

THE CONSTITUTIONAL OPTION TO CHANGE  
SENATE RULES AND PROCEDURES:  
A MAJORITARIAN MEANS TO OVER  
COME THE FILIBUSTER\*

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## INTRODUCTION

In the United States Senate, the majority has the power to decide what will be debated, but the minority can often determine whether

that debate will ever end in a final vote. No one questions that a majority of a quorum can exercise the rulemaking power. But, for almost any debatable proposition, forty-one members can prevent the Senate from taking a final vote, even though as many as fifty-nine Senators support the proposition.<sup>1</sup> In addition, the Senate cloture rule provides that for any change to the Senate rules (including the rules governing debate), one-third of members present and voting plus one can prevent the Senate from resolving a filibuster and taking a vote.<sup>2</sup> And Senate Rule V declares that these rules are perpetual: “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”<sup>3</sup> At issue is whether the Senate cloture rule is carried over from one Congress to the next by Rule V and binds successor majorities. If so, the conclusion would seem to be that absent a change of heart among a sufficient minority, even a substantial majority is helpless to overcome a filibuster on a rules change.

But what if the current Senate cloture rule is not binding? In 1979, faced with a potential filibuster on his rules-change proposal, Senator Robert C. Byrd (D-WV) raised the possibility that the U.S. Constitution provides the majority with a method for overriding the Senate’s cloture rule:

The Constitution in article I, section 5, says that each House shall determine the rules of its proceedings. Now we are at the beginning of Congress. This Congress is not obliged to be bound by the dead hand of the past.

....

The first Senate, which met in 1789, approved 19 rules by a majority vote. Those rules have been changed from time to time . . . So the Members of the Senate who met in 1789 and approved that first body of rules did not for one moment think, or believe, or pretend, that all succeeding Senates would be bound by that Senate. . . . 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 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 of it by majority vote.

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1. SENATE RULE XXII, STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, 106<sup>th</sup> Cong., 2d Sess. 15–17 (2000), *available at* <http://rules.senate.gov/senaterules/menu.htm> (last visited Oct. 17, 2004).

2. *Id.*

3. SENATE RULE V, STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, 106<sup>th</sup> Cong., 2d Sess. 4 (2000), *available at* <http://rules.senate.gov/senaterules/menu.htm> (last visited Oct. 17, 2004).

[I]t 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.<sup>4</sup>

Byrd made clear that if his rules-change proposal were filibustered, he would invoke the Senate's powers under the U.S. Constitution to force a vote.<sup>5</sup> Byrd never carried out his threat to use the “constitutional option.” He never had to. His threat to use it was enough to break the opposition and secure a vote on his rules-change proposal.<sup>6</sup>

Byrd has not been alone, either in his views or his tactics. The constitutional option has been endorsed, explicitly or implicitly, by three U.S. Vice Presidents and three times, by the Senate itself. Moreover, on three occasions prior to 1979, a majority had used the threat of the constitutional option to force a formal change to the Senate Standing Rules.

Senator Thomas J. Walsh (D-MT) first advocated using the constitutional option in 1917.<sup>7</sup> Like Byrd, Walsh reasoned that a newly commenced Senate may disregard the rules established by a prior Senate, including the rules governing filibusters, and adopt new rules in their stead.<sup>8</sup> During this process, Walsh explained, the Senate would revert to the powers set forth in the U.S. Constitution and rely upon traditional parliamentary procedures, which contain procedural mechanisms to control filibusters.<sup>9</sup> Like Byrd's opponents, Walsh's opponents gave way once they realized that Walsh potentially had enough votes to carry out his plan, resulting in the Senate adopting its first formal rule limiting debate.<sup>10</sup>

Similarly, in 1959, after over a dozen civil rights bills had been

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4. 125 CONG. REC. 144 (1979) (statement of Sen. Byrd).

5. *Id.* at 144-45 (statement of Sen. Byrd) (“I want the Senate to take a week or 10 days to debate this resolution, and let any Senator [offer] any amendment that he wishes to offer. Let the Senate vote on amendments. and then vote up or down on the resolution. . . . [T]he time has come to change the rules. I want to change them in an orderly fashion. I want a time agreement. But, barring that, if I have to be forced into a corner to try for a majority vote, I will do it because I am going to do my duty as I see my duty, whether I win or lose.”).

6. On February 7, the Senate agreed to a unanimous consent order providing that the Senate would proceed to consider Byrd's rules-change proposal by February 22. *Id.* at 2032-33.

7. 55 CONG. REC. 17 (1917) (statement of Sen. Walsh) (citing U.S. CONST. art. I, § 5).

8. *Id.* at 9 (statement of Sen. Walsh).

9. The generally established rules of parliamentary procedure are set out in Robert's Rules of Order and Thomas Jefferson's Manual of Parliamentary Practice.

10. 55 CONG. REC. 45 (1917).

defeated by filibusters, and in 1975, after nearly two decades of rules-change attempts were thwarted, the minority gave way and agreed to amend the Senate cloture rule once it became apparent that a majority of the Senate was prepared to carry out the constitutional option. On all four occasions--1917, 1959, 1975, and 1979--the rules changes may never have been adopted but for the prospect that the constitutional option would be exercised.

Moreover, the historical record demonstrates that the use of the constitutional option is not limited to formal amendments of the Senate Standing Rules. Periodically, a majority has exercised the Senate's constitutional rulemaking power to establish new precedents altering Senate procedure. For example, a majority has established precedents to limit members' capacity to offer dilatory amendments, to propose legislative amendments to appropriations bills, to debate motions to proceed to nominations, and to use dilatory tactics to disrupt roll call votes. Likewise, a current majority could exercise the constitutional option to set a precedent altering the Senate's procedures governing debate. A Senator could allow debate to proceed for an extended period of time and then raise a point of order that debate had continued long enough, that any further debate would be dilatory, and that a vote must be taken within a designated time frame. The Presiding Officer could rule in favor of the point of order, and a majority could table any appeal from his ruling. This would establish a precedent limiting the length of time for debate that would bind all future Senates (until the precedent were overturned by majority vote or unanimous consent).

Finally, the Senate could adopt a Standing Order altering the Senate's procedures, including the procedures governing debate. Standing Orders are not incorporated into the text of the Standing Rules, but nonetheless bind the Senate. For example, in December 2000, the Senate adopted a standing order limiting members' ability to filibuster conference reports. The order provided that members could no longer demand the reading of conference reports that were available in writing. Similarly, a current Senate could adopt a Standing Order having the effect of limiting time for debate.

These three exercises of the rulemaking power are not mutually exclusive. To facilitate a formal amendment to the Standing Rules or the adoption of a Standing Order, a majority may seek favorable rulings from the Presiding Officer to override any filibusters.

This Article sets forth the history of the constitutional option. Part I provides a brief overview of the Senate rules governing debate. Part II

details the history of the filibuster. It begins with the first Senate, where there was no concept of a minority engaging in unlimited debate, next details how the possibility for filibuster was inadvertently created, and last provides an overview of the filibuster's early use. Parts III, IV, and V of this Article relate the use of the constitutional option as a response to the filibuster. Part III details past proposals to use the constitutional option to accomplish a formal rule change. It begins with the 1917 Senate special session in which Senator Walsh first proposed the constitutional option on the Senate floor and the Senate adopted its first rule for cloture of debate; it next details the 1950s debates between Senator Richard B. Russell (D-GA) and Senator Paul H. Douglas (D-IL), which culminated in then-Senator Lyndon B. Johnson's 1959 compromise two-thirds cloture rule; and it last relates the 1960s and 1970s procedural battles that led to the establishment of the present three-fifths cloture rule in 1975. Part IV explains how the constitutional power has been and could again be invoked to allow a majority to establish a new Senate precedent on ending filibusters. And Part V explains how a past majority has used Standing Orders to alter the Senate's application of its rules and precedents governing conference reports, and how a future majority could use Standing Orders to alter the Senate's application of its rules and precedents governing filibusters.

#### PART I: SENATE PROCEDURES GOVERNING DEBATE

Senate procedure is built upon three main pillars. First are the Standing Rules of the Senate. Currently, there are forty-three rules: thirty-three governing procedure and ten governing ethics. In theory, these rules may be adopted or amended by a simple majority of Senators acting through a Senate resolution. In practice, however, under the current Standing Rules, a change requires the consent of two-thirds of Senators present—the number needed to end a filibuster on a rules change. The second pillar of Senate procedure consists of those procedures written into statutes to govern the consideration of subsequent legislation. The 1974 Budget Act, for example, specifies certain fast-track procedures the Senate must follow when considering budget resolutions and reconciliation bills and for thirty years has set the terms for floor consideration of such vehicles.<sup>11</sup> The third pillar includes Senate precedents. A precedent is set when (i) the Presiding Officer of the Senate rules on a point of order which the Senate may

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11. 2 U.S.C. §§ 907b, 907d (2004).

or may not affirm if an appeal is taken, (ii) a majority of the Senate addresses a point of order submitted to it by the Presiding Officer, or (iii) the Presiding Officer of the Senate issues an advisory response to a Senator's parliamentary inquiry. Under Article I, Section 3 of the U.S. Constitution, "the Vice President of the United States shall be President of the Senate" and act as Presiding Officer (or Senate Chair).<sup>12</sup> In the Vice President's place, the Senate elects a President pro tempore to act as the Presiding Officer.<sup>13</sup> In practice, the Chair is occupied by an acting President pro tempore who rotates on an hourly basis.

Senate procedures arising from these sources may be modified by Orders. Such Orders are often situational, limited only to the measure or matter before the Senate at a given moment. For example, the Senate may adopt a unanimous consent Order limiting debate on a pending amendment to two hours per side. Occasionally, the Senate will establish a Standing Order which, like a Standing Rule or precedent, remains in effect until the Senate revokes it or it expires under its own terms. A Standing Order may be adopted by a unanimous consent agreement or by a majority vote if the Standing Order is adopted by Senate resolution or is added to a pending bill.

Generally, the Senate operates on the principle of unfettered debate. In fact, for 111 years, the Senate rules provided no limit on debate. A Senator could speak for as long as he wished on nearly any topic he chose, and the majority had no recourse to stop him. This led to the "filibuster," a device to delay Senate business in order to prevent legislation from ever coming to a vote, or to convince unwilling Senators to vote for amendments as a price for ending the filibuster and preserving time for debate on other bills they deem more important.<sup>14</sup>

Today, Senate procedure provides four methods for curtailing debate: tabling of motions, unanimous consent agreements, statutory provisions, and cloture. A motion to table operates to halt debate but also kills the underlying proposition. A bill manager will often offer a

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12. U.S. CONST. art. I, § 3.

13. *Id.*

14. Donald Ritchie, an associate historian of the Senate, explains that a filibuster can take many forms, including placing a hold on a bill or nomination, refusing to report a bill or nomination out of committee, objecting to unanimous consent agreements that would allow the Senate to proceed, being absent during quorum calls to prevent the Senate from obtaining a quorum to do business, and voting against cloture. Aaron Erlich, *Whatever Happened to the Old-Fashioned Jimmy Stewart-Style Filibuster?*, History News Network, available at <http://hnn.us/articles/1818.html> (Nov. 18, 2003).

motion to table in order to defeat a proposal to add a hostile amendment. The motion is non-debatable—the Senate must take an immediate vote on it—and it serves as a final disposition of the underlying question. Accordingly, a tabling motion is an effective tool for ending debate only on propositions the mover opposes.

Under a unanimous consent order, Senators agree to impose new procedures—sometimes including debate limitations—in lieu of customary procedures. In such a case, the agreement typically provides that the time for debate be evenly divided between two opposing sides and be under the control of specified Senators. Once entered, a unanimous consent agreement can only be changed by a subsequent unanimous consent agreement. However, a single Senator can block the agreement, because unanimous consent orders are often unavailable to restrict debate.

A third method to curtail debate is found in certain rulemaking statutes. The 1974 Budget Act, for example, includes procedures that operate akin to a unanimous consent agreement to limit debate on matters specified by the Budget Act.<sup>15</sup>

When a Senator does not wish to kill the underlying proposition and neither statutory provisions nor unanimous consent are available to constrain debate, Rule XXII provides “cloture” to restrict debate.<sup>16</sup> The first step is for at least sixteen Senators to sign a cloture motion. After a required intervening day of session, the Senate holds a quorum call one hour after convening and then votes on the cloture motion. Sixty votes (three-fifths of all Senators duly chosen and sworn) are needed to invoke cloture, unless the proposal is to change the Senate rules, in which case the votes of two-thirds of Senators present are needed. If cloture fails, other cloture votes may be taken, as there is no restriction on the number or frequency of cloture motions that may be presented. If the cloture vote succeeds, a new set of procedures takes effect, including a one-hour-per-Senator limit on debate, an overall thirty-hour cap on consideration of the clotured item, and other rules serving to streamline floor consideration.<sup>17</sup>

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15. 2 U.S.C. §§ 907b, 907d.

