties have done in the past, we do not acquiesce to any provision of Senate rules—adopted by a previous Congress—that would deny the majority that right."[1] The Senator's comments highlight a two-fold conundrum that suffuses this report: (1) a majority of the Senate can amend the chamber's rules; (2) however, before that may occur, reform advocates might be required under existing Senate rules—which carry over from one Congress to the next (part of the "continuing body" thesis)—to first muster a supermajority to bring interminable debate to a close on proposals to amend Senate rules. Only then would Senators have the opportunity to vote directly on proposals to alter the chamber's rules. Contemporary attempts to change Senate rules mirror similar opening day efforts that became biennial rituals nearly every new Congress from 1953 to 1975—the principal focus of this report. A major impetus for the repeated attempts at filibuster reform during this period was the frustration of liberal Senators in winning enactment of civil rights legislation. Prolonged debate and other procedural tactics by southern and other Members often blocked passage of those measures.

The revival of the idea that the Senate has the constitutional right on the opening day of a new Congress to change its procedures by majority vote regardless of entrenched rules or traditions merits detailed analysis. Why? Because this topic addresses perhaps the most distinctive procedural characteristic of the Senate: the filibuster (extended debate). An examination of the 1953 to 1975 initiatives to change Senate rules on the first day of a new Congress—unhindered by supermajority voting requirements carried over from the previous Congress—might provide useful context and analysis for today's advocates and opponents of this approach. Then and now, the procedural/political struggles associated with this idea focus less on rewriting many Senate rules and more on making it somewhat easier to constrain obstructive filibusters. Worth brief mention is that "filibustering," in its broadest sense, refers to more than prolonged debate. It encompasses a range of acts to delay and frustrate the Senate, such as objecting to a unanimous consent request to end quorum calls, raising numerous points of order, or forcing repetitive roll call votes.

Even so, the right of every Senator to engage in extended debate is probably the chamber's most famous feature. It is so well-known that Hollywood even made a classic movie in 1939 (*Mr. Smith Goes to Washington*) that highlighted the filibuster's educative and political value. A solo, around-the-clock filibuster was launched by fictitious Senator Jefferson Smith (played by actor James Stewart). Senator Smith/Stewart collapsed from exhaustion at the movie's end, but his filibuster mobilized public opinion and Member sentiment against a tawdry land deal. In short, the Senator's talkathon exposed wrongdoing, aroused public support, and, importantly, persuaded his colleagues of the rightness of his views.

Senators value extended debate for many other reasons, such as preventing bills they disagree with from becoming law, dramatizing issues for the public, protecting minority rights against majority steamrolling, ensuring thorough analysis of legislation, and checking overzealous

[1] *Congressional Record*, vol. 161, January 6, 2015, p. S23.

Presidents. On the other hand, opponents contend that prolonged debate—its actual or threatened use—thwarts majority rule, promotes gridlock, delays or kills legislation, exacts unwarranted concessions on measures or matters backed by Senate majorities, and, at times, blocks consideration of proposals that enjoy majority support in the country.

In the view of Senator Robert C. Byrd, D-WV, one of the most knowledgeable parliamentary experts in Senate history: "The liberties of a free people will always be safe where a forum exists in which open and unlimited debate is allowed." He added: "The good outweighs the bad, and not all filibusters have been bad, even though they may have been exasperating, contentious, and perceived as iniquitous."[2] Senator Byrd's views underscore that extended debate is the core procedural feature that distinguishes the Senate from the House of Representatives, where almost every second of debate time is limited by some rule, precedent, or practice.

Critics, by contrast, emphasize that filibusters contravene a fundamental principle of democratic governance: majority rule. In *Federalist No. 22*, Alexander Hamilton wrote: "To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser." Or as Thomas Jefferson said in the parliamentary manual he prepared for the Senate when he served as President of the Senate (1797-1801): "The voice of the majority decides. For the *lex majoris partis* [law of the greatest part, or majority rule] is the law of all councils, elections, &c. where not otherwise expressly provided."[3] In addition, the Framers did expressly provide in the Constitution a limited number of instances where supermajorities are required, such as a two-thirds vote of each chamber to override a presidential veto or two-thirds of the Senators voting to win the Senate's consent to a treaty.

Nothing in either the Constitution or Senate rules defines a filibuster, let alone what constitutes an appropriate length of time for debating a measure or matter.[4] From the First Congress, Senators recognized that debates for dilatory purposes would occasionally be used, but "they were not used frequently enough to give the Senate any trace of the notoriety which the filibuster later attached to the Upper Chamber."[5] During much of the 19th century, unrestricted debate aroused rather little senatorial concern, in large measure because the Senate's smaller size and workload (compared to today) made lengthy debates easier to accommodate. Once the motion for the previous question disappeared from the Senate's Standing Rules in 1806,[6] it was not until 1917 that the Senate

[2] Robert C. Byrd, *The Senate, 1789-1989*, vol. II (Washington, D.C.: U.S. Govt. Print. Off., 1991), pp. 162-163.

[3] Thomas J. Wickham, *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H. Doc. 113-181 (Washington, D.C.: U.S. Govt. Print. Off., 2015), p. 268.

[4] Senate Rule XIX is titled "Debate" and addresses the right to speak in the chamber. Paragraph 1(a) identifies a key principle that undergirds the ability of Members to engage in prolonged debate: "No Senator shall interrupt another Senator in debate without his consent." In sum, once a Senator is recognized by the presiding officer, the Senator may speak for as long as he or she wants, which in the case of Senator Strom Thurmond of South Carolina was a record-setting 24 hours and 18 minutes. He set the record for continuously holding the floor in debate on August 28-29, 1957, on a civil rights measure.

[5] Roy Swanstrom, *The United States Senate, 1787-1801*, S. Doc. 99-19 (Washington, D.C.: U.S. Govt. Print. Off., 1985), p. 210.

[6] The previous question is a debate-ending motion. Included as part of the Senate's rules in 1789, it was deleted in 1806 when the Senate recodified its standing rules. Analysts have differed over its original purpose: Was it a rule to end debate or to postpone consideration of matters? The Senate took the advice of Vice President Aaron Burr and eliminated the rule because it had been used only once in four years, which was "proof that it could not be necessary, and that all its purposes were certainly much better answered by the question of indefinite postponement." See Martin B. Gold, *Senate Procedure and Practice* (Lanham, MD: Rowman & Littlefield Publishers, 2004), p. 49. A study by political scientist Joseph Cooper provides strong evidence that the Senate's previous question motion was not used as a debate-ending motion. See Joseph Cooper, *The Previous Question: Its Standing as a Precedent for Cloture in the*

adopted a rule (Rule XXII) to allow a supermajority to bring debate to close. Over time, however, lengthy debate, and its threat, evolved to become a potent obstructive practice for delaying or preventing chamber consideration of measures or matters.

There is significant frustration in the present-day Senate with extended debate because it is difficult to end talkathons. A key reason for the difficulty is that on most measures and matters, a vote of three-fifths of the Senators duly chosen and sworn (60 if all 100 seats are filled) is required to invoke cloture under Rule XXII, which imposes limits on overall consideration. Little surprise that in a sharply divided and polarized Senate, the number 41 is stronger than 59. An even higher threshold (two-thirds of those voting, a quorum being present)[7] is required to end debate on measures to amend the Standing Rules of the Senate.

The supermajority vote required to invoke cloture on both substantive issues and amendments to Senate rules is among the major factors that explain why in recent years various Senators have urged procedural revisions. Among current proposals are changes to limit opportunities for prolonged debate on certain motions, to reduce the length of time required to end debate under Rule XXII, to lower the 60-vote threshold to invoke cloture, or to require Senators to remain in the chamber and engage in a so-called "talking filibuster"—as portrayed in the aforementioned *Mr. Smith Goes to Washington*—rather than use other methods (repeated quorum calls, for example) to stall Senate action.[8]

With heightened interest in revising Senate procedures that permit lengthy debate, this report has several purposes.[9] First, it provides a general overview of the Senate's contemporary legislative context that has triggered renewed interest in amending the Standing Rules of the Senate at the beginning of—even during—a new Congress. Second, the report focuses mainly on issues associated with what some call the "constitutional option," as distinguished from the "nuclear option." Proponents of the constitutional option cite Article I, Section 5, of the Constitution—"Each House may determine the Rules of its Proceedings"—as granting them the authority to

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United States Senate (Washington, D.C.: U.S. Govt. Print. Off., 1962). Also see Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* (Washington, D.C.: Brookings Institution Press, 1997). Binder and Smith state, in part: "It seems the [previous question] motion was not used to limit debate but had become a tactical means of postponing decisions.... The principles of free speech were hardly at stake in the 1806 decision to eliminate the previous question rule." pp. 38-39. In short, the Senate's deletion of the previous question motion from its rules did not give rise to filibusters because the 1806 motion was neither used to end debate nor bring the Senate to a vote on the pending matter.

[7] The language commonly used in referring to Senate votes, specifically the words "present and voting" as in "two-thirds of those present and voting," means "voting, a quorum being present." Why? Because "present and voting" is both imprecise and misleading. Consider this example. A vote of 66 yeas, 33 nays, and 1 response of "present" (not technically a vote) is by precedent sufficient to override a veto or adopt a proposed constitutional amendment. However, if you phrase the vote requirement as "two-thirds of those present and voting," 66 yeas, 33 nays, and 1 response of present, the vote would fail. Although this report uses "present and voting" in various places, the more precise language is "voting, a quorum being present." The importance of "a quorum being present" is that at least 51 Senators must vote to comply with the constitutional quorum requirement: "a Majority of each [House] shall constitute a Quorum to do Business" (Article I, section 5).

[8] See CRS Report R41342, *Proposals to Change the Operation of Cloture in the Senate*, by Christopher M. Davis and Valerie Heitshusen. Worth mention is that some House Members have a negative view of the filibuster. As former Representative David Obey, D-WI, once said: "The filibuster and the threat of the Senate filibuster impacts virtually everything that happens in both bodies. When senators tell me to keep my damn nose out because it's Senate rules, my response is, 'Hell it is.' It has a huge impact on our ability to produce, and we get tarred by the Senate's impotence." See Susan Davis, "A Different Place," National Journal, October 16, 2010, p. 10.

[9] See, for example, Carl Hulse, "G.O.P. Senator Seeks To Forge Path for Change," *New York Times*, November 10, 2015, p. A15; Seung Min Kim, "Republicans Weight Battle Over Filibuster Rules," *Politico*, November 5, 2015, p. 1; and Emma Dumain and Niels Lesniewski, "McConnell Faces More Calls for 'Nuclear Option' in Senate," *Roll Call*, September 18, 2015, online edition.

amend the rules of the Senate on opening day by majority vote and without filibusters. Senate rules require a supermajority vote to end debate on proposals to amend chamber procedures. The nuclear option refers to the creation by majority vote of new precedents to curb filibusters of specific measures or matters.

Third, the report reviews three Congresses (1953, 1957, and 1959) where various Senators professed that a complete rewrite of Senate rules was in order at the start of a new Congress. Fourth, an analysis of the 1961 through 1975 cloture revision proposals is presented. These initiatives focused principally on amending Rule XXII rather than adopting a new Senate rulebook. As with the reform attempts of the 1950s, this analysis summarizes several of the key parliamentary and political considerations or challenges likely to confront contemporary advocates who would like to change Senate rules at the opening of a new Congress. Fifth, the report examines several issues that emerged during these past attempts to change Senate rules that might affect contemporary efforts to revise Senate rules. The report concludes with an afterword that highlights significant cloture developments post-1975, especially the November 21, 2013, precedent that established majority cloture on most presidential nominations (see the discussion in Part VI).

Legislative Context

The legislative work of the contemporary Senate is regularly influenced by at least two key procedural and political factors. First, the Senate remains at its core a "minority rule" institution. The chamber's rules, precedents, and practices accord extraordinary procedural prerogatives to every Senator. No other democratic legislative assembly worldwide, so far as is known, grants its Members such wide-ranging freedom as are accorded to U.S. Senators to debate and to offer amendments, including amendments unrelated to the pending question. Restrictions can be imposed on each of these freedoms, but both are mostly available to all Senators to employ as they personally determine. One consequence is that any Senator is well-positioned to stall or frustrate chamber action on measures or matters, sometimes temporarily, sometimes permanently. Procedural actions by Senators who oppose a measure are particularly potent when time is at a premium near the close of a session. As a frustrated Senate majority leader lamented: "Only in the United States Senate and only in the last few days of a session can 85 Senators vote one way: Yes, for this bill; 12 Senators vote another way: No against the bill—and the no's prevail."[10]

Second, the Senate is currently highly polarized. Collaboration and compromise across the party divide can be much harder to attain than in the post-Depression and World War II eras. Many factors account for this development. For example, Members of the two Senate parties hold sharply divergent views on many of the major issues of the day (the proper role of government, for example). Another factor that inhibits biparty cooperation is intense electoral competitiveness of the two parties as each struggle to win governing power. Bipartisan coalitions, as a result, are very difficult to forge on consequential measures and matters. Recent Senates also have witnessed minority party Senators, whether Democratic or Republican, using an array of parliamentary tools to make governance by the majority party extraordinarily difficult. In response, Senate majority party leaders have employed parliamentary countermoves to try to advance their policy and political priorities.[11]

[10] *Congressional Record*, vol. 138, October 5, 1992, p. 16577. The statement is by Senate Majority Leader George Mitchell, D-ME.

[11] Two relevant articles on contemporary changes in the Senate are Steven S. Smith, "The Senate Syndrome," *Issues in Governance Studies*, No. 35, June 2010, The Brookings Institution, Washington, D.C.; and George Packer, "The Empty Chamber," *The New Yorker*, August 9, 2010, pp. 38-51.

Aggressive use of chamber rules and practices—such as routine threats to filibuster legislation or nominations—has triggered calls for procedural reform. The filibuster is perhaps the prime target for change because its goal is often to delay or prevent votes on measures or matters that might otherwise pass the Senate with majority support. As former Senate Republican Whip Thomas Kuchel of California explained: "What is a filibuster? My definition would be that it is irrelevant speechmaking in the Senate, designed solely and simply to consume time, and thus to prevent a vote from being taken on pending legislation."[12] Of course, extended debate serves a variety of purposes, as previously noted, such as to inform and enlighten colleagues and the attentive citizenry; inflame public opinion; focus attention on emerging issues; foster reasoned deliberation on legislation; influence lawmakers' votes; or highlight the strengths and weaknesses of legislative proposals and presidential nominations. A filibuster marathon by one or more Senators is not easy to stop, however.[13]

The Senate has only one formal rule (Rule XXII) to terminate prolonged debate on measures or matters. It is a time-consuming, multi-step procedure that impacts at least three session days. This salient fact compounds the difficulty of managing a deadline-driven and workload-packed institution; further, as noted earlier, Rule XXII requires a three-fifths vote of the Senators duly chosen and sworn to bring debate to a close. Even then, Rule XXII commonly allows for up to 30 more hours of post-cloture consideration on most matters before a vote could occur on the clotured measure or matter. The procedural reality is that the mere threat of extended debate—perhaps foreshadowed by objections to unanimous consent requests—is often enough to block action on measures or matters, not because proponents lack majority support but because the 60-vote threshold is beyond reach barring, perhaps, various concessions to opposition lawmakers. Even if a party has 60 or more Members, chamber leaders may not want to consume valuable time to go through the cloture process, thus empowering smaller minorities.

Significantly, Rule XXII stipulates that a two-thirds vote of Senators present and voting (interpreted to mean two-thirds of the Senators voting, a quorum being present) is required to invoke cloture on proposals to amend the Standing Rules of the Senate. The proposals themselves only need the support of a majority—even a simple majority, 26 of 51—of Senators to pass the Senate. The conundrum for reform-minded Senators: if they mobilize at least a majority of Members who favor altering Rule XXII, they cannot accomplish their objective under the terms of the rule they want to change. In short, the reformers face a "Catch-22" parliamentary dilemma. As Senator Jacob Javits, R-NY, pointedly noted: "True, the Senate by a majority [even a simple majority] at any time can work its will on any piece of legislation, including a change in the rules, but the question is: What does it take to get to the point where the majority can manifest its will?"[14] In the case of rules changes, the answer is that it could first require the support of a two-

[12] *Congressional Record*, vol. 107, January 4, 1961, p. 82.

[13] Senator Strom Thurmond of South Carolina holds the filibuster record, speaking on the Civil Rights Act of 1957 for 24 hours and 18 minutes.

[14] *Congressional Record*, vol. 105, January 8, 1959, p. 124. Another reform-minded Senator, Democrat Paul Douglas of Illinois, expressed a view similar to that of Senator Javits: "[T]he only safe method of establishing clearly the right of the Senate to adopt rules is to do so at the beginning of the session, when the Senate would not be crippled by the straitjacket for which there was no key; namely, rule XXII." See p. 127. On the other hand, Majority Leader Lyndon Johnson, D-TX, made it abundantly clear, "At every session of the Congress the rules are amended. They are amended with respect to the constitution of our committees and the ratio of majority and minority members. That is usually done by unanimous consent. But I point out again for the *Record* that the majority of the Members of the Senate can rewrite the rules, each one of them, all 40 of them. Substitutes may be submitted for each of the 40 rules. The Senate can amend them in any respect it may desire, at any time a majority of the Senate shall so decide…. [T]he Senate of the United States, by majority vote, can amend any of its rules or rewrite all its rules." See pp. 105-106. Senator Javits responded: "All the argument to the effect that the majority can change the rules at any time is so much dust thrown in

thirds supermajority of Members voting to bring to an end, as Rule XXII states, a filibuster against "a measure or motion to amend Senate rules." Only then could a Senate majority vote on the revision itself.

The Constitutional and Nuclear Options

The "constitutional" and "nuclear" terms are often used interchangeably because at their heart each seeks to change Senate Rule XXII (or any Senate rule) by majority vote, circumventing the two-thirds cloture requirement to bring debate to an end on proposals to alter Senate rules. The term "nuclear" can apply to both options in this specific sense: the success of either the constitutional or nuclear option might trigger a parliamentary meltdown, an explosion of dilatory and obstructive tactics by Senators who vehemently oppose limitations on their ability to filibuster measures or matters.[15] Both options might also use novel procedures to achieve their objectives. For ease of comparison, this report considers the two options separately, which emulates a study by two acknowledged Senate procedural experts.[16]

The "constitutional" option refers to efforts at the start of a new Congress to amend Senate rules by majority vote, without regard to Rule XXII's two-thirds requirement for ending debate. Proponents of this approach cite the constitutional provision that "Each House may determine the rules of its proceedings." Opponents exclaim that "the Constitution says nothing of the sort. It merely says ... that both Houses can make their own rules."[17] Opponents also emphasize that the Senate has rules that require a supermajority vote to end debate on proposals to amend chamber procedures.

The nuclear option refers to the creation of new precedents that prevent filibusters of specific measures or matters. As Senate precedents state: "Any ruling by the Chair in response to a point of order made by a Senator is subject to an appeal. [If there is an appeal, a majority vote of the Senate upholds the decision of the Chair.] If no appeal is taken, the ruling of the Chair stands as the judgment of the Senate and becomes a precedent for the guidance of the Senate in the future."[18] In the view of two Senate procedural experts, the nuclear option is "essentially a variant of the 'constitutional option.' The difference is that this parliamentary maneuver would be applied [during] a congressional session" rather than at the beginning of a new Congress.[19]

Senators often turn to one or the other option in their attempt to amend the Standing Rules of the Senate by majority vote, bypassing the supermajority impediment. The use of either option to try

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the eyes of those who wish to reach the end of the rule XXII question. The dust arises because of the fact that the question is not whether a majority can vote a change—there is no question about that; it can vote a change at any time—but a question of when the majority can reach a vote." See p. 125.

[15] An attorney, Jeffrey Tobin, wrote about a 2005 plan to circumvent the 60-vote requirement of Senate Rule XXII to end judicial filibusters by majority vote. He titled his article "Blowing Up the Senate," *The New Yorker*, March 7, 2005, pp. 42-46.

[16] Richard A. Arenberg and Robert A. Dove, *Defending the Filibuster* (Bloomington, IN: Indiana University Press, 2012. Chapter 10 of this book is titled "Reforming the Filibuster: The Constitutional Option;" Chapter 11 is titled "Reforming the Filibuster: The Nuclear Option." Arenberg and Dove quote Senator Trent Lott, R-MS, the former Majority Leader (1996-2004), as the originator of the "nuclear option" term. He later called it the "constitutional plan," which, he said, was "inspired by prose about appointing judges found in both the Constitution and the Federalist Papers." p. 136.

[17] *Congressional Record*, vol. 121, March 4, 1975, p. 5080.

[18] Alan S. Frumin, *Senate Procedure: Precedents and Practices* (Washington, D.C.: U.S. Govt. Print. Off., 1992), p. 145.

[19] Arenberg and Dove, *Defending the Filibuster*, p. 135.

to amend a major rule of the Senate is almost certain to rile many Members as being outside the conventional legislative process: proposals to amend Senate rules are typically referred to the Committee on Rules and Administration for study and review. Attempts to amend Rule XXII can arouse considerable notice by the media, outside groups, and the attentive public.

To summarize: the nuclear option involves the creation of new debate-ending precedents using proceedings that may require actions in contravention of existing precedents or rules. Precedents are the common law of the Senate and govern scores of chamber proceedings. As freshman Senator Jeff Flake of Arizona noted in his maiden speech, the Senate is "an institution bound by tradition and precedent."[20] Former Senator Judd Gregg of New Hampshire, a four-term veteran of the Senate, underscored Senator Flake's observation. "To the extent that there are precedents," he said, "they're extraordinarily important. In the parliamentary process, precedent is what controls."[21] Precedents do not change the formal text of Senate rules, but they do affect their interpretation and application in Senate proceedings.

The other route to amending the Standing Rules of the Senate by majority vote emphasizes the Senate's constitutional rulemaking authority under Article I, Section 5. This approach has often occurred biennially at the beginning of a new Congress. It is the principal focus of this report. Remember that a Senate majority can amend the Standing Rules at any time. At issue is Rule XXII's two-thirds vote requirement to invoke cloture before the Senate might adopt by majority vote a pending amendment to its Standing Rules. A further review of the two reform options—creating precedents or amending Senate rules—merits additional discussion because each option can provoke contentious floor struggles.

Precedents and Senate Rules

A feature of precedential change is that the text of a formal rule remains unchanged, such as Rule XXII, but the new precedent effectively alters all or part of its application and interpretation in chamber proceedings. A good on-point illustration of how a precedent could change Rule XXII was considered in May 2005.[22] Majority Leader Bill Frist, R-TN, was frustrated by Democratic filibusters against judicial nominees of President George W. Bush. The majority leader realized that in a polarized Senate with 55 GOP Senators and partisan tensions high, he was unlikely to attract the 60 votes required to invoke cloture to end extended debate on a nomination. However, he believed he could win majority approval of these nominees by employing the nuclear option, establishing by majority vote a Senate precedent that would end the ability of a minority party to filibuster these nominees and permit a Senate majority to overcome these filibusters. One version of the parliamentary strategy he devised to create this precedent outlines a sequence of actions like the following:

- Bring a controversial judicial nominee to the floor, which Democrats would filibuster.

[20] Senator Jeff Flake, *Congressional Record*, vol. 159, June 4, 2013, p. S3927.

[21] Joseph J. Schatz, "Debate Turns to Precedents Already Established and Those in the Making," *CQ Today*, March 24, 2010, p. 7.

[22] For an analysis of several examples of changing Senate procedures by precedent, as well as useful background on the filibuster, see Martin B. Gold and Dimple Gupta, "The Constitutional Option To Change Senate Rules and Procedures: A Majoritarian Means To Overcome the Filibuster," *Harvard Journal of Law & Public Policy*, Fall 2004, pp. 205-272.

- After a failed cloture vote to end debate on confirming the nominee, Senator Frist would raise a point of order that further debate was dilatory and that a majority vote was sufficient to invoke cloture on the nominee.
- The ruling by the presiding officer, perhaps the President of the Senate, Vice President Dick Cheney, would sustain the point of order. This ruling might not comport with established precedents and be contrary to the advice of the Senate parliamentarian. As one news account stated, Cheney "almost certainly will oversee [as the presiding officer] any deployment of the so-called 'nuclear option' on judges."[23] If the Chair's ruling at this point went unchallenged, it would set a new Senate precedent.
- However, the strong likelihood was that the minority leader would appeal the decision of the Chair on the grounds that it contravenes existing rules governing Senate procedure.
- The majority leader would then make a non-debatable motion to table (kill) the appeal.
- A Senate majority would agree to the tabling motion, which would have two immediate consequences: (1) affirming the Chair's ruling, thus ending further extended debate on the pending judicial nomination, and (2) establishing a new precedent—as defined by the point of order—that allows Senators to end judicial filibusters by majority vote.

Majority Leader Frist never had the chance to execute his planned procedural maneuver. He was blocked by a bipartisan accord reached by an ad hoc Senate group, the so-called "Gang of 14," seven Democrats and seven Republicans. This bipartisan group had been meeting quietly for weeks, trying to devise a compromise to break the political stalemate on judicial nominations and avert use of the nuclear option. They were successful. For example, in their Memorandum of Understanding, the seven Republicans promised not to support "any recommendation to or interpretation of the Rules of the Senate that would force a vote on a judicial nomination by means other than unanimous consent or Rule XXII." In return, the seven Democrats promised not to filibuster certain pending judicial appointments, and agreed that judicial nominees "should only be filibustered under extraordinary circumstances, and each signatory must use his or her own discretion and judgment in determining whether such circumstances exist."[24] Thus, a high-stakes parliamentary showdown over ending filibusters on judicial nominations by majority vote was averted. Nevertheless, the basic concept of this form of action generally provided the structure for the successful use of a "nuclear option" eight years later by Majority Leader Harry Reid, D-NV (see Part VI).

Four strategic considerations are important to note about Senator Frist's unrealized plan. First, it is especially useful for advocates of procedural change to have the support of the majority leader, because he sets the schedule of floor proceedings, enjoys priority of recognition from the Chair, and engages in the vote-gathering process. Second, it is essential to have a supporter presiding, so that he/she will follow an agreed-upon procedural script—including the issuance of rulings contrary to precedent—that bolsters the objectives of the reformers. Third, the majority leader should expect an appeal of the Chair's ruling, either by the minority leader or his designee. Fourth, once the appeal is made, the majority leader would immediately offer a non-debatable

[23] Geoff Earler, "The Veep Is Heading To Disclosed Location," *The Hill*, April 28, 2005, p. 1.

[24] The Memorandum of Understanding can be found in the *Congressional Record*, vol. 151, May 24, 2005, p. 10931.

motion to table (kill) the appeal, which would be agreed to by majority vote. Thus, the new precedent would end filibusters on judicial nominees.

Important to emphasize in the Frist example is the favorable ruling of the Chair. Without it, the majority leader cannot secure the desired precedent by moving to table the appeal. If the presiding officer rejects the majority leader's point of order, an appeal of that ruling would place the majority leader in an untenable parliamentary situation for two reasons. First, appeals normally are subject to unlimited debate that may require a supermajority vote to limit, outcomes diametrically opposed to the preferences of the majority leader. Second, a motion to table the appeal, if one should be made, is not an effective option for the majority leader because it upholds the Chair's ruling. Failure to table means the appeal remains open to extended debate.

The Senate's Rulemaking Authority

Champions of filibuster reform contend that the Senate may, like the House, adopt its rules by majority vote when a new Congress convenes. Among the inter-connected principles asserted by reform-minded Senators are as follows: (1) A Senate majority has the constitutional right at the start of a new Congress to create or amend procedural rules, unhindered by Senate rules inherited from earlier Congresses. (2) All Senate rules continue from one Congress to the next except those viewed as being unconstitutional. The cloture rule, therefore, is unconstitutional to the extent that it inhibits the Senate from exercising its constitutional power to amend its rules. (3) Even if Senate rules continue from one Congress to the next, this continuity cannot extend to rules viewed as being unconstitutional. As asserted in 1969 by Democratic Senator Frank Church of Idaho, the start of a new Congress is a special constitutional time that permits the Senate to change its procedures by majority vote unencumbered by chamber rules adopted by a previous Congress.

> Experience over the past two decades makes it perfectly clear that there is no escape hatch once the Senate binds itself to rule XXII at the beginning of a new Congress. After rule XXII is acquiesced in by a new Congress, it becomes self-perpetuating until the next Congress is elected, since it has proven impossible to obtain the required two-thirds vote to close debate on any proposal to change the rule. This means that modification of [Rule XXII] will either be won at the opening of a new Congress, when the majority can make the decisions, or it will not be won at all.[25]

Many lawmakers, then and now, challenge Senator Church's view as being contrary to Senate rules, traditions, and the long-standing "continuing body" doctrine. Senator Church argues that the Senate that convenes after an election is a new Senate; others emphasize that it is a continuing body, which has been the unbroken tradition since the Second Congress.

The basic idea of the continuing body is that from its beginning in 1789, the Senate always has a quorum (a majority under the Constitution) of Senators to conduct official business. Proponents of this doctrine state that because only one-third of the Senate's membership stands for election every two years, the Founding Fathers enabled the other two-thirds of the chamber's membership to operate as a functioning continuing body. Moreover, long-standing practices bolster the credibility of the doctrine, such as Senate officers have no set term of office and serve until their successors are named; standing committees and their membership, as well as standing orders, simple Senate resolutions and concurrent resolutions (such as budget resolutions), and unanimous consent agreements continue from one Congress to the next until they are changed; treaties submitted to the Senate and articles of impeachment from the House of Representatives remain

[25] *Congressional Record*, vol. 115, January 13, 1969, p. 528.

before the Senate from one Congress to the next; and "the uniform practice from the time of the organization of the Second Senate until the present time has been to treat the rules of the Senate as continuing."[26] Further, a 1959 amendment to Senate Rule V states explicitly that the chamber's rules continue from one Congress to the next "unless they are changed as provided in these rules," which include the supermajority cloture requirements of Rule XXII. Rule V was adopted as part of a package amending Rule XXII. It was not voted on separately.

Senate history also reveals that there is not universal adherence to the continuing body thesis. In 1959, prior to the aforementioned Rule V addition to the Standing Rules of the Senate, Senator Hubert Humphrey of Minnesota referred to "the misguided theory that the rules of the Senate are continuing." He contended that the theory was of "doubtful validity."[27] His point was two-fold: first, simply because two-thirds of the Senate's Members carry over from one Congress to the next does not mean that the Senate cannot change its rules by majority vote;[28] and, second, because the Senate's rules carry over does not imply that a new Senate necessarily favors the old rules.

In short, a fundamental question is this: Do the rules of the Senate automatically carry over from Congress to Congress and govern proposals to change Senate rules at the start of a new Congress? Senate Rule V—chamber rules carry over unless changed according to the procedures outlined therein—answers the question affirmatively.[29] Senate reformers assert that the Constitution (Article I, Section 5) takes precedence over Senate Rule V. As Democratic Senator Joseph S. Clark of Pennsylvania said:

> The fact is that the Senate is a continuing body for some purposes but not for others. The question is accordingly entirely irrelevant to the issue of the constitutional right of each newly elected Senate to change its rules at the beginning of each session, as authorized by the Constitution. For that purpose the Constitution overrides any fine spun theory about a continuing body.[30]

Three times in the 1950s—1953 (the 83rd Congress), 1957 (the 85th Congress), and 1959 (the 86th Congress)—Senate reformers stated the case for the Senate's right to adopt its Standing Rules at the start of a new Congress without facing a possible supermajority hurdle. If successful, their goal also would do away with the continuing body doctrine. The historical record suggests that the principal focus of the 1950s reformers was to amend Rule XXII rather than to readopt the Senate's Standing Rules every two years. Yet they had to argue for revising chamber rules because of two 1949 changes to Rule XXII that made any effort to amend only that rule highly problematic, if not impossible. This reality heavily conditioned the 1950s efforts.

First, the number required to invoke cloture was changed in 1949 from the original 1917 cloture rule—two-thirds of those voting—to two-thirds of the Senators duly chosen and sworn. Saddled with mobilizing a higher threshold of support for invoking cloture, the 1950s reformers knew the odds of that happening were quite slim. Second, and more significant, the 1949 change to Rule XXII disallowed cloture on motions to proceed to the consideration of proposals to alter Senate rules. This feature of Rule XXII remained in place until it was changed in 1959.

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[26] *Congressional Record*, vol. 99, January 7, 1953, pp. 165-178.

[27] *Congressional Record*, vol. 105, January 8, 1959, p. 119.

[28] Left unaddressed by Senator Humphrey is whether the carryover of a *quorum* means that the *rules* carry over.

[29] The continuity provision in Senate Rule V was adopted as part of the package amending Rule XXII. It was not voted on separately.

[30] *Congressional Record*, vol. 109, January 31, 1963, p. 1504.

In short, the reformers had no real or effective way to stop filibusters on Senate rule changes. As a result, reformers—led by Senator Clinton Anderson, D-NM—believed that the only way they could alter Rule XXII by majority vote without provoking a filibuster was to invoke the constitutional option: assert their right to adopt new Senate rules by majority vote, rejecting any supermajority requirement to achieve that goal. (They did not consider the nuclear option.) Until new rules were adopted, the presumption of the reformers was that the Senate would follow general parliamentary procedures that would permit a majority to cut off extended debate, such as the previous question motion. Their plan, if agreed to, would shatter the continuity doctrine. (In later years, reformers emphasized that their primary focus was to revise Rule XXII rather than all Senate rules).

Attempts to Amend the Standing Rules of the Senate on Opening Day: 1953, 1957, and 1959

It is useful to note that several parliamentary topics discussed herein vary in their salience in the debates of different years. Even so, they are subjects that have been raised repeatedly over the decades during debates on revising Senate rules. The topics include such matters as the role of the majority leader and the Vice President as presiding officer; the continuing body doctrine; interim procedural rules pending adoption of new Senate rules (or amendments thereto); the "opening day" concept; parliamentary strategies; and ending debate. To be sure, many of these general issues also orient much of the cloture reform discussion in subsequent decades.

83rd Congress (1953)

On January 6, 1953, Senator Clinton Anderson, D-NM, moved "that the Senate take up for immediate consideration the adoption of rules for the Senate of the Eighty-third Congress." As he stated, "I am contending that we are operating without rules at the present time."[31] Senator Anderson's view was that the Senate's rules had expired, which would mean that new ones could be adopted by majority vote of the membership without the requirement for a supermajority cloture vote to end debate on their proposal. A reform advocate, Democratic Senator Paul Douglas of Illinois, contended that, in the absence of Senate rules, "general parliamentary law governed in the Senate" until a majority adopted new Senate rules.[32] Anderson's fundamental goal was to retain the Senate's previous rules with one exception: amend Rule XXII to reduce the number required to invoke cloture.

Majority Leader Robert Taft, R-OH, noted that he could deal with Senator Anderson's motion in several ways: by extended debate, by a non-debatable motion to table (or kill) the motion, or by raising a point of order. He then said that, after sufficient debate on Anderson's motion, he would either move to table or make a point of order that the motion contravened the continuing rules of the Senate. Senator Taft noted that no "Senate has undertaken at the beginning of a Congress to adopt its rules. It has been assumed that the Senate is a continuing body and that it has continuing rules."[33] He added: "It is now said that the Senate must now operate under Robert's Rules of Order, or some other rules of parliamentary law. But surely there must be rules of some kind. It

[31] *Congressional Record*, vol. 99, January 6, 1953, p. 118.

[32] *Ibid.*, January 7, 1953, p. 220.

[33] *Ibid*., January 6, 1953, p. 108.

seems obvious to me that those should be the [existing] rules of the Senate."[34] Senator Taft was suggesting that Senate rules have been continuously in effect since the First Congress, with later amendments, without any explicit requirement that they must be readopted at the start of every new Congress. Since the Senate already had rules, there was no need to proceed to adopt biennially a set of new rules.

Opponents of the continuing body thesis recognized its "Catch-22" feature: how can the Senate amend Rule XXII when the practical effect of that rule is to prevent its amendment? To overcome this obstacle, supporters of majority cloture (or some other change in the number needed to invoke that procedure) contended that every new Senate can amend its rules by majority vote under the Constitution. The continuing body argument, reformers said, is simply not relevant, because any new Senate on opening day can adopt its own rules. As Senator Humphrey put it: "I think the question before the Senate is whether we have the right to adopt rules, be they good, bad, or indifferent. Do we, as Members of this body, lose our right to have anything to say about its rules, by reason of the fact that we are elected to a Senate which adopted rules years and years ago?"[35] Moreover, Members who voted for those rules probably no longer serve in the institution? Acquiescence in repeatedly accepting the rules of previous Senates did not mean, according to Senator Humphrey, that "the Senate has … renounced its constitutional right to make its own rules. It cannot, in fact, renounce this constitutional power."[36]

Majority Leader Taft, who doubtless knew he had the votes to table Anderson's motion, responded to these issues in various ways. For one, he stated that the continuing body theory is supported by tradition and precedent and enhances the Senate's "prestige and power. I believe that it adds to the influence we have with the people in performing the duties which we have to perform." For another, it is a "radical step" to declare "that the Senate is not a continuing body, that we have no rules, and that at the first of every session we are to debate all the practices and rules of the Senate." Third, Senator Taft noted that, if reformers can mobilize the votes and with favorable rulings from the presiding officer, "it is always possible for the Senate to protect itself against a filibuster." He added: "I submit that the rules of the Senate permit a change by a majority vote at any time the Senate wishes to make a change."[37] Majority Leader Taft also made clear that he would not prejudice the right of Senator Anderson to offer his rules-revamping resolution. In the end, after three days of debate (January 3, 6, and 7), the Senate voted by a wide margin (70 to 21) to table Senator Anderson's motion.[38] That decision meant that existing Senate rules continued to govern chamber proceedings.

