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Changing the Senate Cloture Rule at the Start of a New Congress

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Summary

From 1953 to 1975, proposals 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 the opposition of other Members. The biennial focus declined somewhat when the Senate in 1975 amended Rule XXII to reduce the number of Senators required to invoke cloture from two-thirds of the Senators present and voting to three-fifths of the Senators chosen and sworn (60 of 100). In 1979 and 1986, the Senate also amended Rule XXII by reducing the length of time for post-cloture debate. However, senatorial interest in revising Rule XXII on "opening day" reemerged in the 2000s.

At the start of three recent Congresses—in 2011, 2013, and 2015—a number of reform-minded Senators unsuccessfully urged the Senate (as the House does on its first day) to adopt its rules by majority vote without having to muster a supermajority vote. Rule XXII mandates that prolonged debate on amendments to Senate rules can be brought to an end by a two-thirds vote of the Senators present and voting—67 of 100 Members if all Senators vote, a likely outcome on an issue that affects the institution's long-standing deliberative character.

Reform-minded Senators have generally viewed the opening of a new Congress as a special constitutional time that permits the Senate to amend its procedures by majority vote unencumbered by chamber rules adopted by a previous Congress. They cite the U.S. Constitution (Article I, Section 5) as their authority: "Each House may determine the Rules of its Proceedings," which implicitly means by majority vote, state the reformers. Opponents reject this assertion and point out that the Senate has adopted rules, and the Constitution says nothing about the vote required to adopt those rules. Moreover, the Senate is a continuing body with continuing rules.

This report's prime purpose is to discuss seven considerations that Senators on either side of the issue might bear in mind if an effort is made at the start of the 115th Congress (2017-2018) to amend Senate rules by majority vote. Seven specific considerations are discussed: the role of the presiding officer, who could be the President of the Senate; the assistance of the majority leader; the mobilization of a determined and united majority; skillful use of procedural moves and countermoves; the length of "opening day"; the continuing body doctrine; and procedures to be followed pending approval of new rules. The report concludes with several observations about legislating in the Senate.

Contents

Overview 1
Ways to Alter Senate Rules 2
Changing Senate Rules: Seven Considerations 3
The Presiding Officer 4
The Majority Leader 5
A Determined Majority 6
Procedural Strategy 7
An Historic Procedural Change in 2013 8
Other Procedures Worth Noting 9
Opening Day 10
Continuing Body Doctrine 10
Procedures to Follow Pending Approval of New Rules 11
Concluding Observations 12

Contacts

Author Information 13

Overview

From 1953 to 1975, initiatives to reform Senate Rule XXII at the start of a new Congress were biennial rituals. They were instigated mainly by Senators in each party frustrated by the chamber's inability to enact certain legislation, such as civil rights measures, due to filibusters. The biennial focus on amending Rule XXII at the beginning of a Congress declined somewhat with the revisions made to Rule XXII in 1975—cloture was lowered from two-thirds of the Senators present and voting to three-fifths of the Senators chosen and sworn—and the changes made in 1979 and 1986 involving the length of post-cloture debate. However, senatorial interest in changing Rule XXII at the start of a new Congress—called the "constitutional option" by some—reemerged in the 2000s.

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 mobilize a supermajority vote. For example, on January 6, 2015, a reform 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] Rule XXII mandates that prolonged debate on amendments to Senate rules can be brought to an end by a two-thirds vote of the Senators present and voting.

Reform Senators have generally viewed the opening of a new Congress as a special constitutional time that permits the Senate to change its procedures by majority vote unencumbered by chamber rules adopted by a previous Congress. They cite the U.S. Constitution (Article I, Section 5) as their authority: "Each House may determine the Rules of its Proceedings," which implicitly means by majority vote, state the reformers. The two-thirds supermajority vote to invoke cloture on amendments to the chamber's rules effectively prevents the Senate from exercising its constitutional right to "determine the Rules of Its Proceedings." The reformers noted their "Catch-22" dilemma: How can the Senate amend Rule XXII when the practical effect of that rule is to prevent its amendment?