16. RULE XXII, *supra* note 1.

17. Rule XXII provides that once cloture is invoked,

Thereafter no Senator shall be entitled to speak in all more than one hour on the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto, and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be proposed after the vote to bring the debate to a close, unless it had been submitted in writing to the Journal Clerk by 1 o'clock p.m. on the day following the filing of the cloture motion if

## PART II: CREATION OF THE FILIBUSTER

## A. The “Dignified Senate”

The possibility that a minority of Senators could hold unlimited debate on a topic against the majority’s will was unknown to the first Senate. The original Senate Rules—then only twenty in number<sup>18</sup>—allowed a Senator to make a motion “for the previous question.”<sup>19</sup> This motion permitted a simple majority of Senators<sup>20</sup> to halt debate on a pending issue:

The previous question being moved and seconded, the question for the chair shall be: “Shall the main question now be put?” and if the nays prevail, the main question shall not then be put.<sup>21</sup>

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an amendment in the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof to the exclusion of all amendments not then actually pending before the Senate at that time and to the exclusion of all motions, except a motion to table, or to reconsider and one quorum call on demand to establish the presence of a quorum (and motions required to establish a quorum) immediately before the final vote begins. The thirty hours may be increased by the adoption of a motion, decided without debate, by a three-fifths affirmative vote of the Senators duly chosen and sworn, and any such time thus agreed upon shall be equally divided between and controlled by the Majority and Minority Leaders or their designees. However, only one motion to extend time, specified above, may be made in any one calendar day.

*Id.*

18. RULES ADOPTED BY THE FIRST SENATE OF THE UNITED STATES, 1 ANNALS OF CONG. 20–21 (Joseph Gales ed., 1834), available at The Library of Congress, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875, <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=10> (last visited Oct. 17, 2004).

19. *Id.* at Rule VIII (“While a question is before the Senate, no motion shall be received unless for an amendment, for the previous question, or for postponing the main question, or to commit, or to adjourn.”); *id.* at Rule IX (“The previous question being moved and seconded, the question for the chair shall be: ‘Shall the main question now be put?’ And if the nays prevail, the main question shall not then be put.”).

20. See *id.* at Rule IX; Irving Brant, *Absurdities and Conflicts in Senate Rules Are Outlined*, WASH. POST, Jan. 2, 1957, reprinted in 103 CONG. REC. 17 (1957) (“From 1789 to 1806, debate on a bill could be ended instantly by a majority of Senators present, through adoption of an undebatable motion calling for the previous question.”); accord 113 CONG. REC. 183 (1967) (statement of Sen. Kuchel) (“Every senate chamber in the State governments in this country has a majority rule to terminate debate. . . . The Senate of the United States followed that rule in its early days.”).

21. RULES ADOPTED BY THE FIRST SENATE OF THE UNITED STATES RULE IX, 1 ANNALS OF CONG. 20–21 (Joseph Gales ed., 1789), available at The Library of Congress,

This motion was a well entrenched tradition among legislatures of the time: It had been recognized by the British parliament since 1604, by the Continental Congress, and by the House of Representatives,<sup>22</sup> which still observes it to this day.<sup>23</sup>

Today, the previous question motion is generally understood as a method for cloture;<sup>24</sup> that is how it functions in the House of Representatives<sup>25</sup> and the British Parliament<sup>26</sup> where, if passed, it stops debate and forces “an immediate, final vote” on the pending proposal.<sup>27</sup> How the motion functioned in the early years of the U.S. Senate is the subject of dispute. Some have argued that the motion served as an early cloture device, allowing “a majority of Senators present” to end “instantly” all debate and force a vote.<sup>28</sup> Others have argued that it was used as a mechanism to delay consideration and not as a cloture device.<sup>29</sup> As Senator Clifford P. Case (R-NJ) explained, the evidence is inconclusive for the simple reason that neither the concept nor the practice of filibustering to prevent majority rule existed in the early U.S. Senate:

The fact is that so-called unlimited debate in the Senate is a myth. History shows clearly that up to the time of the Civil War a

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A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875, <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=10> (last visited Oct. 17, 2004).

22. 99 CONG. REC. 112 (1953) (statement of Sen. Taft).

23. HOUSE RULE XVI, RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 106-320, AT 673-74 (2000), AVAILABLE AT [HTTP://WWW.HOUSE.GOV/RULES/HOUSE\\_RULES\\_TEXT.HTM](http://WWW.HOUSE.GOV/RULES/HOUSE_RULES_TEXT.HTM) (LAST VISITED OCT. 17, 2004).

24. FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* 15 (1940) (explaining that the “previous question . . . in modern times has come to mean that, if adopted, all debate shall end and a vote shall be taken on the main question”).

25. *The Previous Question*, at [http://www.house.gov/rules/prev\\_question.htm](http://www.house.gov/rules/prev_question.htm) (last visited Oct. 17, 2004) (discussing RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES RULE XVI).

26. STANDING ORDERS OF THE HOUSE OF COMMONS—PUBLIC BUSINESS 2002(2) ORDER 36, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmstords/27501.htm> (last visited Oct. 17, 2004).

27. *The Previous Question*, *supra* note 25.

28. Brant, *supra* note 20 (“From 1789 to 1806, debate on a bill could be ended instantly by a majority of Senators present, through adoption of an undebatable motion calling for the previous question.”); accord 113 CONG. REC. 183 (1967) (statement of Sen. Kuchel) (“Every senate chamber in the State governments in this country has a majority rule to terminate debate. . . . The Senate of the United States followed that rule in its early days.”).

29. 105 CONG. REC. 145 (1959) (statement of Sen. Thurmond) (“[I]t should be clear that between 1789 and 1806 ‘the previous question’ used in the Senate was not intended to suppress debate, but to suppress the main question, and, therefore, to avoid a vote on a particular piece of legislation.” (citing ROBERT’S RULES OF ORDER 117 (75th anniversary rev. ed., 1951))); 103 CONG. REC. 153 (1957) (statement of Sen. Russell) (“A motion for the previous question was in the nature of a motion to postpone consideration of a bill before the Senate. . . . without taking action on it at that time.”).

majority of the Senate, under its rules and precedents, and under the dignity of its customs, did have the authority to, and for the most part effectively did, limit debate and prevent filibusters. . . . There may be exceptions, but the truly representative picture of the Senate before the Civil War, as shown by our historical records, is that the body observed dignity and restraint in debate, and did not consider talking to consume time a parliamentary instrument appropriate for the Senate. . . . [T]he filibuster as a device, not merely to delay, but to prevent, action is a modern institution which has no support or sanction in early Senate history and practice.”<sup>30</sup>

So strong was this tradition of a “dignified Senate,” that there were no filibusters until the late 1830s.<sup>31</sup>

### B. *The Inadvertent Creation of the Opportunity To Filibuster*

It was against this backdrop of limited debate that Vice President Aaron Burr, in 1806, approached the previous question motion. 1806 marked the first re-codification of the Standing Rules of the Senate. As then-Senator John Quincy Adams reported,<sup>32</sup> Burr advised that the motion for the previous question was of no use and should be dropped:

[Burr] mentioned one or two rules which appeared to him to need a revision, and recommended the abolition of that respecting the *previous question*, which he said had in the four years been only once taken, and that upon an amendment. This was proof that it

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30. 105 CONG. REC. 148 (1959) (statement of Sen. Case of New Jersey).

31. BURDETTE, *supra* note 24, at 16 (“[I]t seems likely that there were no major or extended filibusters in the dignified Senate prior to the advent of the remarkable John Randolph of Roanoke. . . . in 1825 . . . .”); accord SARAH S. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 5 (1997) (“[T]he practice of exploiting the rules (or lack thereof) to block Senate action failed to take root in the original Senate. . . . It was widely assumed in these first decades that measures would be brought to a vote for final consideration and that a simple majority would be sufficient for ending debate on even the most controversial legislative business.”); *id.* at 39 (“[N]o real filibusters took place until the late 1830s.”).

32. As explained by historian Franklin Burdette, for information on the 1806 re-codification, we must turn to contemporary commentators such as John Quincy Adams:

For many of the proceedings of the early Senate, as in the case of the early House, historians are dependent upon contemporary commentaries and upon private records left by the members. Debates in Congress were often scantily reported, and in the Senate they were secret until 1794. Not until 1873 did there originate the official *Congressional Record*, reporting verbatim speeches in both Houses. The earlier *Annals of Congress*, *Register of Debates*, and *Congressional Globe*, printed as commercial undertakings and including verbatim accounts of only parts of the proceedings, leave the searcher without adequate clues to many possible parliamentary maneuvers.

BURDETTE, *supra* note 24, at 16; see also BINDER & SMITH, *supra* note 31, at 42 (discussing the secrecy of Senate proceedings in the late 18th and early 19th centuries).

could not be necessary, and all its purposes were certainly much better answered by the question of indefinite postponement.<sup>33</sup>

The Senate followed this advice but failed to impose any other device by which debate might be restricted. Thus, by sheer oversight in 1806, the Senate opened itself to the possibility of filibuster.<sup>34</sup>

### C. *The First Filibusters*

With no previous question motion available, a minority could hold unlimited debate and prevent a vote on any debatable proposition. It was not until the late 1830s, however, that a group of Senators attempted to do so.<sup>35</sup>

Disputes over the Bank of the United States brought on two of the earliest filibusters. In 1834, the Senate had formally censured President Andrew Jackson for withdrawing federal deposits from the Bank of the United States.<sup>36</sup> Jackson's supporters were unrelenting in their efforts to erase the censure, and between 1835 and 1837, six state legislatures replaced their Senators with men who promised to remove it.<sup>37</sup> In 1837, a group of Jacksonian Senators moved to expunge the censure from the Senate *Journal*.<sup>38</sup> "Opponents talked and talked."<sup>39</sup> "It was evident that consumption of time, delay and adjournment, was their plan," Senator Thomas H. Benton (D-MO) reported.<sup>40</sup> In response, Jackson's supporters prepared for a long night, "fortif[ying] themselves with an ample supply, ready in a nearby committee room, of cold hams, turkeys, beef, pickles, wines, and cups of hot coffee."<sup>41</sup> The filibuster was short lived: Near midnight the opposition gave way, the Senate passed the expunging resolution 24-19, and the anti-Jackson Senators stormed out of the Senate before the expunging could be completed.<sup>42</sup>

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33. 1 MEMOIRS OF JOHN QUINCY ADAMS 365 (Charles Francis Adams ed., 1874), quoted in JOSEPH COOPER, THE PREVIOUS QUESTION: ITS STANDING AS A PRECEDENT FOR CLOTURE IN THE UNITED STATES SENATE, S. DOC. 87-104, at 4 (1962).

34. See BINDER & SMITH, *supra* note 31, at 33-34 ("[In making] the rule change in 1806 that made possible the filibuster—by eliminating the Senate's previous question motion ... members of the original Senate expressed no commitment to a right of extended debate ...").

35. *Id.* at 39 ("[N]o real filibusters took place until the late 1830s.").

36. BURDETTE, *supra* note 24, at 20.

37. *Id.*

38. *Id.* at 19.

39. *Id.* at 20.

40. *Id.*

41. *Id.* (citing 1 THOMAS H. BENTON, THIRTY YEARS' VIEW 727 (New York, D. Appleton & Co. 1854-1856)).

42. *Id.*

Whether it was a sense of the dignity of the Senate or sheer exhaustion that ended the 1837 filibuster, by 1841, the tolerance for unlimited debate had declined and the Senate began a long history of attempting filibuster reform.<sup>43</sup> On June 21, 1841, Whig Senator Henry Clay (W-KY) reported a Fiscal Bank Bill to the Senate, designed to establish the National Bank that Andrew Jackson had thwarted.<sup>44</sup> When Senator John Calhoun (D-SC) made it clear that the Democratic minority would not be rushed, Clay called for a revival of the previous question motion “to allow a majority to control the business of the Senate.”<sup>45</sup> When Senator William King (D-AL) asked if Clay planned to introduce a gag measure, Clay retorted, “I will, sir; I will.”<sup>46</sup> King made clear his intention to filibuster such a proposal: “I tell the Senator, then, that he may make his arrangements at his boarding house for the winter.”<sup>47</sup> At the insistence of his own party, which feared that a “gag measure” would lead to a break down in relations, Clay stood down.<sup>48</sup> Clay agreed to compromise, and the bill passed the Senate on July 28.<sup>49</sup>

The practice of filibustering grew in the last half of the 19th century. Four times Senators unsuccessfully attempted filibuster reform—in 1850, 1873, and 1883 by moving to add a previous question motion to the Standing Rules,<sup>50</sup> and in 1890 by attempting to create a cloture precedent through majority vote.<sup>51</sup> It was not until 1917 that the Senate adopted a cloture rule.