85th Congress (1957)[39]

On January 3, Senator Anderson made the same motion that he proposed four years earlier. Citing Article I, Section 5, of the Constitution, Senator Anderson said: "I now move that this body take

[34] *Ibid.*, pp. 111-112. Senator Richard Russell of Georgia, the acknowledged leader of the informal "Southern Caucus," inquired of Vice President Alben Barkley under what rules was the Senate operating. He received this response from the Chair: "The organization of the Senate is an inherent right of the Senate, as it is of any sovereign body, and all that has taken place up to date has been under that inherent right." *Ibid.*, January 3, 1953, p. 10.

[35] *Congressional Record*, January 6, 1953, p. 114.

[36] *Ibid.*, Jan. 7, 1953, p. 220.

[37] *Ibid.*, January 7, 1953. The first and second points are found on p. 112, the third on p. 113.

[38] *Ibid.*, p. 232.

[39] No attempt was made at the start of the 84th Congress to revise Senate Rule XXII. As Senator Anderson explained, Senate reformers "assembled once more to consider challenging Rule XXII…. But in the [1954] elections, the Democrats had regained control of the Senate by a slim margin and Lyndon Johnson had thereby gone from Minority

up for immediate consideration the adoption of rules for the Senate of the 85th Congress." Majority Leader Lyndon Johnson, D-TX, exercising his leadership prerogative of first recognition by the Chair, planned to offer a motion to table Anderson's proposal. However, after some discussion with Anderson and his supporters, Johnson proposed a unanimous consent agreement that provided six hours of debate, equally divided, with a vote on the tabling motion to occur the next day at 6 p.m. There was no objection to the accord. During discussion of the unanimous consent agreement, Senator Wayne Morse, D-OR, suggested that the Senate ought to face the issue head-on of whether a new Senate can adopt new rules. He suggested that the Senate follow these parliamentary steps:

> First entertain a motion [that Senator Anderson] proposes to make to the effect that the Senate proceed to adopt Senate rules binding upon the 85th Congress. Second, the Senate and the Presiding Officer should then consider a point of order raised by some Senator asking for a determination as to whether or not the motion calling for the adoption of new rules is in fact in order. Third, the Senate should then consider an appeal from the decision of the Chair on the point of order.[40]

Senator Johnson disagreed with Morse's recommendation. He pointed out that a vote on the motion to table was used in 1953 and, furthermore, "when any Senator votes on the motion to lay on the table, he really is voting on the question of whether new rules for the Senate should be adopted at the beginning of the 85th Congress."[41]

The next day the Senate voted 55 to 38 for Senator Johnson's tabling motion.[42] Nonetheless, reform advocates won a favorable and detailed advisory opinion from the President of the Senate, Vice President Richard Nixon, concerning the Senate's constitutional right by majority vote to change its rules at the beginning of a new Congress. Nixon's advisory opinion addressed how to reconcile two constitutional mandates: (1) the constitutional provision that only one-third of the Senate is up for election every two years, implying that the Framers intended the Senate to be a continuing body "for at least some purposes;" and (2) the constitutional provision providing that "each House may determine the rules of its Proceedings." Responding to a parliamentary inquiry from Senator Humphrey, Vice President Nixon said in part:

> Any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying the majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional.
>
> The Chair emphasizes that this is only his own opinion, because under Senate precedents, a question of constitutionality can only be decided by the Senate itself, and not by the Chair.
>
> [U]ntil the Senate at the initiation of a new Congress expresses its will otherwise, the rules in effect in the previous Congress in the opinion of the Chair remain in effect, with the exception that the Senate should not be bound by any provision in those previous rules

Leader to Majority Leader. Johnson approached one of our strongest allies, [Senator] Hubert Humphrey, and pleaded with him to forget the rules fight for the time being…. Humphrey came back to us and asked us to desist from embarrassing his friend Lyndon. He also communicated Johnson's entreaty that we not shatter party harmony on the eve of our resuming control of the Congress. So in 1955, we deferred to the wishes of our Majority Leader and skipped the biennial assault on the seemingly impregnable fortress of Rule 22." See Clinton P. Anderson, *Outsider in the Senate* (New York: The World Publishing Co., 1970), p. 137.

[40] *Congressional Record*, vol. 103, January 3, 1957, p. 11.

[41] *Ibid*., p. 11.

[42] *Ibid*., Jan. 4, 1957, p. 215.

> which denies the membership of the Senate the power to exercise its constitutional right to make its own rules.[43]

Nixon also stated that if Johnson's tabling motion prevailed (as it did), he would view that as the Senate's approval of the previous rules of the chamber; if the motion to table failed, that would mean that "the Senate can proceed with the adoption of rules under whatever procedures the majority of the Senate approves."[44] Senator Richard Russell, D-GA, the leader of the southern lawmakers and Senator Johnson's mentor and patron, made it known informally that, if Anderson's motion prevailed, he would offer changes to every Senate rule and filibuster every proposed alteration, forcing an endless number of separate cloture votes.[45] Although Anderson's motion was rejected on a procedural vote, reformers garnered a favorable advisory opinion from the Vice President that bolstered their commitment to changing Senate rules by majority vote.[46]

86th Congress (1959)

The legislative context for the constitutional option seemed especially favorable in the 86th Congress.[47] One reason was the large Democratic election victory in 1958. The Senate's lineup went from 49 Democrats to 47 Republicans in the previous Congress to 64 Democrats to 34 Republicans in the 86th Congress. Of 15 Democratic freshmen Senators, at least half were sympathetic to rules changes. Moreover, with Vice President Nixon presiding over the Senate, it was expected that he would offer advisory opinions favorable to Senator Anderson and his supporters. Majority Leader Lyndon Johnson, who opposed the constitutional option, recognized the favorable climate for change and proposed a bipartisan filibuster rules change that the Senate in the end adopted unchanged: the first major change of filibuster rules in a decade.

On January 7, the opening day of the 86th Congress, Senator Johnson, using the priority of recognition accorded majority leaders by Senate precedents, asked unanimous consent for the immediate consideration of his reform resolution (S. Res. 5), co-sponsored by nearly every top Democratic and Republican leader. S. Res. 5 proposed to change the number required to invoke cloture on measures and matters from two-thirds of the entire membership to two-thirds of those present and voting. That standard would also apply to motions to proceed to rules changes. In addition, S. Res. 5 would also add a new clause to Senate Rule V (then Rule XXXII) stating that the rules of the Senate continue from one Congress to the next unless changed as provided in the rules. The new clause, according to two legal scholars, was "a concession to Senator Russell" of

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[43] *Ibid.*, pp. 178-179.

[44] *Ibid.*, p. 179.

[45] Robert A. Caro, *Master of the Senate* (New York: Alfred A. Knopf, 2002), p. 856.

[46] Senator Anderson wrote that he and Nixon lived only a few blocks from each other in Northwest Washington. "[O]ccasionally, when I was out walking [my] terrier, I would drop by for a talk…. When I talked to Nixon, I found that his position was far different from what Taft's had been only four years before. He seemed persuaded by the rightness of the cloture amendment," and seemed ready to assist. See Anderson, *Outsider in the Senate*, p. 144. A noted biographer of Lyndon Johnson said that Nixon welcomed the opportunity to preside "in hopes of burnishing his civil rights credentials and winning the support of African Americans for an expected run for the White House in 1960." See Caro, *Master of the Senate*, p. 856.

[47] It is worth emphasizing that the Senate successfully amended Rule XXII in both 1949 and 1959. On March 17, 1949, the Senate adopted S. Res. 15, which toughened the vote required for cloture from two-thirds voting to two-thirds duly chosen and sworn. The Senate also agreed to make Rule XXII applicable to motions to proceed generally, except for motions to proceed to proposals to amend the Standing Rules of the Senate. On January 12, 1959, S. Res. 5 dropped the necessary vote for cloture to two-thirds voting, removed the prohibition against motions to proceed to measures to amend the Standing Rules of the Senate, and added language stating that the Senate's rules continue from one Congress to the next.

Georgia and the other southern Senators.[48] Importantly, Senator Johnson's action preempted Senator Anderson's motion to have the Senate take up for immediate consideration "the adoption of rules for the 86th Congress," as he had done in 1953 and 1957. Senator Johnson's objective was to have his reform initiative and not Anderson's considered first by the Senate.

During his opening remarks on S. Res. 5, Senator Johnson referred to the Senate's one-day rule, "which entitles the Senate to a day's notice in writing of motions to amend or modify a rule and that any Senator may insist upon compliance with the rule."[49] If a Member objected to his request for the immediate consideration of S. Res. 5, Senator Johnson said he would comply with the one-day written notice requirement and then call up S. Res. 5 the next session day (January 8). Subsequent to Johnson's asking unanimous consent for the immediate consideration of S. Res. 5, Senator Jacob Javits, who supported Anderson, asked Presiding Officer Nixon: "Under what rule will the resolution submitted by the Senator from Texas be considered?" The Chair replied: under the rules of the Senate "which have been adopted previously by the Senate," but not any Senate rule that restricts the constitutional right of a majority of Senators "to cut off debate in order to exercise the right of changing or determining the rules." The Vice President elaborated:

> If, for example, during the course of debate on the motion of the Senator from Texas, which deals with changing the rules, a Senator believes that action should be taken and debate closed, such Senator at that time could, in the opinion of the Chair, raise the constitutional question by moving to cut off debate. The Chair would indicate his opinion that such a motion was in order but would submit the question to the Senate for its decision.[50]

After further discussion, Senators Javits and Clifford Case, R-NJ, objected to Johnson's request to call up S. Res. 5. Two things quickly happened back-to-back. First, Senator Johnson sent to the desk his written notice to amend certain Senate rules. Second, Senator Anderson "moved that the Senate proceed to adopt its rules." (Senator Anderson's motion had the bipartisan support of thirty-two other Senators). However, Senator Johnson insisted that he had not yielded the floor and, therefore, Senator Anderson could not offer his motion. The outcome: Senator Johnson adjourned the Senate but not before he declared that "I do not want my motion [S. Res. 5] supplanted by any other motion."[51] Significantly, the adjournment prevented Senator Anderson from giving written notice of his intent to propose revisions to Senate rules.[52]

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[48] Gold and Gupta, "The Constitutional Option To Change Senate Rules and Procedures: A Majoritarian Means To Overcome the Filibuster," p. 231; and Ivan Hinderaker, "From the 86th to the 87th Congress: Controversy over 'Majority Rule'," in *American Government Annual, 1961-1962* (New York: Holt, Rinehard and Winston Inc., 1961), p. 89. As is the case with numerous legislative provisions, lawmakers have their own reasons for voting for or against such matters. For example, Democratic Senator Joseph O'Mahoney, WY, said he supported Senator Johnson's continuous rules provision in S. Res. 5 for these reasons: "I am supporting [the binding] provision in the Johnson resolution in order to prevent future Senates of the United States from being tied up at the beginning of the Congress with debates on the floor about the rules. The proposals should be sent to the Committee on Rules and Administration, where such changes could be considered and, if need be, subsequently made in order." *Congressional Record*, January 12, 1959, p. 452.

[49] *Congressional Record*, January 7, 1959, p. 8.

[50] *Ibid*., January 7, 1959, pp. 8-9.

[51] *Ibid*., p. 11.

[52] There are a number of procedural issues that sometimes assume a prominent role in efforts to change Senate rules, as illustrated in Senator Johnson adjourning the Senate. Three things merit mention. First, Senate rules distinguish between a "calendar day" and a "legislative day," and this distinction can impact when or whether a resolution proposing to amend Senate rules might reach the floor. A "calendar day" is the commonly understood 24-hour time period. A "legislative day" refers to the period when the Senate convenes after an adjournment and ends when it next adjourns. If the Senate *recesses* at the end of a daily session rather than adjourns—which motion is the prerogative of the majority leader to make—the legislative day is carried over into the next calendar day. For example, if the Senate

The next day, January 8, there was considerable discussion about the procedural state of play in the chamber. Three events are worth noting. First, after the Vice President presented S. Res. 5 to the Senate, Majority Leader Johnson stated, "I will be glad to ask unanimous consent that it be in order to consider [Senator Anderson's] motion today." The Senate agreed to Johnson's consent request, and Anderson—citing Article I, Section 5 of the Constitution—moved to adopt new rules for the 86th Congress. Johnson then propounded a unanimous consent request, which was agreed to, that Anderson's motion be considered as a substitute for S. Res. 5.[53] Johnson made it clear that he would consult at some point during the day with Minority Leader Everett Dirksen, R-IL, before offering a motion to table Anderson's proposal.[54] Making Senator Anderson's motion immediately in order was certainly a strong indication that Johnson had the votes to defeat his colleague's proposal and to win adoption of S. Res. 5.

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recesses on July 8 and continues to recess from day to day until July 23, the legislative day still remains July 8. However, as soon as the Senate adjourns, the calendar day and legislative day become the same. Efforts in future years to revise Rule XXII also provoked concern about whether moving to a new legislative day negated the alleged special conditions associated with continuing the first day.

Second, simple resolutions (S. Res.)—a usual vehicle for amending Senate rules—can be called up for immediate consideration only by unanimous consent. It is quite common for noncontroversial Senate resolutions (for example, designating September as "National Prostate Cancer Awareness Month") to be introduced and adopted by unanimous consent on the same day they were introduced. If Senate resolutions are introduced, referred, and reported by the appropriate committee(s) of jurisdiction—remember that committees might refuse to take any action on these measures—they could be called up for chamber consideration by unanimous consent or by a debatable motion to proceed. Absent unanimous consent, as in Senator Johnson's case, simple resolutions are placed on a special section of the legislative calendar entitled "Resolutions and Motions over, under the rule." This verbiage means that the resolutions go over to this section of the calendar to be called up—at least positioned to be called up—per the terms of Rule XIV: "When objection is heard to immediate consideration of a resolution or motion when submitted, it shall be placed here [the appropriate section of the legislative calendar], to be laid before the Senate, on the next legislative day for consideration, unless by unanimous consent the Senate shall otherwise direct." Notice the inclusion of "legislative day" in this Senate rule. A majority leader could prevent any resolution from being taken up by successfully moving to recess the Senate for numerous session days, inhibiting any chance for the resolution to be called up.

Moreover, motions to call up resolutions (called "motions to proceed to a measure or matter" in official Senate parlance) are debatable as are the resolutions themselves, requiring a vote of two-thirds of Senators voting, a quorum being present, to invoke cloture on a resolution to amend the Standing Rules of the Senate. In addition, Senate Rule VIII states that any resolutions that have lain over one legislative day, having gone over, under the rule, are laid before the Senate in the order in which they went over, under the rule during a two-hour Senate period called the "Morning Hour." The morning hour is the first two hours after the Senate convenes following an adjournment. If the resolution is not completed during this period, it is placed on the Calendar of General Orders where it could be called up again by unanimous consent or a debatable motion to proceed to its consideration. And under Senate Rule V, motions to amend Senate rules require one calendar day's notice in writing, as Senator Johnson provided for S. Res. 5.

Third, by adjourning the Senate on January 7, Senator Johnson not only blocked Senator Anderson's effort to call up his reform resolution for at least two session days—assuming Johnson did not recess the Senate—but he ensured that S. Res. 5 was in compliance with Rule V and Rule XIV. The procedural complexities noted in the previous paragraph did not come to pass. As noted in the text, Senator Johnson said on January 8 that he was amenable to having Senator Anderson's resolution considered before his own. The Senate agreed to Johnson's request despite Senator Anderson's resolution not meeting the requirements of Rules V and XIV. Senator Johnson's action no doubt indicated that he had the votes to defeat Senator Anderson's motion, which did in fact occur.

There is little doubt that filibuster fights can give rise to procedural hardball tactics where Senate rules and precedents are employed by both opponents and proponents of rules changes. Importantly, it is often the case that the actual rules may be ignored or waived as informal understandings and unanimous consent requests shape the parliamentary maneuvering over rules changes. Senate party leaders understand that if Senate reformers are not given reasonable opportunity to make their case for change on the Senate floor, they have ample procedural means to frustrate Senate action on numerous other matters and measures.

[53] *Congressional Record*, January 8, 1959, pp. 98-99.

[54] *Ibid*., p. 103.

Second, because the Senate was now in the second calendar day of the new Congress, Senator Javits asked the Vice President whether "the Anderson motion and the Johnson of Texas motion are both within the confines of motions made at the beginning of a new Congress." The Vice President replied: "The Senator from New York is correct."[55] The Vice President emphasized again the distinction between the procedural position of the Senate at the beginning of a new Congress and during a Congress. At the start of a new Congress, a majority has the constitutional authority to amend its rules; during a Congress, once the initial decision is made about chamber rules, the Senate commits to them whether by acquiescence or formal action.[56] Senator Javits tried unsuccessfully to strike the continuity of rules provision from S. Res. 5.[57]

Third, Vice President Nixon's judgment that the Senate would follow the old rules except for Rule XXII, which he viewed as unconstitutional, led to considerable discussion of what rules the Senate was observing pending adoption of new ones. Senator Mike Monroney, D-OK, spoke at length about the perils of "throwing out the rule book," saying "there are no rules which would apply. The Anderson proposal would take us into a blind area." It would open a "Pandora's box" of parliamentary misery. He went on to state: "We are asked, by the Anderson motion, to throw overboard the precedents which have been carefully developed since 1790, and to say that on the opening day of a Congress we shall rewrite the entire book of rules and make them subject to adoption. Thus any group of Senators having a strong majority behind them could write rules which could gag the minority." Senator Monroney urged his colleagues "not to vote to throw away the entire rule book and open the way for a bargain day for crackpots [who would tear up the rule book] in some future Senate."[58]

Remarks by South Carolina Senator Strom Thurmond supported the sentiments of Senator Monroney. The South Carolinian asked which form of "general parliamentary law" would serve as temporary rules until the Senate agreed to adopt permanent rules? He listed nine parliamentary manuals (*Robert's Rules of Order*, for example) as possibilities. "The Senate could easily spend several months debating and deciding on temporary rules," exclaimed Thurmond. "After that would come the more difficult and more time consuming task of debating and agreeing on each of the permanent rules."[59]

Sensitive to the issues raised by Senators Monroney and Thurmond, Senator Anderson modified his original motion (the adoption of new rules for the Senate), specifying that all Senate rules would remain in effect except Rule XXII.[60] In short, what was not subject to amendment was accepted by the Senate. Other reform-minded Senators largely dismissed the concerns of Senators Monroney and Thurmond. "Over in the other body of Congress," stated Senator Javits, "this whole job [of amending and adopting the rule book] was done in 3 minutes. The House does it every 2 years.... They have made it work for decades."[61] Senator Humphrey added that reasonable Senators "know that most of the rules would be reenacted time after time, as is the case in the House of Representatives."[62] Senator Paul Douglas said he was astounded that several of his colleagues believed that the Senate could not adopt new rules very quickly at the start of a new

[55] *Ibid*, p. 101.

[56] *Ibid*., pp. 101-102.

[57] *Ibid*., pp. 452-453. Each amendment was rejected on a division (standing) vote.

[58] *Ibid*., p. 108.

[59] *Ibid*., p.146.

[60] *Ibid*., January 9, 1959, p. 201.

[61] *Ibid*., January 8, 1959, p. 117.

[62] *Ibid*., p. 119.

Congress, as occurs in the House. "I do not claim we are superior to the House," he said. "But I do say we are at least as sensible as the House and as coordinated as the House, and that if the House can adopt new rules at every [new Congress], the Senate can also do it."[63]

When debate ended, Majority Leader Johnson moved "to lay on the table the modified amendment of the Senator from New Mexico, in the nature of a substitute for Senate Resolution 5." Johnson's tabling motion carried by a vote of 60 to 36.[64] Subsequently, on January 12, the Senate adopted S. Res. 5, as introduced, by a 72 to 22 vote. To reiterate: S. Res. 5 made two changes to Rule XXII and one to Senate Rule V: (1) two-thirds of the Senators present and voting could invoke cloture (previously, cloture required a vote of two-thirds of the entire membership); (2) cloture could be applied to motions to proceed to consider a change in Senate rules; heretofore, this was not a feature of Rule XXII; and (3) a provision was added to Rule V affirming that Senate rules continue from one Congress to the next, "unless they are changed as provided in these rules."

The 1950s debate on "opening day" rules changes featured issues that were also prominent in the 1960s and 1970s. The reformers of 1953, 1957, and 1959 encountered little difficulty in having the Senate debate their proposals to change Senate rules. However, bringing the reformer's ideas to an affirmative vote proved to be a procedural and political road too far. This reality also underscores the difficulty of amending Senate rules on opening day by majority vote. On the other hand, history also indicates that, given the right set of political circumstances—determination, patience, adroit leadership, favorable rulings from the Chair, and a committed majority willing to shatter customary ways of proceeding—the unlikely or seemingly unattainable can become a real possibility.

Cloture Reform Attempts: 1961 To 1975

During the 1960s and 1970s, the reformers' strategic purpose shifted from the broad goal of rewriting the Senate's rulebook to a specific focus on amending Rule XXII. All their attempts at revision failed during this era except for the 1975 change. The political context for these initiatives, especially during the 1960s, was shaped to a large extent by the civil rights struggle of African Americans. Later, with enactment of civil rights legislation, many Senators who previously opposed attempts to curb extended debate began to vote for cloture; they realized that prolonged debate could be employed to achieve their policy/political objectives.

Noteworthy is that the filibuster itself was undergoing change. In the decade from 1961 through 1971, there were more cloture votes (40) than in the period from 1917—the year the cloture rule was adopted—through 1971. Double and even triple digit cloture votes became the norm in subsequent Congresses.[65] Significantly, for the first time ever, cloture was invoked to end a southern-led filibuster against the landmark Civil Rights Act of 1964. Gradually, the public's strong association of filibusters with southern Senators against civil rights bills waned as filibusters became a procedural tool for Senators of all ideological stripes. In 1970, for example, liberal Democratic Senator William Proxmire of Wisconsin and his supporters talked to death a bill to fund development of a supersonic transport plane.

[63] *Ibid*., p. 127.

[64] *Ibid*., January 9, 1959, pp. 207-208.

[65] The number of cloture votes reached triple digits (112) in the 110th Congress (2007-2009). For a review of Senate cloture votes, see *Senate Cloture Rule* (U.S. Govt. Print. Off., 2011), pp. 113-158. The Senate Committee on Rules and Administration is responsible for preparing this document on a periodic basis.

Along with the usual arguments against changing Rule XXII (protection of minority rights and small state interests, for example), there were others that emerged during this era. For example, heightened concern among many Members with the growth of executive power, particularly in the defense and foreign policy arenas, bolstered support for extended debate as a means to challenge presidential initiatives and protect congressional power. The willingness of Members to filibuster also increased during this period for other reasons, such as the decline of informal folkways (for example, newcomers should be seen and not heard) and the election of assertive Senators who were not averse to using chamber rules to achieve their personal, policy, and political goals.[66] Thus, efforts continued during the 1961-1975 period (and beyond, of course) to revise the Senate's cloture procedure. For each year discussed—1961, 1963, 1965, and so on—this section will highlight the political context and the major parliamentary/procedural issues that influenced the eventual outcome.

87th Congress (1961)

Overview

The issue of civil rights was not much in evidence during the 1961 effort to revamp Rule XXII. However, everyone was mindful that the enactment of the Civil Rights Act of 1960 required enormous effort on the part of proponents to overcome the dilatory tactics of the opposition. For example, the Senate debate began February 15, 1960, and ended April 8 with around-the-clock sessions from February 29 through March 8. Both the Democratic and Republican presidential platforms of 1960 endorsed filibuster reform. The Democratic platform urged "that action be taken at the beginning of the 87th Congress to improve congressional procedures so that majority rule prevails and decisions can be made after reasonable debate without being blocked by a minority in either house." The GOP platform supported "efforts to change present rule XXII of the Senate."

A bipartisan group of Senators sought to amend Rule XXII rather than try to rewrite *de novo* the rules of the 87th Senate. Concern about opening "Pandora's box"—lengthy argumentation over every conceivable rules change—led the reformers to opt for a narrower reform approach. There were two major proposals to change the cloture rule. Senator Anderson and his GOP sponsor, Thruston Morton of Kentucky, wanted to permit cloture by three-fifths of those present and voting. Majority Leader Mike Mansfield of Montana backed this idea.[67] Senator Hubert Humphrey and Republican Whip Thomas Kuchel of California recommended that after 15 calendar days (exclusive of Sundays and legal holidays) of debate, the presiding officer would submit to the Senate the question of whether the prolonged discussion should be brought to a close. The vote on this question would be decided by a majority of the Senators chosen and sworn.

With the November 1960 election of John F. Kennedy as President, there were many Senate Democrats who were not keen on starting the 87th Congress with a party-splitting debate over revising the cloture rule. A fractured Senate Democratic Party could jeopardize the new President's "New Frontier" program. Contrarily, reform-minded lawmakers argued the

[66] Barbara Sinclair, *The Transformation of the U.S. Senate* (Baltimore, MD: The Johns Hopkins University Press, 1989).

[67] *Congressional Record*, vol. 107, January 10, 1961), p. 520. Senator Mansfield stated: "I am persuaded that ... a change [in Rule XXII] sought in the proposal of the distinguished Senator from New Mexico [Mr. Anderson] is desirable."

importance of revising Senate rules at the start of the new Congress to protect JFK's program from obstructionism. However, after five days of debate, the majority leader offered a motion to refer the proposed cloture proposals (and other Senate reform resolutions) to the Committee on Rules and Administration, which Mansfield chaired. Upset with Mansfield's motion, many reformers voted against the January 11 referral motion, which prevailed by a 50 to 46 vote.[68] This vote damaged reformers' prospect for change. Why? Outgoing Vice President Nixon was still presiding but only until the President Kennedy and Vice President Lyndon Johnson took office on January 20. The reformers knew that Johnson, unlike Nixon, was not sympathetic to their cause. Senator Mansfield did promise, however, that he would bring the Anderson three-fifths cloture reform proposal (S. Res. 4) to the floor in September. The majority leader delivered on his promise.

Still, there were complaints from various reformers that it was not a propitious time so late in the session to bring a controversial rules change to the floor when Members were anxious to depart the capital. Moreover, the Senate would operate under the existing features of Rule XXII requiring a two-thirds vote of the Members voting, a quorum being present, to end prolonged debate. On Saturday, September 16, the majority leader moved to proceed to the consideration of S. Res. 4.[69] Immediately, Senator Mansfield and Republican Leader Everett McKinley Dirksen of Illinois submitted a cloture motion signed by 21 Senators to bring debate on the motion to proceed to the resolution to a close. On Tuesday, September 19, the Senate failed to invoke cloture (37 yeas to 43 nays). The Senate then voted (47 to 35), on a request by the majority leader, to table his motion to consider S. Res. 4.[70] The tabling motion ended the effort to amend Rule XXII.

Calling Up the Anderson/Morton and Humphrey/Kuchel Resolutions

The bipartisan Senate leadership supported the goal of the four reformers to bring their resolutions before the Senate.[71] On opening day (January 3), soon after the traditional proceedings (swearing in of newly elected Senators, adopting resolutions notifying the President and the House that the Senate is ready to proceed to business, and so on), Senator Anderson stated that "in accordance with article I, section 5, of the Constitution, which declares that each House may determine the rules of its proceedings, on behalf of myself and the [GOP] Senator from Kentucky [Mr. Morton], I send to the desk a resolution [S. Res. 4] and ask that it be read." After the resolution was read, Senator Anderson quickly asked unanimous consent for the immediate consideration of S. Res. 4, reducing cloture from two-thirds to three-fifths of those voting, a quorum being present. Senator Russell of Georgia objected. Citing Senate Rule V requiring one day's notice in writing of proposals to amend Senate rules, Senator Anderson submitted his "Notice of Motion to Amend Rule XXII." The same procedure occurred with the Humphrey/Kuchel recommendation (S. Res. 5), providing for majority cloture after 15 session days of debate. Senator Russell also objected to S. Res. 5's immediate consideration. Senator Russell emphasized "that there is no question that it would be necessary for the Senate to adjourn to ever get the Anderson motion before the Senate, because the rule requires [a layover of] 1

[68] *Ibid.*, January 11, 1961, p. 625.

[69] *Ibid.*, September 16, 1961, p. 19838.

[70] *Ibid.*, September 19, 1961, pp. 20146-20148.

[71] Other Senators also advocated institutional reforms, such as Democratic Senator Joseph Clark of Pennsylvania. He recommended such changes as the adoption of a previous question motion (emulating the House's procedure), a germaneness requirement for debate, and a committee "bill of rights" that would allow, for example, a majority of panel Members to convene meetings and take up legislation.

legislative day."[72] The Vice President added: "The [Anderson] resolution [S. Res. 4] will lie over [upon objection], under the rule."[73]

To comply with Senate Rule V, Majority Leader Mansfield adjourned the chamber so that the reform resolutions would be placed on the section of the Senate's *Calendar of Business* entitled "Resolutions and Motions Over, Under the Rule." The presiding officer lays them before the Senate on the next legislative day during the so-called morning hour, the first two hours of a session day following an adjournment of the Senate. Under Senate Rule VII, the resolutions are laid before the Senate only after all other routine morning business, such as the introduction of bills and resolutions, had been conducted. Morning business, in brief, is a component of the morning hour. If consideration of S. Res. 4 was not concluded within the two-hour period, it would be returned to the General Orders calendar unless the Senate agreed to a unanimous consent request to continue debate or a Member offered a debatable motion to proceed to consider S. Res. 4.[74]

With the adjournment of the Senate on January 3, S. Res. 4 met the one-day advance notice requirements of Senate Rule V, having lain over one legislative day between the time of its introduction and its presentment to the Senate the next legislative day (January 4). As Vice President Nixon, who was presiding, stated on January 4: "The Chair lays [Senate Resolution 4] before the Senate, which will be read for the information of the Senate." Subsequently, Senators discussed a variety of issues until Vice President Nixon declared: "The hour of 2 o'clock has arrived and [the morning hour] is concluded; and the resolution [S. Res. 4] goes to the calendar, under the rule."[75] (The Senate convened at noon on January 4).

Senator Javits then asked the Chair whether the Senate was proceeding under the Constitution. Specifically he asked whether consideration of new chamber rules by majority vote was in order notwithstanding inherited procedures "that inhibit that process?" Senator Javits further inquired: "Is it not then proper that the 2 o'clock rule [the two-hour morning period] shall not apply in this instance to this situation?" The Vice President replied: "Under the usual rule and the precedents of the Senate, a resolution of this type is, at the conclusion of the morning hour, placed upon the calendar, subject to being called up at a later time. However, it would be proper to request unanimous consent to proceed without regard to that rule."[76] Senator Humphrey offered a motion to proceed to the consideration of S. Res. 4.

Debate continued that day on filibuster reform, along with discussion of other matters. When the day's debate was largely concluded, Majority Leader Mansfield stated that there would be the usual morning hour on January 5. He asked and eventually received unanimous consent that "morning hour" would occur on January 5 despite the fact that he recessed rather than adjourned the Senate. Senator Javits wanted to know if "such an arrangement" would "effect any change in the pending business, which is the motion to take up these resolutions?" Senator Mansfield

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[72] *Congressional Record*, January 3, 1961, p. 13.

[73] *Ibid*., p. 16. See footnote 53 for a detailed discussion of the "over, under the rule" procedure.

[74] GOP leader Dirksen raised a parliamentary inquiry worth noting. He asked the Vice President: "Two independent motions have been filed under [Senate Rule V]. Do they enjoy a status of priority, by virtue of the fact that the Anderson motion was filed first; or is it a question of recognition when [each resolution is] called up?" The Vice President responded: "Priority generally is determined by whichever Senator gets recognition when the motions are called up." Senator Dirksen further asked of the Vice President: "So the fact that one motion was offered prior to another does not give it any preferred status when the matter is finally considered." The response: "It does not." The Vice President did note that the majority leader receives priority of recognition.

[75] *Congressional Record*, January 4, 1961, p. 82.

[76] *Ibid.*

explained that an adjournment would return the reform resolutions to the legislative calendar. "But by taking a recess," he said, "they will remain, in their present form, in order in the morning hour." Vice President Nixon responded: "That is correct."[77]

What Constitutes "Opening Day"?

"Opening day" is a flexible and imprecise term. Consider these three points. First, it is the calendar day on which the new Congress officially convenes following a biennial election. Second, opening day in the view of various reform advocates is a timely and favorable period under the Constitution for amending Senate rules by majority vote. Third, the Senate can remain in the same legislative—or opening—day for many calendar days if the majority leader successfully moves after each daily session to recess rather than moving to adjourn the Senate. In short, opening day could extend over many days, weeks, months, or the entire two-year life of a Congress.

Understandably, reform Senator Kuchel posed this question to Vice President Nixon: "Would the Vice President rule that if we go over to a new legislative day, we will still have 'the opening of a new Congress' before us, so that we can apply our rights under the Constitution?" Nixon responded as follows: "It is the opinion of the Chair that so long as no substantive business is undertaken by the Senate the opening of a new Congress still is in effect, so that the Senate would be able to adopt its rules under the majority procedure which the Chair has described."[78] Nixon also made clear that it would take unanimous consent to preserve this situation if other business intervened. For example, Majority Leader Mansfield proposed to call up a privileged resolution (H. Con. Res. 1) creating a joint committee to make the necessary arrangements for the inauguration of the President-elect and Vice President-elect. Asked by Senate reformers if such an action would change the procedural situation, Vice President Nixon said:

> [I]t would change the situation in regard to the rules of the Senate, unless there is a unanimous consent agreement entered into that it shall not do so. The present occupant of the Chair must in frankness inform the Senate that for the first time in his 6 years of service he is making a ruling from the Chair which is not entirely in accord with the advice of the Parliamentarian, who is inclined to believe that because this resolution is in the nature of a privileged resolution … it might not have that effect. However, the occupant of the Chair does not dare to make that ruling. The ruling of the occupant of the Chair, unless it is overruled by the Senate, is that, in the absence of an agreement, this would change the situation.[79]

The outcome: the majority leader withdrew the resolution. Clearly, the Vice President's ruling was important to the reformers. They did not want the intervention of "business"[80] to mean that they had inadvertently acquiesced in all the Senate's rules from the previous Congress. If that occurred, reform Senators would be bound by Rule XXII's supermajority requirement to end debate on proposals to amend new Senate rules by majority vote. Thus, various lawmakers periodically asked the presiding officer whether certain actions of the Senate would constitute substantive business. To reemphasize: the reformers did not want opponents to claim that their failure to raise any objections to chamber proceedings meant that they had consented to having

[77] *Ibid*., p. 92.

[78] *Congressional Record*, January 4, 1961, p. 74.

[79] *Ibid*.

[80] Senate precedents define what constitutes substantive business, such as the offering of an amendment, adoption of a motion, or the Chair's ruling on a point of order. See Floyd M. Riddick and Alan S. Frumin, *Senate Procedure: Precedents and Practices* (Washington: U.S. Govt. Print. Off., 1992), pp. 1042-1046. Precedents also indicate what does *not* constitute business.

the rules of the 86th Senate automatically carry over to the 87th Senate. (In recent years, it has become common for the Senate to operate on the opening day of a new Congress pursuant to a unanimous consent agreement obtained in the previous Congress.)

Continuing Body

Senator Richard Russell put this direct question to Vice President Nixon: "Does the Chair hold that the provision [stating that Senate rules continue from one Congress to the next] is unconstitutional?" Nixon said: "The Chair does."[81] However, the Vice President went on to explain at some length his view of whether the Senate is a continuing body. He said:

> The Chair in his [1957] advisory opinion did hold that the Senate was a continuing body and that the rules of the Senate did continue except for any rule adopted by the Senate which, in the opinion of the Chair, would inhibit the constitutional right of a majority of the Members of the Senate to change its rules or adopt new rules at the beginning of a new session of the Senate. This was the basis of the Chair's advisory opinion. The Chair's opinion was not that it was not a continuing body and that it began with no rules at all at the beginning of a new Congress. It is the opinion of the Chair, that, at the beginning of each new session of Congress, the Senate does operate under and begins its business with the rules adopted in previous sessions of the Senate; but the Chair holds that any provisions of the rules previously adopted which would restrict what the Chair considers to be the constitutional right of the majority of the Members of the Senate to change Senate rules, or to adopt new rules, would not be applicable.[82]

Senator Russell observed that it was "most unusual" for the "Vice President, representing the Executive, to select one rule of the Senate and hold it unconstitutional and to hold the other rules constitutional."[83]

A question by Senator Humphrey prompted a brief discussion of the previous question motion (a non-debatable way to end debate, commonly used in the House). Humphrey asked the Vice President how might debate be ended on a reform resolution, "by a motion to table or the previous question?" Nixon responded: "That would be the Chair's opinion." To make sure he heard the Vice President correctly, Senator Russell asked if the "previous question could be applied on something brought up" under Senate rules? And Nixon said: "That would be the Chair's ruling, because, in the Chair's opinion, the right of a majority of the Members of the Senate to adopt its rules at the beginning of a session would include the right to bring the matter to a vote by moving the previous question." Perhaps taken aback by the Chair's position, Senator Russell asked if the "previous question ruling [would] be under *Roberts Rules of Order*?" The Chair replied that *Roberts Rules* "would be applicable to the extent they might apply, but also having in mind the previous procedures of the Senate." Senator Russell then informed the Chair that *Roberts Rules of Order* "provide for a two-thirds vote in moving the previous question."[84]

The Vice President made it clear, however, that he would couple *Roberts Rules of Order* with *Jefferson's Manua*l, which contains a section (XXXIV) on the previous question motion along with a footnote that emphasizes that its use in modern times is to end debate. According to the

[81] *Congressional Record*, January 3, 1961, p. 11. See Aaron-Andrew P. Bruhl, "Burying the 'Continuing Body" Theory of the Senate," *Iowa Law Review*, vol. 95, September 2010, pp. 1401-1465.