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. They also emphasize that the Senate is a continuing body with continuing rules (the "continuing body" doctrine[2]). Their argument is essentially that a Senate majority (even a simple 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 reform stress that the Constitution supersedes Senate rules. While they agree that a majority can amend Senate rules at any time, their concern is Rule XXII's two-thirds requirement to bring debate to a close on amendments to the chamber's standing rules. Such a high threshold has been viewed by some as an unconstitutional infringement on the right of a majority to amend Senate rules. To bolster their contention, reformers sometimes cite a 1957 advisory opinion by the

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

[2] The basic idea of the continuing body doctrine is that from its beginning in 1789, the Senate always has a quorum (a majority under the Constitution) of Senators to conduct official business. Throughout its history, the Senate has also treated its rules as continuing from one Congress to the next unless they are changed in conformance with Senate rules.

President of the Senate, Vice President Richard Nixon. In response to a parliamentary inquiry, Nixon said:

> 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 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 which denies the membership of the Senate the power to exercise its constitutional right to make its own rules.[3]

Given what appears to be renewed interest among a number of current lawmakers to amend Senate rules with only majority support at the start of a new Congress, it might be useful to proponents and opponents of this approach to review several considerations that suffused many of the earlier attempts (1953-1975).[4] First a brief summary of ways to alter Senate rules.[5]

Ways to Alter Senate Rules

A conventional way to amend the chamber's rules is to have resolutions altering the standing rules referred to the Committee on Rules and Administration for hearings, markups, and possible floor consideration. Or the Rules and Administration Committee on its own authority could report to the floor legislation that amends the standing rules. Unanimous consent is another way to modify Senate rules. Still another is by statute, enacted pursuant to the chamber's constitutional rule-making authority. The Senate also can establish standing orders that are regulations or directives that are equivalent to a standing rule but are not incorporated into the standing rules. An example of a standing order is to designate the Senate Parliamentarian, upon his or her retirement, as "Senate Parliamentarian Emeritus."

In addition, there is the so-called "nuclear option," which 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.[6] The term "nuclear" could be applied 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

[3] *Congressional Record*, vol. 103, January 4, 1957, pp. 178-179.

[4] For a detailed review of attempts (1953-1975) made to amend Senate rules by majority vote, CRS Report R44395, *Amending Senate Rules at the Start of a New Congress, 1953-1975: An Analysis with an Afterword to 2015*, by Walter J. Oleszek.

[5] For further detail on changing Senate rules, see CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth.

[6] Two noted Senate procedural experts distinguish between the "constitutional" and "nuclear" options in their book: 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."

and obstructive tactics by Senators who vehemently oppose limitations on their ability to debate at considerable length various measures or matters.[7]

The "nuclear option" involves the creation of a new Senate precedent that has the effect of preventing filibusters of specific measures or matters.[8] In general, precedents are established in the following manner:

> Any ruling by the Chair in response to a point of order made by a Senator is subject to appeal. 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.... [If there is an appeal, then unless] the Chair is supported by a majority vote of the Senate, the decision of the Chair is overruled. This decision of the Senate becomes a precedent for the Senate to follow in its future procedure until altered or reversed by a subsequent decision of the Chair or by a vote of the Senate.[9]

With respect specifically to the nuclear option, "some would hold that what would render proceedings 'nuclear' is not simply that they would establish new precedential interpretations of the rules, but that they would do so through proceedings that ... involve violations of procedural standards previously established and already in effect at the time the Senate is considering the proposed new interpretation."[10] A key 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 parts of its application and interpretation in chamber proceedings. As former GOP Senator Judd Gregg of New Hampshire emphasized, "In the parliamentary process, precedent is what controls."[11]

Changing Senate Rules: Seven Considerations

Attempts to amend Rule XXII involve two fundamental values that are in conflict: the right to debate versus the right to decide. The two can be reframed as minority protection versus majority rule. It can be quite difficult to reach an appropriate balance between these values when the Senate has before it controversial and contentious issues. There are no hard and fast rules regarding the length and thoroughness of debate. Many of today's complex, interconnected, and many-sided issues—cybersecurity, privacy, and so on—typically require extensive debate and involve the jurisdictional interests of several committees. In brief, barring broad consensus among Senators, it is usually difficult to amend Senate rules that affect the chamber's deliberative character.