### *Part III: The Constitutional Option To Amend Formally the Standing Senate Rules*

#### *A. The Senate Adopts a Formal Cloture Rule (1917)*

##### *1. The “Willful Eleven”*

One hundred and eleven years passed from the elimination of the

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43. *Id.* at 21.

44. *Id.* at 22.

45. *Id.* at 23.

46. *Id.*

47. *Id.*

48. *Id.* at 24.

49. *Id.*

50. 2 ROBERT C. BYRD, *THE SENATE 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 115–16 (1991), also printed at S. DOC. NO. 100-20 (1991); see also *SENATE CLOTURE RULE*, S. REP. NO. 99-95, at 12–13, 15 (1985).

51. *SENATE CLOTURE RULE*, S. REP. NO. 99-95, at 12–13, 15; BURDETTE, *supra* note 24, at 52–57; BYRD, *supra* note 50, at 116–17.

previous question motion before a cloture rule was brought to the Senate, and even then, it took the threat of war to enact. On January 19, 1917, America intercepted the Zimmerman Note, a communication from the German Foreign Ministry to the German Ambassador to Mexico. The Ministry advised the ambassador that Germany was about “to begin submarine warfare unrestricted” in the North Atlantic and that these actions might provoke a change in American neutrality toward the war belligerents.<sup>52</sup> The Zimmerman Note further advised the ambassador, in the event that America did side with the Allies, to explore with the Mexican government the possibility of an alliance against the United States. Under the proposed alliance, Mexico would aid Germany and urge Japan to declare war on the U.S. In exchange, Germany would assist Mexico “to reconquer the lost territory in New Mexico, Texas, and Arizona.”<sup>53</sup> Germany commenced unrestricted submarine warfare on February 1.<sup>54</sup>

President Wilson countered with the Armed Ship Bill, a proposal to arm American merchant ships so that they might defend themselves in the event of a German attack.<sup>55</sup> He still hoped that such a defensive measure would enable America to protect itself without entering the war.<sup>56</sup> On March 2, the Senate began a consideration of President Wilson’s proposal.<sup>57</sup> The bill had passed the House with overwhelming support and enjoyed similar support within the Senate, but a group of eleven isolationists led by Senator Robert La Follette (R-WI) filibustered.<sup>58</sup> Although under the bill America remained neutral in the war, these senators feared that such legislation would mark the first step toward American engagement.<sup>59</sup> LaFollette and his allies would not permit the bill to come to a vote, and the 64th

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52. *The Zimmerman Note*, The World War I Document Archive, available at <http://www.lib.byu.edu/~rdh/wwi/1917/zimmerman.html> (last updated Jan. 30, 1996).

53. *Id.*

54. BURDETTE, *supra* note 24, at 118; Letter from Count Johann von Bernstorff, German Ambassador to the United States, to Robert Lansing, U.S. Secretary of State (January 31, 1917), available at [http://www.firstworldwar.com/source/uboaat\\_bernstorff.htm](http://www.firstworldwar.com/source/uboaat_bernstorff.htm) (last updated Dec. 20, 2003).

55. BURDETTE, *supra* note 24, at 118.

56. *Id.*

57. *Id.*

58. *Id.* at 120. The group included Senators Moses Clapp (R-MN), Albert Cummins (R-IA), Asle Gronna (R-ND), William Kirby (D-AR), Robert La Follette (R-WI), Harry Lane (D-OR), George Norris (R-NE), James O’Gorman (D-NY), William Stone (D-MO), James Vardaman (D-MS), and John Works (R-CA). *Id.* at 122.

59. *Id.* at 118.

Congress expired on March 4.<sup>60</sup>

Public reaction was immediate and condemning. Nor was it checked by the President's declaration that he would, under the authority granted by existing statutes, arm America's merchant ships without Senate authorization.<sup>61</sup> Across the nation, "rolls of dishonor" were inscribed with the eleven senators' names.<sup>62</sup> In Oregon a group of voters attempted a recall of Senator Harry Lane (D-OR).<sup>63</sup> At the University of Illinois, students hanged Senator La Follette in effigy.<sup>64</sup> Citizens from Mississippi sent Senator James Vardaman (D-MS) a forty-pound iron cross inscribed, "Lest the Kaiser Forget."<sup>65</sup> And the *New York World* declared, "As for those wretches in the Senate, envious, pusillanimous, or abandoned, who with doubts and quibbles have denied their country's conscience and courage in order to make a Prussian holiday, they may well be left to the judgment that good men and true men never fail to pass upon delinquents and dastards."<sup>66</sup>

Accordingly, President Wilson well reflected the public mood when he stormed that the "Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible."<sup>67</sup> Citing the filibuster of the Armed Ship Bill and several other notable filibusters from the 64th Congress, he demanded the Senate enact filibuster reform: "The remedy? There is but one remedy. The only remedy is that the rules of the Senate should be so altered that it can act... and save the country from disaster."<sup>68</sup>

## 2. *The Constitutional Option Is Introduced*

A Special Session of the 65th Congress was scheduled to begin the following day. With a view toward confirming nominations, Wilson had called for the session prior to and for reasons unrelated to the

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60. *Id.* at 115, 121. Prior to the adoption of the Twentieth Amendment in 1937, Congresses expired at noon on March 4 of odd-numbered years.

61. *Id.* at 122.

62. *Id.* at 122–23.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 122.

67. 65 CONG. REC. 20 (1917) (Proclamation of Pres. Wilson), *quoted in* BURDETTE, *supra* note 24, at 121.

68. BURDETTE, *supra* note 24, at 121–22.

filibuster of the Armed Ship Bill.<sup>69</sup> However, when the session opened, several Senators, including Thomas J. Walsh (D-MT) and Henry Cabot Lodge (R-MA), successfully argued that, although acting in special session, the Senate's power would not be limited to considering nominations and could embrace rule changes.<sup>70</sup>

Although the Senate clearly intended to consider filibuster reform, any such effort faced the prospect of further filibustering. At the time, the Senate had no rule that would permit a majority to stop debate and force a vote on a rules change. It seemed that a willful few could block filibuster reform.

Senator Walsh, however, offered another option: the constitutional option. Walsh explained that under the U.S. Constitution, the Senate had the right to choose the rules governing its procedure by majority vote. A past Senate, he reasoned, could not take this right away from succeeding Senates by passing debate rules that, in practice, prevented a new Senate from choosing its own rules by majority vote. Walsh proposed that the Senate, acting under the rights granted by the Constitution, formally re-adopt all of the previous Senate's Standing Rules except for Rule XXII, which governed the procedure of motions. Walsh proposed that the Senate then adopt an amended version of Rule XXII that included a procedure for cloture of debate.<sup>71</sup> Walsh explained that during this process, the Senate would operate under traditional parliamentary procedures, which include procedural mechanisms (such as a motion for the previous question) to control filibusters.<sup>72</sup>

The Senate, Walsh observed, was operating under the assumption that the rules were continuing in force—an assumption that had never been directly challenged.<sup>73</sup> Walsh looked first to the U.S. Constitution for guidance.<sup>74</sup> He noted that the provision of Article I, Section 5

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69. During this period, special sessions were commonplace every four years in the March following a Presidential election. The new Congress, which otherwise would not meet for thirteen months after the elections, often would convene for several days to confirm Presidential nominations and sometimes would convene for longer periods of time to address legislation.

The Senate Republicans had helped to ensure there would be a special session in 1917 through their concerted filibusters the week before. On February 23, the Republicans agreed in conference to delay Senate business in an attempt to force a special session and embarrass the new Administration. Through February 28, they carried out their plan. BURDETTE, *supra* note 24, at 115.

70. 55 CONG. REC. 8 (1917) (statement of Sen. Walsh); *id.* (statement of Sen. Lodge).

71. *Id.* at 9.

72. *Id.* at 16 (statement of Sen. Walsh).

73. *Id.* at 8.

74. *Id.* at 17.

allowing each branch of Congress to make its own rules treated the Senate and the House identically: “When the Constitution says that ‘Each House may determine its rules of proceeding,’ it means that each House may, by a majority vote, a quorum being present, determine its rules.”<sup>75</sup> Walsh reasoned that just as the House could adopt new rules at any time by a simple majority vote, even in the face of a contrary House rule requiring “that two-thirds or any larger number alone shall make changes,”<sup>76</sup> under Article I, Section 5, so could the Senate.<sup>77</sup>

Furthermore, Walsh explained, just as the rules of the House expire with the Congress in which they were adopted, so do the rules of the Senate. Walsh noted that at the start of each session the House has no rules until it, while operating under general parliamentary procedures, adopts new rules or re-adopts the prior rules. Similarly, he concluded, the Senate has no rules until it adopts new rules or re-adopts the prior rules, whether explicitly by a vote or implicitly by operating under them and thus acquiescing to them.<sup>78</sup>

Walsh acknowledged that historically, many Senates had not formally adopted new rules at the beginning of a new Congress.<sup>79</sup> He cautioned against drawing any conclusions from this past practice, noting that just “because a certain practice has been followed for many years is no reason at all [to conclude] it is the right

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75. *Id.*

76. Walsh quoted Speaker of the House Reed for the proposition that the House could disregard standing rules to the contrary and effect a rules change at any time by simple majority vote:

Such modifications the assembly is always competent to make. Such changes can be made by a majority. This is true even if the rules already adopted provide that two-thirds or any larger number alone shall make changes. The assembly can not deprive itself of power to direct its method of doing business. It is like a man promising himself that he will not change his own mind.

*Id.* (statement of Sen. Walsh) (quoting former Speaker of the House Reed).

77. *Id.* (statement of Sen. Walsh).

78. *Id.* at 9. Walsh further explained,

It is a matter of common knowledge that the rules of the House do not survive the Congress during which they were adopted. At the first session of each new Congress that body entertains a motion that the rules of the last preceding Congress, with or without changes or exceptions, shall govern its deliberations until further ordered. Until such a resolution or some other of like import is passed, the House operates under general parliamentary law, unless, as has occurred, it is assumed that the rules of the last House are in force until by acquiescence they are deemed to have been reinvigorated and in effect reenacted. The House of Representatives holds that by virtue of the provision of the Constitution that “each House may determine [the] rules of [its] proceedings”...

*Id.* (statement of Sen. Walsh) (quoting U.S. CONST. art. I, § 5, cl.2).

79. *Id.* at 8 (statement of Sen. Walsh).

procedure.”<sup>80</sup> Walsh cited the treatment of the joint rules of the two Houses as an example of such an error: “[F]or 87 years—it was regarded that the joint rules of the two Houses lived from one Congress to another, and yet when that question was directly presented to the Senate in 1876 and debated in this body the conclusion was arrived at that they did not.”<sup>81</sup>

Walsh understood that the opposition relied heavily on the notion that the Senate was a “continuing body” whose rules carried forward from one Congress to the next. But, Walsh observed, the Senate had never debated, much less formally adopted, the “continuing body” theory,<sup>82</sup> and the discussion was “absolutely new—*res nova*, to use the language of the law.”<sup>83</sup> Walsh mounted evidence against the continuing-body hypothesis. He observed that if the Senate were a “continuing body,” it would have a “perpetual and continued existence ... in character essentially different from the ephemeral life of the House.”<sup>84</sup> Walsh reasoned that Article I, Section 5, which describes the rulemaking powers of the House and Senate in identical terms, precludes any conclusion which viewed the two branches so differently. Additionally, Walsh noted that the “uniform practice of the Senate, since its career began” was that “all bills die” with the end of a session, a practice that would be wasteful and superfluous if the Senate were a continuing body.<sup>85</sup> Walsh posited that the “idea of a ‘continuing’ Senate [was] at war with the theory of parliamentary government the world over,” in which representatives assembled, conducted their business, and then passed out of existence when their term expired.<sup>86</sup> Rather, Walsh explained, the Senate is described as a “continuous body” only because “two-thirds of its Members remain in office at the expiration of each two year period.”<sup>87</sup>

Senator Miles Poindexter (R-WA) rejected this argument, asking Walsh how the body of the Senate could change during the term of a Senator whose office continued unchanged over that six year period. Poindexter contended that if an individual Senator maintained continuing capacity for action over six years, then the Senate of which he is a part must also maintain this continuing capacity:

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 11.