[82] *Ibid.*

[83] *Ibid*., p. 12.

[84] *Ibid*., January 3, 1961, p. 12.

Vice President, a majority of Senators would have the right at the start of a new Congress to end debate and "bring the matter [rule changes] to a vote by moving the previous question."[85]

Throughout the several days of debate, proponents and opponents shared divergent opinions on the continuing body doctrine. Both sides also acknowledged that the Senate has both continuous and discontinuous features. For example, Senator Russell quoted part of the first paragraph of Senate Rule XXV (naming the standing committees and identifying their jurisdiction), which states that the panels "shall continue and have the power to act until their successors are appointed." A reform advocate, Senator Joseph Clark, cited the exact same rule only highlighting different language therein: "The following standing committees shall be appointed at the commencement of each Congress."

Such disagreements between and among Senators reflected a change in the reformers' strategy. In the 1950s, reformers wanted to amend Rule XXII to reduce the potency of the filibuster by the procedural artifice of adopting a new Senate rulebook every two years. In 1961 (and thereafter), right from the outset, it was clear that the reformers' principal goal was limited to adoption of a new filibuster rule by majority vote at the start of a new Congress. To make their case, the reformers relied on the rulemaking authority granted the Senate by the Constitution; the advisory opinions of Vice President Nixon in 1957 and 1959; and the existing rules of the Senate, except those that, in their judgment, foiled the majority's will. On the latter point, the Vice President's position that all Senate rules applied except those that the Chair believed were unconstitutional did not, as noted earlier, sit well with Senator Russell. He exclaimed:

> In my judgment, either all of the rules go over or none of the rules go over. Either, under the exercise of the rule-making power as provided in the Constitution, the Senate makes its rules and, as a continuing body, the rules apply until changed in the manner described therein, or else in the beginning of each Congress the Senate should adopt all new rules, as is done in the House of Representatives.[86]

In response, Senator Clark noted that, if the Vice President was unable to explain adequately his rationale to Senator Russell, "I suppose this is one of those little things we had better agree to disagree on."[87]

Procedural Strategy

During these proceedings, reform Senator Douglas outlined a procedural pathway to change Senate rules at the opening of a new Congress.[88] Worth underscoring is a key assumption of the reformers: they believed they had the votes—at least a majority or close to it—and the support of the Chair, Vice President Nixon, to accomplish their objective. They also believed, correctly, that the new majority leader, Senator Mike Mansfield of Montana, would not act to frustrate the reformers' opening day parliamentary intentions. Their procedural plan included several of the following key features:

- At the beginning of a new Congress, a Member of the reform group would seek recognition from the Chair. Upon receiving recognition, he would say: "Mr. President, on behalf of the following Senators and myself, and in accordance

[85] *Ibid*.

[86] *Ibid*., January 9, 1961, p. 391.

[87] *Ibid*, p. 392. In another context, Senator Kuchel stated that "the continuing nature of the Senate is irrelevant if its rules conflict with the Constitution. To assume that the rules carry over because two-thirds of the Senate does is to assume that the two-thirds carryover would always carry a majority in favor of the existing rules." *Ibid*., January 4, 1961, p. 85.

[88] *Ibid.*, January 5, 1961, pp. 213-237.

with Article I, Section 5 of the Constitution and the advisory rulings of the Chair at the opening of the 85th and 86th Congresses, I send to the desk a resolution and I ask that the Clerk read it."

- After the Clerk read the resolution changing Rule XXII, the Senator would ask unanimous consent for its immediate consideration. If there was no objection, the resolution would be on the floor for debate.
- Most likely, there would be an objection. Senate rules require one legislative day's notice in writing to amend or modify a Senate rule. The Senator who offered the motion would then address the Chair and send to the desk a motion in writing to amend a Senate rule and ask that the written notice be read. [Recall that the reformers' prime focus was on Rule XXII; they saw no contradiction in observing other Senate rules. They cited the earlier Nixon advisory opinions that all Senate rules carried over, except those that have the practical effect of denying a majority its constitutional right to determine its rules.]
- Presumably, the Senate would adjourn, rather than recess, so the reformer's resolutions would comply with the one legislative day notice rule. [The Senate majority leader, as noted previously, determines whether the Senate recesses or adjourns at the end of a day.]
- Reform Senators would need to object to any attempt to transact substantive business or, alternatively, seek unanimous consent to provide that any such business would not affect the status of "opening day" proceedings. The purpose would be to ensure that the reformers do not waive any rights to amend Senate rules on opening day by majority vote. "Opening day" could extend for an indefinite period until it was terminated by a Senate adjournment.
- Opponents could (a) defeat the motion to call up the resolution; (b) move to refer the resolution to the Committee on Rules and Administration; (c) table the reformers' resolution, reaffirming the continuity of Senate rules; or (d) raise a constitutional (or other) point of order against the resolution.
- The constitutional challenge would likely come if a filibuster is launched against either the motion to call up the resolution or on the resolution itself. After a reasonable period of debate, a reform Senator would move to cut off debate, perhaps even by moving the previous question. A constitutional point of order against such a motion would likely be made by a Member of the opposition. Under well-established precedents, the Chair would submit such a point of order to the Senate.

It is at this stage where things would become problematic for the reformers because they confront again the aforementioned "Catch 22" situation. Unless they had 67 votes, the reformers would be unable to invoke cloture to bring an end to prolonged discussion on the debatable constitutional point of order. Long-standing Senate precedents obligate the Chair to submit constitutional points of order to the Senate for its consideration. To be sure, the reformers would expect the Chair to make favorable rulings—even if Senate precedents were broken—that facilitated their goal of changing Rule XXII (or any other Senate rule for that matter) by majority vote. Fundamentally, this meant a favorable ruling that supported the implementation of what has come to be called the constitutional option.

For example, if the Chair ruled on his own authority in favor of the constitutional option—specifically, that debate would end by majority vote on a motion to proceed to the reform resolution, ignoring long-standing precedents that constitutional points of order are to be

submitted to and decided by the Senate—an appeal of that controversial decision would surely be made by an opponent of change. The appeal is debatable, which would require cloture to end, but the Chair might immediately recognize a reformer (perhaps the majority leader) to table the appeal. If the tabling motion was successful, the Senate would have established a precedent that arguably would terminate filibusters by majority vote on rule changes proposed at the start of a new Congress. Accordingly, Senate reformers could close extended debate by majority vote on both the motion to call up their reform resolution and on the resolution itself.

This parliamentary scenario highlights why favorable rulings from the Chair are among the key elements that sometimes could advantage the "opening day" objectives of Senate reformers. By contrast, if the Chair submitted the debatable constitutional point of order to the Senate—as precedents and practices dictate—it would be unlikely that the reformers could muster the 67 votes required to invoke cloture to end the filibuster.

Ending Debate

On September 15, 27 Democratic Senators and 10 GOP Senators each issued nearly identical press releases. Each release lamented the timing of bringing S. Res. 4 to the floor when "adjournment fever" was high with Senators anxious to return home or to fulfill other commitments. Majority Leader Mansfield responded by saying that the "leadership is not permitted the luxury of considering rule XXII in a vacuum."[89] Several measures required consideration, Mansfield said, before the scheduled end of the first session (September 27). Besides the issue of timing, Senate reformers were unhappy because an unsupportive Vice President Lyndon Johnson was presiding—so favorable rulings from the Chair aiding the reformers could not be expected—and the lapse of the pretense of "opening day" meant, as Senator Javits pointed out, that "a proposed change in rule XXII can be closed only by the votes of two-thirds of the Members present and voting."[90]

On Saturday, September 16, Majority Leader Mansfield moved that the Senate proceed to the consideration of S. Res. 4 (providing for cloture by three-fifths of those voting, a quorum being present), which the Committee on Rules and Administration reported without recommendation. (Recall that the Senate on January 10 had referred the resolution to that panel.) Senator Mansfield explained to Senators why S. Res. 4 was not favorably reported. He said:

> In my opinion, Senate Resolution 4 could not have been reported favorably by the Rules Committee because the votes simply were not there for a favorable report. The Rules Committee, despite what I think was the inherent opposition of many of its members, nevertheless, in the interest of helping the leadership to keep its word, subordinated personal feelings on this most important matter and allowed the resolution to be reported without recommendation.[91]

With the motion to proceed to S. Res. 4 made, Senator Mansfield and Minority Leader Dirksen filed cloture to end debate on the measure. Senator Mansfield also received assurances from the Chair that, given the pendency of the cloture motion, "the Senate cannot consider any other motion or measure except conference reports and other privileged matters, unless unanimous consent is obtained."[92] On September 19, the Senate voted (37 yeas, 43 nays) *not* to invoke cloture on the motion to proceed. Mansfield then moved immediately to table the motion to

[89] *Ibid*., September 16, 1961, p. 19829. The Democratic and GOP press releases can be found on p. 19830.

[90] *Ibid*., p. 19831.

[91] *Ibid.*

[92] *Ibid*., p. 19838.

consider S. Res. 4, which the Senate agreed to by a 47 to 35 vote. Senator Mansfield's successful tabling motion ended filibuster reform in the 87th Congress.

88th Congress (1963)

Political Context

The constitutional option once more came into play at the start of the 88th Congress. A bipartisan group of change-oriented lawmakers tried again unsuccessfully to amend Rule XXII to permit three-fifths of the Senators voting, a quorum being present, to invoke cloture. Senator Anderson was the prime sponsor of this resolution (S. Res. 9), with Senators Humphrey and Kuchel planning to propose a majority cloture resolution (S. Res. 10) as a complete substitute for S. Res. 9. Southern Senators, along with their allies in the chamber, conducted a 24-day filibuster that blocked the liberals' hope for change. Part of the reformers' strategy was to try to persuade Vice President Johnson to rule that, under the Constitution, dilatory debate on the proposed rules change could be cut off by majority vote.

Specifically, the reformist Senators devised an optimistic strategy to change Rule XXII. Among its basic features were the following:[93]

- During the expected filibuster against revising Rule XXII, Senator Anderson would move to end further debate on the pending motion by majority vote.
- The Vice President would rule that the motion was in order because, under the Constitution, debate on a proposed rules change at the start of a new Congress could be terminated by majority vote.
- No doubt a Senator, perhaps from the South, would appeal the ruling of the Vice President.
- A reform Senator would then offer a nondebatable motion to table the appeal, which would be agreed to by majority vote. This vote would uphold the Chair's ruling and create a new Senate precedent that would allow a majority at the beginning of a new Congress to cut off debate on both the motion to proceed to a rules change and on the rules revision itself.
- With the precedent in place, a Senate majority would vote to end debate on the pending motion to proceed and then on the rules change.
- Further filibuster attempts by opponents of reforming Rule XXII could be ended under the new majority vote precedent.

To focus the Senate's attention on the rules debate and induce the membership to reach a decision on the matter, Majority Leader Mansfield served notice "that vacancies on the Democratic policy and steering committee will not be filled, nor assignments to the standing committees made, until we have resolved the rules controversies. Further, I shall object to any committee meeting during sessions of the Senate, because it seems to be quite unfair to transact business, whether legislative or executive, in committees to which no new Member has been assigned."[94]

[93] "Senate Cloture Rule," *Congressional Quarterly Almanac, 1963*, vol. xix (Washington, D.C.: Congressional Quarterly Inc., 1963), p. 375.

[94] *Congressional Record*, vol. 109, January 28, 1963, p. 1181.

Later in the debate, and to force a conclusion, Senator Mansfield informed lawmakers that the Senate would meet six days a week; daily sessions, if necessary, would be lengthened; live quorums would be called; and "Members should be prepared to cancel out-of-town engagements, in order that we may quickly secure these quorums."[95] Once more, the key question was whether, at the start of a new Congress, Senate rules—with their supermajority requirement for cloture—automatically carried over from the previous Congress and governed consideration of proposals to change Senate rules.

An "Opening Day" Accord

When the 88th Congress convened on January 9, Majority Leader Mansfield, in cooperation with Minority Leader Dirksen, informed the Senate that "the rights of every Member of this body with respect to the question of [cloture reform] which will be pending before the Senate next week will be fully protected. [W]e have consulted the Parliamentarian and have been assured that that is the case." Senators Anderson and Humphrey also announced on that day that they would submit to the Senate on January 14 a notice in writing of their intent to amend Rule XXII, and that they would introduce their respective reform resolutions.

"Opening day" was kept alive from a parliamentary perspective through the majority leader's prerogative of deciding whether to recess or adjourn at the end of a Senate session. On January 9, the Senate recessed, as it did on Thursday (January 10). When it reconvened on the calendar day of January 14 (Monday)—the legislative day of January 9—Senators Anderson and Humphrey introduced their respective reform resolutions and provided written notice of their intent to amend Senate Rule XXII. Upon objection to the immediate consideration of the resolutions, the Chair directed that resolutions lie over one legislative day as required by chamber rules. The Senate adjourned on January 14, which ensured the resolutions' compliance with the layover requirement.

Beginning the next calendar day, the Senate recessed continuously—thus remaining in the legislative day of January 15—until it adversely disposed of the motion to proceed to the consideration of S. Res. 9 several weeks later (on February 7). By recessing, the motion to proceed to S. Res. 9 automatically remained the pending business of the Senate until disposed of or until the Senate displaced it with other business. As the Chair said in response to a parliamentary inquiry: "If the Senate adjourns tonight (January 15) without having taken any action on the motion [to proceed], the motion will die. It will have to be taken up anew [although] the motion [to proceed] can be renewed."[96]

Calling Up Anderson's Resolution (S. Res. 9)

On January 15, the Chair presented S. Res. 9 to the Senate during the morning hour. Senator Russell then asked three questions (parliamentary inquiries) of Vice President Johnson to clarify the procedural situation. The three questions were (1) "As I understand [chamber rules], this matter [S. Res. 9] is laid down automatically as business coming over from yesterday?" (2) S. Res. 9 "is now before the Senate and is a debatable issue? and (3) "If the resolution is debated until 2 o'clock [the Senate convened at noon], it then will be the duty of the Chair to send the resolution to the calendar?" Each question received an affirmative response from the Vice President. Subsequently, Senator Willis Robertson of Virginia, a lead opponent of filibuster reform, yielded time to Senator Humphrey, so he could offer without debate a complete substitute

[95] *Ibid*., February 5, 1963, p. 1788.

[96] Ibid., January 15, 1963, p. 370.

amendment to S. Res. 9, which was the text of Humphrey's S. Res. 10 (majority cloture). Senator Robertson yielded time to Senator Humphrey with the understanding that he would not lose his right to the floor.

With the expiration of the morning hour, Senator Anderson's resolution was placed on the Calendar of General Orders.[97] He was prepared at some point to offer a motion to proceed to its consideration. However, Senator Robertson held the floor and discussed at some length the demerits of filibuster reform. Regularly, he deferred to his leader, Senator Russell of Georgia, before he would yield to a colleague for a question or agree to a unanimous consent request propounded by a reform Senator. For example, Senator Anderson interjected during Robertson's lengthy discourse, "I wish to move the adoption of [my] resolution." Senator Robertson responded that he was serving on a team led by Senator Russell. "He is my general; and, therefore, I now yield to him." In a display of collegiality, Senator Russell requested that his southern colleague, without losing his right to the floor, yield to Senator Anderson so he could offer his motion. Senator Anderson then stated: "I now move that the Senate consider my resolution."[98] In response, the Chair stated: "The question is on agreeing to the motion of the Senator from New Mexico that the Senate proceed to the consideration of his resolution." That motion remained pending for the next several weeks of debate on filibuster reform until it was tabled.

Worth underscoring is the role of Majority Leader Mansfield in filibuster reform. Senator Mansfield supported cloture reform, and provided the Anderson-led lawmakers with ample time to make their case for reform, ensured parliamentary fairness to both sides, and made the issue of extended debate the top priority of the Senate for a number of weeks. In brief, Senator Mansfield made sure that the Senate's focus was nearly always on changes to Senate rules, even to the extent of preventing chamber consideration of legislative and executive business. To be sure, a majority leader who opposes filibuster reform can erect parliamentary roadblocks—refusing to schedule reform resolutions or moving to table them after minimal debate, for example—that make revisions to the cloture rule difficult or impossible to accomplish.

The Continuing Body Debate

Senate debate was replete with references to the continuing body doctrine. Senator Robertson, for example, went on at length to explain that the Senate has always been a continuing body. He cited the Constitution, Senate rules, history, the intent of the Framers, the *Federalist Papers,* the statements of eminent former Senators, Supreme Court decisions, and much more.[99] The Senate that organized in 1789, concluded Senator Robertson, "has never died."[100] In the view of Senator Russell, the entire procedure of the reformers was "predicated on the theory that the Senate is not a continuing body and has no rules to continue."[101] He went on to say:

> There is no question that the Senate is a continuing body. All of us know that one-third of the Members of the Senate are elected every 2 years, and two-thirds of the Members carry

[97] Once the resolution was laid before the Senate during the morning hour on January 15, and the morning hour then expired, the resolution would (under current practice) be placed on the Calendar of General Orders, and not returned to the specific place on the Calendar designated for matters that had gone over, under the rule.

[98] *Congressional Record*, January 15, 1963, p. 369.

[99] *Ibid.*, pp. 362-378

[100] *Ibid*., p. 362.

[101] *Ibid*., January 28, 1963, p. 1222.

> over. That is what makes the Senate a continuing body, and until a few years ago no one had the temerity to claim that the Senate is not a continuing body.[102]

Senator Anderson argued that the continuing body thesis had no bearing on the right of the Senate to amend its rules. "The pending question," he said, "is not in any way predicated on the theory that the Senate is a continuing body. The pending question is on agreeing to my motion to have the Senate consider Senate Resolution 9."[103] GOP Senator Javits endorsed Anderson's judgment: "So whether one holds to the view that the Senate is a continuing body or does not hold to that view, that question is not involved in the question of whether we have a right to change the rules" at the start of a Congress by majority vote.[104] Added Senator Humphrey:

> The Anderson constitutional motion has nothing to do with whether or not the Senate is a continuing body. The Senate has both continuous and discontinuous aspects. The arguments for the carryover of rules comes down to this: since two-thirds of the Senators carry over, the Senate is a continuous body; because the Senate is a continuous body, the rules carry over. Striking the words 'continuous body' from this equation, the argument reads: since two-thirds of the Senators carry over, the rules carry over. But this is a patent non sequitur. It assumes that the carryover of two-thirds of the Senate always carries over a majority in favor of the rules.[105]

Senator Humphrey also identified a number of discontinuous features of the Senate, such as that all bills die at the end of a Congress and that the Senate selects its own officers every new Senate even if there is a continuing majority. "If the Senate is a continuing body, why did we have to reelect our beloved friend Carl Hayden" as President pro tempore?[106]

Clearly, there was a wide gap between the Russell and Anderson supporters on the continuity of Senate rules. Senator Russell pointedly noted that the reformers stressed that they support all the Senate's rules, except Rule XXII. Moreover, said Russell, the reformers plan to close debate on S. Res. 9 "in some fashion unknown to the Senate ... That is a most extraordinary situation." Replying to Senator Russell, Senator Anderson explained that the reformers "are willing to abide by all the rules of the Senate which we believe to be constitutional; but we do not wish to abide by rules which are not constitutional." So, said Senator Russell, you are the judge of which Senate rules are constitutional? "No," stated Senator Anderson, but "I reserve the right to vote on the question of constitutionality" when that question is submitted to the Senate.[107]

The Presiding Officer

Recall that the reformers hoped that Vice President Johnson would support the constitutional option when, as planned, Senator Anderson would move to close debate by a simple majority on the motion to proceed to S. Res. 9. It was not to be, however. On January 28, debate on the role of the presiding officer was joined in a significant way. On that date, Senator Anderson, employing the constitutional option, said: "I move under the Constitution that without further debate the

[102] *Ibid*., Jan. 14, 1963, p. 184.

[103] *Ibid*., Jan. 28, 1963, p. 1187.

[104] *Ibid*., Jan. 31, 1963, p. 1500.

[105] *Ibid*., p. 1511.

[106] *Ibid*., January 14, 1963, p, 188.

[107] *Ibid.*, January 15, 1963, p. 369. Reformers understood the important role of precedents in the Senate but, so far as is known, they did not consider using a precedential approach—the so-called "nuclear" option—to try to establish majority cloture on measures or matters. Their focus was fixed on the idea that the Constitution grants a new Senate the right to establish its own rules by majority vote.

Chair submit the pending question [the motion to proceed to S. Res. 9] to the Senate for a vote."[108] The phrasing of the motion was of strategic importance to the reformers. They knew that Johnson would submit the constitutional question to the Senate, as he had stated earlier, but they wanted the Vice President to submit the question for a vote with no debate. That was not to be, however.

Once Anderson's motion was read by the legislative clerk, Johnson emphasized that the "Presiding Officer does not have the authority to rule on a constitutional point of order … because the Vice President cannot make a decision for 100 Senators, unless he has previously been granted the authority to make that decision." The Vice President submitted the following question to the Senate:

> Does a majority of the Senate have the right under the Constitution to terminate debate at the beginning of a session and proceed to an immediate vote on a rule change notwithstanding the provisions of the existing Senate rules?[109]

Johnson also informed the lawmakers that the "Senate is now operating under the rules as shown in the Senate Manual," a view generally endorsed by Senator Anderson but with some exceptions. What no Senator should ignore, said Senator Anderson, "is that the first order of business after the proper organization of the Senate was a motion to amend the Senate rules," particularly Rule XXII. "Is not that the situation this year? In this Congress? At this time? At this hour?"[110]

During the debate, reform Senator Kenneth Keating, R-NY, posed a number of questions to the Chair. One question, restated in several different forms, was particularly telling. "If during the debate on the [Anderson] motion it were to appear to the Chair that dilatory tactics are being employed to prevent the Senate reaching a decision," inquired Keating, "would the Chair have the power to rescind the submission and render a ruling on the motion [subject to an appeal of the Chair's decision]?" Vice President Johnson then asked Senator Keating what Senate rule or constitutional provision gives such authority to the Chair? In response, Keating stated that he had no quarrel with the Chair submitting the motion to the Senate. He simply wanted to learn "whether there is any way to bring the motion to a vote?" The Vice President noted: "Since 1803 every Presiding Officer of the Senate has held that constitutional questions must be submitted to the Senate." He further asked Senator Keating if he knew of any Senate rule granting presiding officers the authority to rule on constitutional questions? Majority Leader Mansfield interjected that, if the Chair responded in the affirmative to Keating's parliamentary inquiries, "it would in effect mean that the Vice President, who is a member of the executive branch, could at his discretion become dictator of the Senate."[111]

Senator Keating continued to press the point. He rephrased his question and asked if the Presiding Officer "knows of any way whereby debate on this subject can be terminated so long as there are any Senators who wish to speak on the subject?" Johnson identified four ways: "first, it could be terminated by majority vote; second, it could be terminated by a motion to table; third, it could be terminated by an agreement among Senators; fourth, it could be determined in accordance with the cloture rule, Rule XXII."[112] Senator Keating then inquired how a majority could cut off debate, and Johnson responded: that is a matter the "100 Senators have within their control, and which is not within the control of the Chair."

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[108] *Ibid.*, January 28, 1963, p. 1214.

[109] *Ibid.*

[110] *Ibid.*

[111] *Ibid.*

[112] *Ibid.*

Senator Keating then wanted to know if either the Constitution or Senate rules grant the Chair "inherent power" to curb dilatory tactics. Johnson responded in the negative. Senator Russell of Georgia, however, was far more direct than Johnson in rejecting Keating's inherent power suggestion. "I have never heard of a procedure so violative of every facet of democracy, of free institutions, of our free government," he said, "as to imply that the Vice President of the United States has the right … to tell Senators to 'Sit down; we are going to vote now. I am tired of hearing all this debate. Clerk, call the roll. Senators, you will now vote.'"[113]

Senator Humphrey joined the debate. He contended that the whole argument was about "whether a majority has the right to change the rules without being stymied by a cloture rule which permits a minority to block a change in the rules."[114] It is most unusual, exclaimed Senator Humphrey, that "we find ourselves in a situation in which we can debate a motion to end debate and can kill a motion to end debate with debate."[115] Is there not, Humphrey asked, some point where dilatory actions become unconstitutional "by reason of the debate, which has no further meaning in logic or reasons, is it not then the unquestioned right of the members of the Senate—either through the method suggested by Jefferson of moving the previous question or by calling again on the Vice President to invoke the constitutional right of a majority to change the Senate rules—to bring the matter to an end?"[116] Senator Humphrey underscored that there was ample precedent for the Chair to make a unilateral ruling. "On the basis of *Jefferson's Manual*, a sound and solemn case can be made for insisting that the Vice President hand down a ruling." According to Jefferson,

> The Senate have accordingly formed some rules for its own government; but those going only to a few cases, they have referred to the decisions of their President, without debate and without appeal, all questions of order arising either under their own rules, or, where they have provided none.[117]

Senator Keating added: "There is danger in giving a Presiding Officer too much power—but there is danger, too, in his having too little power. The Presiding Officer cannot be a passive observer of tactics which make a mockery of debate." He argued that the presiding officer must have implied authority under the Constitution "to bring a constitutional question to a vote in the Senate."[118] Moreover, as suggested by various reformers, the Chair's authority to end debate and bring a matter to a vote would apply only at the start of a new Congress and only on matters involving Senate rule changes.

Other Senators participated in the debate on the Vice President's responsibility as presiding officer. Senator Javits argued that the "Chair does not by law have to submit a constitutional question to the Senate. Although the precedents may say so, we have shattered many precedents."[119] GOP Senator Case of New Jersey urged the Vice President to "help the Senate come to a conclusion which will permit a majority of Senators to exercise their constitutional function."[120] The Vice President remained firm in his view that he would not "exercise authority he does not believe he has merely because other men are unwilling to exercise the authority they

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[113] *Ibid*., p. 1219.

[114] *Ibid*., p. 1229.

[115] *Ibid*., p. 1232.

[116] *Ibid.*

[117] *Ibid*., p. 1230. Jefferson's statement is from the preface to *Jefferson's Manual of Parliamentary Practice*, prepared by Vice President Thomas Jefferson between 1797 and 1801, when he was President of the Senate.

[118] *Ibid.*, January 31, 1963, p. 1506.

[119] *Ibid*., January 30, 1963, p. 1411.

[120] *Ibid.*, p. 1412.

do have."[121] Majority Leader Mansfield emphasized that "what is the Senate's business the Senate will attend to and attend to alone."[122]

Ending Debate

Ending debate on the motion to proceed to S. Res. 9 proved to be a lengthy process. Day after day Senators voiced their strong support or opposition to the constitutional option. As the prolonged debate continued, a number of Senators urged its end so the Senate could consider other business. A close friend of the majority leader, GOP Senator George Aiken of Vermont, expressed a view shared by a number of Members. "I consider the business and the defense of the country and our relationships with other countries of vastly more importance [than filibuster reform]. As far as I am concerned, I am ready to table the original motions and all motions pertaining to it and proceed with the essential business of the Senate."[123] In response to this sentiment, and concern about the public's negative view of the proceedings, the chamber's two party leaders (Mansfield and Dirksen) propounded on January 30 the following unanimous consent agreement (UCA):[124]

> *Ordered*, That on Thursday, January 31, 1963, at the conclusion of routine morning business, the Senate resume consideration of the following question submitted on the 28th instant by the Vice President to the Senate for its decision, namely, "Does a majority of the Senate have the right under the Constitution to terminate debate at the beginning of a session and proceed to an immediate vote on a rule change notwithstanding the provisions of the existing Senate rules?"
>
> And that after debate of 3 hours, to be equally divided and controlled, respectively, by Mr. Russell and Mr. Humphrey, the Senate proceed to vote on the issue of tabling the said question. Furthermore, that there be a live quorum before the debate limitation starts and after it ends.

Immediately, proponents and opponents of cloture reform sought to determine the consequences and implications of the UCA if it was adopted or rejected. The Vice President noted that if the UCA was adopted, the Senate would be agreeing to a specific time to vote on a motion to table the question specified in the consent agreement. During the discussion, Senator Javits asked the Chair, if the question was tabled, "then it will no longer be before the Senate, and there will no longer be debate on that question?" The Vice President responded: "The Chair has twice ruled or twice stated ... that the Senate would revert to the original question, which is the motion to proceed to the consideration of Senate Resolution 9." On the other hand, remarked Senator Javits, if the tabling motion is not rejected, "debate would continue ... upon the constitutional question framed by the Chair and put to the Senate. Is that correct?" Johnson's response: "That would be the question. Senators might discuss many topics, but that would be the question."[125] In the end, no Senator objected to the leadership-crafted UCA.

The next day, January 31, the crucial vote occurred on the Vice President's question contained in the UCA. After three hours of debate, the determination of a quorum, and a request for the yeas and nays, the Senate voted 53 to 42 to table the question submitted by the Vice President. The Vice President then stated: "The question now recurs on the motion submitted on January 15 by

[121] *Ibid.*, January 31, 1963, p. 1506.

[122] *Ibid.*

[123] *Ibid.*, January 30, 1963, p. 1413.

[124] *Ibid.*, p. 1407.

[125] *Ibid.*, p. 1408.

the Senator from New Mexico that the Senate proceed to the consideration of Senate Resolution 9 to amend the cloture rule of the Senate."[126]

Debate on filibuster reform continued into early February. Senator Mansfield expressed doubt about the Senate ever reaching a direct vote on S. Res. 9. If the Senate did adopt the motion to proceed, there were simply too many dilatory motions that opponents could use to prevent a vote on S. Res. 9 itself, such as motions to refer with diverse instructions, to postpone to various days, or to amend S. Res. 9, not to mention raising numerous points of order, calling for live quorums, and proposing motions to adjourn.

To expedite action and to further test the sentiment of Senators, Majority Leader Mansfield announced on February 5 that he would offer a motion the next day to table the motion to proceed to S. Res. 9. (Senator Mansfield also announced that he would vote against his own motion to table the pending question). The majority leader anticipated the failure of his tabling motion because many opponents of filibuster reform, such as Senator Russell, stated before the vote that they would oppose Mansfield's motion because it would cut off debate. Accordingly, Senator Mansfield also introduced a cloture motion on February 5 to end debate on the motion to proceed to S. Res. 9. He outlined his rationale for cloture: "If the motion for cloture does not receive approximately 60 votes in its favor—that the first cloture motion will mark the end of this debate, so far as I am concerned; and I will then make a motion to adjourn." If the cloture vote is "fairly close—say 60 or more—it will be my intention to offer a second motion on cloture" to end debate on the motion to proceed to S. Res. 9.[127]

On February 6, as Senator Mansfield expected, his tabling motion failed by a vote of 5 yeas and 92 nays.[128] The next day, the vote on cloture occurred to close debate on the motion to proceed to S. Res. 9. Before the vote, Senator Mansfield reiterated that "if the vote in favor of cloture is less than 60, I shall immediately, upon the conclusion of the vote, move that the Senate adjourn until Monday." The vote for cloture was 54 ayes and 42 nays. After the Chair announced the defeat of the cloture motion, Senator Mansfield immediately moved that the Senate adjourn; he asked for the yeas and nays on that question. The Senate voted 64 to 33 for adjournment, ending filibuster reform for the 88th Congress.[129] (Motions to proceed to a matter, such as S. Res. 9, die with an adjournment of the Senate.)

A New Procedural Tactic

During debate on February 5, two reform Senators spoke about a matter that is relevant for the contemporary Senate. They wondered if a new Senate precedent was being established: filibustering the motion to proceed. Senator Humphrey declared that it is "most unusual for any Senator to object to a motion to consider in this body."[130] Normal procedure, he said, is to adopt the motion to proceed and then debate the substance of the measure. As he stated: "To take up a motion or a bill in a parliament or the Congress is as normal as the Fourth of July, and to deny people the opportunity even to take up a bill for debate and consideration is unusual, abnormal, and the burden of proof rests upon those who take that position." Senator Anderson elaborated on Humphrey's observations. In 1953, 1957, and 1959, said Anderson, Members who opposed the

[126] *Ibid*., p. 1516.

[127] *Ibid*., February 5, 1963, pp. 1787-1788.

[128] *Ibid*., February 6, 1963, p. 1921.

[129] *Ibid*., February 7, 1963, p. 2058.

[130] *Ibid.*, February 5, 1963, p. 1790.

reformers did not prevent a debate on the substance of their proposals. "Now we have established a precedent in this Congress whereby every time the majority leader moves to proceed to the consideration of a measure, an attempt will be to engage in a 2- to 3-week filibuster. This procedure will come back to plague the Senate."[131]

89th Congress (1965)

Political Context

A bipartisan group of reform-minded Senators, as in previous Congresses, proposed to change Rule XXII by employing the constitutional option. They were unsuccessful. After only three session days of intermittent consideration, the two main reform resolutions were referred to the Committee on Rules and Administration by unanimous consent. The panel reported the resolutions adversely, ending the effort to revise Rule XXII.

Two factors largely changed the reform dynamic. First, the Senate demonstrated in 1964 that it could mobilize the two-thirds vote (71 to 29) required to invoke cloture on the landmark Civil Rights Act of that year.[132] It was the first time that cloture was invoked on a civil rights measure. Senate reformers recognized that they could muster cloture on civil rights legislation—an issue that energized their earlier attempts at filibuster reform. As a result, the intensity for revising Rule XXII was not as strong as in other years. Second, Lyndon Johnson was now President, and Senators wanted to focus on considering the "Great Society" program of the new administration. Lawmakers did not want to delay action on the President's agenda—such as passage of Medicare, the Voting Rights Act, or the Elementary and Secondary Education Act—with a lengthy and divisive filibuster reform fight.

Calling Up the Reform Resolutions

On opening day, January 4, Senator Anderson provided notice to all Senators that he would soon submit a resolution to amend Rule XXII. Immediately, Senator Javits wanted assurances from Anderson that "no business will intervene, before the proposed action is taken [introduction of Anderson's resolution], that will prejudice the legal basis for which we have always contended for this move." Senator Anderson replied that he had discussed the question with the majority leader, the minority leader, and Senator Russell, and all agreed that any subsequent action on Senate business would not prejudice the reformers' aims. As Senator Russell, the anti-reform leader, stated: "I know that the [Anderson resolution] will be submitted. I do not propose to quibble over the time of its submission. The question will be settled on the floor of the Senate at the appropriate time."[133]

Two days later, Senator Anderson introduced his resolution (S. Res. 6) providing for cloture by three-fifths of the Senators voting, a quorum being present, and asked for its immediate consideration. When GOP leader Dirksen objected, the presiding officer (the President pro tempore) stated that S. Res. 6 would go over, under the rule. Senator Anderson immediately sent to the desk his written notice of his motion to amend Rule XXII. Senator Douglas of Illinois also

[131] *Ibid*., p. 1795. Both the Anderson and second Humphrey quotes are found on this page.

[132] Among the many factors that contributed to passage of the landmark civil rights bill was the large Democratic majority in the Senate (67D, 33R) and the procedural and political skills of bipartisan leaders. See Charles and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (Cabin John, Md.: Seven Locks Press, 1985).

[133] *Congressional Record*, vol. 111, January 4, 1965, p. 13.

introduced during the morning hour S. Res. 8 providing for majority cloture. When Senator Douglas asked for the immediate consideration of his resolution, there was an objection. He then submitted, as required under chamber rules, a notice of his intent to amend Senate rules.