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

[7] "Filibustering" in its broadest sense refers to more than lengthy debate. It encompasses a range of acts to delay and frustrate the Senate, such as objecting to unanimous consent requests to end quorum calls or raising numerous points of order. 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 importance.

[8] On November 21, 2013, the nuclear option was used to expedite Senate consideration of presidential nominations, except those for the Supreme Court. See CRS Report R43331, *Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings*, by Valerie Heitshusen.

[9] Floyd M. Riddick and Alan S. Frumin, *Senate Procedure: Precedents and Practices* (Washington, DC: GPO, 1992), p. 145.

[10] Beth, *Procedures for Considering Changes in Senate Rules*, p. 8.

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

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, to highlight an urgent national issue, or to encourage the Senate to modify a measure? The point is that it is often difficult to define what constitutes a filibuster. As former Senator Robert C. Byrd, D-WV, the longest serving Senator in history, once said: "I will be able to perceive [a filibuster], because I know one when I see it."[12]

If an effort is made at the start of the 115th Congress (2017-2018) to amend Senate rules by majority vote—the so-called constitutional option—what key concerns might Senators on either side of the issue bear in mind? Earlier attempts to alter Rule XXII suggest several considerations for Senators contemplating use of the constitutional option at the start of a new Congress. They are the support of the presiding officer, which could be the President of the Senate; the assistance of the majority leader; the mobilization of a determined and united majority; skillful use of procedural moves and countermoves; the length of "opening day"; the continuing body doctrine; and procedures to be followed pending approval of new rules.

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, Senate President Nixon propounded several advisory opinions that benefited the reformer's cause. Nixon said on more than one occasion, as noted earlier, that any Senate rule is not applicable at the start of a Congress if it restricts the constitutional right of a majority of Senators to end debate in order to amend Senate rules. Although Nixon's 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, Democratic Senator Clinton Anderson of New Mexico wanted Vice President Lyndon Johnson to submit the cloture reform motion 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?"[13] 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 Hubert Humphrey and Nelson 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, which did not succeed, included the following basic features:

[12] *Congressional Record*, vol. 129, July 18, 1983, p. 10216. On another occasion, Senator 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.

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

- 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.
- The Vice President ruled 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 motion to proceed to the reform resolution. Furthermore, once cloture was invoked under these circumstances, an appeal would not be debatable. On a vote of 51 ayes to invoke cloture and 47 nays, cloture was declared to be invoked on the motion to proceed.
- An anti-reform opponent immediately 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.
- If the Senate voted down the appeal and sustained the Chair's ruling, this decision would have established a new precedent, permitting a majority to amend Senate rules at the opening of a new Congress. The Vice President's ruling was overturned by the Senate by a vote of 45 yeas to 53 nays. Reformers made no motion to table (kill) the appeal because they knew that the majority leader and minority leader had persuaded six Members to switch their votes from favoring majority cloture to overturning the Chair's ruling.

During the lengthy debate in 1975 on amending Rule XXII at the opening of the new 94th Congress, then Majority Whip Robert Byrd harkened back to the 1969 effort to amend Rule XXII by majority vote.

> 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.[14]

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 correctly on a point of order but was then overturned on appeal by the Senate. The November case concerned an historic use of the nuclear option, which is discussed below.[15]

The Majority Leader

The majority leader is in charge of scheduling the business of the Senate and also enjoys priority of recognition from the Chair. As a result, his support of (or opposition to) the reformers' objectives could be determinative of the final outcome. Majority leaders from GOP Senator Robert Taft of Ohio (1953-1955) to Democratic Senator Mike Mansfield of Montana (1961-

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

[15] For a review of the nuclear option, see CRS Report R43331, *Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings*, by Valerie Heitshusen.