87. *Id.*

If the office of Senator is a continuing office and does not change in any respect during the six years of his term, how [can] the body of which he is a Member ... be said to be changed in that period of time. The two things, it seems to me, are indissoluble ... [because] if the Members of the body have exactly the same nonvarying capacity and functions during the entire period of their term, ... the body which gives them that capacity and authority must also continue.<sup>88</sup>

Walsh responded that “[t]here is a vast difference between the Members of the Senate and the Senate.”<sup>89</sup> If a bill were to be signed by each member at his home, Walsh explained, “it would not be a law.” In order for the bill to become a law, it had to be “enacted while the Senate is actually assembled in its customary place” to conduct business.<sup>90</sup> Poindexter’s argument, Walsh concluded, did not draw the necessary distinctions between the parts and the whole.<sup>91</sup>

Walsh next looked to standard parliamentary practices. He noted that the constitutional option and the principle of majority rule it embodied seemed “universal among ... American legislatures.”<sup>92</sup> Walsh submitted a list of twenty-one states in which the upper legislative bodies re-adopted rules upon assembling after a general election.<sup>93</sup> Walsh explained that none of these bodies accepted “the idea that the rules adopted at some remote time, under conditions that might be characterized as primitive,” could prevent the members of that body from implementing their will.<sup>94</sup> Walsh questioned why the Senate should have “power to impose its views concerning ... procedure” upon another Senate “of some succeeding Congress, one-third of the members of which, possibly, never heard of the rules to which they become subject?”<sup>95</sup> The stagnant legacy of previous Senates, Walsh reasoned, should not be an burden on freshly elected representatives:

Clearly, because the people, whose representatives we are, have a right to have all measures that engage the attention of this body considered without prejudice on account of any action that may have been taken by a Senate whose course and record had made it odious, or which, for some other reason, had been regenerated so

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88. *Id.* (statement of Sen. Poindexter).

89. *Id.* (statement of Sen. Walsh).

90. *Id.*

91. *Id.*

92. *Id.* at 13.

93. *Id.* at 14.

94. *Id.*

95. *Id.*

far as it was possible to make a change. It is because the new members, coming fresh from the people, ought to have the right to be heard and be accorded the opportunity to vote in the light of information gleaned at every stage of the passage of a bill or resolution.<sup>96</sup>

Walsh argued that the constitutional option is fundamental to democratic governance. Each election, he explained, reflects “[t]he sense of the people ... concerning measures passed as well as those proposed.”<sup>97</sup> Walsh reasoned that when an incumbent Senator ignores the lessons of these elections, he ignores the will of the people he has been charged to represent. Walsh concluded that “[t]he theory of the perpetuity of the rules subserves no good purpose” and is convenient only in serving to promote the agendas of “factional reactionaries.”<sup>98</sup>

At this point, discussion came to a head, and in an exchange with Vice President Thomas Marshall and Senator John William (D-MS), Walsh made the implications of his argument clear. Walsh believed that the Senate was, even during the debate they were then having, acting only under the rules of general parliamentary law:

Mr. WALSH: I understood the Chair to say yesterday that in his view—

The VICE PRESIDENT: There are rules here?

Mr. WALSH. That the old rules were in force.

The VICE PRESIDENT. Yes.

Mr. WALSH. My contention is that the body is now governed by general parliamentary law and not by the old rules.

Mr. WILLIAMS. There are no old rules.

Mr. WALSH. That is to say, there are no old rules of the Senate at the present time.<sup>99</sup>

After this exchange, Senator Thomas Sterling (R-SD) asked Walsh if the resolution he introduced at the beginning of the session could be referred to a committee.<sup>100</sup> Walsh responded, in line with his previous explanation, that in his view “there [was] no committee to which it [could] be referred” and that the Senate was free to consider the

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 15 (statements of Sen. Walsh, Vice President Marshall, and Sen. Williams).

100. *Id.* at 16 (statement of Sen. Sterling).

matter as it saw fit, with “no rule except general parliamentary law governing its action.”<sup>101</sup>

Senator Warren Harding (R-OH) favored adoption of a cloture rule, but feared the constitutional option would yield chaos: “I am not ready to accept the soundness of the Senator’s argument, that this is not a continuing body; and I can not accept the contention that we must first enter into a state of chaos in order to bring about the reform which the Senator seeks.”<sup>102</sup> Harding held fast to his belief that the constitutional option was not necessary because “no dilatory tactics” could truly prevent reform if the Senate was favorable to a change.<sup>103</sup> Accordingly, Harding attempted to redirect Walsh to the normal channels of legislative reform. Walsh would have nothing of it. Walsh argued that without a cloture rule, “it is simply impossible to change the rules so long as one man has the physical endurance requisite to prevent the change.”<sup>104</sup>

Other Senators echoed Harding’s “chaos” notion. For example, Senator Francis Warren (R-WY) asked Walsh if he thought he “would gain any time in the long run by declaring that we are in chaos and without rules...?”<sup>105</sup> Warren worried that the Senate would proceed to question and debate all the rules, not merely Rule XXII as Walsh had intended:

I am putting it right down upon the basis of the Senator’s argument that we are totally and wholly without rules; that we will start in to adopt new rules. If that is true, no matter if every rule but one is the same as the Senator presents it, yet every one of them is open to debate, if it is offered as a new matter.<sup>106</sup>

Warren offered that he did not object to a procedure to amend cloture rules, but that he could not accept the notion that every two years the Senate could be “at sea without rudder or compass regarding rules.”<sup>107</sup>

Walsh concluded his presentation by asserting that the constitutional option would not incite chaos but would help express the will of the present majority: “A majority may adopt the rules, in the first place. It is preposterous to assert that they may deny future

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101. *Id.* (statement of Sen. Walsh).

102. *Id.* (statement of Sen. Harding).

103. *Id.*

104. *Id.* (statement of Sen. Walsh).

105. *Id.* at 17 (statement of Sen. Warren).

106. *Id.*

107. *Id.*

majorities the right to change them.”<sup>108</sup> Walsh reasoned that just as any court whose rules could only be changed by a vote of two-thirds of the judges would be justifiably an object of ridicule, and future members of that court would undoubtedly change that rule, so the U.S. Senate risked ridicule and contempt if it did not change its rules:

A court would make itself the subject of ridicule that should attempt to adopt rules one of which should provide that they could be changed only by a vote of two-thirds of the judges. It would not be tyrannical to make such a rule; it would be futile. The court, when wiser men graced the bench, would contemptuously, by a majority, set it aside. It is scarcely less preposterous that a legislative body should by rule deny itself the right to bring debate to an end and to proceed to a vote ... [T]o maintain that a rule has any virtue under which one man may, by his physical prowess alone, defeat a vote is to invite calamity unspeakable and expose the Senate to the well-deserved contempt of mankind.<sup>109</sup>

Walsh closed by declaring that any Senate rule is void if its effect is to bar a majority of Senators from legitimately closing debate.<sup>110</sup> “To delay justice,” Walsh proclaimed, “is to deny justice.”<sup>111</sup>

### 3. *Cloture Established*

With Walsh’s proposal looming, the two parties each appointed five Senators to negotiate a cloture rule. The two party caucuses proposed a compromise cloture rule which, after six hours of debate, passed 76-3 on March 8, 1917.<sup>112</sup> Rule XXII of the Standing Rules of the Senate was amended to permit cloture on “any pending measure” at the will of two-thirds of all Senators present and voting:

If at any time a motion signed by 16 Senators, to bring to a close the debate upon any pending measure is presented to the Senate, the Presiding Officer shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the Secretary call the role, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by an aye-and-nay vote the question:

“Is it the sense of the Senate that the debate shall be brought to a close?”

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108. *Id.* at 18 (statement of Sen. Walsh).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 45.

And if that question shall be decided in the affirmative by a two-thirds vote of those voting, then said measure shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the pending measure, the amendments thereto, and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be in order after the vote to bring the debate to a close, unless the same has been presented and read prior to that time. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.<sup>113</sup>

Although the Senate was not forced to act on Walsh's constitutional option, there is strong reason to believe that the proposal was the impetus for cloture reform. Looking back on the 1917 rule change, Senator Clinton P. Anderson (D-NM) concluded that Walsh's proposal carried the day: "[Walsh] made a very powerful argument [in favor of adding a cloture rule] ... When he finished, someone surrendered. Senator Walsh won without firing another shot. A cloture rule was brought forth ... and, with the exception of three, every one of [the opposing Senators]... fell into line."<sup>114</sup> Senator Paul H. Douglas (D-IL) concurred that the 1917 rules "change would not have been made had not Senator Walsh presented his original resolution"<sup>115</sup>:

[W]hile there was no formal rule or decision dealing with the Walsh motion, it was not overruled, and the result he was seeking to accomplish was attained, because the objectors had hanging over their heads general parliamentary law, under which the previous question could be moved to shut off debate.<sup>116</sup>

#### *B. The Vandenberg Ruling and Wherry Amendment: Cloture Broadened But Made More Difficult (1948-1949)*

For supporters of filibuster control, 1948 and 1949 proved to be harrowing years. Opponents of cloture pointed out that, according to its own text, Rule XXII applied only "to bring to close the debate

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113. *Id.* at 19.

114. 99 CONG. REC. 116 (1953) (statement of Sen. Anderson).

115. *Id.* at 117 (statement of Sen. Douglas).

116. *Id.*

upon any pending *measure*.”<sup>117</sup> They seized upon this language to argue that Rule XXII’s cloture device applied only to the measure itself, and not to motions to proceed to the consideration of the measure.<sup>118</sup> In 1948, President pro tempore Arthur Vandenberg (R-MI) adopted this stance in a formal ruling.<sup>119</sup> Under Vandenberg’s ruling, the minority could evade Rule XXII cloture by filibustering the motion to take up legislation, on which they could hold unlimited debate, instead of filibustering the legislation itself, which was subject to Rule XXII.<sup>120</sup> Accordingly, Vandenberg observed, the Senate had “no effective cloture rule at all.”<sup>121</sup>

The following year, Vice President Alben Barkley reversed the Vandenberg precedent.<sup>122</sup> On March 10, 1949, Majority Leader Scott Lucas (D-IL) filed for cloture on a motion to proceed to a bill.<sup>123</sup> Senator Richard B. Russell (D-GA) made a point of order that, under the Vandenberg ruling, cloture did not apply to motions to proceed.<sup>124</sup> Barkley disregarded the Parliamentarian’s advice<sup>125</sup> and ruled that Rule XXII’s cloture provision applied to motions to proceed:

It is the opinion of the Chair ... that the Senate, when it adopted the rule, intended to make it possible for a cloture petition to be filed in order that it might transact its business, and certainly the motion under discussion is business ... Therefore, in view of the obvious intention of the Senate in 1917 ... the Chair cannot do otherwise than overrule the point of order.<sup>126</sup>

Barkley reasoned that those Senators who first established the cloture rule in 1917 intended that rule to streamline legislative business, and that Vandenberg’s precedent was wrongheaded in contradicting their intentions.<sup>127</sup> Barkley’s ruling, however, was

117. SENATE CLOTURE RULE, S. REP. NO. 99-95, at 106 (1985) (emphasis added).

118. 1953 CONG. Q. ALMANAC 313.

119. *Id.*

120. *Id.*

121. SENATE CLOTURE RULE, S. REP. NO. 99-95, at 110 (1985).

122. 95 CONG. REC. 2175 (1949) (statement of Vice President Barkley).

123. *Id.* at 2166.

124. *Id.* (statement of Sen. Russell).

125. Former Senate Parliamentarian Floyd M. Riddick explains,

[The Parliamentarian] had advised [Barkley] that the point of order was in order. But Barkley, having been against that line of thought while he was majority leader was consistent and refused to sustain the point of order.

Interviews by Donald A. Ritchie with Floyd M. Riddick, Senate Parliamentarian, 1964-1974 (July 27, 1978, August 1, 1978, August 25, 1978), available at *Floyd M. Riddick, Senate Parliamentarian, ORAL HISTORY INTERVIEWS* 128, [http://www.senate.gov/artandhistory/history/oral\\_history/Floyd\\_M\\_Riddick.htm](http://www.senate.gov/artandhistory/history/oral_history/Floyd_M_Riddick.htm).