On January 7, as one of the first orders of business, Majority Leader Mansfield clarified the intent of a consent agreement entered into the previous day. He stated that the introduction and referral of measures and the transaction of routine business during the morning hour would not prejudice "the rights of any Senator as regards the parliamentary situation affecting any proposed amendment to Senate rules."[134] Later in the morning hour, the President pro tempore stated that S. Res. 6 automatically "comes over from the previous day." Immediately, Senator Dirksen moved that S. Res. 6 be referred to the Committee on Rules and Administration. Senator Douglas asked Senator Dirksen, before he began to speak, if he could offer his proposal. Senator Dirksen refused on the ground that he wanted to focus exclusively on S. Res. 6. A period of debate then ensued between opponents and proponents of filibuster reform. When Senator Anderson was recognized to speak on the subject, he offered an amendment to Dirksen's motion to commit:

> That the resolution be referred to the Committee on Rules and Administration, which shall make its report on said resolution and any other proposed amendments of rule XXII of the Senate on January 25, 1965, and all rights in existence at the opening of the Congress shall be deemed preserved.[135]

Considerable debate followed as to the intent of Anderson's motion. Senator Russell raised two points of order against it. First, he argued that instructions to committees "cannot apply to anything except a measure before the Senate." Anderson's motion "aims to instruct the committee with respect to resolutions that have not yet been offered," which is contrary to Senate rules and precedents. Second, Senator Russell contended that language in Anderson's motion—"all rights in existence at the opening of the Congress shall be preserved"—is not in order because it is instructing the Senate itself. Senator Russell wanted to know, he said, how the Chair construes the clause—"with respect to preserving constitutional rights."[136]

President pro tempore Carl Hayden of Arizona ruled the instruction to the committee in order but not the instruction to the Senate itself. Specifically, Hayden said, "The first part of the resolution were instructions to the committee [and in order] and the last part is instructions to the Senators and not in order."[137] He then said: "The hour of 2 o'clock having expired, and the morning hour having expired, the resolution under consideration now goes to the calendar under the uniform rules of the Senate." Senator Mansfield then asked if a motion to call up S. Res. 6 from the calendar was in order. The Chair responded that the majority leader was correct. Without delay, Senator Anderson said: "Mr. President, I move that the Senate proceed to the consideration of Senate Resolution 6." Republican leader Dirksen noted that the motion to proceed is debatable.

After the Senate proceeded to a matter unrelated to filibuster reform, several Senators engaged in a discussion of the Chair's earlier ruling. For example, Senator Douglas explained that he and other Senators could not hear the President pro tempore's ruling because he spoke in an inaudible voice. If he had heard the decision, said Senator Douglas, he would have appealed the ruling because it implied the end of "opening day." Because "this matter is getting a little out of hand," the majority leader recessed the Senate until the next day (January 8).

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[134] *Ibid*., January 7, 1965, p. 364.

[135] *Ibid.*, p. 401.

[136] *Ibid*., pp. 401-403.

[137] *Ibid*., p. 403.

Preserving "Opening Day"

Controversy surrounding the Chair's inaudible ruling continued on January 8. That ruling upheld a point of order that ostensibly undermined the idea that the reformers' "opening day" rights are preserved during subsequent session days even if other business intervenes. Senator Russell pointed out that various lawmakers and floor staff heard the decision, no reform Senator appealed the ruling of the Chair, and, therefore, "there is no question in my mind that the ruling is binding."[138] Senator Douglas called the ruling unfair and said that reform proponents would have appealed the ruling if they had heard it. He added:

> If the Senate appoints committees during this time [referring to Anderson's reporting deadline of January 25 for Rules and Administration], it can be maintained with a great deal of strength that we have adopted the previous rules *in toto*, including Rule XXII and that therefore a motion to change Rule XXII is not in order.[139]

Senator Douglas then asked the Chair: if the Senate is organized would the advocates of reform be viewed as tacitly accepting all of the Senate's rules, including Rule XXII? The Chair responded: "The parliamentarian advises me that the Senator will not lose any of his constitutional rights, and furthermore if amendments must be made to rules, they can be made at any time."[140] Senator Douglas advised his reform colleagues not to view as binding the Chair's ruling with respect to their opening day constitutional rights. Senator Russell argued to the contrary. He declaimed that "there is no doubt that the ruling of the Chair is the ruling of the Senate as of this hour."[141]

In the end, the outcome of the discussion was murky, but it appeared that the Chair's inaudible (to some Senators and parliamentary staff) ruling was not overturned. In the judgment of Senator Javits, "we are discussing a matter of great importance in terms of whether Senators hear the ruling or not, so that they can appeal. But I see no permanent jeopardy or loss of rights which has been done so far."[142] The Senate recessed, ending that session day.

Ending Debate

On January 11, the Senate resumed consideration of Senator Anderson's pending motion to call up S. Res. 6. Majority Leader Mansfield received unanimous consent to refer the Anderson and Douglas (S. Res. 8) resolutions to the Committee on Rules and Administration with instructions "to make its report on said resolutions to the Senate on March 9, 1965."[143] Senator Anderson asked if the majority leader's request "would protect all existing rights?" Senator Mansfield responded: "Yes, of course." Asked later what accounted for senatorial agreement to Mansfield's unanimous consent request, Senator Anderson said, "We just got reasonable, all of us."[144] The committee issued a negative report on the two resolutions; the Senate did not resume consideration of either resolution in the 89th Congress.

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[138] *Ibid*., January 8, 1965, p. 452. Also see E. W. Kenworthy, "Unheard Ruling Confuses Senate," *New York Times*, January 8, 1965, p. 30. By unanimous consent, the Dirksen and Anderson motions were withdrawn.

[139] *Ibid*., p. 405.

[140] *Ibid*., p. 406.

[141] *Ibid.*, p. 450.

[142] *Ibid*., pp. 452-453.

[143] *Ibid*., January 11, 1965, p. 470.

[144] "Senate Cloture Rule," *Congressional Quarterly Almanac, 1965. vol. xxi* (Washington, D.C.: Congressional Quarterly Inc., 1966), p. 592.

90th Congress (1967)

Political Context

A bipartisan group of liberal and moderate Senators, led by George McGovern, D-SD, and Thruston Morton, R-KY, proposed to amend Rule XXII by permitting cloture by three-fifths—rather than two-thirds—of those voting, a quorum being present. The reformers were optimistic that conditions were favorable for change because Vice President Hubert Humphrey would be presiding—recall that as a Senator he was a strong advocate of filibuster reform—and these Members believed a majority of their colleagues were sympathetic to their cause. Their effort was unsuccessful. Nonetheless, what made this attempt noteworthy is that a parliamentary procedure was devised—a "compound motion"—that might permit Rule XXII to be amended by majority vote at the beginning of a Congress.

The reformers met soon after the November 1966 elections to plan their strategy. Similarly, Senator Russell, the opposition leader, convened meetings with his group. When the new Senate opened on January 10, Majority Leader Mansfield stated that he would follow established practice: "no bills or resolutions will be introduced and no routine business will be transacted prior to the President's delivery tonight" of the State of the Union message. Two reform Senators then sought and received assurances from the majority leader and Vice President Humphrey that the rights of every Senator with respect to amending Rule XXII would be protected.

Once more, reformers wanted to establish the principle that each new Congress could adopt its own rules by majority vote, unfettered by entrenched rules of previous Congresses. As a result, reform Senators regularly sought assurances that revisions of Senate rules by majority vote at the start of a new Congress would not be nullified by the transaction or intervention of legislative business. Otherwise, such a development might give rise to points of order that the "opening day" window had closed and reformers had tacitly accepted chamber rules, including Rule XXII, inherited from previous Congresses. The reformers also wanted to terminate filibusters on rule changes without using Rule XXII and its supermajority requirements. Their well-settled approach: emphasize that Article I, Section 5, of the Constitution takes precedence over Rule XXII and allows a majority both to end prolonged debate and to revise Senate rules. Senator Russell, the leader of the opposition, viewed the matter differently: "I do not understand what rights could be prejudiced" since the Senate can adopt or amend rules at any time by majority vote.[145]

Calling Up S. Res. 6

On January 11, Senator McGovern, citing the Constitution (Article I, Section 5) and the advisory opinions of Vice President Richard Nixon, introduced S. Res. 6 to change the cloture requirement from two-thirds of those present and voting to three-fifths of those present and voting. Senator McGovern then asked unanimous consent for the immediate consideration of the resolution. As expected, there was an objection. Vice President Humphrey then called the Senate's attention to the following Senate rule: "All resolutions shall lie over one [legislative] day for consideration, unless by unanimous consent the Senate shall direct otherwise." At once, Senator McGovern announced that "without prejudice to the constitutional rights of the majority of the Senate of the 90th Congress to accept, reject, or modify any [Senate] rule, I hereby give notice in writing that I shall hereafter move to amend Rule XXII of the standing rules." GOP Senator Kuchel then followed the same procedure as McGovern when he introduced S. Res. 7, which proposed that an

[145] *Congressional Record*, vol. 113, January 11, 1967, p. 180.

absolute majority (51) of the Senate could invoke cloture. Subsequently, there was some debate on both resolutions involving the majority leader, the minority leader, and other Senators. Vice President Humphrey noted that under chamber rules, the Senate would have to adjourn, not recess, if S. Res. 6 was to come before the Senate on a new legislative day. Senator Mansfield adjourned the Senate by unanimous consent.

On January 12, the Senate convened at noon. Majority Leader Mansfield received unanimous consent that, following a period of morning business, S. Res. 6 would be called up, and, if not disposed of by 2 p.m., would be returned to the Calendar of General Orders. During the morning business period (recall that routine business is conducted at the start of the morning hour), an amendment was filed to S. Res. 6 and another to S. Res. 7, but neither amendment was ever acted upon. When morning business ended, the Chair stated: "Pursuant to a previous unanimous-consent agreement, the Chair lays before the Senate, Senate Resolution 6 which will be stated by title." Senator Russell then asked for a live quorum call. After a quorum was established, the Vice President stated: "The question is on agreeing to the resolution." Senator Russell was immediately recognized, and he went on at considerable length discussing the deficiencies of S. Res. 6 and highlighting the uniqueness of the Senate as a deliberative body. When Senator Russell ended his discourse, Senator McGovern said: "Mr. President, I move that the Senate proceed to the consideration of Senate Resolution 6."[146] Senator McGovern then spoke at some length on the need for cloture reform.[147]

Several days later, on January 18, Senator McGovern stated that, after consultation with the majority leader, he determined that it was time to end debate on the motion to proceed to S. Res. 6. Accordingly, Senator McGovern asked unanimous consent that further debate on the motion to proceed to S. Res. 6 would end within two hours, the time to be divided between the majority leader and Senator McGovern. He further stated that "if we cannot achieve that purpose, I would then seek to obtain the same objective through a motion."[148] Senator Dirksen objected. Senator McGovern then offered a compound motion containing two discrete directives that aroused considerable debate.

The Vice President and the Compound Motion

Unable on January 18 to achieve unanimous consent to end debate on his motion to proceed, Senator McGovern remarked that he would propose a compound motion that would implement the constitutional option long sought by the reformers. He further emphasized that the procedure "would not be a precedent for any action during the term of the Senate." His compound motion, which sparked a procedural battle, was as follows:

> Mr. President, under article I, section 5, of the Constitution, which provides that a majority of each House shall constitute a quorum to do business, and each House may determine the rules of its proceedings, I move that debate upon the pending motion to proceed to the consideration of S. Res. 6 be brought to a close in the following manner:
>
> The Chair shall immediately put the motion to the Senate for a yea-and-nay vote and, upon adoption thereof by a majority of those present and voting, with a quorum present, there shall be two hours of debate upon the motion to proceed to the consideration of S. Res. 6

[146] The expiration of the morning hour meant that S. Res. 6 was returned to the Calendar of General Orders, which made another motion to proceed necessary.

[147] By the time Senator McGovern was recognized, the morning hour had expired, sending S. Res. 6 to the Calendar of General Orders and making another motion to proceed necessary.

[148] *Congressional Record*, January 18, 1967, p. 908.

> divided equally between proponents and opponents thereof and immediately thereafter the Chair shall put to the Senate, without further debate, the question on adoption of the pending motion to proceed to the consideration of S. Res. 6.[149]

Senator Russell quickly said the motion was subject to a division. Vice President Humphrey agreed and stated that the division would occur "at the time of the vote upon the motion." He also added that "a point of order can be raised against the entire motion at any time." Minority Leader Dirksen acted on the Vice President's suggestion. He raised a point of order that the entire motion was out of order. Furthermore, he stated that McGovern's motion did not present a constitutional question but was simply a dressed-up previous question motion. "So, no constitutional question being involved, [the motion] flies in the face of the present rules of the Senate and of all other parliamentary procedure, and is, in my judgment, clearly subject to a point of order."[150]

The Vice President then explained his view of the issues raised by the McGovern motion, which provoked prolonged procedural wrangling between opponents and proponents of change. Vice President Humphrey stated that the point of order raised constitutional questions and, following long-standing Senate precedents, he submitted the matter to the Senate for its consideration. "Shall the point of order made by the Senator from Illinois be sustained? That question is debatable."[151]

Majority Leader Mansfield and other lawmakers then posed a series of parliamentary questions to the Vice President, which made plain the reformers' procedural strategy for ending prolonged debate on McGovern's motion. The salient points are as follows:

- If Dirksen's point of order was tabled by a simple majority, that would establish the "propriety" of McGovern's motion. The pending business then would be the motion to proceed to the consideration of S. Res. 6.
- If a tabling motion failed to receive majority support, the point of order remained the pending business and was debatable.
- If the Senate tabled the point of order, thus validating McGovern's motion, there would be two hours of debate and then, without further debate or intervening motions, points of order, or appeals, the Chair would order the clerk to call the roll on the motion to proceed to S. Res. 6.
- Vice President Humphrey repeated several times that, if the motion to table was agreed to, then he and the Senate were bound by the instructions in McGovern's motion to have the Senate vote (after two hours of debate) on the motion to proceed.
- At least four procedural votes seemed possible, all to be decided by majority vote of the Senate: (1) on the motion to table the point of order; (2) on the first part of McGovern's basic motion—implementing Senator Russell's earlier request for a division of the resolution;[152] (3) on the proviso in McGovern's motion to allow two hours of debate; and (4) on the motion to take up S. Res. 6.

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[149] *Ibid.*, p. 918.

[150] *Ibid.*

[151] *Ibid.*, p. 919.

[152] Senate Rule XV and various precedents permit resolutions to be divided on demand of a Senator if they are susceptible of division by containing two or more distinct parts "so that if one part is eliminated the other part would be able to stand on its own." See Floyd M. Riddick and Alan S. Frumin, *Senate Procedure: Precedents and Practices* (Washington: U.S. Govt. Print. Off., 1992), p. 808.

To be sure, Senator McGovern's motion was controversial. Opponents castigated the motion as cloture by a simple majority; destructive of the Senate as an institution and a continuing body; not in conformity with Senate rules and unworthy of the Senate; a "bizarre" procedure; and a parliamentary scheme that violates Senators' procedural rights. Proponents rejected those arguments. They contended that the Senate would determine what it wanted to do in this situation. No procedural rights would be denied Senators, they argued, because "motions in order of preference provided in [Senate] rules" could be made during the two hours of debate as well as when the resolution was taken up. As reform Senator Clifford Case of New Jersey stated: "All this talk of bad precedent or destruction of the Senate is all poppycock. The only precedent established here will be a precedent for the constitutional right of the Senate at the beginning of each session to change its rules or to adopt the old ones, if it so desires."[153]

In the view of Senator Javits, Members who worried that future Vice Presidents or Senate majorities might become tyrants and violate the Constitution failed to recognize that such behavior could occur at any time. Presiding officers could refuse to recognize Senators when four or five are standing seeking to address the Chair. A presiding officer could say: "Nobody else wishes to debate this question, read the resolution, and let's vote." If a presiding officer acted in such an arbitrary and autocratic manner, the result would be a "revolution" in the Senate against that behavior. "You can conjure up all the terrible images you like as to what any precedent will do."[154] McGovern's motion, Senator Javits declaimed, was based upon the Constitution for a given time period and for a narrow purpose.

Ending Debate

On January 18, Senator McGovern's motion to table the Dirksen point of order was rejected by a vote of 37 yeas and 61 nays. The Vice President stated: "The point of order is still the pending business; the motion to table was not successful." He then put this question to the Senate: "Is the point of order of the Senator from Illinois to be sustained?" The Senate voted to sustain the point of order by a 59 to 37 vote.[155] Majority Leader Mansfield stated his intent to adjourn the Senate, which would return S. Res. 6 to the calendar. However, Mansfield stated that he would renew the motion to proceed to S. Res. 6 on January 19, and that he, Senator Dirksen, Senator McGovern, and other lawmakers would file cloture on the motion to proceed to S. Res. 6. On January 19, a bipartisan group of 31 Senators, including the party leaders on both sides of the aisle, submitted a cloture motion to close debate on the motion to proceed to the consideration of S. Res. 6.[156]

On January 24, there was some debate preceding the motion to invoke cloture. Senator Mansfield emphasized that the question soon to be voted on was neither about S. Res. 6 nor changing Rule XXII; it was about whether the Senate would ever permit a vote on the substantive issue. "The Senate has never been willing to face up to its merits," he said. "I believe we have an obligation and a responsibility to do so now."[157] Senator Dirksen asserted that there was no public outcry to change the two-thirds rule required to invoke cloture. "We hear it from the groups who want it

[153] *Congressional Record*, January 18, 1967, p. 936.

[154] *Ibid.*, p. 938.

[155] *Ibid.*, p. 940.

[156] *Ibid.*, January 19, 1967, p. 1011.

[157] *Ibid.*, January 24, 1967, p. 1331.

made much easier to ram through the Senate panaceas and laws, bills and resolutions, which are usually self-serving rather serving the public interest."[158]

In the end, 53 Senators voted to invoke cloture with 46 opposed. As the Vice President declared: "two-thirds of the Senators present and voting not having voted in the affirmative, the motion [to end debate on the motion to proceed to S. Res. 6] is rejected." Senator Mansfield stated that he had been prepared, had the vote been reasonably close, to submit a second cloture motion. But I think it would be a sham, a fake, and a phony thing to do in view of the vote just taken."[159] (It is noteworthy that a majority (53)—but not a two-thirds supermajority—voted to end debate on the motion to proceed to S. Res. 6.) Subsequently, Senator Mansfield adjourned the Senate but not before stating that an adjournment would return S. Res. 6 to the Calendar of General Orders. His action ended further consideration of the reform resolutions.

Continuity Doctrine

During the Senate's debate on S. Res. 6, Senator McGovern refuted the idea that the Senate is a continuing body, arguing that the "dead hand of the past cannot control the 100 Senators who today comprise the Senate of the United States."[160] He contended that only in the limited sense that two-thirds of the Senate carry over from Congress to Congress can the Senate be considered a continuing body. Arguments are made, he said, that since two-thirds of the Senate carry over, the rules carry over. "But this a patent non sequitur," declared the Senator.

> It assumes that the carryover of two-thirds of the Senate always carries over a majority in favor of the rules. The infusion of one-third newly elected Senators—both by their numbers, by their convictions, and by their powers of persuasion—may very well change the majority view of the rules, and it is this majority that is determinative under our constitutional democracy, not who carries over into the new Congress. That the new one-third may change the majority on any matter is well illustrated by the shifting of the Senate from party to party over the years.[161]

Senator McGovern then raised the idea that a national calamity could one day affect Senate operations. He said that situations could develop where the Senate would not be a continuing body. "If a catastrophe wiped out a large number of Senators at any given time, this might not be true. Then, of course, we would be faced with a situation where the membership was not carried over."[162]

Florida Democrat Spessard Holland opposed S. Res. 6, and challenged the views of Senator McGovern. The resolution, said Senator Holland, would destroy Rule XXII and, more importantly, its adoption would strike down "the stability of the Senate itself by [offering] each recurring Senate ... an open invitation to rewrite the rules so as to substitute its own views at that time or the views of a simple majority of the Senate at that time."[163] Senator Strom Thurmond, R-SC, pointed out that if the Founding Fathers did not want the continuity of the body, they "would not have provided the necessary quorum to do business at all times, and the Senate would not

[158] *Ibid.*, p. 1335.

[159] *Ibid.*, p. 1336.

[160] *Ibid.*, January12, 1967, p. 387.

[161] *Ibid.*

[162] *Ibid.*

[163] *Ibid.*

have been a continuing body."[164] And Senator Sam Ervin, D-NC, offered this criticism of the proposed filibuster reforms. The reformers argue, said Senator Ervin, that the Senate could change its rules by majority vote "at the beginning of each session, but not later in the session. It is an obvious absurdity that the Constitution of the United States changes its meaning from the first part of a session to other stages of a session. The constitutional truth is that the Senate is empowered to make the rules of its own proceedings, and this provision of the Constitution applies at the beginning of a session and during every day of the session."[165]

91st Congress (1969)

Political Context

Once more the Senate confronted the fundamental issue: can the Senate, at the beginning of a new Congress, rewrite its rules without being bound by those very same rules, specifically the supermajority requirement embedded in Rule XXII? Senators Frank Church, D-ID, and James Pearson, R-KS, proposed to change the number of Senators required to invoke cloture under Rule XXII from two-thirds of those present and voting to three-fifths of those present and voting. Senator Philip Hart, D-MI, and other reform-minded Members, beginning in Fall 1968, began to assess whether there was significant support for modifying Rule XXII. They found support for the three-fifths change but not for majority cloture. As a result, Senators Hart and Javits announced that they would not introduce their majority cloture proposal. Their goal was to consolidate "strength in the Senate behind the so-called 60 percent amendment." A more fundamental objective of theirs was to win acceptance of the principle that the Senate is "empowered at the beginning of each Congress to change its own rules without being subject to those very rules."[166] Senatorial opposition to this principle remained high.

Senator Church noted that Senator Anderson was not leading the fight for the three-fifths change, as he had done for years, because heavy Senate responsibilities prevented him from being the "general" of the reform effort. Importantly, Hubert Humphrey was still Vice President until Republican Spiro Agnew assumed the role of President of the Senate. (Agnew's first day in the Chair would be January 21.) Humphrey's role as presiding officer was especially significant because he laid out a controversial procedural strategy for achieving the reformers' objectives.

Calling Up the Reform Resolution (S. Res. 11)

The 91st Congress opened on January 3, and Majority Leader Mansfield announced that established practice would be observed: no bills and resolutions would be introduced, or other business transacted, until after the President's State of the Union address. Six days later, Senator Church introduced S. Res. 11. He said:

> Mr. President, article I, section 5, of the Constitution of the United States declares that "each House may determine the rules of its proceedings."
>
> Pursuant to this, and to advisory opinions of both Vice President Nixon and Vice President Humphrey that rules which restrict the power of a majority of the Senate of a new Congress to change its rules are not binding on the Senate at the opening of a new Congress, I submit

[164] *Ibid*., p. 394

[165] *Ibid*., January 16, 1967, p. 553.

[166] *Congressional Record*, vol. 115, Jan. 10, 1969, p. 423.

> on behalf of myself, the distinguished senior Senator from Kansas (Mr. Pearson), and 35 other Senators, a resolution to amend rule XXII, and ask that it be read.[167]

Following the reading of the resolution, the usual procedural events occurred. Senator Church asked unanimous consent that the Senate proceed to the immediate consideration of S. Res. 11. The chief floor opponent of the resolution, Senator Holland of Florida, objected, and the Chair, citing Rule XIV, said "the resolution will lie over 1 day." Senator Church then sent to the desk his notice of a motion to amend certain Senate rules, which was ordered to be printed in the *Congressional Record.* This sequence of events largely concluded that day's floor discussion of S. Res. 11. Reform Senator Javits did ask the Chair whether Senator Church's notice to amend left unaffected the constitutional rights of all Senators. President *pro tempore* Richard Russell, who was presiding, rejected the suggestion that opening day conferred special rights.

> The Chair has noted from year to year that the Senator from New York and others have undertaken very zealously to protect some imaginary right while proceeding under the rules on all other procedures. The Chair is of the opinion that that is wholly unnecessary to protect any constitutional right any Senator has or the Senate as a parliamentary organization has. Any constitutional right can be asserted at any time.[168]

At the end of proceedings on January 9, Senator Mansfield adjourned the Senate so that S. Res. 11 would meet the aforementioned one-day layover requirement. Subsequently, Senator Mansfield recessed the Senate through January 28. During consideration of S. Res. 11, Senators generally accepted the view that "opening day" could extend for several weeks.[169] On January 10, at the end of the morning hour, Senator Hart moved "that the Senate proceed to the consideration of Senate Resolution 11."[170]

Continuing Body Doctrine

Senator Church took the initial lead in explaining and defending S. Res. 11. He noted that amending Rule XXII to reduce to three-fifths from two-thirds of those present and voting was a modest change. It was not a "gag rule." Rule XXII as written, he said, placed too much power in a minority of Senators. He underscored the necessity of affirming that a majority of the 100 Senators has a constitutional right to adopt whatever cloture rule they think best without hindrance from previously adopted Senate rules.

As for the continuing body doctrine, it applied only in the limited sense that two-thirds of the Members carry over from Congress to Congress. In the larger sense, said Senator Church, the Senate is not a continuing body citing, for example, that bills and resolutions must be reintroduced afresh at the start of a new Congress. Senator Church exclaimed that "whether we choose to call the Senate a continuing body or not, the fact that two-thirds of the Senators normally carry over does not support the proposition that rules adopted by an earlier Congress

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[167] *Ibid*., Jan. 9, 1969, pp. 357-358.

[168] *Ibid*., p. 358.

[169] Senator Russell did ask the Vice President for his view of "just when a new Congress begins, and the old one ends?" *Ibid*., January 14, 1969, p. 594. The Vice President noted that the 91st Congress began on January 3, 1969. Senator Javits then said: "Is it a fact that upon more than one occasion—upon several occasions—assurance was given by the majority leader, by the president pro tempore, and by the minority leader that no rights of any kind were being waived to raise this question [of amending Senate rules] by virtue of the proceedings [the administration of oaths, for example] which have taken place since the opening day of this Congress, January 3?" The Vice President replied: "It is the view of the Chair that such assurances have been given at the opening of this Congress and in previous Congresses." (p. 596)

[170] *Ibid*., January 10, 1969, p. 430.

can prevent the Senate of a new Congress from altering those rules in such manner as the majority may determine at the opening of that Congress."[171]

Senator Holland then offered his critique of S. Res. 11. He stated that its adoption would constitute a precedent whereby a "mere majority of the Senate, no matter how transient, at the beginning of any Congress" could change any Senate rule. Senator Church agreed and emphasized that such a precedent would be fully in accord with the Constitution. Senator Holland replied that it would be a "real disaster" to grant such "sweeping power" to a mere majority. He further noted that such a precedent would damage the prestige of the Senate, weaken the Senate's ability to ensure "stability" in our governmental system, and would be contrary to the traditions and intentions of the Founding Fathers. S. Res. 11, he said, should reach the floor in the regular way, which includes consideration by the Committee on Rules and Administration. The Founding Fathers, he contended, regarded the "Senate as a continuing body, and a body which, because of that continuation and because of the peculiar structure under which it was set up, would give stability to the Government, which otherwise might be without such stability."[172]

Senate Rules in Force

There was considerable controversy over the issue of acquiescence to Senate rules versus non-acquiescence during the opening day period. Senator Javits took the lead in explaining the position of the reformers. Two points are noteworthy. First, Javits re-emphasized a view that reformers articulated for years. The Senate has the constitutional authority to change any rule by majority vote at the start of a new Congress. Senate rules that thwart this possibility are contrary to the Constitution, and Members are not bound by them, he argued. Stated differently, if reformers must attract a two-thirds supermajority vote to curb a filibuster before the Senate can consider amendments to change the rules, "then the Constitution has been as effectively amended as if it had been contained in the original document, or three-quarters of the States or two-thirds of both Houses of Congress had agreed."[173]

Second, reformers accepted by acquiescence, said Senator Javits, all Senate rules except those that vitiate "the constitutional authority of a majority of the Senate to act. [W]hat does vitiate the authority of a majority of the Senate to act is the inability of a majority to close off debate."[174] Thus, reformers "are not bound by any rule which would vitiate our right to endeavor to change the rule we challenge. That is why we have accepted the concept that, by acquiescence, rules can be made applicable without vitiating our ability to change the rule which we seek to change with the authority of the majority of the Senate."[175] Senator Javits continued: "We say that by acquiescence everything is applicable except what prevents us from exercising what we consider to be authority given by the Constitution to bring about amendment to the rules."[176]

Senator Holland did not agree with the views of Senator Javits. He found it unusual that the reform Senators accepted all the Senate's rules and were willing to proceed under them, but they were unwilling to follow the Senate rule that stipulates that all the chamber's rules carry over from Congress to Congress. The two Senators' disagreement was set in bold relief when the Senate discussed several critical decisions of Vice President Humphrey.

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[171] *Ibid*., p. 421.

[172] *Ibid.*, p. 425.

[173] *Ibid*., January. 13, 1969, p. 507.

[174] *Ibid*., p. 505.

[175] *Ibid*.

[176] *Ibid*., p. 505.

The Role of the Vice President

During debate on the motion to proceed to S. Res.11, Senator Javits stressed that the Senate has never been able on opening day to get a direct vote on the question of amending Senate rules by vote of the majority. He recommended a way, however. "I think we might as well face it very honestly and straightforwardly …, I think it depends on the Presiding Officer…. As the saying goes, he has to bite the bullet. There is no other way.... [H]e can rule on whether the Senate, at the beginning of a Congress, can amend its rules. He has that power if he will use it."[177] Vice President Humphrey was prepared to do just that.

The triggering event was a cloture motion filed on January 14 by Senator Church and 19 other colleagues. Cloture was filed to bring debate to a close on the motion to proceed to S. Res. 11. In offering the cloture motion, Idaho Senator Church stated that "we continue to proceed under the constitutional rights and privileges to change the rules of the Senate agreed to at the opening of the session."[178] He then asked the Vice President the crucial question: "If a majority of the Senators present and voting, but less than two-thirds, vote in favor of this motion for cloture, will the motion have been agreed to?" The Vice President said:

> If a majority—this is the view of the Chair—but less than two-thirds of those present and voting, vote in favor of this cloture motion, the question whether the motion has been agreed to is a constitutional question. The constitutional question is the validity of the rule XXII requirement for an affirmative vote by two-thirds of the Senate before a majority of the Senate may exercise its right to consider a proposed change in the rules. If the Chair were to announce that the motion for cloture had not been agreed to because the affirmative vote had fallen short of the two-thirds required, the Chair would not only be violating one established principle by deciding the constitutional question himself, he would be violating the other established principle by inhibiting, if not effectively preventing, the Senate from exercising its right to decide the constitutional question. The Chair does not intend to violate both of these principles.
>
> In response to the parliamentary inquiry of the Senator from Idaho, therefore, the Chair informs the Senate that in order to give substance to the right of the Senate to determine or change its rules and to determine whether the two-thirds requirement of rule XXII is an unconstitutional inhibition on that right at the opening of a new Congress, if a majority of the Senators present and voting but fewer than two-thirds, vote in favor of the pending motion for cloture, the Chair will announce that a majority having agreed to limit debate on Senate Resolution 11, to amend rule XXII at the opening of a new Congress, debate will proceed under the cloture provisions of that rule.
>
> The Chair notes that its decision that debate will proceed under the cloture provisions of rule XXII is subject to an appeal if it is taken before any other business intervenes. The Chair would place the appeal before the Senate for an immediate vote since rule XXII provides that appeals from the decision of the Chair, under cloture procedure, shall be decided without debate.[179]

After the Vice President stated his parliamentary course of action, he was bombarded with questions from various Senators who strongly opposed his plan. Senator Holland declared that the Vice President's proposed ruling would completely rewrite Rule XXII. "I know of no precedent

[177] *Ibid*., p. 509.

[178] *Ibid.*, January14, 1969, p. 592.

[179] *Ibid*., p. 593. Parliamentarians might wonder if Humphrey's ruling is inconsistent. In the first paragraph, Humphrey seems to state that the issue raises a constitutional question and therefore he won't rule. In the second paragraph, he outlines his potential ruling.

whatsoever, and I cannot conceive of any precedent," declared Senator Holland, "whereby a ruling should be made that a proceeding can be undertaken under an existing rule, and follow it meticulously in every respect except one, and that is that after the vote is taken the Presiding Officer shall decide that the rule does not apply, and hold that the objectives of the rule to close debate may be attained by a lesser and smaller vote than that announced by the rule."[180] Other Senators expressed dismay with the Chair's ruling. The selected views of two Senators make the point.

> *Senator Herman Talmadge, D-GA*. "Do I understand the ruling of the Chair to be that the Senate is a continuing body?" *The Vice President*: "The Chair has not ruled on it, but it is the view of the Chair that the Senate is a continuing body, and he does not feel it is relevant to the issue….The question is not whether the Senate is a continuing body. The question is posed by the Senator from Idaho, and it has nothing to do with a continuing body."
>
> *Senator Talmadge*. "Under what authority does the Vice President propose to gag Senators if [Rule XXII] does not give him that authority?" *The Vice President*: "[I] would place the question before this body so that the body itself may decide whether or not that provision of rule XXII is or is not constitutional."
>
> *Senator Talmadge*. The Vice President has said "that rule XXII is unconstitutional and yet he purports to use that same rule to gag Senators from 50 States sent to represent them." *The Vice President*: "[T]he Chair has not said rule XXII is unconstitutional….The Chair merely said that the question posed by the Senator from Idaho in his motion is one that challenges the constitutionality of section 2 of rule XXII….It has been understood [by numerous Congresses] that Senators could test the rules and portions thereof as to constitutionality."
>
> *Senator Talmadge*. "If rule XXII is unconstitutional, we have no cloture rule whatever. Not only a majority could not gag the Senate, but 99 Senators could not gag the Senate, if any Senator wanted to speak, if rule XXII is unconstitutional." *The Vice President*: "The Chair would only respond that cloture proceedings are not the subject being contested."
>
> *Senator Sam Ervin, D-NC*. The Senate's rules can be changed at any time by a majority. "The power of the Senate is exactly the same every day it is in session, whether at the beginning of a session, in the middle of a session, or at the last part of a session, is it not, under the Constitution?" *The Vice President*: "As it stands now, the Senate has the right, by majority vote, to change its rules. However, the Chair must observe that the Senate also has a rule that says, under rule XXII, it will take a two-thirds vote to limit debate."
>
> *Senator Ervin*. "How can Congress establish rules under the Chair's ruling that will prevent a majority from doing what it wants at any time?" *The Vice President*: "By the Senate itself making its own decisions. The Senate is the judge of its own rules."
>
> *Senator Ervin*. "Does not the ruling of the Chair hold it to be unconstitutional for the Senate to establish any rule requiring more than a bare majority to silence all Senators?" *The Vice President*: "[W]hen the Senate finally decides on its rules, it can decide any kind of rules it wants, by majority vote. If done under section 2 of rule XXII, they can have it, but at the beginning of a new Congress ..., it has been the long-standing precedent of this body that none of the rights of any Senator are to be denied or prejudiced in any way."[181]

Other Senators, all from the South, joined in the critique of the Vice President's planned ruling. As Senator Russell of Georgia exclaimed: "What we are asked to do here now on the dictum of the Presiding Officer is to disregard our rules and give him power over the Senate by a ruling

[180] *Ibid.*, p. 595.

[181] *Ibid.*, pp. 597-600. These pages include the parliamentary inquiries made by Senators Talmadge and Ervin.

from the Chair to impose gag rule of the worse sort—by a bare majority."[182] Senators Javits, Pearson, and Hart supported Vice President Humphrey, who noted that he would be leaving the Senate soon, and wanted the Senate to decide this constitutional question. "It appears to the Chair we can decide it, and will decide the most fundamental issue … in the only way it can be decided, by majority vote. All constitutional issues are decided by majority vote."[183]

Ending Debate

On January 16, all Senators realized that an historic vote was imminent. Senators Holland, Russell, and Dirksen discussed why the intended ruling of the Vice President was wrong. Senators Javits and Jennings Randolph, D-WV, offered their support for the expected ruling. When the cloture motion was presented to the Senate, the Vice President said: "The question before the Senate is, Is it the sense of the Senate that the debate shall be brought to a close?" The vote was 51 yeas and 47 nays. As the Vice President stated:

> Under the provisions of article I, section 5, of the Constitution and those provisions of rule XXII and other rules not in conflict with this constitutional provision, the Chair announces that 51 Senators having voted yea and 47 Senators having voted nay, cloture has been invoked on the motion to proceed to the consideration of Senate Resolution 11, and debate will proceed under the limitation provisions of rule XXII.

The Vice President's decision amounted to majority cloture on the motion to proceed to S. Res. 11. Senator Holland immediately appealed the ruling, noting that the "Chair was without the authority to declare cloture upon a vote of less than two-thirds of the Senate." The appeal, said the Vice President, is not debatable under Rule XXII. He then stated: "The question is, Is the decision of the Chair to stand as the judgment of the Senate?" Clearly, this was another key vote because majority cloture on the motion to proceed would not be invoked if the Vice President's decision was overturned. The Senate chose not to uphold the Chair's ruling by a vote of 45 yeas to 53 nays. "The decision of the Chair not having been sustained," said the Vice President, "the Senate will continue the debate on the motion to take up."[184]

What contributed to the sudden reversal? Six Senators (two Democrats and four Republicans) switched their positions on the two votes: they first backed the Vice President's majority cloture decision and then voted against it on appeal. Uncertainty surrounds these vote changes, but two reasons seem plausible. First, Majority Leader Mansfield "had made it known earlier that although he favored cloture on the rules debate, he would not support the Vice President's ruling." His view of the matter could have influenced one or more of the six to switch their votes. Second, Minority Leader Dirksen, in the lead-up to the first vote, reminded party colleagues that Republicans "are still a minority" in the Senate and will need extended debate both to stop or modify legislation and to support the new occupant of the White House, Republican Richard Nixon. "I do not propose to liquidate the freedom of this body," he said.[185] Moreover, according to one account, the position of the six switchers "was that they approved the effort to bring the question of unlimited debate to a vote but did not agree that the Senate filibuster rule itself could be changed by a simple majority, as Mr. Humphrey had ruled."[186]

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[182] *Ibid*., January 16, 1969, p. 990.