1977)—were generally helpful in ensuring that reformers had adequate time to make their case for altering Rule XXII. Majority Leader Taft set aside two days for the consideration of Senator Clinton 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. Instead, he allowed the Senate to consider Anderson's proposal for two days, a time period that was satisfactory to the reformers.

Majority Leader Mansfield, who supported certain changes to Rule XXII, provided ample time to debate those proposals. For example, Senator Mansfield made the issue of extended debate the top priority of the Senate, even to the extent of preventing chamber consideration of legislative and executive business. 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 (1955-1961) was not especially sympathetic to changing Rule XXII, either as a Senator or Vice President. However, he did broker in 1959 major changes to Rule XXII. First, cloture could be invoked by two-thirds of those voting, a quorum being present, rather than two-thirds of the entire membership. Cloture could also be filed on a motion to consider a change in the standing rules, which was prohibited in earlier versions of the rule. 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 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

A major factor that influences the fate of filibuster reform proposals, as with other major legislation, 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. Even so, unity can be hard to maintain because many Senators are cross-pressured with respect to debate limitations. Some Senators, even in the majority, want to preserve the filibuster because it enhances their personal power to influence chamber proceedings.

Opponents of major changes to Senate Rule XXII seem certain to engage in an array of dilatory practices to block the reformers' plans. For example, they could appeal rulings of the Chair unfavorable to their objectives or object to unanimous consent requests. The aim: to stall action on proposals to amend Senate rules. Protracted floor proceedings might require the constant presence of various reform Senators to defend and protect their goals. Rulings favorable to reform Senators could be affirmed by tabling (killing) opponents' appeals. In today's hyper-partisan and 24/7 media environment, 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 aims: either advancing or blocking filibuster reforms.

Procedural Strategy

Most major legislative battles, including Senate rules changes, require a procedural and strategic plan. Among various considerations are the following: Is the presiding officer likely to be someone who favors cloture reform and coordinates with the reformers to ensure that appeals of the Chair's rulings would not be debatable? Who will floor manage the proposal to amend Senate rules on opening day? What is the sentiment of the Senate Parliamentarian? Does the Vice President share the partisan affiliation of the Senate's majority party? What is the Vice President's view of the reformers' 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? If the Vice President is absent, what is the view of the President pro tempore on this entire matter? 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)?

Listed below is a selected, brief sketch of several procedural plans employed by reformers during the 1967 to 1975 period.

- **Senator George McGovern's 1967 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 by majority vote on the motion to proceed after two hours (equally divided between proponents and opponents), after which the Chair would then place before the Senate, with no further debate, the vote on the motion to proceed to consider his reform resolution. A point of order was raised against McGovern's two-part motion on the grounds that it was out of order. Senator McGovern's motion to table the point of order failed, followed by a successful Senate vote to sustain the point of order. Additional procedural developments occurred, including an unsuccessful attempt by Majority Leader Mansfield to conclude debate on the motion to proceed to McGovern's reform resolution.
- **The Church-Pearson Approach.** In 1971, after the fourth failed cloture vote on the Church-Pearson motion to proceed to the filibuster reform resolution, GOP Senator Jacob Javits of New York 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 Approach of Senators Walter Mondale and James Pearson.** 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. President of the Senate Rockefeller 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.

An Historic Procedural Change in 2013

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 approach to allow a majority of the Senate to end debate on presidential nominees, except those for the Supreme Court. The procedure employed by Senator Reid could also provide a parliamentary road map for Senators today who support the "first day" approach to changing Senate procedure. A brief word on the background at the time and then the procedural step-by-step used by Senator Reid to effectuate the nuclear option.