126. 95 CONG. REC. 2175 (1949) (statement of Vice President Barkley).

127. *Id.*

immediately appealed and overturned by the full Senate 41-46.<sup>128</sup> This reinstated Vandenberg's ruling and the potential for unlimited debate on the motion to proceed.

This state of affairs was short lived. After some deliberation, Senator Kenneth Wherry (R-NE) proposed a compromise amendment: Rule XXII cloture would be broadened to apply to all debatable propositions (including, for the first time, nominations, treaties, and motions to proceed) except for motions to proceed to a rules change, but the super-majority cloture requirement would be raised from two-thirds of Senators present to two-thirds of all Senators.<sup>129</sup> Nominations were swept into the rule in 1949, but only by happenstance. The Senate debates include not a single mention of filibusters of nominations, likely because the concept was so alien to the Senate of 1949.

On March 17, 1949, the Senate passed the Wherry Amendment 63-23.<sup>130</sup> The end result was that Rule XXII now read:

[subsection 2] Notwithstanding the provisions of rule III or rule VI or any other rule of the Senate, except subsection 3 of rule XXII, at any time a motion signed by 16 Senators, to bring to a close the debate upon any measure, motion, or other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer shall at once state the motion to the Senate, and 1 hour after the Senate meets on the following calendar day, but one, he shall lay the motion before the Senate and direct that the Secretary call the roll, and, upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote question:

“Is it the sense of the Senate that the debate shall be brought to a close?”

And if that question shall be decided in the affirmative by two-thirds of the Senators duly chosen and sworn, then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than 1 hour on the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto, and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks.

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128. *Id.* at 2,275.

129. Ritchie, *supra* note 125, at 128–30.

130. 95 CONG. REC. 2724 (1949).

Except by unanimous consent, no amendment shall be in order after the vote to bring the debate to a close, unless the same has been presented and read prior to that time. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

....

[subsection 3] The provisions of the last paragraph of rule VIII (prohibiting debate on motions made before 2 o'clock) and of subsection 2 of this rule shall not apply to any motion to proceed to the consideration of any motion, resolution, or proposal to change any of the Standing Rules of the Senate.<sup>131</sup>

Filibuster reformers had broadened application of the cloture rule, but the higher threshold left them one step back from where they had been between 1917 to 1948.

### *C. The Return to Cloture by Two-Thirds Present (1953-1959)*

#### *1. The Civil Rights "Gravedigger"*

Among the most noteworthy victims of the filibuster was early civil rights legislation. By mounting a filibuster, a minority of Senators blocked bills to protect black voters in the South in 1890;<sup>132</sup> anti-lynching bills in 1922, 1935, and 1938;<sup>133</sup> anti-poll tax bills in 1942, 1944, and 1946;<sup>134</sup> and anti-race discrimination bills on eleven occasions between 1946 and 1975.<sup>135</sup> In fact, it was the Civil Rights Act of 1957 that prompted what is still the longest individual speech in the U.S. Senate—a speech by Senator Strom Thurmond (D-SC)<sup>136</sup> that lasted twenty-four hours and eighteen minutes and would have lasted longer had Thurmond's doctors not forced him to quit out of concern for kidney damage.<sup>137</sup>

131. SENATE CLOTURE RULE, S. REP. 99-95, at 111 (1985).

132. BURDETTE, *supra* note 24, at 52–57.

133. BINDER & SMITH, *supra* note 31, at 139.

134. *Id.* at 140.

135. See 111 CONG. REC. 3850 (1975) (“List of Cloture Votes Since Adoption of Rule 22”).

136. Senator Thurmond was a member of the Democratic Party from 1956 to 1964; from 1964 until his death in 2003, he remained a member of the Republican Party. Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000254> (last visited Nov. 14, 2004).

137. *Strom Thurmond: Historic Filibuster Waged To Stop Civil Rights Plan*, THE STATE, (Dec. 9, 2002), at <http://www.thestate.com/mlid/thestate/news>

The filibuster had become the weapon of choice for southern Democrats and conservative Republicans opposed to civil rights legislation. Legislation that easily passed the House of Representatives was repeatedly filibustered and either defeated or passed in watered-down form. Moreover, because cloture could not be proposed against a motion to proceed to a rules change, reform of the rule seemed out of reach. It seemed that the pro-reform Senators had good reason to conclude that the 1949 cloture rule was a “gravedigger” for any civil rights legislation.<sup>138</sup>

A group of northern Democrats and moderate Republicans responded with a series of efforts to end the civil rights filibusters by using the constitutional option to ease Rule XXII’s cloture requirement. At the start of the 83rd Congress in 1953, and the 85th Congress in 1957, Senator Clinton P. Anderson (D-NM) moved to implement the constitutional option, but both motions were tabled 70-21 and 55-38, respectively. The 86th Congress presented a real possibility that the constitutional option would succeed. The Senate of 1959 included eighteen freshman Democrats; if they voted mostly with the liberals, Anderson reasoned, he would have enough votes to defeat a tabling motion and carry out the constitutional option.<sup>139</sup> Additionally, the 1957 session had produced an advisory opinion from then-Vice President Richard M. Nixon endorsing the constitutional option. It seemed that both the votes and the procedural rulings were on Anderson’s side.

Senate Majority Leader Lyndon B. Johnson (D-TX), however, opposed the constitutional option and decided to cut it off at its head. Johnson parlayed his status as Democratic leader and his powers as Senate Majority Leader (Senate precedent entitled him to introduce his proposal first)<sup>140</sup> to push through a compromise resolution: cloture could be achieved by a vote of two-thirds present on any measure or motion. As a concession to Senator Russell, the compromise also included language that purported to resolve the “continuing body” controversy: “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”<sup>141</sup>

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/special\_packages/strom/4701448.htm.

138. 1959 CONG. Q. ALMANAC 213.

139. *See id.* at 212.

140. By Senate precedent, the Majority Leader has priority of floor recognition. FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 1091, 1098 (1992).

141. 105 CONG. REC. 8 (1959).

## 2. *The Constitutional Option Is Re-Introduced (1953)*

On January 2, 1953, a bipartisan group of Senators held a closed-door strategy session on ending the ongoing filibuster. They agreed to offer two successive motions.<sup>142</sup> First, Senator Clinton P. Anderson (D-NM) would move for the Senate to consider the adoption of a new set of rules.<sup>143</sup> The reformers knew that if the motion passed, their opponents would likely respond by filibustering any rules-change proposal. Accordingly, the reformers agreed that the Senate should then “proceed under general parliamentary rules” which would allow them to end a filibuster through majority vote.<sup>144</sup> After sufficient debate, a majority would force a vote on the rule change either “by moving the previous question, or by a motion under certain circumstances to lay on the table.”<sup>145</sup>

The next day,<sup>146</sup> Anderson introduced a “motion that the Senate immediately consider the adoption of rules for the Senate of the Eighty-third Congress.”<sup>147</sup> Debate began on January 6.<sup>148</sup> Senators Hubert H. Humphrey (D-MN), Paul H. Douglas (D-IL), and Anderson led the revision attempt, while Majority Leader Robert A. Taft (R-OH) and Senator Richard B. Russell (D-GA) headed the opposition.<sup>149</sup>

Taft stated that he did not object to filibuster reform—he also wanted to see Rule XXII “changed and liberalized somewhat”—but to the “radical” process Anderson proposed for achieving it.<sup>150</sup> Taft acknowledged that the Senate had never voted on the question of whether a new Senate had the right to adopt its own rules,<sup>151</sup> and conceded that he could not “conceive that the Senate would surrender the position it is given under the Constitution” to make its own rules by majority vote.<sup>152</sup> Taft saw the dispute as a prudential one. The issue

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142. The Senators were precluded then, as now, from combining two points into one motion by Senate Rule XV’s directive, “If the question in debate contains several propositions, any Senator may have the same divided.” SENATE RULE XV, STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, 106<sup>th</sup> Cong., 2d Sess. 10 (2000), available at <http://rules.senate.gov/senaterules/menu.htm>.

143. 1953 CONG. Q. ALMANAC 314.

144. 99 CONG. REC. 203 (1953) (statement of Sen. Douglas).

145. *Id.* (statement of Sen. Douglas).

146. 1953 CONG. Q. ALMANAC 314.

147. 99 CONG. REC. 108 (1953) (statement of the Vice President).

148. 1953 CONG. Q. ALMANAC 314.

149. *Id.*

150. 99 CONG. REC. 112 (1953) (statement of Sen. Taft).

151. *Id.* at 113 (statement of Sen. Taft) (responding to inquiry from Sen. Lehman).

152. *Id.* at 114 (statement of Sen. Taft) (responding to inquiry from Sen. Humphrey).

was not whether the Senate had the power to adopt new rules, but what means it should use when doing so.<sup>153</sup> Because he believed that the constitutional option undermined the Senate's status as a continuing body—a status he deemed critical to the institution—he opposed Anderson's proposal.

In asserting that the Senate is a continuing body, Taft noted the absence of contrary authority in Senate precedents<sup>154</sup> and the U.S. Constitution.<sup>155</sup> Taft also relied upon the Senate's past practice in continuing its rules without formally re-adopting them at the beginning of each Congress.<sup>156</sup> Additionally, he cited the fact that the Senate always has a quorum chosen and sworn and is always available for public business.<sup>157</sup> Like Senators Harding<sup>158</sup> and Warren<sup>159</sup> in 1917, Taft raised the specter of chaos, warning, "If we should become involved in a rules fight, the discussion could go on forever."<sup>160</sup> Finally, Taft stated that there was nothing novel or troubling about the "fact that previous Congresses have sought to bind future Congresses."<sup>161</sup> He noted that the U.S. Constitution includes a "perpetual provision" guaranteeing every state equal representation in the Senate and that the Constitution itself cannot be amended without a two-thirds vote of both Houses.<sup>162</sup> Russell opined that there was nothing unequal about such a state of affairs. "[N]o new Member of the Senate is put at a disadvantage," he argued, because all members, new and old, had the same rights "in dealing with changes in the rules."<sup>163</sup>

Anderson and Douglas argued that the 1917 debates showed that the constitutional option was a tried and validated method for amending the Standing Rules of the Senate.<sup>164</sup> Taft and Senator Francis Case of South Dakota (R-SD) countered that the Senate of 1917 actually "bypassed" Senator Walsh's proposal to readopt the Senate rules and instead added a cloture rule to Rule XXII under existing procedures. Thus, they argued, the 1917 debates did not lend

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153. *See id.* at 113 (statement of Sen. Taft).

154. *See id.* at 108 (statement of Sen. Taft).

155. *See id.*

156. *See id.*

157. *See id.*

158. *See* 55 CONG. REC. 16 (1917) (statement of Sen. Harding).

159. *See id.* at 17 (statement of Sen. Warren).

160. 99 CONG. REC. 114 (1953) (statement of Sen. Taft).

161. *Id.* at 115.

162. *Id.*

163. *Id.* at 122 (statement of Sen. Russell).

164. *Id.* at 116–17 (statements of Sen. Anderson and Sen. Douglas).

support to Senator Anderson's motion.<sup>165</sup> Anderson rejected this historical interpretation and insisted that the record was clear: Once Walsh invoked the constitutional option, "victory was handed him on a silver platter."<sup>166</sup>

Taft strongly disagreed. He argued that by "amending the rules in accordance with the rules of the Senate," the Senate of 1917 "reaffirmed its belief that those rules existed."<sup>167</sup> "How," he asked, "could the Senate amend rule XXII if rule XXII was not in existence?"<sup>168</sup> Senators Douglas and Anderson rebutted with a colloquy designed to show that Walsh's proposal was the impetus for the Senate's 1917 rule change:

MR. DOUGLAS. Is it not true that what the Senate did on the 7th and 8th of March 1917, was to make the change in rule XXII which Senator Walsh urged? Is it not also true that this change would not have been made had not Senator Walsh presented his original resolution for the adoption of Senate rules as a whole, except rule XXII, and for a committee to draft a substitute for that rule, and that this resolution was based upon the theory clearly set forth by Senator Walsh that the Senate had the power to adopt new rules under general parliamentary law at the very beginning of the new Congress?

MR. ANDERSON. I do not believe there is any question in the world about that.

MR. DOUGLAS. Is it not further true that the provision of general parliamentary law was that the previous question could be moved, and that debate could thereby be cut off?

MR. ANDERSON. That is true.