[183] *Ibid.*, January 14, 1969, p. 605.

[184] *Ibid*., January 16, 1969, pp. 994-995.

[185] *Ibid*., p. 992.

[186] Warren Weaver Jr., "Senate Defeats Filibuster Curb," *The New York Times*, January 17, 1969, p. 18.

Important to note is that Vice President Humphrey created what might seemingly be an efficacious way for reformers to employ the constitutional option at the beginning of a Congress. Under the short-lived "Humphrey precedent," the Chair could rule that if a majority voted to invoke cloture to terminate extended debate on a motion to proceed to a resolution amending Rule XXII, then further debate would occur under the provisions of Rule XXII. This outcome would mean that an appeal of the Chair's ruling on constitutional grounds—the presiding officer is obliged to submit such appeals to the Senate for resolution and they are typically subject to extended debate—would be nondebatable because the cloture motion itself is nondebatable. A successful vote on a motion to table the appeal would likely occur immediately, creating a precedent that would grant the Senate the constitutional right to change its rules by majority vote at the start of a new Congress.[187]

The demise of S. Res. 11 did not come immediately, however. Senator Church filed a cloture motion on January 24. Its purpose was to end debate on the motion to proceed to the consideration of S. Res. 6. Senator Church acknowledged that it would take two-thirds of the Senators present and voting to end debate. He said: "[T]he constitutional question was posed to the Senate itself a few days ago, as to whether or not, in the judgment of the Senate, a majority is sufficient, at the commencement of a Congress, to limit debate. The Senate has voted it was not, and I think, for purposes of the 91st Congress, that question has been settled."[188] In short, the rules of the previous Congress were fully in force in the 91st Congress. On January 28, the Senate vote on the motion—"Is it the sense of the Senate that debate on the pending motion shall be brought to a close?"—was 50 yeas and 42 nays, short of the two-thirds required to invoke cloture.[189]

92nd Congress (1971)

Political Context

Senators Church and Pearson again took the lead in introducing a resolution (S. Res. 9) to reduce the number required to invoke cloture under Rule XXII from two-thirds to three-fifths of those present and voting. Fifty-one Senators, from both parties, sponsored the resolution. The reformers' fundamental argument was that a majority at the beginning of a new Congress has the constitutional right to change Senate rules. Reformers were also committed, said Senator Javits, "to the constitutional principle that the legislative arm should have the right, after full and fair debate, to vote."[190]

Reformers were fairly optimistic that this time they would be successful in amending Rule XXII. In Senator Church's view, "opposition to the existing Senate cloture rule" has increased, and "there is reason to believe that the movement within the Senate to modify rule XXII has gained additional strength."[191] Majority Leader Mansfield, who continued to support cloture reform, said that some opponents of cloture reform showed signs of softening given the logjam that occurred

[187] If cloture is at issue but has not been invoked, it is unclear whether any appeal would not be subject to debate because the cloture motion itself is nondebatable.

[188] *Congressional Record*, January 24, 1969, p. 1802.

[189] *Ibid*., January 28, 1969, p. 1937.

[190] *Congressional Record*, vol. 117, March 4, 1971, p. 5115.

[191] *Ibid*., January 26, 1971, p. 618.

in the closing days of the 91st Congress, which ended just two days before the start of the 92nd Congress.[192]

Although the movement to modify Rule XXII did gain strength, it was not enough to end debate on S. Res. 9. Over a six-week period (January 26 to March 9), there were four unsuccessful attempts to invoke cloture. Each attracted majority support—February 18, (48 to 37); February 23, (50 to 36); March 2, (48 to 36); and March 9, (55 to 39)—but not the required two-thirds of those present and voting. Tellingly, the opposition to reform was led by two formidable parliamentary experts: Senators James Allen, D-AL, and Sam Ervin. (Senator Allen was reputed to be the equal of Senator Byrd in his mastery of Senate rules and precedents.) Senator Russell, long the anti-filibuster reform leader, died on January 21, 1971.

In general, opponents of reform made several familiar points—extended debate protects the minority against an arrogant majority, it ensures that the view and voice of the small states will be heeded, and unlimited debate is what makes the Senate a great deliberative body. The anti-reformers added new arguments to their repertoire. For example, the filibuster, they said, was essential to challenge the growing power of the executive branch, particularly in the defense and foreign policy arenas. (Remember this was the time of the Vietnam War.) Further, the opposition pointed out that liberal Senators also employed the filibuster, finding it a useful procedural tool to block unwanted legislation advanced by conservative Members and the Republican White House.

Calling Up S. Res. 9

On the opening day of the 92nd Congress (January 21, 1971), Majority Leader Mansfield received unanimous consent that debate on amending Senate rules would be postponed until a later date, "and that this deferral shall not be prejudicial to the rights or positions of any opponent or proponent of any rules change." Four days later Senator Church introduced S. Res. 9 and asked that the resolution "go over under the rule," referring to Rule XIV. As Senator Church stated: "I ask unanimous consent that [the written notice to amend Senate rules] be read, and go over under the rule, as required by rule XIV, so that it may be taken up tomorrow, on the next legislative day, for consideration and debate." There was no objection to the unanimous consent request. Senator Church then asked the President pro tempore: "As matters now stand, will the resolution that I have just introduced to amend rule XXII be the pending business before the Senate tomorrow when the legislative business is laid before the Senate?" The Chair replied: "It will be laid down after the routine morning business before the end of the morning hour, and subject to debate until the end of the morning hour, when it will go to the calendar."[193]

The next day, January 26, Vice President Agnew presented to the Senate S. Res. 9, "which comes over 'under the rule' from the previous day." Senator Allen asked the Vice President whether at the conclusion of the morning hour, S. Res. 9 would be returned to the calendar. "The Senator is correct," stated the Chair. The Vice President then said: "The question is on adoption of the resolution." Various Senators began to debate the proposed modification of Rule XXII. With the expiration of the morning hour, the Chair stated, "the resolution goes to the calendar." Reform Senator Pearson immediately said: "I now move that the Senate proceed to the consideration of Senate Resolution 9," and this motion became the Senate's pending business. Because Senator Pearson chose not to speak on the resolution, Senator Allen quickly moved "that the pending

[192] *Ibid*., January 27, 1971, p. 756, and February 3, 1971, p. 1526. Senator Robert Byrd stated at the close of the 91st Congress that in the next Congress he would examine the rules, procedures, and precedents of the Senate and consider action on several reform resolutions that he authored. See December 31, 1970, pp. 44422-44427.

[193] *Ibid*., January 25, 1971, pp. 368-369.

motion be postponed to the next legislative day" (which occurred on February 11).[194] As he stated: "The effect of [my] motion is to postpone until the next legislative day the consideration of the motion" offered by Senator Pearson. Senator Allen then discussed at length the pitfalls of S. Res. 9 and the history of proposed cloture reforms until the Senate recessed. Over the next several weeks, Senator Allen was joined by other Senators in criticizing S. Res. 9 and championing the benefits of extended debate.

Three things about this overall debate are worth noting. First, unlike previous efforts, rarely did reformers inquire of party leaders or the Chair whether the conduct of Senate "business" would constitute their acquiescence to the rules of the previous Congress. As a result, the Senate did transact legislative and executive business. As Senator Allen explained:

> Mr. President, I want to say that this is the most benign and the most benevolent filibuster that I have seen, if it could even rise to the status of a filibuster. It is an extended discussion, but Senators have had no difficulty whatever in getting consideration of any other matter they want to bring up. At any time anyone has wanted to speak, introduce a bill, bring up confirmations, he has been allowed to do so.... No one objects to anyone else speaking.[195]

In fact, Senator Allen often asked and received unanimous consent that the resumption of his remarks on filibuster reform not be considered a second speech. (Rule XIX states that "no Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate.")

Second, two parliamentary experts who both opposed major filibuster reform, especially majority cloture—Senator Allen and Senator Byrd—were on opposite sides on matters of procedure. Senator Allen's aim was to protect his procedural prerogatives so he could defeat S. Res. 9; Senator Byrd's goal was to ensure that the Democratic leadership, and not the Senator from Alabama, maintained control of the floor. An example of their competitive procedural relationship was this series of back-and-forth exchanges regarding the implications of recessing or adjourning the Senate.[196] The exchanges began when Senator Byrd requested unanimous consent that when the Senate completed its business "on Monday next, it stand in recess until ... Tuesday next." Senator Allen, reserving his right to object, asked:

> *Senator Allen*. I should like to inquire of the distinguished Senator whether, by moving to recess rather than to adjourn until next Monday, he does not rule out the possibility of a morning hour or a period for the transaction of morning business or for special allocations of time except by unanimous consent.
>
> *Senator Byrd*. The answer is yes, but I will be very glad to ask unanimous consent that there be such a period for the transaction of routine morning business.
>
> *Senator Allen*. By adding the routine morning business, does not the Senator in effect make of the recess an adjournment?
>
> *Senator Byrd*. He does, in effect, only with regard to routine morning business; but he does not change the morning hour, which is the first 2 hours following an adjournment. It is just by the sufferance of the Senate that [I] would arrange for a period for the transaction of routine morning business following a recess.
>
> *Senator Allen*. The point the junior Senator from Alabama is making is that as long as we recess each day rather than adjourn, each Senator is limited to two speeches, and the recess session when it convenes would be part of the same legislative day. Therefore, if a Senator

[194] *Ibid.*, January 26, 1971, pp.616-620.

[195] *Ibid*., February17, 1971, p. 2886.

[196] *Ibid*., Feb. 19, 1971, pp. 3322-3323.

> should make two speeches [upon any one question] in 2 calendar days but the same legislative day, he would not be allowed to make still another speech until there is an adjournment.
>
> *Senator Byrd*. The distinguished Senator is correct in that regard. However, the able Senator, I am sure, with his usual great resourcefulness, would have no difficulty in finding a way to make a third speech if he so desired. [In fact, Senator Allen had no difficulty in making numerous speeches on the same question. For example, he would propose a new question—a motion to postpone consideration of S. Res. 9—and talk at great length about the demerits of filibuster reform.]
>
> [C]hanging the program from that of a recess to that of an adjournment to that of a recess also prevents the death of the motion to proceed to the consideration of Senate Resolution 9, and eliminates the morning hour which is marked by the close of the first 2 hours following an adjournment.
>
> *Senator Allen*. I offer no objection.

Senator Allen also inquired of the Chair whether at the conclusion of the morning hour at 2 p.m., the motion to proceed to S. Res. 9 would die and the resolution would be returned to the Calendar of General Orders. The Chair responded that the motion to proceed would not die at the end of the morning hour "because there is no unfinished business. The motion [to proceed], therefore, would continue to be debatable."[197] (When Senate resolutions are considered during the morning hour but action is not concluded on those matters, they are typically returned to the Calendar of General Orders to be potentially called up again by a debatable motion.)

A third noteworthy feature of the debate was how infrequently the anti-filibuster Senators participated in the deliberations on S. Res. 9. For example, on February 26, Senator Church offered for the third time a cloture motion to end debate on the motion to proceed to the consideration of S. Res. 9. (Recall that S. Res. 9 was taken up on January 26.) Immediately, Senator Ervin asked the Chair if the cloture motion was in order. Senator Ervin explained:

> [C]loture refers to bringing debate to a close. I have been here in rather constant attendance on the sessions of the Senate. In the English language, the word 'debate' signifies a discussion or series of discussions in which adverse views are expressed in respect to a subject. In my opinion, there is no debate to be brought to a close. The proponents of the resolution to change the rules of the Senate have been conspicuous by their absence and by their silence, and I respectfully submit that the rules of the Senate cannot be construed to be applicable to the end of debate upon a proposition when the debate has never begun.[198]

The Chair responded that Senator Ervin had not raised an appropriate parliamentary inquiry.

Senator Church, one of the two lead co-sponsors of S. Res. 9, acknowledged Senator Ervin's observation. "[T]here is justice in [the Senator's] observation that most of the time has been taken by the opponents, which has placed a burden on them."[199] During subsequent session days, as a review of the *Congressional Record* reveals, Senate proponents of filibuster reform did come to the floor to advocate for adoption of S. Res. 9.

Various reasons might account for why the filibuster reformers did not engage their opponents during much of the time that S. Res. 9 was pending on the floor. One is that the reformers knew the arguments of the opposition so well, having heard them over the years, that they saw little value in contesting their opponents' unyielding positions with their own views. (Of course,

[197] *Ibid*., p. 2890.

[198] *Ibid*., p. 4108.

[199] *Ibid*.

opponents of the proposed change also knew well the arguments and views of the reformers.) Another reason for the minimal debate is that since the Senate had little business on its legislative calendar during the period when S. Res. 9 was on the floor (January 26 through March 9), the reformers opted to be busy in other areas. And with 51 co-sponsors of S. Res. 9, including Majority Leader Mansfield, reformers might have decided that private discussions with Vice President Agnew and on-the-fence Senators were better ways to enhance their chances of success.

Vice President's Role

When debate commenced on the motion to proceed to S. Res. 9, Senator Allen asked the Vice President whether he planned to issue any advisory opinions as to actions he might take during the Rule XXII debate. In a setback for reformers, the Vice President said that he had "no intention of issuing advisory opinions on hypothetical cases…. [S]uch opinions could serve no useful purpose other than to give a particular conclusion of the Chair." He added that questions involving constitutional issues or the continuity of the Senate would be submitted to the chamber's membership for decision.[200] Senator Javits wrote to Agnew urging him to follow the so-called Humphrey precedent of 1969: declare that cloture has been invoked by majority vote with any appeal of that ruling to be decided without debate.[201] Javits stated that such an action by the Vice President "is not a precedent, because it is entirely susceptible to change with a newly constituted Senate." Vice President Agnew did not accept the Javits suggestion.

Continuing Body Doctrine

As in previous attempts to amend Rule XXII at the start of a new Congress, a key question was whether the Senate is a continuing body with continuing rules. If the Senate is a continuing body, reform advocates would need to muster the two-thirds vote required to invoke cloture under Rule XXII and thus bring an end to a talkathon. If the Senate is not a continuing body, then two things might occur: first, a majority vote could end a filibuster on a proposal to amend Rule XXII and, second, the reform proposal itself could then be adopted by majority vote.

Senator Allen challenged the reformers' view that the Senate is not a continuing body. "They offer an amendment to rule XXII," he said, "thereby adopting and accepting, as in full force and effect, every rule of the U.S. Senate, including rule XXII." If there is no rule XXII, then what is there to amend? By implicitly accepting the continuity of Senate rules, it stands to reason that the only way to end debate is by rule XXII, which requires a two-thirds vote.

> Without rule XXII, there is no right to cut off debate. So [the reformers] have to accept rule XXII in order to have any vehicle by which to cut off debate. So they are seeking to amend that rule, a rule which they say does not exist, because they are making new rules for the Senate.[202]

Moreover, Senator Allen emphasized that the Senate was in full compliance with Article I, Section 5, of the Constitution. The Senate, he said, has rules and they state that they "carry forward from Congress to Congress unless amended as provided by the rules."[203]

Senator Allen did suggest that if the Senate was not a continuing body, then it would be reasonable to conclude that, at the beginning of a Congress, the chamber could establish anew its

[200] *Ibid.*, , p. 618.

[201] *Ibid.*, March 4, 1971, p. 5115.

[202] *Ibid.*, January 26, 1971, p. 624.

[203] *Ibid.*, p. 623.

procedural rules ("For the ___Congress, the following shall be the rules."). Calling that approach "ludicrous," Senator Allen contended that it would be "hard to conceive of any circumstance more disruptive of the continuity of the legislative process than any such power in a simple majority of the Members of the Senate."[204]

Proponents of revising Rule XXII, disagreed with the view that the Senate was a continuing body and bound by procedural rules inherited from previous Senates. That view, they said, meant that only those Senators who served in the First Congress enjoyed the constitutional right to adopt Senate rules by majority vote. "The illogic behind the proposition that two-thirds of the Senate constitutes grounds for making it a continuing body even though the new one-third can radically alter its philosophy, partisan composition, and committee hierarchies has never ceased to amaze me," declared Senator Pearson.[205] Reform Senator Hart of Michigan said, "I have never understood this notion that those dead and gone can, nonetheless, inhibit those of us here in establishing the rules of the Senate when we start this Congress."[206] In response, Senator William Fulbright, D-AK, noted: "We do not inhibit you. All you need is two-thirds."[207]

Ending Debate

Prior to the fourth and final cloture vote to end debate on the motion to proceed to the consideration of S. Res. 9, Senator Javits repeated that the only way to bypass what he viewed as the extra-constitutional filibuster process is for the Vice President to rule that debate had gone on long enough. He should declare, said Javits, "that as we are operating under the Constitution that ends the matter," and the Senate should proceed to a vote on the reform resolution without further debate, points of order, or appeals.[208] When President *pro tempore* Allen Ellender of Louisiana announced on March 9 that the cloture vote had failed (55 to 39), Senator Javits immediately appealed the decision of the Chair. The majority leader withheld offering a motion to table to permit Senator Javits to make a brief statement. Javits contended that Rule XXII makes it "impossible for less than two-thirds to end debate."

> Therefore, I believe, in this unique situation, the Chair should have ruled that a majority of the Senate having voted to close debate, and debate having continued for what everyone agrees has been an adequate period of time so that the Chair would not have to hear any more debate, debate should have been declared closed, and the rest of rule XXII applied. That would mean appeals as well as points of order would not be subject to debate, but would be decided without debate.[209]

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[204] *Ibid*., p. 624.

[205] *Ibid.*, p. 617.

[206] *Ibid*., January 25, 1971, p. 4026.

[207] *Ibid.* Worth noting is that various southern Senators, such as Allen Ellender of Louisiana, said that "there was some discussion of alternatives within the southern caucus, including a proposal to accept a three-fifths cloture vote on appropriations bills and conference reports." Senator Church rejected that option because it did not apply to civil rights legislation. Similarly, Senator Church turned down a plan by Senator Byrd which, interestingly, became the Rule XXII change adopted as a compromise in 1975. Senator Byrd recommended a reduction in "the [cloture] cutoff figure to three-fifths of the entire membership of the Senate (60 votes) instead of the three-fifths of those present and voting." Senator Church believed that Byrd's proposal was not much of an improvement over the existing Rule XXII. Other Senators also suggested compromise ideas. See "Senate Again Rejects Change in Filibuster Rule," *Congressional Quarterly Almanac, 1971*, vol. xxvii, (Washington, D.C.: Congressional Quarterly Inc., 1971), p. 14.

[208] *Ibid*., March 9, 1971, p. 5481.

[209] *Ibid*., p. 5486. Senator Javits asserted that an appeal from a ruling that cloture had not been invoked was not debatable. Whether this is the case is unclear.

The majority leader took the floor after Senator Javits and urged his colleagues to reject the appeal. If it were upheld, he said, "it would only be a matter of time before a majority would be able to cut off debate on any issue. That is the real issue at this time. The heart of this institution is as stake."[210] Mansfield moved to table the appeal, which was agreed to by a 55 to 37 vote. This decision ended the reform effort.

93rd Congress (1973)

Reform Senators chose not to try to amend Senate Rule XXII at the start of this Congress. Part of the explanation might involve the change of heart of several prominent reform advocates. In what Majority Whip Alan Cranston, D-CA, said was a "Senate seminar" on Rule XXII, several reform lawmakers stated that they had gained a greater appreciation of unlimited debate. "I shall vote to keep rule XXII unchanged if the question comes up again when the new Congress convenes in January 1973," remarked Senator Cranston. Senator Church, who served in 1969 and 1971 as the majority floor manager of those reform efforts, explained that experience "states a strong case for the retention of rule XXII in its present form." Church's statement underscored that liberal Senators were now employing extended debate on unwanted measures or matters.[211]

94th Congress (1975)

Political Context

Many Senators remained dismayed at the difficulty of invoking Rule XXII under the two-thirds present and voting standard. Moreover, the 1970s witnessed wider use of the filibuster by Senators of varying ideological perspectives. With the enactment into law of major civil rights legislation during the 1960s, the filibuster no longer was tainted as a procedural weapon to preserve racial inequality. Many non-southern Senators came to appreciate that they could use the filibuster, or its threat, to achieve their legislative objectives. The result: "the filibuster came into such regular use that senators sponsoring any bill of substance found that they had to muster enough votes to invoke cloture to halt the almost automatic filibuster."[212] Even Senators who had unswervingly supported the filibuster, often as a matter of principle, became more flexible in their view of cloture and voted for it.

Where party leaders filed cloture motions only six times during 1969-1970, that number surged to thirty-one by the 1973-1974 period.[213] These procedural developments, combined with the perception among anti-filibuster Senators that cloture was too difficult to invoke, set the stage for another round of reform at the start of the 94th Congress. In addition, in the wake of Watergate and the resignation of President Nixon, the 1974 mid-term elections "saw a huge Democratic majority swept into the Senate. Working closely with Vice President Nelson Rockefeller, the reformers forced the threshold for cloture down to three-fifths" of the membership duly chosen and sworn (60 of 100).[214]

Two Senators—Democrat Walter Mondale of Minnesota and GOP Senator James Pearson—took the lead in urging a revision of the cloture rule. Along with 43 other Senators of both parties, the two lawmakers introduced S. Res. 4, which proposed to reduce the number required to invoke

[210] *Ibid*.

[211] *Ibid*., September 29, 1971, pp. 33886-33891.

[212] Neil McNeil and Richard A. Baker, *The American Senate* (New York: Oxford University Press, 2013), p. 336.

[213] *Ibid.*, p. 340.

[214] Ezra Klein, "Let's Talk," *The New Yorker*, January 28, 2013, p. 27.

cloture from two-thirds to three-fifths of the Senators present and voting. Lowering the number to invoke cloture promoted at least two overlapping reformist goals: (1) discouraging Senators from launching filibusters because cloture would be easier to invoke, and (2) encouraging party and committee leaders to schedule legislation for floor consideration that previously might never have been subject to chamber action because of insufficient votes to end talkathons.

The debate on S. Res. 4 consumed seven weeks (January 14 to March 7) and was perhaps more contentious than any previous effort to amend Rule XXII. Once more, filibuster reformers pursued the constitutional option. They wanted to establish the principle that a majority of the Senate, at the beginning of a new Congress, could modify Senate rules by majority vote without being subject to Rule XXII and its supermajority requirement for invoking cloture. The reformers won the day in some respects but not until the "mortal combat," as one Senator called it, ended with adoption of a compromise proposal sponsored by the joint party leadership.[215]

Procedural hardball was the order of the day as the two acknowledged masters of Senate rules and precedents faced off against each other once again: Senator Allen for the opponents of filibuster reform and Majority Whip Byrd for the proponents. Initially, Senators Mondale and Pearson functioned as the floor managers, but they were supplanted for a time when Senator Byrd became the de facto floor leader for S. Res. 4, fending off an array of parliamentary maneuvers and dilatory actions initiated by Senator Allen and his allies. It is evident from the *Congressional Record* that Senator Allen dominated floor proceedings with Majority Whip Byrd working to overcome Allen's dilatory tactics.[216]

Significantly, Senators Mondale and Pearson had the support of Vice President Nelson Rockefeller, who played a pivotal and controversial role in advancing the reformers' objectives through his rulings. His decisions, especially the furor aroused by Rockefeller's recognition practices, triggered such vehement criticism that it created a hostile mood in the chamber. That reality contributed to Senate approval of the joint leadership's compromise of three-fifths of all Senators, duly chosen and sworn (or 60 if there are no vacancies), as sufficient to end prolonged debate. (The two-thirds requirement for cloture on a measure or motion to amend Senate rules remained in effect.)

Calling Up S. Res. 4

On January 14, the opening day of the 94th Congress, Senator Mondale submitted S. Res. 4 on his behalf and 44 other bipartisan co-sponsors. Mondale also sent to the desk, as required by Senate rules, a notice in writing of his intent to amend Rule XXII. Furthermore, as had become customary in these proceedings, Senator Mondale declared that by operating under Senate Rules, "the supporters of this resolution do not acquiesce to the applicability of certain of those rules to the effort to amend rule XXII; nor do they waive any rights which they may obtain under the Constitution…, uninhibited by rules in effect during the previous Congresses." Majority Leader

[215] *Congressional Record*, vol. 121, March 7, 1975, p. 5635.

[216] An example of the role of the two Senators and their generally competitive procedural relationship is the following: Senator Byrd stated that he was on Senator Allen's side with respect to opposing majority cloture. He then added: "But I also carry other responsibilities, one of which is to get urgent legislation disposed of." The urgent legislation at the time was financial legislation to bail out the troubled Penn Central and other railroads. The Penn Central bill was blocked by Senator Allen, perhaps to encourage the Mondale-Pearson duo to drop their attempt to revise Rule XXII. Referencing the ongoing filibuster reform struggle, Senator Byrd said to Senator Allen during the Penn Central debate, "The leadership does not want this thing to develop in an all-out struggle as to who knows most about the rules and who can utilize the rules to the fullest extent. We can all play that game, and I hope we will not get into that business." Both Senators remained deeply involved in "that business." *Ibid*., February 21, 1975, p. 3928.

Mansfield endorsed Mondale's statement. He received unanimous consent that, "notwithstanding any delay in the consideration of this resolution, all proceedings, rights and privileges concerning the effort to change rule XXII … be reserved, so that proponents of such a change not be prejudiced in any way in the actual commencement of the consideration of this resolution."[217] Mansfield's goal was to assure the reformers that their "opening day" status would be preserved even though an adjournment would end the first day. The Senate adjourned on January 14 so S. Res. 4 would comply with chamber rules,[218] thus enabling the measure to be considered on the next legislative day. On January 16, Majority Whip Byrd received unanimous consent for the Senate to proceed the next day to the consideration of S. Res. 4 at the conclusion of morning business.[219]

On January 17, under the aforementioned unanimous consent agreement, the Chair presented S. Res. 4 to the Senate.[220] "Debate on this resolution," he said, "may continue until the close of business today or the hour of 6 p.m., whichever is earlier." When debate concluded on S. Res. 4, the resolution was placed on the Calendar of General Orders where it could be called up by a motion to proceed rather than, as Senator Byrd stated, "come down automatically under the rule [Rule XIV] and would remain before the Senate until the morning hour had expired."[221]

Senator Pearson led off the debate on January 17. He contended that changing cloture from two-thirds of those present and voting to three-fifths of those present and voting would strike a better balance between the right to debate and the right to decide. He cited Senator Henry Cabot Lodge's, R-MA, well-known observation, "To vote without debating is perilous, but to debate and never vote is imbecile."[222]

Other Senators joined the debate. Senator Mondale pointed out that repeated use of the filibuster by a small group of Senators had blocked important social, economic, and government reform legislation favored by a large majority of Senators. He also posed the critical question facing the Senate and Vice President Rockefeller: "May a majority of the Members of the Senate of the 94th

[217] *Ibid.*, January 14, 1975, p. 12. Senator Mansfield even expanded on his earlier unanimous consent request preserving the Senate's first day. By unanimous consent, Mansfield stated that "notwithstanding any delay in consideration of [S. Res. 4], all proceedings, rights and privileges concerning efforts to change rule XXII [will] be reserved, so that proponents [will] not be prejudiced in any way in the actual commencement of the consideration of this resolution." p. 11.

[218] Recall that under Rule XIV, paragraph 6, a resolution that is not immediately called up (or referred to committee) will go over, under the rule, to the next legislative day at the end of morning business (see Rule VII). If time permits—before the expiration of the morning hour (a two-hour period that occurs at the start of each new legislative day—the Chair will automatically lay the resolution before the Senate. A new legislative day occurs when the Senate convenes following an adjournment (but not if the Senate recesses) and ends when it next adjourns. Senate Rule V requires a calendar day's notice in writing specifying the rule or part thereof proposed to be amended.

[219] On January 15, the Senate considered a number of matters, particularly the controversy surrounding the New Hampshire Senate election, concerning the seating of Republican Louis Wyman or Democrat John Durkin.

[220] *Ibid.*, January 16, 1975, p. 597. The unanimous consent request propounded by Senator Byrd and agreed to by the Senate stated "that at the conclusion of routine morning business on tomorrow [January 17] the Senate proceed to the consideration of Senate Resolution 4, to amend Rule XXII of the Standing Rules of the Senate, coming over under the rule, and that debate on that matter continue until not later than 6 o'clock p.m. tomorrow; and that no call for the regular order, on tomorrow, displace the resolution." In response to a query from Senator Allen, Senator Byrd added: "Under the request that I have submitted, the resolution would automatically go to the calendar at the close of business tomorrow.... "

[221] *Ibid.*, p. 598.

[222] Senator Henry Cabot Lodge, "Obstruction in the Senate," *The North American Review*, November 1893, p. 527. Senator Lodge added an observation that many of today's Senators might agree with. He said: "The difficulty in the Senate to-day [1893] is that, while the courtesy which permits unlimited debate is observed, the reciprocal courtesy, which should insure the opportunity to vote, is wholly disregarded." *Ibid.*

Congress change the rules of the Senate, uninhibited by the past rules of the Senate?" Mondale also addressed the "continuing body" thesis. He argued that the continuing body debate is not determinative of the constitutional question. The Framers spelled out exactly on what matters a two-thirds vote was to be required, such as overriding a presidential veto. That they did not do so in dealing with the rules of the Senate or House clearly meant "that a majority should be able to do so."[223] Moreover, Senator Mondale noted that the Constitution is replete with protective provisions for the minority, such as our tripartite system of government with its checks and balances; the Bill of Rights; the Civil War Amendments; the judicial branch with its power of judicial review; and the Senate itself with two Members from each state regardless of population.[224] Senator Charles Mathias, R-MD, underscored that fundamental to any parliamentary institution is "a time for debate and a time for decision." He emphasized that the current two-thirds standard for invoking cloture was "so high that debate lingers on even after all that needs to be said has been said, and resaid."[225]

Senator Allen then took the floor and challenged the views of the reformers. For example, he refuted the idea that "a different [parliamentary] situation exists every 2 years, at 2-year intervals, in the continuing Senate." If the Senate is not a continuing body, then it would need to adopt a full set of rules at the beginning of a new Congress. The Senate, he observed, has never followed the procedure of the House in adopting rules at the start of a Congress. Furthermore, said Senator Allen, his reading of the Constitution is that it is the same at the start of a session and during the remainder of the session. In that case, "when in the world does the beginning of a session end?"[226]

Proposals to amend Senate rules, he argued, are subject to the provisions of the existing rules. He contended that the Mondale-Pearson approach was a backdoor or "basement" approach to change. Senator Allen also found it ironic that the reformers would introduce a resolution to revamp Rule XXII yet plan to "follow it up with a cloture motion." The reformers take one part of Rule XXII that they like and discard the part they dislike. The reformers are saying, he said:

> Let us use rule XXII to cut off debate; let us follow that procedure. Let us put in a resolution, follow it up with a cloture motion. Let us use rule XXII to that extent. But, oh, no, let us not use that pernicious two-thirds in there. Let us come forward with something new. Let us reject that, but let us accept this part of it.[227]

Senator Allen also rejected the advisory opinions of Vice President Nixon and the 1969 ruling of Vice President Humphrey. Humphrey's ruling that cloture could be invoked by majority vote "was a precedent for about 15 minutes" before it was overturned on appeal.[228] Reform Senators, exclaimed Allen, are trying to impose a "gag rule" on the Senate.

On January 21, at the conclusion of the morning hour, Senator Mondale offered a motion "that the Senate proceed to the consideration of Calendar Order No. 1, Senate Resolution 4, amending Rule XXII of the Standing Rules of the Senate with respect to the limitation of debate." After the Vice President directed the clerk to report the resolution to the Senate, the Chair said: "The question is on agreeing to the motion of the Senator from Minnesota." Senator Mondale's motion, as expected, was not agreed to as Senator Allen began a lengthy discussion of the merits of Rule XXII. When the Senate adjourned, Mondale's motion to consider fell to be renewed at another time. Recall that under Senate precedents an unacted-upon motion to proceed dies with an

[223] *Congressional Record*, January 17, 1975, p. 762.

[224] *Ibid.*, p. 757.

[225] *Ibid.*, pp. 755-768.

[226] *Ibid.*, February 24, 1975, p. 4115.

[227] *Ibid.*, January 17, 1975, p. 773.

[228] *Ibid.*, pp. 773-776.

adjournment of the Senate. In the days ahead, little floor action occurred on filibuster reform until February 20.

The Vice President's Role

When debate began January 17 on S. Res. 4, reform Senator Javits emphasized the key role of the Vice President in issuing favorable rulings. The reformers wanted helpful rulings from the Chair, specifically that the Senate could amend its rules by majority vote and not be bound by the supermajority requirements of Rule XXII. Senator Javits asked rhetorically: If the Chair made those rulings, would a Senate majority vote to sustain the Chair's decisions and not "shrink" from supporting the presiding officer—whose pronouncements would certainly be appealed—as Senate majorities have done in the past?[229] Vice President Rockefeller, according to one account, "surprised everyone, including President Ford, with a series of rulings" that favored the Mondale-Pearson initiative.[230] His decisions and the actions of various Senators ultimately shaped the eventual outcome. Key proceedings occurred on February 20, February 24, February 26, February 28, March 3, March 5, March 6, and March 7.

February 20

The previous day, February 19, Senator Byrd received unanimous consent that a reform proponent was to be recognized the next day to call up S. Res. 4. Accordingly, Senator Pearson offered a motion similar to the one supported by the reformers in 1969: a compound, or multi-part, motion. It stated:

> I move that the Senate proceed to the consideration of Calendar item No. 1, Senate Resolution 4, amending rule XXII of the Standing Rules of the Senate with respect to limitation of debate; and that under article I, section 5, of the U.S. Constitution, I move that debate upon the pending motion to proceed to the consideration of Senate Resolution 4 be brought to a close by the Chair immediately putting this motion to end debate to the Senate for a yea-and-nay vote; and, upon the adoption thereof by a majority of those Senators present and voting, a quorum being present, the Chair shall immediately thereafter put to the Senate, without further debate, the question on the adoption of the pending motion to proceed to the consideration of Senate Resolution 4.[231]

To summarize: Senator Pearson's compound motion would establish a unique cloture procedure to bring S. Res. 4 to the floor. Three parts formed the essence of the compound motion: (1) the Senate would consider a motion to proceed to S. Res. 4; (2) the Chair would immediately end debate on the motion to proceed and submit to the Senate the question of ending debate on the motion to proceed by majority vote; and (3) upon approval of that question, the Senate would, without further debate, vote immediately on adoption of the pending motion to proceed to S. Res. 4.

Senator Pearson stressed that his compound motion, if adopted, would not apply to subsequent attempts to invoke cloture by majority vote. He implied that his motion, if approved, would only be in order at the start of a Congress when the Constitution authorizes the Senate to create its rules by majority vote. As Senator Mondale put it, under the Constitution, "at the beginning of a Congress, and on questions affecting the rules alone, the majority has the right to determine its

[229] *Ibid.*, p. 769.

[230] Finlay Lewis, *Mondale: Portrait of an American Politician* (New York: Harper & Row, 1980), p. 217.

[231] *Congressional Record*, February 20, 1975, p. 3835.

own rules."[232] As for the 1959 rules change (mandating the continuity of Senate rules), Senator Mondale called it "bootstrap language. It cannot bind future Senates; the Constitution prohibits it."[233]

Majority Leader Mansfield was recognized. He declared that the Pearson motion seeks "to destroy—let me repeat, is to destroy—the very uniqueness of this body; to relegate it to the status of any other legislative body, and to diminish the Senate as an institution of this Government." To invoke cloture by a simple majority vote, as contemplated by the Pearson motion, "would alter the concept of the Senate so drastically that I cannot under any circumstances find any justification for it."[234] The majority leader stated that he would make a point of order that Pearson's motion is out of order, but would withhold to allow further Senate debate on the matter.

Later in that day's debate, the majority leader received unanimous consent to permit the Vice President to make a statement relative to the Mansfield point of order. Vice President Rockefeller noted that he had reviewed the past history of the issue and would be guided by those precedents. The gist of his statement, periodically repeated to the Senate in the days ahead, was that if a motion to table the Mansfield point of order prevailed, the Vice President would interpret that senatorial decision as approval of the compound motion. The Vice President also observed that the procedure by which the rules may be amended is a constitutional question, and all Presidents of the Senate save one (Vice President Humphrey) had submitted the question to the Senate for debate and determination. Accordingly, the Vice President declaimed: "the Chair submits to the Senate the question: Is the point of order made by the Senator from Montana well taken? The question is debatable."[235]

Senator Javits was recognized and explained his view of the parliamentary matter. Senator Javits's basic point was that the Constitution "stands on the [Senate] landscape bigger, more solidly than any declaration of any kind, whether contained in the rules or whether contained in our fears or our prejudices." The reform effort, he argued, "has been constantly frustrated by importing into the argument fears and concerns that a majority could do this, do that, or do the other…. But [majority rule] is the essence of Government and the essence of this Constitution, and the fact that our people have confidence in the way in which the form has been declared."[236] Senator Edward Kennedy, D-MA, added, "There has been a great deal of discussion about the rights of the minority, and very little about the rights of the majority."[237]

Senator Javits also addressed a series of parliamentary questions to the Chair designed to elicit from the Vice President how he might rule on several critical issues. The Vice President's responses aroused considerable controversy. Javits asked, if Mansfield's point of order was tabled, "would it be a decision by the Senate to affirm the propriety of the motion to end debate which has been offered by Senator Pearson?" Vice President Rockefeller answered, "Yes." He elaborated:

> The point of order raised by the Senator from Montana challenges the propriety of the motion offered by the Senator from Kansas. [I]f the point of order raised by the Senator from Montana is tabled, the Chair would be compelled to interpret that action as an expression by the Senate of its judgment that the motion offered by the Senator from

[232] *Ibid.,* p. 3847.