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

Lack of success in winning confirmation of the three judicial nominees proved to be the spark that ignited use of the nuclear option. After supporters of each nominee failed to muster the required 60 votes to invoke cloture, Leader Reid would "enter" a motion to reconsider. A motion to reconsider is in order on the day of the vote or the next two session days. Typically, after a vote on a question, a Senator would move to table the motion to reconsider. "Entering" means that Senator Reid did not want an immediate vote on reconsideration. Instead, he would wait for a more favorable time to offer that motion, which was November 21. The nuclear precedent was established in this 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 "entered" motion to reconsider the vote by which cloture on the Millett nomination was not invoked. The motion to proceed to the "entered" motion to reconsider was adopted by a 57 to 40 vote.
- The Senate then proceeded to reconsider the failed cloture vote on the Millett nomination. His motion was adopted by a vote of 57 yeas to 43 nays. However, the motion did not receive the 60 votes that would have been required under Rule XXII 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 Senator Reid's point of order: it covered all executive and judicial nominees except those for the Supreme Court.)
- The President pro tempore, Senator Patrick Leahy of Vermont, overruled Senator Reid's point of order, pursuant to existing rules and precedents.
- Senator Reid immediately appealed Leahy's ruling. The Chair put the appeal to a vote without debate. 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 52 nays. 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.

- Senate Minority Leader 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 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.

Other Procedures Worth Noting

A number of formal rules and precedents could be invoked when Senators try to call up a reform resolution on "opening day." Prior practice during the 1953 to 1975 period indicates that seven observations merit mention about procedural rules and practices that might be triggered during the first day period. Whether the referenced rules would be observed is uncertain because the Senate might set them aside by unanimous consent.

The first procedure to take cognizance of is Rule V. It requires a Senator who offers an amendment to the standing rules to first provide one calendar day's written notice "specifying precisely the rule or part" to be amended "and the purpose thereof."

Second, a Member who introduces the reform resolution on opening day usually asks that it be read, and then requests unanimous consent for its immediate consideration. Another Senator would likely object, perhaps citing Rule V's written notice requirement. Absent unanimous consent, the reform resolution would then be assigned to a special section of the Senate's *Calendar of Business* entitled "Resolutions and Motions, under the Rule." The reform resolution is referred to this section under 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 *Calendar*], to be laid before the Senate, on the next legislative day, for consideration, unless by unanimous consent the Senate shall direct otherwise." If a Senator did not take these steps, any submitted resolution would be referred to the Committee on Rules and Administration.

Third, notice the inclusion of "legislative day" in Rule XIV. Senate rules and precedents distinguish between a "calendar day" and a "legislative day." A calendar day is the commonly understood 24-hour period of time. A "legislative day" refers to the period when the Senate convenes after an adjournment and ends when it next adjourns. For example, if the Senate adjourns on July 10 but then recesses at the end of each session day until July 24, the legislative day still remains July 10. However, as soon as the Senate adjourns, the calendar day and the legislative day become the same. Whether the Senate recesses or adjourns at the end of a session

day is the prerogative of the majority. Thus, the majority could prevent a reform resolution from being called up for chamber consideration by recessing, rather than adjourning, the Senate for many days, weeks, or months.

Fourth, a reform resolution, having met the "written notice" and "legislative day" requirements, would be presented to the Senate by the Chair at the beginning of the new legislative day. The first two hours (incongruously called the "morning hour") is a period where routine "morning business" is transacted, such as the introduction of bills and joint resolutions. Simple resolutions coming over from the previous day may also be called up for consideration during the morning hour period, but only after, under Rule VII, the disposal of all other routine business. If consideration of the reform resolution is not concluded within the "morning hour" period, it would be returned to the *Calendar of Business* unless the Senate agreed to a unanimous consent request to continue debate or a Senator offered a debatable motion to proceed to consider the reform resolution.

Lastly, history demonstrates that proposed amendments to Rule XXII can give rise to complex procedural hardball tactics by both proponents and opponents. However, it can also be the case that the formal rules are ignored or waived and informal understandings and unanimous consent requests shape the deliberations surrounding attempts to amend Rule XXII. As Nevada Senator Harry Reid, the Democratic leader, observed: "[W]e as a body can do anything we want to do. That is the way the Senate operates. We have the ability to change the rules in a [matter] of minutes and move on to change what is before this body."[16] Senators who oppose amendments to Rule XXII understand that reformers should have fair and reasonable opportunity to make their case for change because pro-revision advocates have the procedural means to raise the issue frequently and to frustrate chamber action on many other measures or matters.