MR. DOUGLAS. Is it not true that after Senator Walsh spoke on the 7th of March the opposition collapsed, and then a substitute was presented providing what Senator Walsh was trying to accomplish, namely, that there should be a rule for cloture?

MR. ANDERSON. There is no question about that.

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165. See *id.* at 112 (statement of Sen. Taft); see *id.* at 117 (statements of Sen. Case of South Dakota and Sen. Taft).

166. Anderson explained, "Senator Walsh said he was not striking at any portion of the rules except rule XXII." *Id.* at 117 (statement of Sen. Anderson). "[Walsh] made a very powerful argument ... When he finished, someone surrendered. Senator Walsh won without firing another shot. A cloture rule was brought forth ... and with the exception of three, every one of [the opposing Senators] fell into line." *Id.* at 116 (statement of Sen. Anderson).

167. *Id.* (statement of Sen. Taft).

168. *Id.*

MR. DOUGLAS. So that while there was no formal rule or decision dealing with the Walsh motion, it was not overruled, and the result he was seeking to accomplish was attained, because the objectors had hanging over their heads general parliamentary law, under which the previous question could be moved to shut off debate. Was that not the situation?

MR. ANDERSON. There is no question about it.<sup>169</sup>

Senator Russell argued that the constitutional option was a lawless method. He charged his opponents with advocating a view based on “inherent rights and inherent powers,” a view he deemed dangerous to “the future of this Republic.”<sup>170</sup> He described himself as “one of those who believe in the written law” and the Constitution.<sup>171</sup> Accordingly, he explained, he would not submit to arguments based on “the inherent rights of the Senate when [the Senate had] written rules” that decided the issue.<sup>172</sup>

Senator Humphrey countered that he and the other proponents of the constitutional option were in fact acting under the written law—the written law and “the doctrine of powers under the Constitution of the United States.”<sup>173</sup> The Constitution, he observed, listed only a few instances when more than a majority was needed to act; all other actions, including choosing Senate rules, were to be decided by majority vote. A contrary view, he argued, led to absurd results: Under the current Standing Rules, it potentially required more Senators to end debate and force a vote than to impeach the President of the United States.<sup>174</sup>

Senator Anderson similarly argued that Rule XXII could not be squared with the U.S. Constitution’s provision that “Each House may determine the Rules of its Proceedings,” and predicted that if “rule XXII ever got before the Supreme Court of the United States, . . . the Court would throw it out very quickly.”<sup>175</sup> The Supreme Court had already indicated as much, Anderson noted, when it wrote that:

[N]either House may by its rules ignore constitutional restraints or violate fundamental rights, and there must be a reasonable relation between the mode or method of the proceeding established by the

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169. *Id.* (statements of Sen. Douglas and Sen. Anderson).

170. *Id.* at 118 (statement of Sen. Russell).

171. *Id.*

172. *Id.* at 119.

173. *Id.* (statement of Sen. Humphrey).

174. *See id.* at 218.

175. *Id.* at 119–20 (statement of Sen. Anderson) (quoting U.S. CONST. art. I, § 5).

rule and the result which is sought to be attained.<sup>176</sup>

On January 7, Senator Taft moved to table Anderson's motion for the Senate to consider adoption of new Standing Rules. The motion passed 70-21, ending Senator Anderson's attempt to employ the constitutional option in the 83d Congress. Senator Herbert Lehman (D-NY) explained that implicit in the Senate's vote to table was the "recognition ... that each Senate has the constitutional right to adopt its own rules."<sup>177</sup> He opined that "the opposition did not dare to raise a point of order because of the fear that such a point against the Anderson motion would have been overruled."<sup>178</sup> Lehman closed with the promise that this was "only the beginning of a long and historic fight to establish majority rule in the United States Senate."<sup>179</sup>

### 3. *Nixon's Advisory Opinion (1957)*

On January 3, 1957, less than one hour after the Senate convened,<sup>180</sup> Senator Anderson, acting on behalf of a bipartisan group of thirty-one Senators, again proposed that the Senate, "[i]n accordance with article 1, section 5 of the Constitution ... take up for immediate consideration the adoption of rules for the Senate for the 85th Congress."<sup>181</sup> Debate on the constitutional option was substantially reduced due to a unanimous consent agreement secured by Senate Majority Leader Lyndon B. Johnson (D-TX).<sup>182</sup> The agreement allowed for six hours of debate<sup>183</sup> to be "equally divided between those favoring and those opposing the motion" and allowed for parliamentary inquiries.<sup>184</sup>

The arguments largely echoed those raised in the 83rd Congress. Senator Leverett Saltonstall (R-MA) took a position similar to Senator Taft's,<sup>185</sup> supporting filibuster reform but objecting that Senator Anderson's method posed a threat to the Senate's status as a continuing body:

I want to help amend this rule, but I do not want to help amend the

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176. *Id.* (statement of Sen. Anderson) (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)).

177. *Id.* at 232 (statement of Sen. Lehman).

178. *Id.*

179. *Id.*

180. See 1957 CONG. Q. ALMANAC 655.

181. 103 CONG. REC. 9 (1957) (statement of Sen. Anderson).

182. *Id.* at 10-12.

183. *Id.* at 10.

184. *Id.* at 11-12.

185. See 99 CONG. REC. 112 (1953) (statement of Sen. Taft).

rule by altering the Senate procedures so as possibly in the future to give the Senate a different form, as a parliamentary body, from the form which was established in the Constitution . . . . [Under Senator Anderson's proposal] A majority at the start of each session could establish its own set of rules. This certainly would end the continuity of the Senate . . . .<sup>186</sup>

Saltonstall contended that the Senate has a continuous existence: "There never is a new Senate; there is merely a change in one-third of its Members."<sup>187</sup> "Continuous existence," he argued, "implies potential continuous functioning,"<sup>188</sup> which in turn requires continuing rules of procedure.<sup>189</sup> Senators Saltonstall and William Knowland (R-CA) also warned of the potential for "chaos."<sup>190</sup> Knowland cautioned that if chaos ensued, Senator Anderson's proposal could have the opposite of its intended effect and actually strengthen minority rule: "Without rules there would be no Senate committees; and without committees, the legislative business of the Senate could not be conducted, except by unanimous consent. Mr. President, that would be minority rule with a vengeance . . . ."<sup>191</sup>

Anderson's opponents emphasized the importance of protecting minority rights and states' rights. Johnson argued that it was perverse to allow a bare majority to "abandon[] a rule that was designed specifically to protect minorities" "against rash action by a temporary majority."<sup>192</sup> The majority, he continued, was short-sighted for not realizing one day it might "be protect[ed] . . . by the rules of the Senate which are denounced today."<sup>193</sup> Knowland feared that the minority would lose its right to be heard: "[A] bare majority [might] adopt rules which would provide that on a question before the Senate there could be not more than 1 hour's debate on either side, and that no Senator could speak for more than 5 minutes."<sup>194</sup> Senator John Stennis (D-MS) emphasized that "only the Senators represent the States" as States.<sup>195</sup> Anderson's proposal, he worried, would limit States' rights to be heard.<sup>196</sup>

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186. 103 CONG. REC. 160 (1957) (statement of Sen. Saltonstall).

187. *Id.*

188. *Id.*

189. *Id.* at 161.

190. *See id.* at 160 (statement of Sen. Saltonstall); *id.* at 209 (statement of Sen. Knowland).

191. *Id.* at 209 (statement of Sen. Knowland).

192. *Id.* at 214 (statement of Sen. Johnson).

193. *Id.* (statement of Sen. Johnson).

194. *Id.* at 209 (statement of Sen. Knowland).

195. *Id.* at 166 (statement of Sen. Stennis).

196. *See id.*

The proponents of the constitutional option looked past the “continuing body” question and turned to the U.S. Constitution. Senators Prescott Bush (R-CT) and Humphrey explained that “whether or not the Senate is a continuing body ... [was] immaterial”<sup>197</sup> and certainly “not a controlling factor in this debate.”<sup>198</sup> The relevant question, they explained, was whether “the Senate of each new Congress [was] free to adopt rules for its proceedings under the Constitution,”<sup>199</sup> a question Article I, Section 5 of the U.S. Constitution answered in the affirmative.<sup>200</sup> Nor had the Senate lost this right, Senator Humphrey emphasized, by failing to exercise it in the past.<sup>201</sup> Senator Anderson observed that the Senate was not debating a novel issue; in 1890, the House of Representatives decided the identical question in favor of the constitutional option:

For a period of time, from 1860 to 1890, the House operated much as the Senate has operated, under a system of acquiescence in past rules stemming from a resolution of the House that the 1860 rules should be the rules of the present and subsequent Houses unless otherwise provided. But in 1890 Speaker Reed ruled that at the beginning of each new Congress the House operates under general parliamentary law until new rules are adopted. Thereupon the House adopted new rules designed to permit efficient majority exercise of legislative functions, and to prevent minority obstructions. Since 1890 the House rules have been adopted anew by each incoming house.<sup>202</sup>

The most influential statement in support of the constitutional option came from then-Vice President Richard M. Nixon. Senator Humphrey posed a parliamentary inquiry designed to elicit endorsement of the constitutional option:

Prior to propounding my parliamentary inquiry, I should like to say that I note in the Record at page 11 a motion of the Senator from Texas [Mr. Johnson] to lay on the table the Anderson motion.

I also note that a unanimous-consent agreement was arrived at which would permit us to have an orderly discussion of this crucial matter of Senate rules today. Therefore, Mr. President, my parliamentary inquiry is this:

In light of these developments and in light of what transpired

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197. *Id.* at 182 (statement of Sen. Bush).

198. *Id.* at 167 (statement of Sen. Humphrey).

199. *Id.* at 182 (statement of Sen. Bush).

200. *See id.* at 167 (statement of Sen. Humphrey).

201. *Id.* at 143.

202. *Id.* at 141 (statement of Sen. Anderson).

yesterday, and thus far today, under what rule is the Senate presently proceeding?<sup>203</sup>

Nixon responded with an advisory opinion supporting the constitutional option. Nixon emphasized that his statement was not a formal ruling and thus was not binding precedent for the Senate. Nixon began by noting that because the “Presiding Officer of the Senate ha[d] never ruled directly” as to whether the “rules of the Senate continue from one Congress to another,” the issue was open.<sup>204</sup> In such a case, he argued, it was proper to “first turn to the Constitution for guidance.”<sup>205</sup> Nixon concluded that the Constitution’s provision that “each House may determine the rules of its proceedings” grants “the majority of the new existing membership of the Senate ... the power to determine the rules under which the Senate will proceed.”<sup>206</sup> Nixon reasoned that because no Senate could deny a future Senate the ability to exercise a constitutional right, and because Rule XXII, paragraph 3 “in practice” prevented a majority of Senators from adopting new rules,<sup>207</sup> Rule XXII, paragraph 3 was unconstitutional.<sup>208</sup>

Nixon explained that a new Senate had three options available “[a]t the beginning of a session”: (i) proceed under the rules of the “previous Congress and thereby indicate [its] acquiescence that those rules continue in effect,” which was the practice the Senate had followed for nearly 170 years; (ii) vote down a motion to adopt new rules and thereby “indicate approval of the previous rules”; or (iii) “vote affirmatively to proceed with the adoption of new rules.”<sup>209</sup> Applying these principles to the situation before him, Nixon held that if Johnson’s motion to table prevailed, “a majority of the Senate ... would have indicated its approval of the previous rules of the Senate, and those rules would be binding on the Senate for the remainder of th[e] Congress unless subsequently changed under those rules.”<sup>210</sup> If Johnson’s motion to table failed, the Senate could “proceed with the adoption of rules under whatever procedures the majority of the

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203. *Id.* at 178 (statement of Sen. Humphrey).

204. *Id.* (statement of Vice President Nixon).

205. *Id.*

206. *Id.* (quoting U.S. CONST. art. I, § 5, cl. 2).

207. Then, as now, Rule XXII required two thirds of Senators present to invoke cloture on a rules change. SENATE RULE XXII, STANDING RULES OF THE SENATE (1957), materials provided by Senate Historian Richard Baker, on file with author; SENATE RULE XXII, *supra* note 1.

208. 85 CONG. REC. 178 (1957) (statement of Vice President Nixon).

209. *Id.* at 178–79.

210. *Id.* at 179 (statement of Vice President Nixon).

Senate approve[d].”<sup>211</sup>

Senator Johnson closed the debate, and on January 4, the Senate voted to table Anderson’s motion by a 55-38 roll-call vote, ending all consideration of the constitutional option in the 85th Congress.