[233] *Ibid.,* p. 3844.

[234] *Ibid.,* p. 3836.

[235] *Ibid.,* p. 3837.

[236] *Ibid.,* p. 3838.

[237] *Ibid.,* p. 3847.

> Kansas to end debate is a proper motion. Therefore, since the motion offered by the Senator from Kansas to end debate provides that it shall be immediately put to the Senate for a yea-and-nay vote the Chair would be compelled to abide by such requirement, the Senate having determined the requirement to be a valid one.[238]

In response to questions from other Members, the Vice President reiterated that tabling the Mansfield point of order meant that the Pearson motion to proceed would be before the Senate for an immediate vote by a majority without any additional debate.

Senators Allen, Byrd, and Thurmond, among others, challenged the views of the Chair. Senator Allen, for example, declared, "A mere motion could not say that it is not going to be debatable. The motion to table is not decisive of another, it is an entirely different point."[239] Senator Thurmond acknowledged that a majority can change Senate rules. "But it is not clear that one Senator can make a motion and embody in that motion provisions that cut off debate." He added that Senate rules "mean nothing if a Senator can send up a motion that, in itself cuts off debate, and that is what is being done here."[240] Senator Byrd went on at some length to contest the probable ruling of the Chair and to urge Senators to sustain the majority leader's point of order. Among Senator Byrd's observations are the following:

- "This motion is self-executing, and the Chair is interpreting the motion of the Senator from Kansas to mean that if this point of order … is tabled the motion to shut off debate is self-executing, and the motion, which would, in any other instance, be debatable once the point of order is laid to rest, is, indeed, not debatable by virtue of the Senate in tabling the point of order in this instance. I must say that I have to disagree."[241]
- "We are today operating by the rules of the Senate, which rules and precedents provide that a motion before the Senate, against which a point of order has been made and tabled, remains before the Senate and is debatable. I cannot for the life of me understand how, in this instance, the motion, if the point of order is tabled, will not still be before the Senate and will not be debatable. I cannot understand that. I cannot understand how the Chair can logically state that the Senate, by this motion, and by virtue of its tabling a point of order, which is a separate matter, ipso facto shuts off debate on the motion of the Senator to close debate by a majority vote."[242]
- "[I]t is not a rule of the Senate that a motion to close debate must be immediately put to a vote, without debate. Beyond that, which is even more dangerous, it is not the rule of the Senate that 1 Senator can dictate his own terms by which the Senate will close debate and if he got 51 Members to back him up, immediately gags the other 49."[243]

To be sure, Senators Mondale and Pearson disagreed with the "frightening" procedural picture painted by their opponents. Senator Pearson acknowledged that his motion incorporated a

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[238] *Ibid.,* The quoted material represents a clarification of the response that the Vice President provided to Senator Javits earlier in the debate. For the Vice President's shorter response to Javits, see pp. 3839-3840.

[239] *Ibid.,* p. 3840.

[240] *Ibid.*, pp. 3846-3847.

[241] *Ibid.*, p. 3842.

[242] *Ibid.*

[243] *Ibid.*, p. 3845.

provision to end debate, but that was by design. Its purpose, he said, was to raise the constitutional right of the Senate to amend its rules by majority vote at the start of a new Congress. Our opponents "talk about disregarding rules; I submit that we could very well disregard provisions of the Constitution."[244] The Pearson motion was "borne within the Constitution" and would be decided by majority vote. Senator Mondale emphasized that there was no precedent being established "that would give a Presiding Officer the authority to rule except where article I, section 5, is involved…. Beyond that, on other issues, the general rules of the Senate prevail."[245]

Soon thereafter, Senator Mondale said: "Mr. President, I move to lay on the table the point of order raised by the distinguished Senator from Montana, and I ask for the yeas and nays."[246] The Senate agreed to the tabling motion by a 51 to 42 vote, thus rejecting Mansfield's point of order and upholding Pearson's compound motion. The effect of the vote was seemingly to establish, at least temporarily, an authoritative Senate precedent that at the start of a Congress a majority could terminate debate on a rules change without being bound by Rule XXII's supermajority requirement.[247] Senate reformers appeared to have won the day, but they were foiled by the parliamentary shrewdness of Senator Allen.

Immediately after the vote, Senator Allen was recognized by Vice President Rockefeller. He asked for a division of Senator Pearson's motion, noting that the first part of the motion simply asked that the Senate proceed to consider S. Res. 4. Since that part made no reference to a constitutional question, said Senator Allen, it was therefore debatable. The Vice President agreed that the motion is both divisible and debatable. Following the decision of the Chair, Senator Allen informed his colleagues:

> [T]he Senator from Alabama would suggest that all Members who would not like to hear a further discourse on this subject may retire to their office. The Senator from Illinois can go to Mandalay, where, I believe, the plane is waiting for him. The Senator from Oklahoma can go to Vietnam, because the Senator from Alabama will be discussing this motion, since the Chair, in its wisdom, has ruled that the first section of this motion is debatable.[248]

Senator Allen held the floor that day until the Senate adjourned. The Senate's adjournment killed the motion to proceed to S. Res. 4, and returned the resolution to its place on the Calendar of General Orders. Senate GOP Whip Robert Griffin, MI, observed that proponents "had the opportunity ... to challenge the motion to adjourn, and could have insisted instead upon a recess in order to keep their motion before the Senate."[249] However, Senate reformers, surprised by the sudden turn of events, needed to regroup and plan their next procedural move.

Despite having been thwarted by Senator Allen's procedural maneuver, reformers did win two meaningful goals. First, the successful 51 to 42 tabling of Mansfield's point of order arguably represented Senate acceptance of the theory that a simple majority rather than two-thirds could cut off a filibuster against a rules change at the start of a new Congress. It bears repeating that the procedural reality is that a majority of the Senate can change its rules on the first day or the last

[244] *Ibid*., p. 3843.

[245] *Ibid.*, p. 3847.

[246] *Ibid*., p. 3854.

[247] It might be an open question whether anything in the Pearson motion itself or statements by the Vice President would limit the effect of this precedent to the beginning of a Congress. Statements by the proponents mentioning the beginning of a Congress do not create a precedent.

[248] *Congressional Record*, February 20, p. 3855.

[249] *Ibid*., February 21, p. 3925.

day of a session. What troubles reform advocates is that it can require a supermajority to get to a vote on an amendment to the Standing Rules of the Senate. Hence, the reformers' advocacy of the constitutional option.

Second, Vice President Rockefeller's ruling bolstered the legitimacy of the constitutional option, long advocated by anti-filibuster Senators. According to one account, the new precedent was "the first time the Senate and its presiding officer ever simultaneously accepted" the constitutional option.[250]

What happened over the next few days was a concerted effort by opponents of S. Res. 4 to reverse the Senate's decision to table Majority Leader Mansfield's point of order. Senator Allen dominated debate and castigated the reformers' effort to change Rule XXII. Although he permitted interruptions in his discourse, he ensured that he would regain the floor and that his subsequent speeches would not count under the Senate's "two-speech rule."[251]

February 24

The procedural battle resumed with particular intensity on this day. Almost as soon as it began, Senator Allen sent a four-part motion to the desk and asked for its division. The first part was a motion to proceed to S. Res. 4. The second part declared an end to the "beginning" of the 94th Congress, which meant, as Senator Allen made clear, that debate "may continue until brought to an end as provided by the provisions of Senate Rule XXII." The third part directed the Vice President to submit any question of order to the Senate for decision. And the fourth part stated "that the question submitted be the direct question and not on a motion to table."[252] With Senator Allen's request that his motion be divided, the first part (the motion to proceed) was pending before the Senate.

Before Senator Allen had a chance to speak on his motion, Senator Mondale was recognized by the Chair. Citing the Constitution, he offered a compound motion designed to trump Senator Allen's.

> Under article I, section 5, of the U.S. Constitution, I move that debate upon the pending motion to proceed to the consideration of Senate Resolution 4 be brought to a close by the Chair by immediately putting this motion to end debate, without debate and with no intervening motions and without amendments to the Senate for an immediate vote; and upon adoption thereof, by a majority of those Senators present and voting, a quorum being present, the Chair shall immediately thereafter put to the Senate, under article I, section 5,

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[250] Spencer Rich, "Filibuster Reform Set Back," *The Washington Post*, February 21, 1975, p. A1.

[251] Senate Rule XIX states that "no Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate."

[252] *Congressional Record*, February 24, 1975, p. 4108. A likely reason for the fourth part of Senator Allen's motion was that Senators often find it easier to defeat a proposal on a procedural vote (the motion to table) because that decision—unlike a direct vote—is not on the merits of a proposition. The text of Senator Allen's four-part motion is as follows:

> I move that the Senate proceed to the consideration of S. Res. 4.
>
> And I further move that the "beginning" of the 94th Congress have now ended and no constitutional question now existing, if in fact one ever existed, debate on this motion may continue until brought to an end as provided by the provisions of Senate Rule XXII.
>
> And, I further move that the Vice President submit directly to the Senate any question of order presented by this motion as he is empowered to do under Rule XX and other provisions of Senate Rules and other provisions of the Senate Rules, and under his general powers as Presiding Officer of the Senate; and that the question submitted be the direct question and not on a motion to table.

> of the U.S. Constitution, without further debate and without intervening motions and without amendments, the question on the adoption of the pending motion to proceed to the consideration of Senate Resolution 4 for an immediate vote.[253]

In a replay of February 20, Majority Leader Mansfield immediately raised a point of order against Mondale's compound motion stating that it was out of order. (Recall that the thrust of Mondale's motion was to supplant completely Senator Allen's motion, part 1 of which was pending before the Senate.) Senator Mondale moved to table the Mansfield point of order. Senator Allen then entered the fray. My point of order, said Senator Allen, is "that the whole resolution is out of order, which would supplant the point of order as to the motion to lay on the table."[254] The Chair ruled that Allen's point of order was not in order. Senator Mondale then said, "Regular order, Mr. President," which was the motion to table Mansfield's point of order. Senator Allen suggested the absence of a quorum, which was "live."[255] Once a quorum was established, an array of procedural actions came fast and furious—for example, points of order, appeals, motions to table, votes to reconsider chamber actions, requests for the yeas and nays—as each side sought to parry the objectives of the other.

As the parliamentary maneuvers continued, the majority leader became frustrated with the proceedings. He inquired of the Vice President: "[I]s there a rule covering dilatory tactics in the Senate?" The Chair responded: "Only after cloture has been invoked." So a Senator, asked Mansfield, can keep suggesting the absence of a quorum or making a motion to recess to a certain time or adjourn ad infinitum? Correct, said the Vice President, so long as business has intervened between quorum calls, such as votes on motions to recess. "[W]hat is the value of a tabling motion which forecloses debate if it allows the continuation of tactics of a dilatory nature," said Mansfield. The Chair replied: "The proper motions can be entertained, not debated, if there has been intervening business."

Senator Allen even forced a vote to table part 1 of his own compound motion (to proceed to the consideration of S. Res. 4), which the Senate rejected by a vote of 38 yeas to 49 nays. After further delaying tactics, the Vice President submitted the critical question to the Senate: the motion to table the majority leader's point of order that Senator Mondale's motion, whose terms invoked the Constitution, was not in order. For the *second* time, the Senate upheld the legitimacy of the compound motion—to close debate immediately on the motion to proceed to S. Res. 4 and, thereafter, the Senate would vote immediately on the pending motion to proceed.[256] The vote on the tabling motion was 48 to 40.[257] Unsurprisingly, after voting on the prevailing side as Senate Rule XIII requires, Senator Allen became eligible to offer a motion to reconsider; he moved to reconsider that vote. By the same 48 yeas to 40 nays, Allen's reconsideration motion was tabled.

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[253] *Ibid*.

[254] *Ibid*.

[255] First, the U.S. Constitution states that "a Majority of each [House] shall constitute a Quorum to do Business." A quorum in the Senate is always technically present until official notice reveals otherwise. Regularly, Senators suggest the absence of a quorum not actually to require the presence of a quorum but to allow Members to engage in private discussions, to allow a Senator slated to speak additional time to reach the floor, and for other purposes. Once the reasons for the quorum call are met, it is dispensed with by unanimous consent. A "live" quorum call means that the Senator who asked for it will object to any unanimous consent request to dispense with it. He or she wants at least 51 Senators to come to the floor, which can sometimes consume considerable time.

[256] It is open to question whether there is anything in the text of the Mondale motion and points of order against it that clearly establish these as just "new Congress" or "opening day" precedents.

[257] *Congressional Record*, February 24, 1975, p. 4114.

Following the tabling of Mansfield's point of order, Senator Harry Byrd of Virginia made a negative comment about the Vice President's role as presiding officer, which reflected the view of Senators who opposed amending Rule XXII. Senator Harry Byrd stated: "I want to protest the rapidity with which the Chair is putting these questions and refusing to recognize some of us who have been seeking recognition."[258] (Two days later, this issue prompted angry Senate debate.) Several times, for example, Senator Allen had sought recognition but did not receive it from the Vice President. The Senate recessed on February 24 and continued to do so until March 3. This meant that both the Allen and Mondale motions to proceed to S. Res. 4 remained the Senate's pending business. As Senate precedents state: "A motion to proceed to the consideration of a matter, if unacted upon, dies with an adjournment of the Senate."[259]

The next day (February 25) there were various motions to postpone—for a day, week, or month—to table, and other dilatory tactics on Mondale's motion to end debate on Senator Allen's motion to proceed to S. Res. 4. Most of the day's debate was dominated by opponents of S. Res. 4, led by Senator Allen. As reform Senator Mathias pointed out, "it is worthy of note at this time that on no less than 27 occasions the Senate has been effectively prevented from voting on the Mondale motion through the use of quorum calls, and similar parliamentary practices."[260]

Control of the floor seesawed between proponents and opponents of filibuster reform. When motions were made or votes were taken, Vice President Rockefeller had some leeway in recognizing the first Senator whom he believed was seeking the floor. As a journalistic account noted, each time the Vice President "put the question to the Senate whether debate shall be cut off right away, Senator Allen and his allies move in with privileged motions, such as motions to recess or postpone action, or with quorum calls. Mondale and his allies then jump in with successful votes to table these intervening motions. But Senator Allen and his allies immediately rise and offer new delaying tactics."[261]

February 26

This was a fateful day for the Senate and the Vice President.[262] Not only were many Senators frustrated by the parliamentary maneuvers, but certain actions of the Vice President dramatically altered the mood of the Senate. Many lawmakers, anxious to move on to other business, supported private negotiations among proponents and opponents that could lead to a compromise acceptable to both sides. Senator Russell Long, D-LA, for example, suggested that the threshold

[258] *Ibid.*, p. 4115.

[259] Floyd M. Riddick and Alan S. Frumin, *Senate Procedure* (Washington, D.C.: U. S. Govt. Print. Off., 1992), p. 657.

[260] *Congressional Record*, February 26, 1975, p. 4369.

[261] Spencer Rich, "Senate Stalled On Filibusters," *The Washington Post*, February 26, 1975, p. A5.

[262] Worth mention is that on February 25, Senator Byrd received unanimous consent to allow the chamber on February 26 to consider cloture on an unrelated matter—a motion to agree to a House amendment to a Senate bill, the Penn Central railway measure (S. 281). Following disposition of the clotured matter, the Senate would resume its consideration of the motion to proceed to S. Res. 4 (p. 4226). On February 26 cloture was invoked on the motion to agree to the House amendment to the Senate bill. Senator Allen then raised a point of order that Rule XXII was not in effect. As he said: "I make the point of order that rule XXII not being in full force and effect, the procedure under rule XXII improperly limits the right of the Senator from Alabama to debate this question." The Chair overruled the point of order. Allen appealed the ruling and Mondale moved to table the appeal. The Senate voted 92 to 0 to table the appeal of Senator Allen. Allen deliberately raised the point of order, he said, to have the Senate go on record that Rule XXII is in effect and applies to S. Res. 4 (pp. 4353-4354). Senator Mondale immediately disputed Senator Allen's contention, and asserted that the Senate, under Article I, section 5 of the Constitution, has the right to change Senate rules by majority vote at the beginning of a Congress (p. 4354). The Senate did vote (62 to 30) for the motion to concur in the House amendment to the Penn Central bill (p. 4367).

to invoke cloture be reduced to three-fifths of those chosen and sworn (60 of 100) rather than the current two-thirds of those present and voting. The triggering event that produced this outcome concerned the Vice President's authority and duty under Senate rules and precedents to "recognize the Senator who shall first address him."[263] In the judgment of many Senators, this did not occur.

When the Senate resumed consideration of the motion to proceed to S. Res. 4, the pending question was a motion by Senator Allen to postpone consideration of the Mondale resolution for a month. GOP Senator Charles Mathias, MD, after noting the numerous dilatory actions of the opponents of S. Res. 4, moved to table Senator Allen's motion to delay consideration of S. Res. 4 by one month. Senator Mathias' tabling motion was successful: 57 yeas to 34 nays. Majority Leader Mansfield, who wanted to expedite Senate action, quickly renewed a motion he had made previously, albeit unsuccessfully. He said: "I make the point of order that the pending [compound] motion by the Senator from Minnesota is out of order, insofar as it precludes debate, intervening motions, and amendments."[264] The Vice President responded: "This being a constitutional question the Chair will submit to the Senate for debate and determination the question: 'Is the point of order raised by the Senator from Montana well taken?'" What happened next is what aroused the anger of many Senators.

As soon as the Vice President submitted the constitutional question to the Senate, Senator Allen and reform Senator Edmund Brooke, R-MA, both sought recognition from the Chair. No doubt by prearrangement, Vice President Rockefeller recognized Senator Brooke, who moved to table Mansfield's point of order. Without delay, Senator Allen tried to get recognized by the Chair. Three times in rapid succession, he said, "Mr. President, a parliamentary inquiry." Each time the Vice President chose to ignore Senator Allen's request. Instead, the Vice President directed the Clerk to call the roll. The Senate agreed to table Mansfield's point of order by a vote of 46 to 43, the *third* time that a Senate majority implicitly upheld the principles embedded in the constitutional option. As soon as the vote was announced, Vice President Rockefeller stated:

> The Senate having voted to table the point of order questioning the propriety of the motion of the Senator from Minnesota, insofar as it precludes debate, intervening motions, and amendments, thereby affirming the propriety of the motion in this regard, the motion is now to be put to the Senate for an immediate vote. The question now is on the motion of the Senator from Minnesota [to end debate and vote on the Allen motion to proceed to S. Res. 4].[265]

An angry Democratic Senator Long was recognized to comment on "what the Chair did a few minutes ago." Senator Long castigated the Vice President for not recognizing Senator Allen, who was "standing on his feet making a parliamentary inquiry, and he made it three times before the first name was called and answered on that roll." He continued: "The Presiding Officer presides over the Senate…. [H]e does not own this body. I have never in my life seen it happen in the Senate that a man can be standing trying to seek recognition, for whatever purpose, and the Chair can just go right on ahead and say, 'The yeas and nays have been ordered and the clerk will call the roll,' call the roll—tell the clerk, 'Call the roll'." Senate reformers, declared Long, were wasting their time trying to change the cloture rule. "[Y]ou have one-man cloture right now."[266]

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[263] Under Senate precedents, the two party leaders and the two committee floor managers are accorded preferential recognition by the presiding officer.

[264] *Congressional Record*, February 26, 1975, p. 4370.

[265] *Ibid.*

[266] *Ibid.*, pp. 4370-4371.

Senator Long ended his strong criticism of the Vice President's action by noting that a bipartisan group of lawmakers was working behind-the-scenes to fashion a compromise on amending Rule XXII.

For the remainder of the day, various Senators took the floor to rebuke the Vice President. There were also Members who defended the Chair and supported his actions. The Vice President apologized to Senator Allen for any unintended discourtesy, but observed that he applied "the parliamentary procedures to the best of my ability."[267] He also stated that "Senate rules don't require the presiding officer to recognize a senator for the purpose of making a parliamentary inquiry—it's discretionary."[268] Senator Long rejected that contention. He cited a Senate precedent that every Senator "has a right to recognition [for any purpose whatsoever] before the Senate acts on an issue."[269] Majority Whip Byrd added, "[W]hile the Chair was under no obligation to respond to the parliamentary inquiry, I think the Chair is always under an obligation to recognize a Senator who is seeking recognition."[270]

At day's end, Majority Leader Mansfield recessed the Senate and encouraged Senator Long to work with party and reform leaders to replace the current version of Rule XXII (two-thirds of those present and voting) with a "constitutional" three-fifths of 100 Senators. (Recall that the Mondale/Pearson plan recommended cloture by three-fifths of those present and voting.)

February 28

Majority Whip Byrd, on behalf of himself; the majority leader; the minority leader, Hugh Scott of Pennsylvania; and the minority whip, Robert Griffin, introduced a resolution (S. Res. 93) that was the product of the private negotiations. (Senator Byrd also filed at the desk a complete substitute amendment embodying the text of S. Res. 93, which he intended to offer to S. Res. 4.) The compromise that emerged from these negotiations consisted of three intertwined elements: (1) three-fifths of the Senate present and sworn (60 of 100) would be required to invoke cloture; (2) a two-thirds vote of those present and voting would continue as the requirement to invoke cloture on a proposed rules change; and (3) the Senate would reverse the three precedents established earlier that a majority could change Senate rules at the beginning of a Congress. Byrd submitted the required notice of his intent to amend Senate rules. He also asked unanimous consent for the resolution's immediate consideration. Senator Allen objected, and S. Res. 93 went over under the rule. Senator Byrd then explained the impetus for S. Res. 93:

> I personally think that we have arrived at the point where the Senate is looking bad, and we are in a parliamentary morass. I realize there is a determined effort on the part of some Senators to change the rules so as to provide for the invoking of cloture by less than two-thirds of those present and voting. It seems to me that the resolution which has now been introduced, and which would provide for invoking cloture by a constitutional three-fifths on all matters other than a change in the rules, is the proper way to proceed.[271]

Senator Griffin concurred with Byrd's statement, but emphasized the importance of reversing the February 26 vote (51 yeas to 42 nays) tabling Senator Mansfield's point of order directed at Mondale's compound motion. Senator Roman Hruska, R-NE, entered a motion to reconsider the

[267] *Ibid*., p. 4372.

[268] Spencer Rich, "Filibuster Compromise Eyed," *The Washington Post*, February 27, 1975, p. A10.

[269] *Congressional Record*, February 26, 1975, p. 4901.

[270] *Ibid.* , p. 4902.

[271] *Ibid*., February 28, 1975, p. 4818.

February 26 vote to table Mansfield's point of order against the compound motion.[272] The majority leader received consent that the reconsideration vote would occur on Monday (March 3) at a propitious time, which turned out to be 4 p.m.[273] Senator Mondale announced that he would vote against the motion to reconsider, but if the motion was agreed to, he would support S. Res. 93, "which I think is substantially sound."[274] Senator Allen remained adamant in his opposition to any change to Rule XXII, and declared his intent to try to defeat the joint leadership compromise.

March 3

At 4 p.m., the Senate held important votes back-to-back. As the presiding officer stated: "The hour of 4 p.m. having arrived, the Senate will now proceed to vote on the motion by the Senator from Nebraska to reconsider the vote by which the Senate tabled the Mansfield point of order against part 1of the Mondale motion to close debate on the Allen motion to proceed to Senate Resolution 4." First, by a vote of 53 yeas to 38 nays, the Senate agreed to reconsider the [February 26] vote by which the Senate laid on the table the Mansfield point of order. Next, with Mansfield's point of order the pending question, the Senate reversed its earlier action and rejected the motion to table Mansfield's point of order by a vote of 40 yeas to 51 nays.[275] Significantly, the Senate did not then vote to sustain Mansfield's point of order, which became a source of debate and controversy during the next two days. Nonetheless, the two successful reversal votes seemed to signal that Senators amenable to reform were inching closer to adoption of the filibuster compromise: cloture by a three-fifths vote of the Senators duly chosen and sworn (60 of 100).

Senator Byrd filed a cloture motion to end debate on Senator Allen's pending motion to proceed to the consideration of S. Res. 4. The Senate then adjourned for five minutes by a 44 to 15 vote insisted upon by Senator Allen. As Senator Byrd said, it was "the desire of the leadership of the Senate to have the resolution [S. Res. 93] ... come over under the rule. Only an adjournment would initiate that procedure."[276]

With the start of a new legislative day (March 4) following the previous day's adjournment, a two-hour period (called the "morning hour") occurred at the session's start for the conduct of typically routine business (reference of measures to committees, for instance). Senator Allen and his allies wanted to run out the clock on the two-hour period to prevent the presiding officer from automatically laying the joint leadership reform resolution (S. Res. 93) before the Senate. They succeeded through a variety of dilatory actions. For instance, Senator Allen proposed an amendment to the Senate's *Journal* (the official record of Senate actions) to include the Lord's Prayer. The Senate tabled Allen's prayer amendment.[277] Using a different dilatory tactic than usual, a number of pro-filibuster Senators would ask, after a roll call vote, "Mr. President, how is the Senator from North Carolina [Jesse Helms] recorded, please?"

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[272] The purpose of a motion to reconsider is to allow a legislative body to review its decision on a proposition. To table the motion to reconsider prevents any future attempt to undo the chamber's decision on a specific motion or matter. In the Senate, any Senator who voted on the prevailing side or who did not vote is eligible that day or the next two session days to offer the reconsideration motion.

[273] *Congressional Record*, February 28, 1975, p. 4821.

[274] *Ibid.*

[275] *Congressional Record*, March 3, 1975, p. 4972.

[276] *Ibid.*, March 5, 1975, p. 5247. Senator Byrd provided other reasons for adjourning the Senate. "For example, the leadership expected an objection to the request to suspend the reading of the Journal—which had been building up for several days. By adjourning for 5 minutes and having the Journal read on Monday evening, the Senate saved a day and cleared the way for morning business on Tuesday to open the door for Senate Resolution 93 to come up under the rule, which did not occur because the opponents were successful in running the clock for the first 2 hours." p. 5247.

[277] *Ibid.*, March 4, 1975, p. 4995.

During the March 4 debate, Senator Allen raised a compelling issue that the Senate formally addressed the next day. The issue was compelling because various Senators had indicated that they would vote for the joint leadership compromise only if previous precedents (February 20, 24, and 26) were reversed. Senator Allen contended that when Senator Byrd adjourned the Senate for five minutes, his action killed the opportunity to reverse the precedent established on February 26 when the Senate tabled the Mansfield point of order against the Mondale-Pearson constitutional option approach to changing the Standing Rules of the Senate.

March 5

The Senate continued with debate on the motion to proceed to S. Res. 4. Senator Allen reminded his colleagues that the Senate voted on March 3 to accomplish two things: (1) it reconsidered the successful February 26 vote (46 to 43) by which the Senate tabled the Mansfield point of order against the pending Mondale motion on grounds that "it precludes debate, intervening motions, and amendments;" (2) upon reconsideration, the Senate then rejected the tabling of Mansfield's point of order (40 yeas to 51 nays). However, Senator Allen pointed out that the Senate did not take the crucial next step: a vote to sustain, or uphold, the Mansfield point of order against the Mondale compound motion. Allen contended that precedents upholding the reformers' objectives were still viable because they had not been reversed.

Senator Allen argued that when Senator Byrd on March 3 filed cloture on the motion to proceed to S. Res. 4 and then adjourned the Senate for five minutes, that action removed the point of order from the floor and prevented the Senate from acting to sustain Mansfield's point of order.[278] As a result, the Mansfield point of order was dead and no longer before the Senate. As Senators Allen and Jesse Helms, R-NC, wrote in their one-sentence "Dear Colleague" letter to all the Members: "Please note from the speech below [by Senator Allen] that the precedent as to majority vote cut-off of debate has not been reversed, and that the last [February 26] Mansfield point of order was never acted on and died with the adjournment of the Senate on Monday, March 3, 1975."[279]

Senator Allen's contention was important because various Senators had committed to vote for the joint leadership compromise only if the earlier precedents legitimizing the Mondale-Pearson initiatives were reversed. The February 26 precedent was *not* reversed, exclaimed Allen, and, therefore, [supporters of the leadership compromise] "are under no obligation to go along with the compromise."[280] Senator Byrd argued that when Mansfield's point of order was untabled, "the Senate reversed its previous vote to table the Mansfield point of order."[281] He also observed that "various interpretations can be placed on what happened, depending upon one's personal point of view, and the cause that one seeks to further." Moreover, even though the adjournment killed the point of order, the anticipated adoption of cloture on the motion to proceed to S. Res. 4 would, as

[278] Senator Byrd explained his reasons for adjourning the Senate. He noted that the Senate did not deal further with Senator Mansfield's point of order [part 2 dealing with Mondale's majority cloture provision] because it was debatable, and the Senate "had shown an inclination to move in a new direction." He also said that "it was desirable in the view of the leadership, that the Senate adjourn so that the machinery could begin moving whereby Senate Resolution 93 would come over under the rule. There were other reasons, as well. For example, the leadership expected an objection to the request to suspend the reading of the Journal—which has been building up for several days. By adjourning for 5 minutes and having the Journal read on Monday evening, the Senate saved a day and cleared the way for morning business on Tuesday to open the door for Senate Resolution 93 to come up under the rule, which did not occur because the opponents were successful in running [out] the clock for the first 2 hours." *Ibid.*, March 5, 1975, pp. 5244, 5247.

[279] *Ibid.*, p. 5243.

[280] *Ibid.*, p. 5245.

[281] *Ibid.*, p. 5247. The second Byrd quotation in this paragraph can also be found on page 5247.

Rule XXII states, make the motion to proceed to S. Res. 4 the "unfinished business to the exclusion of all other business until disposed of." Minority Whip Robert Griffin of Michigan viewed Senator Allen's observations as "a highly technical kind of argument. In terms of substance and intent, the Senate has done what is necessary to reverse—very emphatically and dramatically—the action taken earlier."[282]

Nonetheless, several Senators recommended that the Senate vote to sustain Mansfield's point of order. For example, Senator Carl Curtis, R-NE, received unanimous consent that prior to the pending cloture vote to close debate on the motion to consider S. Res. 4, the Senate would vote to sustain Mansfield's point of order, which it did by a 53 to 43 vote. Senator Byrd also received unanimous consent that this vote be recorded in the permanent *Congressional Record* of March 3 so that the March 5 vote "will appear as part of the entire March 3 proceeding."[283] Worth mention is that Senator Byrd, in his multi-volume history of the Senate, cited a report of the Committee on Rules and Administration that the March 5 action "erased the precedent of majority cloture established two weeks before, and reaffirmed the 'continuous nature of the Senate rules'."[284] The March 5 vote did not address the precedents of February 20 and February 24—which ostensibly upheld the right of a majority of Senators to adopt new rules at the beginning of a Congress. On the other hand, the Senate's March 5 vote sustaining the February 26 point of order was the last and, therefore, the controlling precedent.

After the vote to sustain Mansfield's point of order, the Senate invoked cloture (73 to 21) on the motion to proceed to S. Res. 4. Senator Allen was recognized and, under post-cloture procedures, had one hour to discuss issues involving S. Res. 4. Other Senators (Strom Thurmond of South Carolina and Republican Jesse Helms of North Carolina) joined Allen in criticizing the entire filibuster reform effort. When Senator Allen yielded back his remaining time and no other Member sought recognition, the Chair put the question on the motion to take up S. Res. 4. The motion was agreed to by a 69 to 26 vote. Senator Byrd then submitted S. Res. 93 as a complete substitute for S. Res. 4. He received unanimous consent that the complete substitute amendment (the text of S. Res. 93) be agreed to and considered as original text for the purpose of further amendment. Senator Byrd then submitted a cloture motion to end debate on S. Res. 4, as amended.[285]

March 6

Senator Byrd filed another cloture motion to end prolonged debate on S. Res. 4, as amended. Senator Allen asked Byrd if there is "any feeling that the [first] cloture motion will not carry." Senator Byrd responded: "Just a bit of insurance, I always like to have another cloture motion in my pocket. As a matter of fact, I have two or three more lying around my desk."[286] The Senate considered a number of other amendments and motions before it adjourned.

March 7: The Finale

An hour after the Senate convened on this day, Vice President Rockefeller put this question to the membership: "Is it the sense of the Senate that debate on Senate Resolution 4, as amended,

[282] *Ibid.*

[283] *Ibid.*, p. 5251.

[284] Robert C. Byrd, *The Senate, 1789-1989*, vol. II (Washington: U.S. Govt. Print. Off., 1991), p.132.

[285] *Congressional Record*, March 5, 1975, p. 5262.

[286] *Ibid.*, March 6, 1975, p. 5532.

amending rule XXII of the Standing Rules of the Senate with respect to the limitation of debate, shall be brought to a close." The Senate voted (73 to 21) for cloture on S. Res. 4, as amended. Majority Leader Mansfield then took the floor and expressed his dismay at the parliamentary turmoil that had enveloped the floor during the past weeks. "Here we have a group of grown men, mature men, our constituents think, and we have been acting like schoolchildren…. We cannot allow a minority, a small group of Members, to grab the Senate by the throat and hold it there. It is about time … that we recognize our responsibilities and live up to them, regardless of our particular feelings."[287] Senator Mansfield's plea fell on deaf ears.

Senator John Stennis, D-MS, refuted Mansfield's view of things. "I do not make any apologies, not any, to anyone, under my circumstances," he said, "for doing what I can to keep the Senate a distinctive body."[288] Senator Allen endorsed Stennis's views. Allen and his allies then spent the remainder of the post-cloture period—hour after hour—employing numerous parliamentary maneuvers to stymie expeditious action on S. Res. 4, as amended. For example, Senator Byrd asked unanimous consent that any roll call votes "throughout the remainder of today and this evening and tonight and tomorrow, if necessary, be limited to 10 minutes rather than 15 minutes."[289] Senator Allen objected. Senator Byrd pointed out that during the post-cloture period, dilatory amendments and motions are not in order, "and appeals are not debatable. But delaying tactics are still possible."[290] Senator Allen excelled at offering what many viewed as dilatory amendments, points of order, motions, appeals, and quorum calls.

Despite the plethora of procedural moves and countermoves, both sides knew that the Mondale-Pearson forces had the votes to adopt S. Res. 4, as amended. As GOP Senator James McClure of Idaho, an opponent of S. Res. 4, remarked, "I have been involved in the legislative process long enough to count votes."[291] After 50 days of debate, it was evident to many lawmakers that it was time to stop the parliamentary wrangling and proceed to a final vote on S. Res. 4, as amended. With the end in sight, various lawmakers offered their personal assessment of what had taken place in the Senate. A sampling of the comments of Senator Allen and Senator Mondale underscores the wide gulf between the two sides. In the view of Senator Allen:

> If the idea is prevalent that Members of the Senate will lie down, roll over and play dead to this type of action—unauthorized and not countenanced by the rules—then you can certainly look for that effort to be made.
>
> We have heard a great deal about a compromise in the Senate. The Senator did not participate in any conferences looking to a compromise, because you cannot compromise on principle…. This so-called compromise carried with [it] the idea [that] the precedent set by the Vice President, that you could have majority cloture at the beginning of a Congress with respect to amendment of the rules. The agreement was—as was echoed throughout the Chamber and throughout the cloakrooms—that future rules changes would be governed by the rules; and they cynically put in there that two-thirds would still be the requirement for cutting off debate on a rules change, knowing full well that they would go the majority vote route by just putting in a debate-chokeoff motion, getting a point of order made to it, tabling it, and then you would have a nondebatable, nonamendable, and nonreferrable measure before the Senate.

[287] *Ibid.*, March 7, 1975, p. 5612.

[288] *Ibid.*, p. 5613.

[289] *Ibid.*, p. 5634.

[290] *Ibid.*, p. 5620.

[291] *Ibid.*, p. 5635.