Opening Day

There is no consensus on the length of "opening day" reform proceedings. Days, weeks, and several months have not been uncommon. (Recall that by recessing rather than adjourning, the majority leader can extend "opening day" for many weeks.[17]) 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 cite 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. A basic goal of the reformers was to establish the principle that at the start of each new Congress the Senate could adopt its own rules by majority vote, unfettered by entrenched rules of prior Congresses, such as Rule XXII.

Continuing Body Doctrine

This doctrine suffused every attempt at Senate rules reform at the start of a new Congress. Each side made reasoned arguments during debate. The Senate is a continuous body in some respects—two-thirds of the Members carry over, more than the majority quorum under the Constitution

[16] *Congressional Record*, vol. 162, July 13, 2016, p. S5048.

[17] 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.

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. 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 Senate rules.

Reform Senators contend that just because two-thirds of the Senate carry over and constitute an official quorum does not mean that a new Senate cannot alter the standing rules by majority vote. The Senate is also a discontinuous institution. For example, all measures die at the end of a Congress. As a reform Senator stated about the doctrine, "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.[18] Senate rules that thwart this possibility are contrary to the Constitution. In rebuttal, opponents argue that such a precedent would grant sweeping authority to a mere transient majority, a circumstance that would be contrary to the traditions and rules of the Senate.

Procedures to Follow Pending Approval of New Rules

This topic concerned which of many parliamentary manuals would govern Senate procedures pending approval of new Senate rules? Supporters of change largely contended that the Senate would observe existing Senate rules with revisions targeted only at provisions that inhibit majority rule. 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."[19])

GOP Senator Strom Thurmond of South Carolina, an opponent of reform, identified 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. After that would come the more difficult and more time consuming task of debating and agreeing on each of the permanent rules."[20]

Several reform Senators disputed the views of Senator Thurmond. "Over in the other body of Congress," remarked GOP Senator Jacob Javits of New York, "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." Democratic Senator Hubert Humphrey of Minnesota pointed out that reasonable Senators "know that most of the rules would be reenacted time after time, as is the case in the House of Representatives."[21]

[18] *Congressional Record*, vol. 109, January 31, 1963, p. 1500.

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

[20] *Congressional Record*, vol. 105, January 8, 1959, p. 108.

[21] *Ibid.*, p. 117 for the Javits quote and p. 119 for the Humphrey quote.

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, ideology, or seniority. 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.

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.[22]

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."[23]

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. Moreover, it is largely the case that the contemporary Senate has morphed into a 60-vote institution—the new normal for approving measures or matters—a fundamental transformation from earlier eras.

Rule XXII is the focus of so much attention because it is the only formal rule to limit debate in the Senate. Debates surrounding amendments to Rule XXII focus on such matters as protecting minority rights, the uniqueness of the Senate compared to the other body, or who is advantaged or disadvantaged from proposed amendments to Rule XXII. Typically, revisions to Rule XXII occur when several conditions are met, such as a determined and unified majority long frustrated in achieving their goals by today's 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 some personal power will be more than offset by the Senate's enhanced ability to govern; and a public relations, or messaging, strategy that explains the necessity of the change and to rebut criticisms from those who might oppose the revision,

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

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

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 (e.g., the sinking of U.S. merchant ships by German submarines that led to the 1917 adoption of Rule XXII).

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 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 Robert Byrd explained to a class of newly elected Members, 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 the executive. As such, the Senate is the central pillar of our Constitutional system."[24]

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 would 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."[25]

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[24] Quoted in Neil McNeil and Richard A. Baker, *The American Senate* (New York: Oxford University Press, 2013), pp. 4-5.

[25] Frank H. Mackaman, ed., *Understanding Congressional Leadership* (Washington, DC: Congressional Quarterly Press, 1981), p. v.

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