4. *The Constitutional Option Preempted: The Leadership Pushes Through a Compromise (1959)*

The 86th Congress presented the real possibility that the constitutional option would succeed. The Senate of 1959 included fifteen freshmen Democrats, raising the Democratic majority to 64-36. Anderson reasoned that if the freshmen Democrats mostly voted with the party liberals, he could build upon his 1957 tally and gain enough votes to carry out the constitutional option.<sup>212</sup> Additionally, in the previous Senate session, Vice President Richard M. Nixon had issued an advisory opinion endorsing the constitutional option. It seemed that both the votes and the procedural opinions were on Anderson’s side.

Senate Majority Leader Lyndon B. Johnson (D-TX), however, continued to oppose the constitutional option. Fearing that a majority of Senators deemed the constitutional option a credible course of action, Johnson joined forces with Minority Leader William F. Knowland (R-CA) to push through a substitute proposal in its stead. As in 1953 and 1957, the majority and minority leaders would join forces to block the constitutional option.

Johnson set his plan in motion on January 7, the opening day of the 86th Congress, by asserting his right as Senate Majority Leader to speak first<sup>213</sup> and proffering a compromise resolution: Rule XXII would be amended to reduce the required vote for cloture to “two-thirds of the Senators present and voting,” and, in order to assuage the worries of Senators who opposed the constitutional option, a new clause would be added to the Senate Standing Rules holding, “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”<sup>214</sup> When Anderson rose to proffer his proposal to exercise the constitutional option, Johnson refused to yield the floor and instead

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211. *Id.*

212. 1959 CONG. Q. ALMANAC 212.

213. By Senate precedent, the Majority Leader has priority of floor recognition. RIDDICK & FRUMIN, *supra* note 140, at 1091, 1098. This clause is currently codified at Rule V. SENATE RULE V, *supra* note 3.

214. 86 CONG. REC. 8 (1959).

moved to adjourn, thus assuring his resolution would be the only rules change pending when the Senate convened on the next legislative day:

Mr. JOHNSON of Texas. I wish to make it very clear that I do not want any other motion to take precedence over my motion. I was asking the Chair for a ruling that I had not lost the floor . . . . . I am prepared, as I informed the Chair in advance, to make a motion to adjourn, since I do not want my motion to be supplanted by any other motion. I have not yielded for that purpose. I do not intend to do so.<sup>215</sup>

The next session day brought complaints that Johnson was guilty of “hijacking and blackjacking” the Senate process.<sup>216</sup> In response, Senator Mike Mansfield (D-MT) propounded several parliamentary inquiries aimed at establishing that, even though Johnson’s proposal would be debated first, the Senate would have an opportunity to vote on the constitutional option as well:

Mr. MANSFIELD. . . . What I am trying to have made clear is this: There has been talk of hijacking and blackjacking because the majority leader, by reason of his position, was recognized first yesterday and submitted a resolution. As I understand the rulings of the Chair, every Member of the Senate will have a chance to vote yea or nay on the Anderson proposal . . . and on the Johnson of Texas proposal. Is that not correct?

The VICE PRESIDENT. The Senator from Montana is correct.<sup>217</sup>

Supporters of the constitutional option were not satisfied. They had concluded “that the only safe method of establishing clearly the right of the Senate to adopt rules [wa]s to do so at the beginning of the session.”<sup>218</sup> As Senator Douglas explained, under Nixon’s opinion, if the Senate considered another rules-change proposal first, it might “be deemed to be operating under the old rules of the Senate,” and any attempt to assert the Senate’s right to adopt new rules could “be crippled by the straightjacket for which there [is] no key; namely, rule

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215. *Id.* at 10–11 (statements of Sen. Johnson). Senate Rule XL (now codified as Rule V) required “one day’s notice in writing” before any “motion to suspend, modify, or amend any rule” could be brought. SENATE RULE XL, STANDING RULES OF THE SENATE (1953), materials provided by Senate Historian Richard Baker, on file with author; *accord* SENATE RULE V, *supra* note 3. Accordingly, Johnson reasoned that if the Senate adjourned, Anderson would not be able to give notice that he intended to propose a rule change until the next legislative day, and the earliest Anderson’s proposal could be considered would be two session days forward.

216. 86 CONG. REC. 95 (1959) (statement of Sen. Mansfield).

217. *Id.* (statements of Sen. Mansfield and Vice President Nixon).

218. *Id.* at 127 (statement of Sen. Douglas).

XXII.”<sup>219</sup>

Senator Johnson, in what was interpreted as a show of confidence that he had amassed the needed votes,<sup>220</sup> relented and allowed the Senate first to consider Senator Anderson’s proposal for the constitutional option.<sup>221</sup> Johnson knew that the fifteen freshmen Democrats would be reluctant to break ranks with their party leadership.<sup>222</sup> He also knew that his strategy had altered the choices facing filibuster reformers. In contrast to past Senate sessions where the constitutional option presented the only method to alter Rule XXII, in the present session, a majority could achieve cloture reform under the existing rules by voting for Johnson’s compromise. Senator John O. Pastore (D-RI) emphasized this point in an effort to sway votes for Johnson’s compromise. Pastore asserted that if the goal was to achieve filibuster reform, the Johnson proposal and Anderson proposal were functionally identical.<sup>223</sup> Both methods, he stated, allowed a majority of Senators to choose any “cloture formula” it desired.<sup>224</sup> The only difference, Pastore argued, was that Johnson’s method avoided the potential chaos inherent in the Anderson method.<sup>225</sup>

On January 8, debate on Anderson’s proposal to implement the constitutional option commenced with a series of parliamentary inquiries. Vice President Nixon reiterated his opinion that the majority had the constitutional right to establish new Senate rules, and any rule that effectively blocked this right was inapplicable:

In the opinion of the Chair ... the rules of the Senate continue from session to session until the Senate, at the beginning of a session indicates its will to the contrary.

In the opinion of the Chair, also, however, any rule of the Senate adopted in a prior Congress, which has the express or implied effect of restricting the constitutional power of the Senate to make its own rules, is inapplicable when rules are before the Senate for consideration at the beginning of a new Congress.

It has been the opinion of the chair, for example, that subsection 3

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219. *Id.*

220. See 1959 CONG. Q. ALMANAC 213.

221. See 86 CONG. REC. 103 (1959) (statements of Sen. Johnson).

222. See 1959 CONG. Q. ALMANAC 212.

223. See 86 CONG. REC. 117 (1959) (statement of Sen. Pastore).

224. *Id.*

225. See *id.* (“The net result can be accomplished by the Johnson route or by the Anderson route. If the Anderson motion should be adopted, the Senate would have agreed to adopt new rules at the beginning of each new Congress.”).

of rule XXII [requiring two-thirds vote for cloture] would fall in that category, because it has the practical effect, or might have the practical effect, of denying to a majority of the Senate at the beginning of a new Congress its constitutional power to work its will with regard to the rules by which it desires to be governed.<sup>226</sup>

This, Nixon explained, also meant that at the start of a new session, before the Senate had acquiesced to and begun operating under the previous Senate rules,<sup>227</sup> “the majority has the power to cut off debate in order to exercise the right of changing or determining the rules.”<sup>228</sup>

Senator Wayne Morse (D-OR) clarified that the constitutional option was a means to an end—a majoritarian means to the end of implementing a new rule of procedure—not an end unto itself. The constitutional option, Morse explained, governed “the act of adopting the rule”; “the content of the rule ... adopt[ed] ... is quite another thing.”<sup>229</sup> Accordingly, Morse concluded, the Senate could use the constitutional option “to adopt any percentage for limiting debate in the Senate it wished to provide,” including a super-majority percentage.<sup>230</sup> It just could not force that rule onto a future Senate if a majority of that Senate chose not to be bound by it.<sup>231</sup>

Johnson’s opponents hammered away at Johnson’s “continuing body” proposal, citing it as a major point of contrast between the Anderson and Johnson reform efforts. The Senate, they argued, could either “follow the Constitution of the United States” or “follow a rule made by one Senate for all succeeding time, to bind all Senates.”<sup>232</sup> Senator Jacob K. Javits (R-NY) criticized those Senators who turned to the Johnson resolution as a “mild and pleasant” way of achieving filibuster reform without a potentially “barbed and difficult” debate.<sup>233</sup> Javits explained that the Johnson resolution sought “to give [the Senate] an extraconstitutional power” to bind all future Senates to the current rules, and thus should be rejected by a Senate bound “to obey the Constitution.”<sup>234</sup>

Senators Herman Talmadge (D-GA) cited *The Federalist Papers* for evidence that the Senate is a continuing body. He noted that

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226. *Id.* at 96 (statement of Vice President Nixon).

227. *Id.* at 101, 104.

228. *Id.* at 9.

229. *Id.* at 165 (statement of Sen. Morse).

230. *Id.*

231. *Id.* at 164, 165.

232. *Id.* at 124 (statement of Sen. Javits).

233. *Id.*

234. *Id.*

Madison had “urged that the Senate be so constituted as to have ‘permanency and stability,’”<sup>235</sup> and Jay had explained that Senate elections were staggered so that “‘uniformity and order, as well as a constant succession of official information will be preserved.’”<sup>236</sup> Talmadge and Thurmond further asserted that the U.S. Supreme Court had confirmed this view of the Senate as a “‘continuing body’”<sup>237</sup> when it ruled that a Senate committee established in one Congress could “be continued or revived” in the next.<sup>238</sup>

Douglas and Morse countered that the “Constitution provides that the majority will is to prevail except in those [six] matters which are specifically stated to the contrary.”<sup>239</sup> Choosing Senate rules, they noted, was not among those six exceptions. Morse additionally observed that “[t]he main reason” Hamilton, Madison, and Jay advocated replacing the Articles of Confederation “was that a minority was then able to exercise a veto over the majority,”<sup>240</sup> the very outcome that filibusters achieved.

Opponents of the constitutional option again raised the specter of chaos:

If the Anderson proposal were to supplant the Johnson proposal, we would have no rules under which to proceed. . . . There would be no rule that a Senator must proceed in order, or that he must refrain from making derogatory references to his colleagues in the Senate. We would be flying blind, without instruments and without any control points to check. Under the Anderson proposal we would throw out the rule book and say that the Senate rules are not continuing.<sup>241</sup>

Douglas countered that under Anderson’s proposal, the Senate would in fact have rules, the “fundamental rules of parliamentary

235. *Id.* at 151 (statement of Sen. Talmadge) (quoting THE FEDERALIST NO. 39 (James Madison)).

236. *Id.* at 152 (statement of Sen. Talmadge) (quoting THE FEDERALIST NO. 64 (John Jay)).

237. *Id.* at 152 (statement of Sen. Talmadge) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 181 (1927)); *accord id.* at 144 (statement of Sen. Thurmond).

238. *McGrain*, 273 U.S. at 181.

239. 86 CONG. REC. 128 (1959) (statement of Sen. Douglas); *see also id.* at 165 (statement of Sen. Morse). The six matters for which the Constitution requires a two-thirds vote of the Senate are (i) conviction upon impeachment; U.S. CONST. art. I, § 3; (ii) expulsion of a Member; *id.* art. I, § 5; (iii) overriding a Presidential veto; *id.* art. I, § 7; (iv) ratification of treaties; *id.* art. II, § 2; (v) proposing amendments to the U.S. Constitution; *id.* art. V; and (vi) removing a disability imposed for rebellion against the United States; *id.* amend. XIV, § 3.

240. 86 CONG. REC. 166 (1959) (statement of Sen. Morse).

241. *Id.* at 107 (statement of Sen. Monroney).

procedure.”<sup>242</sup> Additionally, Javits reasoned that if the House of Representatives could choose new rules at the start of each session by majority vote without devolving into chaos, there was ample reason to believe that the Senate could do so as well.<sup>243</sup>

Johnson’s allies argued that the Senate is unique among legislative institutions and that “[a]nalogies to the procedure of other parliamentary bodies have little, if any relevancy.”<sup>244</sup> Senators Thurmond and Talmadge observed that, unlike the House of Representatives, the Senate was not “exclusively a legislative body.”<sup>245</sup> They argued that because the Senate “exercises quasi-executive functions in relation to ... treatymaking”<sup>246</sup> and appointment of officers<sup>247</sup> and “judicial” functions “in impeachment proceedings,”<sup>248</sup> it was not appropriate to hold it to the same rules as a purely legislative body like the House.