> This is not going to be the proudest day for the gag-rule Senators, starting off as they did operating outside the rules, knowing full well that they were getting the cooperation of the Vice President, cutting off debate in advance, having the Vice President activate a motion that had not even been passed by the Senate. Then that led to the plan to run it the cloture route, inasmuch as the original effort acquired such a terrible smell that they had to turn the management of the bill over to the leadership to handle from there on out.[292]

Senator Mondale's perspective on the proceedings was quite different from Senator Allen's. Mondale stressed the significance of reforming Rule XXII because it "will make the Senate more efficient, more democratic, and more effectual."[293] He added:

> Let no one misunderstand. For the first time in American history, the President of the Senate of the 94th Congress and the membership of the Senate of the 94th Congress have both clearly, unequivocally, and unmistakenly accepted and upheld the proposition that the U.S. Senate may, at the beginning of a new Congress, establish its rules by majority vote, uninhibited by rules adopted by previous Congresses.[294]

Senator Mondale also highlighted the three times (February 20, February 24, and February 26) that a Senate majority tabled points of order against the Mondale-Pearson approach (the compound motion) to revise Rule XXII. These actions, said Mondale, underlined the constitutional right of a majority to modify Senate rules at the start of a new Congress. As for the votes on March 3 (reconsidering and untabling) and March 5 (sustaining Mansfield's point of order), "I caution against giving those actions much significance. Those actions cannot erase the two other affirmative votes on tabling," he contended. "Those actions cannot waive, alter, or undercut the constitutional right which the majority of the Members of the Senate possess."[295] It must be remembered, Mondale stated, that the legislative context surrounding the March 3 and March 5 votes involved private negotiations among Senators Long, Mansfield, Byrd, and others. Their efforts produced a supermajority consensus in support of a joint leadership compromise. Many reform Senators, remarked Mondale, "acted in the interest of compromise and consensus. No [reform] Senator, to my knowledge, abandoned any right."[296]

Several reform Senators acknowledged and endorsed the views of Senator Mondale. A good example was Senator Dick Clark, Democrat of Iowa. "I reluctantly agreed to the joint leadership's request for a compromise," he said. "It was not necessary to compromise. The crucial votes to end debate had been won, and it was possible to move ahead to pass Senate Resolution 4 as originally introduced. But the leadership felt that an explosive situation existed in the Senate, so the proponents of a change in rule XXII have cooperated in their efforts to resolve this dispute."[297] After Senators had their say, S. Res. 4, as amended, was agreed to by a 56 to 27 vote.

Changing Senate Rules: Several Considerations

It appears evident from this discussion that it is usually difficult—barring consensus among Senators as in the 1959 and 1975 cases—to amend Senate rules, especially amendments that affect the chamber's deliberative character. When attempts are made to amend Rule XXII, two

[292] *Ibid.*, pp. 5644-5646.

[293] Ibid., p. 5647.

[294] *Ibid.*, p. 5649. Also see Walter F. Mondale, "The Filibuster Fight," *The Washington Post*, March 18, 1975, p. A16.

[295] *Ibid.*, p. 5649.

[296] *Ibid.*

[297] *Ibid.*, p. 5650.

fundamental values are in conflict: the right to debate versus the right to decide. The two can be reframed as minority protection versus majority rule. To be sure, it can be quite difficult to reach an appropriate balance between these values when the Senate has before it controversial and contentious issues. How long and thorough debate must be is not always clear, partly because today's complex, interconnected, and many-sided issues typically require extensive debate and discussion.

Noteworthy is that even the threat of extended debate—which today might be viewed as a "silent" filibuster—can stall action on various issues. Given a crowded Senate agenda, it may not be practical for majority party leaders to call up measures and spend considerable time (a scarce and precious resource) to try to end an expected talkathon. It is also not easy to determine the goals or motives of a Senator who engages in unending debate: Is it to thwart senatorial action on "bad" ideas or is it to highlight an urgent national issue? Over time Senators can fathom when the purposes of prolonged debate are to educate and inform rather than to block and frustrate legislative issues. As Senator Robert Byrd once said: "I will be able to perceive [a filibuster], because I know one when I see it."[298]

"Opening day" initiatives to amend Senate rules commonly expose sharp divisions between and among Senators. On one side are Members who claim that the Senate, at the commencement of a new Congress, has the right under its constitutional rulemaking authority to amend Senate rules by majority vote, uninhibited by any inherited supermajoritarian rules from previous Congresses. Many of the "majoritarian" Senators do not want to eliminate filibusters but to impose constraints on unlimited debate, such as imposing debate limits on the motion to proceed to legislation. On the other side are Members who contend that initiatives to amend Senate rules at the beginning of a Congress must follow the Senate's existing rules because the Senate is a continuing body. "Minoritarian" Senators emphasize the virtues of extended debate, such as protecting minority views, encouraging bipartisanship and comity, and allowing even one Senator to challenge the agenda of the White House.

If an attempt is made at the start of the 115th Congress (2017-2018) to amend Senate rules by majority vote, what key concerns might Senators on either side of the issue bear in mind? This summary examination of earlier attempts to alter Rule XXII suggests that at least four elements could influence the fate of the constitutional option. They are: the sympathetic support of the presiding officer; the assistance of the majority leader; the mobilization of a determined and united majority; and skillful use of procedural moves and countermoves. Needless to say, Senate champions of change are essential, as are elections that produce an influx of lawmakers supportive of procedural reform.

The Presiding Officer

The historical record indicates that rulings from the Chair can either help or hinder the objectives of Senate reformers. In 1957, 1959, and 1961, Vice President Richard Nixon propounded several advisory opinions that bolstered the cause of the reformers. Nixon said, for example, that "any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying the majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional."[299] Although Nixon's

[298] *Congressional Record*, vol. 129, July 18, 1983, p. 10216. On another occasion, Senate Byrd stated: "[T]here are a lot of Senators here who wouldn't know a filibuster—a lot of people who wouldn't know a filibuster—if they met one on the way home. There are a lot of people who wouldn't know it if they met it in the middle of the road." See *Congressional Record*, vol. 148, November 14, 2002, p. 22209.

[299] *Congressional Record*, January 3, 1957, p. 11.

opinions did not have precedential value, they certainly provided encouragement to and inspired confidence among the reform Senators in what they realized would be an uphill parliamentary struggle.

In 1963, by contrast, Senator Anderson wanted Vice President Lyndon Johnson to submit the cloture reform motion, based on Article I, Section 5, of the Constitution, to the Senate for a vote, but not for debate. That was not to be. Johnson submitted the following question to the Senate: "Does a majority of the Senate have the right under the Constitution to terminate debate at the beginning of a session and proceed to an immediate vote on a rule change notwithstanding the provisions of existing Senate rules?"[300] Johnson's decision assisted the anti-reformers in defeating the Anderson forces. (Constitutional questions, since 1804, are submitted to the Senate for resolution. They are debatable and not decided by presiding officers, unless a presiding officer opts to break this long-standing precedent.)

Vice Presidents Humphrey and Rockefeller, on the other hand, made official rulings that promoted the preferences of the reformers. Take the 1969 case involving Vice President Humphrey, a strong reform supporter. Strategic pre-planning between the Vice President and the reformers created the parliamentary conditions for changing Rule XXII. Briefly, their opening day strategy included the following features:

- Reformers introduced a resolution to reduce the number of Senators required to invoke cloture. A reformer offered a motion to proceed to the resolution.
- Opponents launched a talkathon against the motion to proceed to the proposed change.
- Reformers filed cloture on the motion to proceed to the reform resolution.
- In response to a parliamentary inquiry, the Vice President stated that if a majority, but less than the required two-thirds specified in Rule XXII, voted in favor of cloture, that would constitute invoking cloture on the reform resolution. Furthermore, once cloture was invoked under these circumstances, the debate-limiting prohibitions of Rule XXII would govern floor proceedings.
- An opponent appealed the ruling of the Vice President on the ground that cloture under Rule XXII requires two-thirds of the Senators present and voting to invoke, not a majority.
- Once majority cloture was invoked, an appeal would not be debatable under Rule XXII.[301]
- If the Senate voted down the appeal and sustained the Chair's ruling, this decision would establish a new and binding precedent permitting a majority to amend Senate rules at the opening of a new Congress.

Vice President Humphrey's majority cloture "precedent," however, lasted about 15 minutes before it was overturned on appeal by the Senate. In fact, parliamentarians might contend that the Humphrey precedent was never a precedent because his ruling was rejected on appeal to the Senate.

Important to reemphasize is that the Senate, at any time during the two-year life of a Congress, could circumvent the supermajority requirements of Rule XXII and create a new precedent for

[300] *Ibid.*, January 28, 1963, p. 1214.

[301] The nondebatability of appeals under Rule XXII only arises if cloture has been invoked, not if it has failed.

majority cloture. As then Majority Whip Byrd stated during consideration of the 1975 reform proposal:

> As I have said more than once, at any time a majority of Senators in this body are determined to invoke cloture, if they have the support of the leadership—certainly, if they have the support of the joint leadership—and if they have a friendly presiding officer in the Chair, they can do it. Using the example I cited yesterday in debate, going back to 1969, when a Presiding Officer ruled that at the beginning of a new Congress, a majority of Senators, voting to invoke cloture, could invoke cloture. I wish to say again that in such a situation in the future, if 51 Senators were to vote to uphold the ruling of the Chair, we would have majority cloture.
>
> On that occasion in 1969, fortunately, the Presiding Officer did not apply that provision of rule XXII that says that appeals are not debatable once cloture is invoked. But another Presiding Officer, at another time, in taking the view that a majority can invoke cloture, might invoke the rule, might invoke the rule in its entirety and not allow an appeal to be debatable, in which case an appeal could be made by any Senator against the ruling of the Chair, a motion to table could immediately be made, and 51 Senators could reject the appeal and thus sustain the ruling of the Chair, and we would have majority cloture, which would be a much easier method than the way in which the distinguished Senator from Minnesota and other Senators went about approaching this matter at the beginning of this session.[302]

Note that unlike the requirement of a "friendly presiding officer" referenced by Senator Byrd in the above quotation, on November 21, 2013, the presiding officer ruled according to precedent. He did not uphold Majority Leader Reid's point of order. (The 2013 case is discussed below.)

The Majority Leader

The majority leader is in charge of scheduling the business of the Senate. As a result, his support of (or opposition to) the reformers' objectives could be determinative of the final outcome. The majority leaders discussed in this report—from Taft to Mansfield—were largely helpful in ensuring that reformers had adequate time to make their case for altering Rule XXII. Remember that Majority Leader Taft in 1953 set aside a limited but reasonable period of time for the consideration of Senator Anderson's proposal to revamp all the Senate's rules by majority vote at the start of a new Congress. Alternatively, Taft might have quickly made a motion to table Anderson's resolution with little or no debate.

Majority Leader Mansfield, who supported certain changes to Rule XXII, provided ample time to debate those proposals. Although Senator Mansfield favored amendments to Rule XXII, he opposed strongly any hint of majority cloture. He also protected the reformers from unknowingly acquiescing to Senate rules from the previous Congress. Regularly, he ensured that "opening day" extended over several days and weeks. Mansfield also adjourned at times, rather than recessed the Senate, to expedite action on reform resolutions required to lay over a legislative day before being eligible for floor consideration.

Majority Leader Lyndon Johnson was not especially sympathetic to changing Rule XXII, either as a Senator or Vice President. However, he did broker in 1959 two major changes to Rule XXII. First, cloture could now be invoked by two-thirds of those voting, a quorum being present, rather than two-thirds of the entire membership. Second, the new two-thirds requirement also would apply to proposals to change Rule XXII. In addition, a continuity of rules provision was added to Rule V: "The rules of the Senate shall continue from one Congress to the next Congress unless

[302] *Congressional Record*, March 6, 1975, pp. 5530-5531.

they are changed as provided in these rules." Senator Johnson persuaded traditional opponents of filibuster reform—southern Democrats and conservative Republicans—that unless they supported these changes, proponents might rewrite Rule XXII in a manner inimical to their political and policy interests, such as allowing majority cloture on civil rights measures.

A Determined Majority

Another factor that influences the fate of filibuster reform proposals is the mobilization of a cohesive and determined majority willing to battle for their procedural aims. As Senator Byrd noted, given friendly rulings from the Chair and the support of the party leaders, a majority of Senators can achieve their goal of amending Senate rules on opening day (or at any time) if they are and remain united. Unity is vital because it is the means to achieve the desired end: amending Senate rules on opening day by majority vote.

Opponents of major changes to Senate Rule XXII seem certain to engage in an array of dilatory practices to block the reformers' plans. They would also appeal unfavorable rulings of the Chair. Rulings of the Chair favorable to reform Senators would be affirmed by tabling (killing) appeals by opponents of change. Recall that when a majority of reform Senators did prevail, it was only to see their ephemeral victory reversed either immediately or after a few days. Today's opponents and proponents of amending Rule XXII seem likely to enlist the support of outside groups, think tanks, and other allies to achieve their broad goals: either advancing or blocking filibuster reforms.

Procedural Strategy

Every major legislative battle, including Senate rules changes, requires a procedural and strategic plan. Among various considerations that could affect strategy and options are the following: In brief, what procedural scenarios might best advance the reformers' goals? Among various considerations that could affect strategy and parliamentary options are the following: A procedural plan might be vetted with the Vice President, the Senate parliamentarian, party leaders, Senate allies, and other relevant actors. As for the Vice President, what is his view of the reformer's objectives? Would he preside on opening day during the reform debate or would he depart soon after he performs various administrative or ceremonial duties, such as administering the oath to newly elected Senators? Does the Vice President share the partisan affiliation of the majority party? If the Vice President is absent, what is the view of the President pro tempore on this entire matter? Reform advocates would surely prepare in advance their procedural moves and countermoves. Importantly, how many Senators are expected to support the reform initiative and will they actively participate on the floor to explain and advocate for the proposed reform(s)?

There are many procedural options with none guaranteed to produce the outcome contemplated by advocates of change. A successful result, however, would establish an authoritative precedent that would govern in analogous floor situations.

- **The Anderson Approach.** Introduce a resolution that asserts that Senate rules have lapsed and new ones are to be adopted by majority vote at the start of every new Congress. This approach has not been successful to date. Prospects for favorable action in the future remain uncertain. Still, this method might focus lawmaker and public attention on whether it is important to update the Senate's rulebook every two years with an eye toward strengthening the institution's governing capacity. Embedded in this concept is adjusting rules to strengthen the Senate's ability to process the public's business in a reasonably deliberative and effective manner. If successful, the Anderson plan could gradually move the

Senate toward majority rule, the fundamental decision-making principle of most parliamentary bodies. However, given the unique and long-standing traditions of the Senate, it seems likely that, under the Anderson proposal, provision would need to be made for ample and lengthy debate on measures and matters before the right to vote took priority over the right to discuss. Needless to say, opponents of the Anderson approach would contend that it would change fundamentally the character, purpose, and uniqueness of the Senate.

- **The McGovern Approach.** In 1967, citing the Constitution, Senator McGovern introduced his reform resolution, which was filibustered. Later, he offered a compound motion (again citing the Constitution) to close debate after two hours (equally divided between proponents and opponents), after which the Chair would place before the Senate, with no further debate, the vote on the motion to proceed to his reform resolution. A point of order was raised against McGovern's compound motion. The Senator moved to table the point of order, but the Senate voted to reject McGovern's tabling motion and to sustain the point of order.
- **The Church-Pearson Approach I.** In 1969, Senators Church and Pearson introduced a reform resolution, which was subject to lengthy debate. A cloture motion was offered, and the Vice President stated that if a cloture motion attracted majority, but not two-thirds, support, he would accept the legitimacy of majority cloture and any appeals would be decided without debate. There was an appeal of the Chair's ruling, which the Chair declared to be nondebatable, based on his contention that cloture had been invoked. The Senate voted to reject the Vice President's ruling.
- **The Church-Pearson Approach II.** In 1971, after the fourth failed cloture vote on the Church-Pearson motion to proceed to the filibuster reform resolution, Senator Javits appealed the Chair's ruling that cloture had failed because it did not attract sufficient votes (though it had attained a majority of 55). His appeal was tabled. Senator Javits also argued that the Chair should have simply declared that debate had gone on long enough and put the question on the procedural motion or on the reform resolution itself without further debate or intervening motions. A majority vote would decide the outcome. The Chair did not act on that "nuclear" suggestion, which would have contravened long-standing Senate precedents.
- **The Mondale-Pearson Approach III.** In 1975, Senator Pearson offered a compound motion that would (1) end debate on the motion to proceed, and (2) permit a vote, without further debate, on the motion to proceed. A point of order was raised against this procedure. The Vice President said that, if the point of order was tabled, that would establish the propriety of the motion. The point of order was tabled—a victory for reformers—but the motion was divided and became ensnared in parliamentary maneuvers. Senator Mondale then offered another compound motion designed to force majority action on the motion to proceed to the reform resolution. Points of order were raised against Mondale's motion, but they were tabled, a victory for reformers. However, as personal and procedural tensions escalated in the chamber, the Senate reversed course and, upon reconsideration, sustained a point of order against the compound motion used by the reformers to accomplish their goals. In the end, the Senate adopted changes to Rule XXII acceptable to most Members, including the reform advocates.

There are other matters, to be sure, that were raised during past reform endeavors, but none were determinative of the outcome. Among several secondary issues are the topics discussed below, though what appear secondary to some might be primary for others.

"Opening Day"

There is no consensus on how long "opening day" reform proceedings may go on. Days, weeks, and several months have not been uncommon. (By recessing rather than adjourning, the majority leader can keep the Senate in the same "legislative day" for many weeks.)[303] Opponents of reform often made critical comments about the length of opening day, and reminded the anti-filibuster Senators that Senate rules could be changed at any time during a legislative session. From the reformers' perspective, "opening day" was viewed as their best opportunity to avoid the supermajority hurdles of Rule XXII. They cited the Constitution and House practice to support their position. Regularly, change-oriented Members commonly sought assurances from the Chair that the conduct of other Senate business would not constitute their acquiescence to Senate rules from the previous Congress.

Senator Byrd suggested that the nuclear option—establishing new precedents that circumvent the two-thirds vote required to invoke cloture on proposed rule changes—would be an easier way to change Senate rules by majority vote.[304] That option could be used by a determined majority at the beginning, during, or end of a legislative session. Whether reformers employ the constitutional or nuclear option to try to amend Senate rules, perhaps their most critical challenge concerns mustering the votes to achieve their goals.

Continuing Body Doctrine

This topic suffused every attempt at Senate rules reform at the beginning of a Congress. From a review of the debate, it appears that the each side had reasonable positions. The Senate is a continuous body in some respects—two-thirds of the Members carry over, more than the majority quorum under the Constitution required to conduct official business; impeachments carry over from one Congress to the next; treaties remain before the Senate from one Congress to the next; simple and concurrent resolutions bind the Senate from one Congress to the next; and Senate committees remain constituted from the previous Congress minus Members who were not reelected. The Senate is also a discontinuous institution in other respects (for example, all measures die at the end of a Congress). However, Senate Rule V, not to mention the long-standing tradition since the Second Congress, stipulates that the chamber's rules continue from Congress to Congress unless changed according to those rules.

The Scope of Changes to the Senate Rulebook

The 1950s reformers initially sought to rewrite Senate rules anew at the start of every new Congress. This idea, which emulates House practice, remains an option for the Senate. The Senate might adopt a resolution terminating all extant Senate rules. Another resolution that contains the new Senate rules might then be introduced for debate, amendment, and, finally, an up-or-down vote. In the main, this approach has generated insufficient support among the membership. Instead, Rule XXII (cloture) remains the principal focus of the reformers.

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[303] Any Senator can offer the motion to adjourn, but long-standing precedent has granted this prerogative to the majority leader. To be sure, the Senate could reject any adjournment motion regardless of who proposes it.

[304] See Senator Byrd's comments on this point in the *Congressional Record*, March 6, 1975, pp. 5530-5531.

Senator Anderson recognized that revisions to the Senate rulebook at the start of every new Congress might arouse extensive debate about which of the numerous parliamentary manuals would govern the Senate pending adoption of a new rulebook. Supporters of change contended that the Senate would observe existing Senate rules with revisions targeted at provisions that inhibit majority rule. Other reformers pointed out that the House has no difficulty in adopting new rules at the start of every new Congress, following so-called "general parliamentary law," and that the Senate is surely as competent as the other chamber. (General parliamentary law refers to "that body of precedent which traditionally serves as guidance for proceedings pending the adoption of formal rules.")[305] Needless to say, the Senate could undertake to revise its rulebook by following the conventional legislative process: committee review of reform proposals by the Rules and Administration Committee (hearings, markups, and the report stage), followed by floor consideration under a debate and amendment process, perhaps regulated by a unanimous consent agreement.

Afterword

The Senate's cloture rule (Rule XXII) was revised a number of times between 1917, when it was first adopted, and 1975. In 1917, Rule XXII required two-thirds of those present and voting to invoke cloture. Subsequently, there were these formal changes to Rule XXII during the 1949 to 1975 period; thereafter, from 1977 to 2013, other important changes occurred.

- 1949: (a) To invoke cloture, two-thirds of the entire membership, and (b) cloture could *not* be applied to motions to proceed to consider proposals to change Senate rules (though it could, for the first time, be applied to other motions to proceed).[306]
- 1959: (a) To invoke cloture, two-thirds of the Senators present and voting, and (b) cloture could be applied to motions to proceed to a change in Senate rules.
- 1975: (a) To invoke cloture, three-fifths of all Senators duly chosen and sworn: 60 of 100, except a two-thirds vote of Senators present and voting is still required to close debate for measures or motions to amend Senate rules.

The parliamentary ingenuity of Senator Allen in 1975 and Democratic Senators James Abourezk, SD, and Howard Metzenbaum, OH, in 1977 during the post-cloture period set the stage for two follow-on amendments to Rule XXII: one in 1979 and the other in 1986.[307] Both rule changes limited the time for post-cloture consideration. Why? Because Senator Allen created and Senators

[305] William McKay & Charles W. Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* (New York: Oxford University Press, 2010), p. 148.

[306] See Hon. Francis J. Myers, "Limitation of Debate in the United States Senate, A Discussion of the Issues and Results of the Fateful 1949 Senate Filibuster over Filibustering," *Temple Law Quarterly*, July 1949, pp. 1-12.

[307] On April 6, 1976, the Senate adopted a technical change to paragraph 2 of Rule XXII that dealt with the reading of amendments: "Except by unanimous consent, no amendment shall be proposed after the vote to bring debate to a close, unless the same has been submitted in writing to the Journal Clerk prior to the end of the vote." The amendment's purpose concerned "the deadline by which Senators must hand in amendments to the [Journal Clerk] before a cloture vote, in order that the amendments may be eligible for consideration after cloture." Before the technical change, as noted by GOP Whip Robert Griffin, "an amendment to be qualified and be considered after the invocation of cloture the Senator must have presented the amendment to the desk and it must have been read to the Senate prior to the vote on cloture." Invariably, unanimous consent was obtained, stated Senator Edward Kennedy, "that all amendments be considered to have been read for purposes of rule XXII." Still, noted Senator Kennedy, "there have been circumstances where the failure to comply with this reading requirement has blocked the opportunity for the Senate to consider important amendments after cloture." The technical amendment (S. Res. 268), adopted without objection, was designed to avoid such circumstances. See *Congressional Record*, vol. 122, April 6, 1976, pp. 9680-9681.

Abourezk and Metzenbaum further developed a procedural innovation, dubbed a "post-cloture filibuster," that exploited loopholes in Rule XXII to prevent or delay final action on clotured legislation.

For example, under the provisions of Rule XXII, once cloture is invoked, each Senator is limited to one hour of post-cloture debate. However, the time for reading amendments, appeals, roll call votes, quorum calls, and so on did not count against the one hour. These dilatory tactics could consume many days before they might conclude. Their effect was to end the tradition that, once cloture was invoked on a measure, opponents would bow to the will of the Senate and allow a final vote on the legislation without further procedural maneuvers.

Once new dilatory tactics emerge on the legislative scene, Senators are likely to use these devices for their own purposes. Such was the case in 1977 when Democratic Senators Abourezk and Metzenbaum waged a nearly unbreakable post-cloture filibuster against an energy bill supported by President Jimmy Carter and backed by a substantial bipartisan majority of the Senate. The dilatory tactics of the two Senators provoked the 1979 and 1986 revisions to Rule XXII. (Worth mention is that Senator Allen and his allies engaged in a post-cloture filibuster in 1976 on an antitrust enforcement measure. Majority Leader Mansfield exclaimed that the post-cloture filibuster against the antitrust bill was an "attempt to murder" Rule XXII.)[308]

The 1977 Post-Cloture Filibuster

In 1977, two Democratic Senators—the aforementioned Abourezk and Metzenbaum—launched a post-cloture filibuster against a controversial natural gas deregulation bill. Their post-cloture tactic stymied Senate action for 13 days on President Carter's national energy plan. Here are several examples of how the two Senators employed the post-cloture filibuster:

- Prior to the vote on cloture, as Rule XXII requires, the two Senators pre-filed over 500 amendments that they were ready to call up once cloture was invoked, as the two Senators fully expected. With so many amendments filed[309] and eligible for consideration, the two Senators had plenty of "ammunition" with which to delay Senate proceedings.
- Senators Abourezk and Metzenbaum called up numerous amendments and objected to unanimous consent requests to suspend the required reading. In one case, the reading clerk took 55 minutes to read an amendment.

[308] *Ibid*., June 9, 1976, p. 17274-17275. Senator Mansfield pointed out that the Senate debated the antitrust bill "under the cloture rule since Thursday—for 5 days. We have had 54 votes on this bill. We have voted on 12 amendments, 18 motions to table amendments, 8 motions to table motions to reconsider previous votes, 1 motion to table an appeal of a ruling by the Chair, 7 motions to instruct the Sergeant at Arms to request the attendance of absent Senators, 4 motions to recess or adjourn, and 1 cloture motion. And we have had all but four of these votes under the cloture rule." Senator Mansfield went on to say "that there are some 43 amendments still pending at the desk on this bill. I point out that in spite of the fact that cloture was invoked on the substitute last Thursday, there remain well over 60 hours of time exclusive of the time for quorum calls, roll call votes, and countless dilatory motions."

[309] There is a significant difference between "filed" and "pending" amendments. A pending amendment is one that has been called up (reported by the Clerk, read or had its reading dispensed with), and at some point was presented to the Senate for consideration (debate and amendment, points of order, etc.). Pending amendments must be disposed of before the Senate may complete action on the underlying measure. Filed amendments are simply catalogued at the desk, a clerical convenience generally but an eligibility requirement under the terms of Rule XXII. Most filed amendments never become pending amendments. A parliamentary strategy behind the filing of hundreds of amendments is discussed in Richard E. Cohen, "Amendment Mania," *National Journal*, November 1, 2003, pp. 3334-3338.

- Occasionally, the Senators would demand two roll-call votes on a single amendment, one on the proposal itself and another on the motion to reconsider. In such instances, the two Senators voted with the majority to reject the amendments so they would be eligible to offer motions to reconsider.
- The two Senators demanded roll-call votes on each amendment, a process requiring at least 15 minutes.

These relatively simple procedural steps enabled the two Senators for 13 days to tie the Senate in knots. None of the time consumed for their procedural motions, as noted earlier, counted against each Senator's one hour for debate once cloture was invoked. Senatorial frustration was growing as the post-cloture filibuster rolled on.

In the end, Senator Robert Byrd, who at the beginning of 1977 became majority leader, came up with an effective counter-strategy. The aim was to rule out of order as dilatory the bulk of the Abourezk-Metzenbaum amendments that had been filed. Senator Byrd enlisted the cooperation of Vice President Walter Mondale, the President of the Senate, to accomplish his aims. On October 3, 1977, Vice President Mondale recognized Majority Leader Byrd, who made a point of order "that when the Senate is operating under cloture, the Chair is required to rule out of order all amendments which are dilatory or which on their face are out of order."[310] Under precedents at the time, the Chair had to wait until a Senator raised a point of order against each amendment before ruling whether it was dilatory.

Mondale sustained Byrd's point of order. The Vice President ruled that the majority leader's point of order "goes to the meaning of rule XXII which provides that once cloture is invoked, no dilatory motion or dilatory amendment or amendment not germane shall be in order. The purpose of the rule is to require action by the Senate on a pending measure following cloture within a period of reasonable dispatch.... The Chair will take the initiative to rule out of order dilatory amendments which, under cloture, are not in order and which on their face are out of order." Senator Abourezk appealed the decision, but lost on a 79 to 14 vote.[311] The stage then was set for the pre-arranged plan. Reading from a typed script given him by Senator Byrd, the Vice President recognized only the majority leader (by precedent the majority leader receives priority of recognition), who called up over 30 Metzenbaum amendments in rapid succession. (Any Senator can call up any filed amendment, even if it is not his or her own.) Each of Metzenbaum's amendments was quickly ruled out of order by the Vice President, who ignored the Senators who wanted to appeal the Chair's rulings, a customary right of Senators. Although bedlam broke out on the floor, Senators Abourezk and Metzenbaum soon thereafter ended their post-cloture filibuster.[312] With this experience fresh in their minds, Senators were ready to revise Rule XXII, which occurred in the next Congress.

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[310] *Congressional Record*, vol. 123, October 3, 1977, p. 31916.

[311] *Ibid*., p. 31920.

[312] An informative summary of the 1977 post-cloture filibuster can be found in "Natural Gas," *Congressional Quarterly Almanac*, vol. XXXIII (Washington, D.C.: Congressional Quarterly Inc., 1977), pp. 735-737. Senator Byrd identified several new precedents that were created during the 1977 post-cloture filibuster. As he wrote, for example: "One such precedent requires the chair to take the initiative, under cloture, 'to rule out of order all amendments which are dilatory or which on their face are out of order.' Another precedent was established requiring the chair, under cloture, to take the initiative 'to rule out of order all dilatory motions, including calls for a quorum, when it has been established by a quorum call or roll call that a quorum is present and the Chair's count reaffirms that a quorum is still present.'" See Robert C. Byrd, *The Senate: 1789-1989, Addresses on the History of the United States Senate*, vol. 2 (Washington, D.C.: U.S. Govt. Print. Off., 1991), p. 156.

1979 Revision

On February 22, 1979, the Senate amended Rule XXII to restrict opportunities for further post-cloture filibusters. Most significantly, Rule XXII now provided that once cloture was invoked, a 100-hour cap would be imposed on all post-cloture consideration, including time spent reading and voting on amendments, quorum calls, and other procedural motions. This 100-hour cap was the fundamental achievement of the 1979 amendment to Rule XXII. Other post-cloture revisions provided that no Senator may call up more than two amendments until every other Senator has had the opportunity to call up two amendments. Further, the reading of any amendment was also dispensed with after cloture was invoked, provided that the amendment was available in printed form at the desk of each Senator for not less than 24 hours.[313]

These changes occurred in the context of Majority Leader Byrd's deep and successful commitment to ending the post-cloture filibuster. First, Senator Byrd emphasized that the post-cloture filibuster had created "ill feelings and deep divisions in the Senate. It is fractious; it fragments the Senate, it fragments the party on either side of the aisle, and it makes the Senate a spectacle. It is not in the national interest." He further underscored that the Senate was "becoming more and more the victim of this ingenious procedure that allows, first a filibuster threat; second, the filibuster on the motion to proceed; third, the filibuster on the matter itself; and fourth and finally, the [most] cataclysmic and divisive filibuster of all, the postcloture filibuster."[314] The Senate, exclaimed Senator Byrd, no longer had an effective Rule XXII. He set about to revise Senate procedures on the opening day of the 96th Congress (1979-1980).

On January 15, Senator Byrd introduced a resolution, S. Res. 9, that proposed general reforms (e.g., the installation of an electronic voting system in the chamber), as well as others focused on post-cloture procedures. However, many Republican Senators believed that the changes proposed by Senator Byrd would reduce the role of the minority in the legislative process. To promote bipartisan collaboration and compromise, the two party leaders (Byrd and GOP leader Howard Baker of Tennessee) created an ad hoc committee to develop a mutually acceptable way to consider Byrd's reform proposals. The key recommendation that emerged from the discussions was for the Senate to consider separately the post-cloture reforms embedded in S. Res. 9. On February 7, Senator Byrd submitted a resolution (S. Res. 61) that dealt only with post-cloture procedures.

Noteworthy is that on January 15, Majority Leader Byrd had made clear to his Senate colleagues that it was imperative for the Senate to deal with the postcloture filibuster because it thwarts "the will not only of a majority but of a three-fifths majority of the Senate, which, having voted for cloture signifies its will that the debate shall come to a close and that the pending matter shall be acted upon one way or the other."[315] If a unanimous consent agreement to address changes to the post-cloture filibuster was unattainable, Senator Byrd said that he would employ the constitutional option—"in essence upholding the power and right of a majority of the Senate to change the rules of the Senate at the beginning of a new Congress." Moreover, he dismissed the view that the Senate's rules continue from one Congress to the next unless they are changed in accordance with those rules. "That [Senate] rule was written in 1959 by the 86th Congress. The 96th Congress is not bound by the dead hand of the 86th Congress." He went on to state:

[313] For a detailed review of the 1979 revision to Rule XXII as well as the other changes to Rule XXII, including a chronological history of efforts to limit debate in the Senate, see *Senate Cloture Rule* (Washington, D.C.: U.S. Govt. Print. Off., 2011).

[314] *Congressional Record*, vol. 125, January 15, 1979, p. 144.

[315] *Ibid.*, pp. 143-144.

> The Senate of the 86th Congress could not pretend to believe that all succeeding Senates would be bound by the rules that it had written. It would be just as reasonable to say that one Congress can pass a law providing that all future laws have to be passed by a two-thirds vote. Any Member of this body knows that the next Congress would not heed that law and would proceed to change it and would vote repeal by a majority vote.
>
> I am not going to argue the case any further today, except to say that it is my belief—which has been supported by rulings of Vice Presidents of both parties and by votes of the Senate—in essence upholding the power and right of a majority of the Senate to change the rules of the Senate at the beginning of a new Congress.
>
> I have not always taken that position, but I take it today in the light of recent bitter experience. The experience of the last few years has made me come to a conclusion contrary to the one I reached years ago.[316]

By continually recessing the Senate until it adjourned on the calendar day of February 22, Senator Byrd kept the chamber in the same "opening" legislative day of January 15. (See footnote 52 for a discussion of "legislative" and "calendar" days in the Senate.)

On February 7, Majority Leader Byrd successfully propounded a unanimous consent agreement consisting of three parts: (1) the Senate would immediately proceed to consider a separate resolution (S. Res. 61) dealing only with that part of S. Res. 9 that addressed post-cloture procedure; (2) only germane amendments to post-cloture provisions would be in order; and (3) if the post-cloture provisions were not disposed of by 6 p.m. on February 22, the Senate would automatically proceed to consider the remaining general provisions of S. Res. 9, as a new resolution. Several Senators asked Senator Byrd to clarify a few matters. For example, Senator Jesse Helms asked "if the majority leader does intend to adjourn [the Senate] after resolution has been reached on this matter, whether it be February 22 or earlier, is that correct?" Senator Byrd responded yes if "the [post-cloture] resolution has been agreed to."[317] In short, the Senate's agreement to S. Res. 61 would conclude "opening day" and "avoid a confrontation on the issue of whether Byrd could cut off a filibuster against rules changes by majority vote at the beginning of a Congress."[318] On February 22, the Senate adopted S. Res. 61, as amended, by a 78 to 16 vote, after which the Senate briefly adjourned (ending the "first day" of the 96th Congress).

1986 Revision

Seven years later, when the Senate considered and agreed on February 27, 1986, to a proposal (S. Res. 28) to televise Senate floor sessions gavel-to-gavel, it also agreed to a provision in that resolution to further limit post-cloture consideration. S. Res. 28 amended Rule XXII to reduce the time for post-cloture consideration from 100 hours to 30 hours. This reduction meant that Senators during the post-cloture period could potentially still be recognized for one hour, but the 30 hours would be available on a first-come, first-served basis. This alteration, along with other post-cloture rules and precedents—such as dispensing with the reading of amendments and enabling the Chair to rule dilatory amendments and motions out of order—reduced the delaying

[316] *Ibid*., p. 144.

[317] *Ibid.*, February 7, 1979, p. 2033.

[318] "Filibuster Rules Changes," *Congressional Quarterly Almanac, 1979*, p. 594. This article stated that Senate Republicans opposed S. Res. 9 except for considering limits on post-cloture debate. For his part, Senator Byrd told the minority party that "if they allowed action on the scaled-down proposal, S Res 61, he would not try to push through his other rules changes by majority vote." These informal understandings contributed to adoption of S. Res. 61.

potential of post-cloture filibusters. "The threat of a [post-cloture] filibuster loses some of its sting if only [30] postcloture hours are allowed," noted a Senator.[319]

Minority Leader Byrd and Majority Leader Robert Dole, R-KS, were the lead sponsors of S. Res. 28. Both were also advocates of rules changes that might encourage public understanding of the Senate through more efficient management of the chamber's business. For example, Senator Byrd wanted to limit debate on motions to take up legislation to two hours. Negotiations between the opponents and proponents of televising Senate sessions went on for days because "some senators were for television but against rules changes; others wanted rules changes but not television; and still others insisted that the two be linked."[320]

A concern of many opponents of television in the Senate was that it would eventually lead to constraints on the right of Members to engage in prolonged debate. Democratic Senator Long of Louisiana "believed the public would not like what it saw—that is 'free' or unlimited debate—and would demand more expeditious floor action." Former Senator and GOP leader Howard Baker of Tennessee viewed the matter differently. Televising floor proceedings, he contended, would enhance the Senate's role as "a great public forum."[321] In the end, the Senate, by a 67 to 21 vote, agreed to televise its floor proceedings gavel-to-gavel over C-SPAN (the Cable Satellite Public Affairs Network) and, in the only change to Rule XXII, to cap post-cloture consideration to 30 hours.[322] It is useful to know that S. Res. 28 did not technically authorize gavel-to-gavel television coverage of the Senate "over C-SPAN." As with the House, the resolution authorized "a Senate owned, operated and controlled" television system, with the idea that broadcasts would be made available to the public through normal broadcast channels (networks, stations, etc.).[323]

It is worth noting that S. Res. 28 also provided for a non-debatable motion to approve the Senate *Journal*. The *Journal* is a constitutional requirement, and constitutes the official record of Senate actions, such as votes cast. In the past, one filibustering tactic was to force a reading of the *Journal* of the previous legislative day. Because a legislative day in the Senate could extend over several days or weeks, the reading could take hours.[324]

A January 2013 Development

On January 24, 2013, the Senate made several changes to its cloture procedures.[325] Two were permanent amendments to the Standing Rules of the Senate and two were temporary standing

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[319] *Congressional Record*, vol. 132, February 6, 1986, p. 1851.

[320] Jacqueline Calmes, "Senate Agrees to Test of Radio, TV Coverage," *Congressional Quarterly Weekly Report*, March 1, 1986, p. 521. For a more detailed discussion of the proceedings associated with imposing a cap of 30 hours on post-cloture consideration, which involved the work of the Committee on Rules and Administration as well as an informal bipartisan working group, see *Senate Cloture Rule*, pp. 221-225. Under Senate Rule XXV, the Committee on Rules and Administration has jurisdiction over "Congressional organization relative to rules and procedures, and Senate rules and regulations, including floor and gallery rules."

[321] See Richard F. Fenno Jr., "The Senate Through the Looking Glass: The Debate over Television," *Legislative Studies Quarterly*, August 1989, pp. 327 (Long) and 332 (Baker).

[322] *Congressional Record*. vol. 132, February 27, 1986, p. 3156.

[323] This information was provided by Donald Wolfensberger, the former staff director of the House Rules Committee. The author gratefully acknowledges Mr. Wolfensberger for providing this information.

[324] Senate precedents state that the reading of the *Journal* is required "only following an adjournment; it does not have to be read on a new calendar day following a recess from the previous day." See Riddick and Frumin, *Senate Procedure: Precedents and Practices*, p. 899.

[325] It should be noted that a few weeks after the start of the previous 112th Congress (2011-2013), the two party leaders announced a non-binding "gentlemen's agreement." For his part, GOP leader Mitch McConnell, R-KY, said the

orders that expired with the end of the 113th Congress. A standing order has the same binding procedural status as a Senate rule, but cloture on a measure proposing a standing order can be invoked by three-fifths of Senators, duly chosen and sworn (60 votes if there are no vacancies in the Senate) because a standing order does not amend the Standing Rules of the Senate. To invoke cloture on measures to amend the Standing Rules of the Senate requires a vote of two-thirds of the Senators voting, a quorum being present, or as many as 67 votes if all 100 Senators vote on the measure.

As for the permanent changes, one added a new paragraph 3 to Rule XXII; it authorized a bipartisan cloture motion to proceed to a measure or matter (to date, not yet used). That bipartisan motion, however, requires the signature of the two party leaders as well as seven Senators not affiliated with the majority party and seven additional Senators not affiliated with the minority party. Normally under paragraph 2 of Rule XXII, a cloture motion must be signed by at least 16 Senators—in practice, often all from the majority party—and presented in open session and read by the clerk. Then, two session days later—a cloture motion filed Monday, for example, is acted on Wednesday—the presiding officer will, after ascertainment of a quorum (typically waived by unanimous consent), put this question to the Senate: "Is it the sense of the Senate that debate shall be brought to a close?" A vote is held immediately. Under the new permanent change contained in paragraph 3, if there is a bipartisan cloture motion on a motion to proceed, the vote on cloture will occur the session day after a cloture motion is presented—thus eliminating a day's wait—and if cloture is invoked, the vote will occur on the motion to proceed without further debate (eliminating the 30 hours of post-cloture consideration).

The other permanent change collapsed the three actions required to take a House message to conference into a single debatable motion. The single motion, which would typically be propounded by the majority leader, goes something like this: "I move to insist upon the Senate amendment, agree to the request by the House for a conference, and authorize the Presiding Officer to appoint conferees." Previously, if a Senator objected to any of the three actions required to convene a conference—in this example: *insist*, *request*, and *authorize*—a filibuster could occur on each part, which effectively inhibited the use of conference committees to resolve bicameral differences on legislation. Today, the consolidated or compound motion for the Senate to authorize a conference is still subject to a filibuster. However, "if cloture is filed on the motion to authorize a conference, the motion will thereafter be subject to only two hours of debate, equally divided between the majority and minority leaders, or their designees."[326] If 60 Senators vote to invoke cloture, then without further debate a simple majority could approve taking a measure to conference.

Republicans would restrict filibusters on motions to proceed to consider legislation. Democratic Majority Leader Harry Reid, D-NV, stated that he would exercise restraint in "filling the amendment tree," a procedure which blocked GOP amendments. In the end, these leadership commitments proved difficult to maintain. See Brian Friel and Niels Lesniewski, "Leaders Expected to Reach Agreement to Informally Tweak Senate Rules," *CQ Today*, January 27, 2011, p. 3; and Emily Ethridge and Brian Friel, "Senate GOP Orders Up Repeal Vote," *CQ Today*, February 2, 2011, pp. 1, 17. It might be likely that Senate dissatisfaction over the success of the "gentlemen's agreement" contributed, in part, to the cloture changes adopted by the 113th Senate on January 24, 2013. On October 6, 2011, the Senate established a new precedent that making motions to suspend the rules of the Senate to offer nongermane amendments to legislation after cloture has been invoked was dilatory, and therefore out of order. When Majority Leader Reid called up one of these suspension motions, he quickly made a point of order that the motion was dilatory under Rule XXII. The presiding officer overruled the point of order. The majority leader successfully appealed the presiding officer's ruling, thus creating a new Senate precedent. Some analysts suggested that the majority leader's action was a mini-nuclear option and laid the groundwork for what occurred on November 21, 2013.

[326] CRS Report R42996, *Changes to Senate Procedures at the Start of the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki.

As for the two temporary standing orders, one minimized the threat of a filibuster on the motion to proceed by limiting debate to four hours, equally divided, if two amendment opportunities were provided to each party. Minority party Senators often lamented that the majority leader too often prevented them from offering amendments by a procedural tactic called "filling the amendment tree," restricting Senators' ability to offer amendments. Under the temporary change, the majority and minority parties were allowed at least two amendment opportunities, which was never used. The second temporary change limited post-cloture debate on certain nominations, for example, to two hours on federal district judges and eight hours on lower executive branch appointments.

In addition, the two party leaders—Senators Reid and McConnell—agreed that each would insist that Senators who object to unanimous consent requests must come to the floor and engage in debate; that the presiding officer could put the question (a vote) under certain circumstances if no Senator was seeking recognition to debate; and that the conventional legislative procedures (committee review, for example) would be followed during the 113th Congress for any further procedural changes. These agreements proved difficult to implement.

Historic Change in November 2013: Filibusters Curbed on Most Presidential Nominees[327]

On November 21, 2013, Majority Leader Reid—asserting that the Senate's constitutional advice and consent responsibility had become "deny and obstruct"—employed a nuclear option to allow a majority of the Senate to end debate on presidential nominees, except those for the Supreme Court. (Filibusters on legislative matters remain intact.) Recall that in 2005 Republican Majority Leader Bill Frist planned to execute the nuclear option to end Democratic filibusters against President Bush's judicial nominees. The "Gang of 14," composed of lawmakers with long service in the Senate, prevented implementation of Frist's objective. They did not want a precedent set that future majorities could use at any time to change Senate rules.

By contrast, as a sign of generational change—as well as heightened polarization in the Senate and in each party's electoral base—many newer Democratic Senators wanted to reform the filibuster procedure. Nearly half of Senate Democrats at that time had begun their service only since 2008. They had never experienced minority status, and urged Senator Reid to employ the nuclear option. In the view of political scientist Ross Baker of Rutgers University, "I don't think you'll ever see a much clearer example of a generation gap on the wisdom of changing the filibuster rules."[328] Another prominent congressional scholar wrote that use of the nuclear option on November 21, 2013, was "among the three or four most important events in the procedural history of the Senate. Ignoring the plain text of [Rule XXII], a majority of senators changed the effective rule by merely declaring it to be something else."[329]

Support for using the nuclear option had been building for months, if not years, among some Senate Democrats. The issue that served as the catalyst for the November action was Senate refusal to confirm within a few weeks' time three judicial nominees to the U.S. Court of Appeals

[327] See CRS Report R43331, *Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings*, by Valerie Heitshusen.

[328] Francine Kiefer, "How Youth Felled the Filibuster," *Christian Science Monitor*, December 9, 2013, p. 14.

[329] Smith, *The Senate Syndrome*, p. 265.

for the District of Columbia.[330] Each nominee failed to win the 60 affirmative votes to end prolonged debate.

The 11-member D.C. Circuit Court, which had three vacancies, is viewed as one of the most important in the nation. It considers issues involving such matters as the legitimacy of federal regulations and legislative-executive clashes over constitutional prerogatives, such as the recess appointment authority of the President versus the Senate's advice and consent responsibility.[331]

The majority consensus among Senators was that the three nominees were qualified to serve on the appellate court. Filibustering opponents argued, however, that the D.C. Circuit Court was underworked; thus, there was no need for more judges. They also noted that, when Democrats were in the minority during the George W. Bush presidency, they also argued that the circuit court's workload did not justify adding more judges. Opponents suggested, too, that it was unnecessary to upset the ideological balance on the D.C. Circuit Court: four were appointed by Democratic Presidents and four by Republican Presidents. Moreover, GOP Senators pointed out that their alleged obstructionism of President Obama's judicial nominees was incorrect. They noted, for instance, that more of the President's federal district judicial nominees were confirmed by the 112th Senate "than were approved during the past eight Congresses."[332]

Democratic Senators made their own arguments on behalf of confirming the three nominees to the circuit court. As one Democratic Senator stated, opponents are trying "to force us to govern as though President Obama hadn't won the 2012 election."[333] President Obama also backed use of the nuclear option. The majority leader explained that the Senate works on "collegiality just like judges do. But there comes a time when collegiality breaks down and you have to do something."[334] He added: "We need good, strong debate on nominations and everything else," but we do not need hours, days, weeks, and months of obstructive delay. "Was it only a debate when my Republican colleagues decided the DC Circuit—some say the most important court in this country, even, some say, the Supreme Court—when they decided there were vacant seats there and for 5 years held up filling those seats? Is that debate? No. It is obstruction."[335] Given this view, in a carefully scripted procedural scenario, and with a near party-line vote, Majority Leader Reid followed a series of steps to establish a new Senate precedent—majority cloture—to end filibusters on executive and judicial nominees, excepting only Supreme Court nominees.

Note several key aspects of Senate procedure that were involved in the events that culminated on November 21, 2013. When a motion to reconsider is "entered" on an unsuccessful vote on a

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[330] For a review of the President's major nominations that won Senate confirmation in 2013—but only after contentious debate, which contributed to use of the nuclear option, see "Executive Branch," *CQ Weekly*, Jan. 6, 2014, pp. 52-53. As an example, the majority leader noted that for "the first time a sitting Member of Congress [Mel Watt, D-NC] has been filibustered since 1843, since before the Civil War." See *Congressional Record*, vol. 159, December 10, 2013, p. S8581. With the changes made via the nuclear option, Congressman Watt was subsequently confirmed to head the Federal Housing Finance Agency by a 57 to 41 vote. See Brent Kendall and Nick Timiraos, "Senate Confirms Obama Nominees Under New Voting Rule," *Wall Street Journal*, December 11, 2013, p. A4.

[331] It is interesting to note that on April 15, 2014, the D.C. Circuit Court dismissed a law suit brought by Common Cause and others that the Senate's 60-vote procedure to end filibusters violated the Constitution's implicit principle of governance by majority rule. The Court found, in part, that plaintiffs (Common Cause and others) lacked standing to sue because they had suffered no cognizable procedural or substantive injury.

[332] Nancy Ognanovich, "Republicans Criticize Democrats' 'Nuclear' Threat, Say Nomination 'Crisis' Non-Existent," *Daily Report for Executives*, November 21, 2013, p. A-18.

[333] Burgess Everett, "Senate Heads Toward New Filibuster Fight," *Politico*, November 18, 2013, p. 22.

[334] Adriel Bettelheim, "Going Nuclear," *CQ Weekly*, December 2, 2013, p. 1987.

[335] *Congressional Record*, vol. 160, January 9, 2014, p. S5207.

question in the Senate,[336] that motion is debatable unless the underlying question, such as a motion to invoke cloture, is non-debatable. In the 2013 case, the three pertinent motions offered in sequence were: (1) the motion to proceed to the entered motion to reconsider; if that motion is successful, then; (2) the motion to reconsider is voted upon; and (3) a successful motion to reconsider returns the original question to the Senate for a new vote. The three motions were non-debatable because the underlying matter was a cloture vote, which is not a debatable question. This circumstance meant that all three votes in 2013 would take place without intervening debate; moreover, any appeal to the underlying question would also be decided without debate. Thus, Senator Reid used existing Senate procedures to effectuate his precedent in the following manner:

- On October 31, 2013, after the Senate failed to invoke cloture on the nomination of Patricia Millet to serve on the D.C. Circuit Court of Appeals, Senator Reid entered a motion to reconsider that vote.
- On November 21, 2013, Senator Reid moved to proceed to the motion previously entered to reconsider the vote by which cloture on the Millett nomination was not invoked. The motion to proceed to the motion reconsider was adopted by a 57 to 40 vote.
- Senator McConnell moved to adjourn the Senate, but that was rejected by a vote of 46 yeas to 54 nays.
- The Senate then proceeded to reconsider the failed cloture vote on the Millett nomination. His motion was adopted by a vote of 57 yeas and 43 nays. However, the motion did not receive the 60 votes that would have been required under Rule XXII for a vote to invoke cloture.
- Senator Reid then raised a point of order that a vote on cloture under Rule XXII for all nominations, except for Supreme Court nominees, is a majority vote. (Notice the sweep of Reid's point of order: it covered all executive and judicial nominees except for those to the Supreme Court.)
- The President pro tempore, Senator Patrick Leahy of Vermont, overruled Reid's point of order, pursuant to existing rules and precedents.
- Senator Reid immediately appealed Leahy's ruling. After a series of parliamentary inquiries, the Chair put the appeal to a vote without debate. Significantly, the appeal was treated as non-debatable due to its connection to a non-debatable question (cloture). The Chair was overruled by a vote of 48 yeas to uphold the ruling to 52 nays to overturn. As the President pro tempore stated: "The decision of the Chair is not sustained." This vote established a new majority cloture precedent for most presidential nominees.
- Senator McConnell quickly tested the viability of the new precedent. He raised a point of order that nominees are fully debatable under Senate rules unless 60 votes are obtained to invoke cloture. "Therefore, I appeal the ruling of the Chair."
- "The Chair has not yet ruled," said Senator Leahy. He added, however, that "under the precedent set by the Senate today, November 21, 2013, the threshold

[336] A motion to reconsider a vote is in order on the day of the vote or the next two session days. Only Senators who did not vote, or who voted on the prevailing side, may offer the reconsideration motion. After a vote on a question, it is often the case that a Senator will move to table the motion to reconsider. A Senator, such as the majority leader, may also "enter" a motion to reconsider, which will be placed on the legislative calendar. Entering means that the Senator does not want an immediate vote on reconsideration, perhaps waiting for a more favorable time to offer that motion.

for cloture on nominations, not including the Supreme Court, is now a majority. That is the ruling of the Chair."

- Senator McConnell appealed the ruling of the Chair. On this vote, the Chair's ruling was upheld by a vote of 52 yeas to 48 nays.
- The Chair immediately presented to the Senate the pending cloture motion to end debate on the Millett nomination. Cloture was invoked by a vote of 55 yeas to 43 nays, short of the 60 previously required but sufficient for "majority cloture" under the new precedent.

Reaction among Senators was swift, as tension between the parties escalated even beyond that of recent years. On the majority side, one Democratic Senator stated that he had "waited 18 years for this moment," and recommended that the Senate go even further: "We need to change [the filibuster] as it pertains to legislation."[337] Another Democratic Senator underscored that point: "For a lot of us, this is only halfway to the finish line. We should get rid of the filibuster for legislation as well as nominations."[338]

By contrast, Senate Republicans were quite upset. A GOP Senator viewed the majority leader's procedural maneuver as a "raw exercise of political power" that will permit the "majority to do whatever it wants whenever it wants to do it."[339] Another GOP Senator noted that the filibuster has been a part of the Senate for over 200 years. "Both parties have used it, both parties have criticized it." But no majority party until today, he emphasized, had acted to alter fundamentally the character of the Senate by curbing extended debate on presidential nominations.[340] Like the majoritarian House, the Senate majority was now positioned to enable a determined majority to amend any Senate rule by majority vote.[341] Still another GOP minority lawmaker pointed out, "The silver lining is that there will come a day when the roles are reversed," perhaps sooner than the majority party expected.[342] Arguably, the vigorous debate by the two sides was less about filibusters against presidential nominations and more about the creation of a precedent that allows Senate rules to be changed by majority vote rather than the two-thirds supermajority specified in Rule XXII. Every minority party Senator (and three majority party Senators) voted against creation of the new precedent.

For the remainder of the 113th Congress, Senate Republicans continued to delay action on presidential nominees, ironically by often using a Rule XXII procedure left unchanged by the new precedent: they used post-cloture time for consideration of nominations rather than agreeing to complete action earlier. They also employed other parliamentary tactics, such as objecting to unanimous consent requests or employing sharp rhetoric to castigate the majority party on the floor and in the media.[343] Despite such actions, the majority party's use of the nuclear option precedent increased Senate approval of the President's nominations.[344]

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[337] *Congressional Record*, November 21, 2013, p. S8419.

[338] Gene Healy, "Nobody Wins When You Go Nuclear on Filibusters," *WashingtonExaminer.Com*, Nov. 25, 2013, p 29. Also see Philip Rucker, Al Kamen, and Ed O'Keefe, "Obama's Nominees Still Face Difficulties," *The Washington Post*, November 23, 2013, p. A1.

[339] Jonathan Weisman, "Partisan Fever Likely to Rise," *The New York Times*, Nov. 22, 2013, p. A1.

[340] *Congressional Record*, November 21, 2013, p. S8436.

[341] To emulate what Senator Reid did on November 21, 2013, would require a non-debatable situation.

[342] Jess Bravin, "Divide in Courts Likely to Deepen," *Wall Street Journal*, November 22, 2013, p. A6.

[343] Burgess Everett, "Presidential Nominations Are Still No Slam Dunks," *Politico*, November 25, 2013, p. 1.

[344] Shawn Zeller, "Rule Here To Stay?" *CQ Weekly*, October 13, 2014, p. 1286.

From the Democratic perspective, Members noted that few in the public pay much attention to, or understand, parliamentary maneuvers on Capitol Hill. "To the average American," noted the majority leader, "adapting the rules to make the Senate work again is just common sense."[345] Many Democrats, too, were irate at what they viewed as deliberate minority party obstructionism against the policies and nominees of their President. Others believed that if Republicans won control the Senate, they would not hesitate to "go nuclear" to achieve their objectives.[346] Still other Democrats favored majority rule for both legislation and nominations regardless of which party controls the Senate. The Democratic majority leader remarked that he might use the nuclear option again in the 113th Senate if the minority party regularly used dilatory tactics to frustrate party priorities. "I'm not precluding anything," said the majority leader. "It's just according to how we get along here."[347]

Two separation of powers issues, among others, emerge from the new precedent. First, President Obama (and likely succeeding Presidents) gained greater influence in securing Senate approval of nominations to the federal bench and the executive branch. In the short term, with Democrats still in control of the Senate, President Obama was advantaged in winning additional confirmation of executive and judicial candidates who share his policy outlook. Instead of attracting 60 Senate votes to invoke cloture to end prolonged debate on most nominations, a majority vote now was sufficient to bring debate to a close.

Longer-term, a political risk for the two parties is that one party would control both the White House and the Senate and be positioned by majority vote to confirm either liberal or conservative district and circuit court judicial nominees who share their philosophy. As one Republican Senator stated, "There are a lot more ... [Clarence] Thomases out there that we would love to put on the bench."[348] A Senate Democratic leader responded: "We'd much prefer the risk of up-or-down votes and majority rule than the risk of continued total obstruction. That's the bottom line no matter who's in power."[349]

With the GOP in control of the 114th Senate (54 to 46) following the November 2014 mid-term elections, Senate Democrats and the White House contend that there has been a slowdown in the approval of judicial nominees. Senate Republicans disagree and insist that nominations are moving along "at a rate comparable with the final two years of previous lame duck presidents...."[350] Traditionally, committee chairs set their panel's agenda. They can refuse to hold

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[345] Jeremy W. Peters, "Senate Vote Curbs Filibuster Power to Stall Nominees," *The New York Times*, November 22, 2013, p. A1.

[346] When Republicans took control of the 114th Senate, they moved slowly on filibuster reforms. To assess what rules changes are possible to achieve, Majority Leader Mitch McConnell of Kentucky created a task force, headed by Senators Lamar Alexander of Tennessee and Roy Blount of Missouri. For example, frustrated with what they viewed as dilatory tactics by Senate Democrats, a number of GOP Senators favored reducing cloture from 60 to 51 on motions to proceed to consider appropriations measures. Senator McConnell "has said little publicly about his preference on rules changes, except that any alterations should go through regular order, not by going nuclear." See Seung Min Kim, "Republicans Weigh Battle Over Filibuster Rules," *Politico*, November 5, 2015, p. 16. In addition, Carl Hulse, "G.O.P. Senator Seeks To Forge Path for Change," *New York Times*, November 10, 2015, p. A15; Niels Lesniewski, "Senate Seeks Bipartisnship in Rules Overhaul," *CQ News*, November 11, 2015, online version; and Julian Hattem, "House GOP Puts Pressure on McConnell To Go Nuclear," *The Hill*, September 16, 2015, p. 4.

[347] Niels Lesniewski, "When Will Majority Leader Reid Step Down? 'If I Drop Dead'," *Roll Call*, December 19, 2013, p. 9.

[348] Burgess Everett, "Grassley: Changing Filibuster Rule Could Pave Way for More Scalias," *The Hill*, November 13, 2013, p. 24.

[349] Michael A. Memoli and Lisa Mascaro, "Senate Democrats Invoke 'Nuclear Option' on Filibusters," *Los Angeles Times*, November 21, 2013, online edition.

[350] Burgess Everett and Seung Min Kim, "Nuclear Payback: Republicans Block Obama Judicial Picks," *Politico*, June

hearings on executive and judicial branch nominees or fail to report them for possible floor consideration. In brief, the Senate Democratic minority is reportedly grumbling that the GOP-controlled committees are slowwalking President Obama's nominees.[351]

Second, given the 2013 majority cloture precedent, minority Senators of either party might begin to use other practices to foil Senate approval of nominations they oppose. For example, the "blue slip" process might be employed more frequently as a pre-floor blocking tactic. This long-standing policy of the Judiciary Committee, as established by the chair, allows Senators from the home-state of judicial nominees to prevent committee action either by not returning their "blue slips" to the panel or returning them with a negative recommendation. According to two scholars of the federal judicial appointments process:

> The blue slip policy of the Senate Judiciary Committee, as set by the chair, dates back to 1917. Under this policy, the committee chair seeks the assessment of Senators regarding district court, circuit court, U.S. attorney, and U.S. marshal nominations in their state. If a home state Senator has no objection to a nominee, the blue slip is returned to the chair with a positive response; however, if a Senator has some objection to the nominee and wants to stop or slow committee action, he or she can decide not to return the blue slip or return it with a negative response. Some, but not all, chairs of the Judiciary Committee have required a return of a positive blue slip by both of a state's Senators before allowing consideration of a nominee.[352]

In short, if states have one or two minority party Senators, these Members are positioned to stymie consideration of judicial nominees, barring changes in Judiciary's blue slip policy. As a recent Judiciary chairman remarked: "As long as the blue slip process is not being abused by home-state senators, then I will see no reason to change that tradition."[353]

Members opposed to various presidential nominations might also launch committee filibusters. The Judiciary Committee is one of only two panels (Finance is the other[354]) that have a procedure for ending committee filibusters by majority vote. However, at least one minority party Member of the committee must vote with the majority. Rule IV of the Judiciary Committee states: "The Chairman shall entertain a non-debatable motion to bring a matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a roll call vote of the Committee shall be taken, and debate shall be terminated if the motion to bring the matter to a

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7, 2015, p. 16.

[351] Tom Howell, Jr., "Congress: 'Nuclear Option' Now Hits Obama Nominees," *The Washington Times*, November 26, 2015, p. A1; Burgess Everett and Seung Min Kim, "Nuclear Payback: Republicans Block Obama Judicial Picks," *The Hill*, June 7, 2015, p. 1; and Bridget Bowman, "Backlog in Congress Creates Problem for D.C. Court," *Roll Call*, December 3, 2015, p. 1.

[352] CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Barry J. McMillion and Denis Steven Rutkus.

[353] Charlie Savage, "Despite Filibuster Limits, A Door Remains Open To Block Judicial Nominees," *The New York Times*, November 29, 2013, p. A25. Law Professor Carl Tobias notes that Senate Republicans also might simply refuse to send the names of judicial nominees from their home state to the White House. Senate Republicans "haven't been systematically suggesting people to the White House, and the White House won't nominate someone who doesn't have home-state senator support. So they can bring [this process] to a halt in every state where they have one [GOP] senator." See Dave Boyer, "Senate Rule Change Opens Floodgates for Nominees," *The Washington Times*, December 13, 2013, p. A3.

[354] Rule 8 ("Bringing a Matter to a Vote") of the Finance Committee for the 114th Senate states: "If the chairman determines that a motion or amendment has been adequately debated, he may call for a vote on such motion or amendment, and the vote shall then be taken, unless the committee votes to continue debate on such motion or amendment, as the case may be. The vote on a motion to continue debate on any motion or amendment shall be taken without debate."

vote without further debate passes with eleven votes in the affirmative, one of which must be cast by the minority." (In the 114th Senate, 11 to 9 was the ratio of majority to minority Members on Judiciary.) A rash of orchestrated committee filibusters on judicial or executive branch nominees might provoke majority party committee members either to eliminate the minority Member requirement for ending prolonged panel debate at the Judiciary Committee or provoke other Senate committees to adopt rules to overcome committee filibusters.[355]

The 114th Congress (2015-2016)

When the new Congress began on January 6, 2015, there was discussion among the Members of the incoming GOP Senate majority about whether to retain the 2013 precedent or return to the 60-vote requirement for cloture on all judicial (excepting the Supreme Court) and executive nominees. Republicans were divided on the issue. Some lawmakers wanted to overturn the 2013 precedent and restore the supermajority requirement for presidential nominees; others wanted to maintain majority cloture on nominations, partly because it would make it easier for the Republican Senate to confirm judicial and Cabinet nominees of a future Republican President. There was even sentiment to create a new precedent that would apply majority cloture to legislation repealing the Affordable Care Act. Even the contenders for the 2016 GOP presidential nomination and their supportive constituencies were divided on the issue. According to one account, Republican groups outside Washington are "vowing to gut the filibuster in order to repeal the Affordable Care Act, while GOP senators pursuing the White House want to keep the time-honored 60-vote threshold."[356]

Senate Majority Leader McConnell favored the "regular order" and supported review of the matter by the Committee on Rules and Administration. However, he opposed use of the nuclear option to end the Senate's supermajority requirement for legislation. A close ally of Senator McConnell's, when asked if the majority leader would support majority cloture for legislation, replied, "Absolutely not." He added, "The filibuster protects the minority, and it is the only vehicle that allows the Senate to function in its historic role of protecting the minority."[357] Many Senators also believe it would be a grave mistake for the Senate to "become just like the House" with its majority party dominance.

On opening day of the 114th Congress (January 6), two minority party Senators introduced S.Res. 20. As one of lead sponsors stated: "It has been the tradition at the beginning of many Congresses that a majority of the Senate has asserted its right to adopt or amend the rules" by majority vote. The Constitution, he added, makes it very clear that the "Senate can adopt and amend its rules at the beginning of the new Congress by a simple majority vote." The other lead sponsor endorsed this view and also put forward six other ideas designed to improve the operations of the Senate. They included, for example, creating "a process to consider rule changes at the start of each legislative session," ending "the filibuster on the motion to proceed to legislation," and expediting the creation of conference committees by eliminating any cloture process for their establishment, with debate on their formation limited to two hours. S.Res. 20, after an objection was made to its immediate consideration, was placed on the appropriate section of the Calendar of General Orders pursuant to Rule XIV, paragraph 6.[358] Two GOP Senators "floated a proposal that would make all

[355] Niels Lesniewski, "Leahy Open to Changing Judiciary Panel Rules," *Roll Call*, December 19, 2013, p. 3.

[356] Daniel Strauss and Burgess Everett, "Filibuster Divides GOP 2016 Contenders," *Politico*, July 7, 2015, p. 6.

[357] Alexander Bolton, "Senate Republicans Slam the Door on Scrapping Filibuster," *The Hill*, July 1, 2015, p. 4; Alexander Bolton, "Clock Ticking Down on Filibuster Reform," *The Hill*, February 9, 2016, p. 6.

[358] *Congressional Record*, vol. 161, Jan. 6, 2015, pp. S23-S26. In addition to S.Res. 20, the other six resolutions—

nominations, including to the Supreme Court, subject to a simple majority. Republicans haven't acted since that January [2015] trial balloon."[359]

Concluding Observations

Legislating in the contemporary Senate can be a difficult enterprise. The chamber's rules and precedents grant significant procedural powers to each Senator regardless of party, geography, or ideology. In the Senate, the policymaking advantage usually goes to those who wish to delay or obstruct legislative action. History demonstrates that senatorial delay can be a virtue as the Senate can block or "cool" hastily conceived measures that emanate from the House of Representatives, the White House, or from other quarters. The Senate, in short, is an institution largely structured to promote deliberation—both to educate and persuade as well as to induce gridlock—and to protect minorities from majorities willing to steamroll measures or matters quickly through the Senate. A Senator or group of Senators can also use the possibility of a filibuster to extract important information from a reluctant executive branch agency or department.

Indeed, the ability of any Senator to delay Senate action through prolonged debate might lead to a compromise acceptable to all sides. Of course filibusters or their threat also can prevent passage of legislation. This reality means that the daily life of today's Senate is often replete with filibusters, threats of extended debate, and cloture votes. As one Senator explained:

> You have to think of the Senate as if it were 100 different nations and each one had the atomic bomb and at any moment any one of you could blow up the place. So that no matter how long you've been here or how short you've been here, you always know you have the capacity to go to the leader and threaten to blow up the entire institution. And, naturally, he'll deal with you.[360]

Understandably, Senators have struggled for decades over when or whether Senate rules, procedures, or traditions require change. The procedural quandary is that most Senators value the benefits to them as individuals provided by unlimited debate (or the threat thereof). Yet the Senate has often reformed and revised its rules and procedures in big and little ways. Consider the filibuster and Rule XXII, and how each has changed over time. For example, as a former Senate parliamentarian noted, "For nearly 50 years after its adoption [in 1917], Rule XXII served a purpose more symbolic than real. From 1917 to 1927, cloture was voted on 10 times but it was adopted only four times. From 1931 to 1964, cloture was successful only twice."[361] Today, filibusters, filibuster threats, and cloture votes are commonplace and employed on major and minor issues—with cloture votes often occurring multiple times on the same measure or nomination—and throughout various policymaking stages.

Since 1917, both the vote to invoke cloture and the amount of time for post-cloture debate have been revised several times. Rule XXII is the focus of so much attention because it is the only formal rule to limit debate in the Senate. Debates surrounding changes to Rule XXII often concentrate on the right to debate versus the right to decide (or protecting minority rights versus allowing the majority to vote on a matter); the uniqueness of the Senate as an institution; the

S.Res. 118 through S.Res. 123—were introduced on March 26, 2015, and referred to the Committee on Rules and Administration. To date, the Senate has not taken up any of the seven reform resolutions.

[359] Strauss and Everett, "Filibuster Divides GOP 2016 Contenders," p. 6.

[360] Sarah A. Binder and Thomas E. Mann, "Slaying the Dinosaur: The Case for Reforming the Senate Filibuster," *The Brookings Review*, Summer 1995, p. 44.

[361] Robert B. Dove, "Senate Rule XXII: The Good, the Bad and the Ugly," *Roll Call*, November 13, 2003, p. 9.

intent of the Framers (majority versus supermajority decision making); or who is advantaged or disadvantaged from proposed amendments to Rule XXII.

Typically, revisions occur to Rule XXII when several conditions are met, such as: a determined and unified majority long frustrated in achieving their goals by the 60-vote hurdle required for cloture; a leader or set of leaders who craft a successful procedural and political strategy for achieving change, including persuading colleagues that their loss of personal power is more than offset by the Senate's enhanced ability to govern; and a public relations, or messaging, strategy designed to explain the necessity of the change and to rebut criticisms from those who might oppose the revision, whether colleagues, pundits, journalists, or outside groups. Other political and procedural forces are also relevant, such as the election of change-oriented lawmakers or crises of one sort or another (the sinking of U.S. merchant ships by German submarines that led to the 1917 adoption of Rule XXII or the once unbreakable post-cloture filibuster).

What appears at issue today—and what Members of earlier eras also confronted—is whether Senate rules and practices require alteration to better meet the challenges of the day. In brief, do they require "modernization" to enhance the Senate's governing capacity and its role as a co-equal branch of government? Some Senators might suggest that the legislative system is working as intended and requires only periodic, small-bore improvements. They might also view the Senate and its individual Members as one of the few effective counterweights to an increasingly powerful executive branch.

Other Members, mindful that many of today's lawmakers are not reluctant to exploit the chamber's procedures and practices for individual or political gain, might favor a Senate whose procedures tilt in a more majoritarian direction. They recognize that today's Senate has morphed into a 60-vote institution for passing measures and matters—a fundamental transformation from earlier Senates. There are also people who suggest that it is not the procedural rules that require amendment but the "culture" of the Senate that requires change, such as the revival of norms and values that strengthen civility, habits of cross-party compromise and collaboration, and vigorous debate anchored more in influencing policy and less in political messaging for the next election.

Ultimately, it is the procedural context that shapes how individual Members, committees, or the two parties raise issues and make—or avoid making—decisions. If certain Senate procedures cause unnecessary delay and hamper the Senate's ability to address clear, festering, and pressing national problems, then the time might be right for procedural, structural, or other changes. A comment made in 1971 by Senator Phil Hart of Michigan still resonates more than four decades later. "The apparent inability of [the Senate] to take action on our domestic ills when the needs are so painfully clear is a basic cause of unrest and disaffection" among the citizenry.[362] Change is obligatory if institutions like the Senate are to have the capacity to handle a large and growing workload and a complex array of overlapping domestic and international issues. Long ago Thomas Jefferson said, "As new discoveries are made, new truths discovered, and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times."[363] In short, the Senate itself would determine whether or when to "keep pace with the times."

That the Senate undergoes change constantly is a given. It responds to events, issues, and crises in different ways and speeds. The election of new Members every two years brings to the Senate additional energy, issues, and ideas. Procedural change, whether formal or informal, is commonplace. Yet a basic philosophical conflict suffuses many reform initiatives: preserving the

[362] *Congressional Record*, vol. 117, March 9, 1971, p. 5482.

[363] Letter to Samuel Kercheval, July 12, 1816, *The Writings of Thomas Jefferson, Memorial Edition*, vol. 15 (Washington, D.C.: The Thomas Jefferson Memorial Association of the United States, 1904), p. 41.

Senate's important functions and traditions—for example, cooling popular passions with due deliberation—while enhancing its policymaking performance, oversight capacity, and longer-term focus. As Senator Byrd of West Virginia explained to a class of newly elected Senators, the Senate's "purpose was and is to examine, consider, protect, and to be a totally independent source of wisdom and judgment on the actions of the lower house and on the executive. As such, the Senate is the central pillar of our Constitutional system."[364]

A final observation: It is understandable that there are many difficulties in managing the contemporary Senate where bipartisanship, collegiality, and compromise are sometimes in short supply. One consequence is that the Senate has evolved from an institution where the filibuster (or its threat) was an infrequent occurrence, to be used on significant matters only, to a new institutional reality where 60 votes are required to approve scores of measures and matters, major or minor. History suggests that this development, too, will change when the sentiments and votes of enough Senators are favorable to another approach, perhaps encouraged by politically active constituents and outside groups and organizations. Meanwhile, the many demographic, geographical, and ideological differences in the nation mean that determination, patience, and sheer hard work are fundamental to negotiating, reconciling, and resolving partisan, policy, and procedural disagreements among Senators and between the two parties. Illinois Senator Everett McKinley Dirksen, a renowned Republican minority leader (1959-1969), made an apt comment about the art of governance in the mid-1960s that also applies to today's Senate: "There are 100 diverse personalities in the U.S. Senate. O Great God, what an amazing and dissonant 100 personalities they are! What an amazing thing it is to harmonize them. What a job it is."[365]

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[364] Quoted in MacNeil and Baker, *The American Senate*, pp. 4-5.

[365] Frank H. Mackaman, ed., *Understanding Congressional Leadership* (Washington, D.C.: Congressional Quarterly Press, 1981), p. v.

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