As the debate continued, it became apparent that Johnson’s compromise resolution would easily pass. For example, Minority Leader Everett Dirksen (R-IL) stated that “in the absence of any other specific proposal ... [he] would support the Anderson proposal.”<sup>249</sup> Dirksen explained that because Johnson’s compromise allowed the Senate to address cloture liberalization “with the least delay,” he would vote against the Anderson proposal and in favor of the Johnson compromise.<sup>250</sup> Similarly, Senator Frank Church (D-ID) withdrew his support from the Anderson proposal, explaining that in his view, the Johnson compromise was “identical with” Senator Anderson’s 1957 proposal to implement the constitutional option.<sup>251</sup> Church noted that the Johnson compromise would operate just as Anderson’s proposal would—the Senate could “rewrite rule XXII” either by acting directly on Johnson’s proposal or by offering “amendments or substitutes for it.”<sup>252</sup> Accordingly, Church explained, he no longer saw the need for

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242. *Id.* at 124 (statement of Sen. Javits).

243. *See id.* at 125.

244. *Id.* at 144 (statement of Sen. Thurmond).

245. *Id.*; *accord id.* at 152 (statement of Sen. Talmadge).

246. *Id.* at 152 (statement of Sen. Talmadge); *see also id.* at 144 (statement of Sen. Thurmond).

247. *Id.* at 144 (statement of Sen. Thurmond).

248. *Id.* at 152 (statement of Sen. Talmadge); *accord id.* at 144 (statement of Sen. Thurmond).

249. *Id.* at 195 (statement of Sen. Dirksen).

250. *Id.* at 196.

251. *Id.* at 205 (statement of Sen. Church).

252. *Id.*

the broader Anderson proposal he once supported.<sup>253</sup>

On January 9, Johnson moved to table Anderson's proposal for the constitutional option.<sup>254</sup> The Senate adopted the motion 60-36<sup>255</sup> and began consideration of Johnson's compromise.<sup>256</sup>

With Anderson's proposal defeated, the Johnson compromise represented the only possibility for cloture reform in the 86th Congress. Anderson's supporters, however, continued to oppose that portion of the Johnson compromise that purported to eliminate the majority's right to exercise the constitutional option. Again, Johnson had proposed adding to the Senate Standing Rules a clause providing that the Senate rules would continue from one Congress to the next unless they were changed. Senators Thomas Hennings (D-MO) and Javits argued that this clause, even if passed, would be "without final force or effect."<sup>257</sup> They reasoned that because the right to adopt new Senate rules was guaranteed by the Constitution and the Senate had no power to amend the Constitution, any attempt by the Senate to do away with the constitutional option was "not binding."<sup>258</sup>

Still, Javits worried that future Senators might read such a bill as a Senate rejection of the constitutional option.<sup>259</sup> Accordingly, he proposed an amendment to alter the clause to be consistent with Nixon's opinion: "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed."<sup>260</sup> Senator Case of New Jersey went a step farther and proposed striking the entire clause,<sup>261</sup> arguing that it was constitutionally incorrect:

[I]n favor of my amendment is the consideration that the rules of the Senate do not continue indefinitely, but, in my view, must be adopted by the Senate in each new Congress, whether or not we place this language in the present rules of the Senate. Many times in the past there has been no separate vote to adopt rules at the beginning of the first session of the Senate in a new Congress. . . . The fact that we have, by acquiescence, readopted or continued the old rules does not mean, however, that they continue in effect, when we do not acquiesce in such procedure.<sup>262</sup>

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253. *Id.*

254. *Id.* at 207.

255. *Id.*

256. *Id.* at 208.

257. *Id.* at 447 (statement of Sen. Hennings); *accord id.* (statement of Sen. Javits).

258. *Id.* (statement of Sen. Javits); *accord id.* (statement of Sen. Hennings).

259. *See id.* (statement of Sen. Javits).

260. *Id.*

261. *Id.* at 452 (statement of Sen. Case of New Jersey).

262. *Id.*

Both amendments were rejected.<sup>263</sup> The only vehicle for cloture reform remaining was the original Johnson compromise, which included a declaration that the Senate rules were binding on future Senates. The supporters of the constitutional option divided on the compromise.

With the support of the majority leader, minority leader, and many of the backers of the constitutional option, the Johnson compromise passed 72-22.<sup>264</sup> Johnson summarized the consequences of the compromise: (i) cloture would “be possible on the vote of two-thirds of the Senators present and voting”; (ii) cloture would be broadened to include “any motion to proceed to consideration of a change in the rules”; and (iii) the rules would include a statement that “the rules of the Senate shall continue in force, at all times, except as amended by the Senate.”<sup>265</sup> Johnson declared that the vote was proof that there was no need for “a fundamental change in the nature of the Senate itself.”<sup>266</sup> A majority, he asserted, could act “when it has the will to proceed.”<sup>267</sup>

#### *D. Three-Fifths Cloture Reform (1960-1975)*

Throughout the 1960s and 1970s, the liberal block experimented with a series of strategies aimed at achieving three-fifths cloture reform. Only on their sixth attempt, in 1975, did the Senate reduce Rule XXII’s cloture requirement from two-thirds present to three-fifths of all Senators.

##### *1. The “Biannual Ritual” Continues (1961-1971)*

After a nearly two-month long filibuster against civil rights legislation from February 15 to April 11, 1960, which included a 157-hour, 26-minute, around-the-clock session,<sup>268</sup> both political parties included calls for filibuster reform in their platforms.<sup>269</sup> Accordingly,

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263. *Id.* at 452, 453.

264. *Id.* at 494.

265. *Id.* at 493 (statement of Sen. Johnson).

266. *Id.* at 492.

267. *Id.* at 493.

268. See 87 CONG. REC. 600 (1961) (“Outstanding Senate Filibusters from 1841 to 1960”).

269. The Republican platform read in relevant part:

We pledge our best efforts to change present rule XXII of the Senate and other appropriate congressional procedures that often make unattainable proper legislative implementation of constitutional guarantees.

*Id.* at 510 (quoted by Sen. Javits). The Democratic platform read in relevant part:

In order that the will of the American people may be expressed upon all

on January 3, 1961, when the 87th Congress convened, Anderson moved to amend Rule XXII to allow cloture by only three-fifths of the Senators present and voting.<sup>270</sup> On January 10, new Majority Leader Mike Mansfield (D-MT) cut this effort short with a motion to refer the issue to the Rules and Administration Committee for further study.<sup>271</sup> The motion carried the next day by a 50-46 vote.<sup>272</sup> The Rules Committee reported the proposal without recommendation over nine months later, on September 5, “in the midst of the September adjournment rush.”<sup>273</sup> The proposals’ supporters criticized Mansfield for not waiting to bring Anderson’s proposal to a vote, noting that the end of a session, when Senators “were tired and anxious to go home,” was no time for proposing a rules change.<sup>274</sup> On September 19, the three-fifths proposal was tabled 46-35, ending filibuster reform in the 87th Congress.<sup>275</sup>

In 1963, the liberal bloc crafted a new strategy to enact three-fifths cloture reform. First, Anderson would introduce a motion to amend Rule XXII.<sup>276</sup> At some point during the inevitable filibuster of any effort to bring debate to a conclusion, Anderson would move to end debate by a simple majority vote—that is, attempt to exercise the constitutional option.<sup>277</sup> A point of order would follow. The Vice President would be forced either to rule on the point of order or construe the point of order as raising a question of constitutional interpretation which, under Senate precedents, would require that the question be put directly to the Senate.<sup>278</sup> If the Vice President ruled in favor of the constitutional option, opponents would assuredly appeal the ruling, and civil rights backers could table the appeal. Because a motion to table is not debatable and requires only a simple majority vote, the minority would not be able to filibuster or otherwise block it. Anderson’s supporters reasoned that once the motion to table was adopted and the Vice President’s ruling was thereby affirmed, they

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legislative proposals, we urge 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.

*Id.* (quoted by Sen. Javits).

270. *See* 87 CONG. REC. 8–9 (1961).

271. *See id.* at 520 (statement of Sen. Mansfield).

272. *Id.* at 625.

273. 1961 CONG. Q. ALMANAC 408–09.

274. *Id.* at 409.

275. *Id.*

276. *See* 1963 CONG. Q. ALMANAC 375.

277. *See id.*

278. *See id.*

would have set a binding Senate precedent that would allow them to defeat future filibusters of rules changes by a simple majority vote.<sup>279</sup> The entire strategy, however, hinged on the Vice President ruling in favor of the constitutional option. If he referred the issue to the Senate, the question would be debatable, the minority could filibuster, and the civil rights reformers would have made no progress.<sup>280</sup>

On January 14, 1963, Anderson set the plan in motion with a proposal to alter Rule XXII to allow for cloture “by three-fifths of the Senators present and voting.”<sup>281</sup> As expected, Senators seeking to preserve the ability to block future civil rights legislation filibustered.<sup>282</sup> On January 28, Anderson offered the planned motion to test the constitutional option:

I move under the Constitution that without further debate the Chair submit the pending question to the Senate for a vote.<sup>283</sup>

Vice President Johnson responded that the motion raised an issue of constitutional interpretation and referred the matter to the Senate as a debatable question:

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?<sup>284</sup>

The civil rights backers quickly lost steam. On January 31, the Senate decided 53-42 to table the constitutional question Johnson had posed.<sup>285</sup> The attempt at filibuster reform officially ended on February 7, when Anderson’s backers failed to garner the two-thirds vote needed to invoke cloture on Anderson’s original proposal for cloture reform.<sup>286</sup>

On January 11, 1967, Senators George McGovern (D-SD) and Thruston Morton (R-KY) continued the liberals’ “biennial ritual”<sup>287</sup> of attempting cloture reform.<sup>288</sup> As they offered a resolution to reduce the cloture requirement to three-fifths present and voting, the issue

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279. *See id.*

280. *See id.*

281. 88 CONG. REC. 181–82 (1963).

282. 1963 CONG. Q. ALMANAC 375.

283. 88 CONG. REC. 1214 (1963).

284. *Id.* (statement of Vice President Johnson).

285. *Id.* at 1516.

286. The Senate vote was 54-42, ten votes short of the two-thirds present and voting required for cloture. *Id.* at 2058.

287. 90 CONG. REC. 391 (1967) (statement of Sen. Thurmond).

288. *Id.* at 180.

was how to avoid a filibuster on the motion to proceed to its consideration. On January 18, 1967, McGovern set in motion a plan to bring the motion to proceed to a vote by offering a self-executing cloture procedure that would supplant the cloture process set forth in Rule XXII.<sup>289</sup> McGovern moved that (i) without intervening debate, the Presiding Officer should immediately put to a vote his motion to institute a new cloture-type procedure; (ii) upon adoption of his procedure by a simple majority of Senators present, debate on a motion to proceed to a rules change would be limited to only two hours; and (iii) after two hours of debate, the Senate would vote on the motion to proceed.<sup>290</sup>

McGovern argued that “article I, section 5, of the Constitution” empowered the Senate to forego reliance on Rule XXII and instead act by majority vote as he proposed.<sup>291</sup> Minority Leader Everett Dirksen raised a point of order against McGovern’s motion, arguing that the Senate was compelled to follow the cloture procedures set forth in Rule XXII.<sup>292</sup> Vice President Hubert Humphrey held that the point of order raised a constitutional question and thus, under Senate precedent, should be referred to the Senate.<sup>293</sup> In response to a series of parliamentary inquiries, Humphrey explained that if one of McGovern’s backers moved to table Dirksen’s point of order, and the Senate agreed to the tabling motion, the Chair would conclude that the Senate had “affirmed the propriety” of McGovern’s attempt to close debate by a simple majority vote.<sup>294</sup> Reform proponents, however, lacked sufficient support to capitalize on this ruling. McGovern’s motion to table Dirksen’s point of order failed 37-61, and Dirksen’s point of order carried 59-37.<sup>295</sup> The reform effort officially closed on January 24, when McGovern’s supporters failed to garner the two-thirds support needed to achieve cloture under Rule XXII.<sup>296</sup>

Two years later, reform advocates won a short-lived victory when Vice President Humphrey allowed a simple majority of Senators to invoke cloture. Humphrey’s ruling was soon reversed by the full Senate, however, bringing the reformers back to square one. On

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289. *Id.* at 918 (statement of Sen. McGovern).

290. *Id.*

291. *Id.*

292. *Id.* (statement of Sen. Dirksen).

293. *Id.* at 918–19 (statement of Vice President Humphrey).

294. *Id.* at 919 (statements of Sen. Mansfield and Vice President Humphrey).

295. *Id.* at 940.

296. The cloture motion failed 53-46, falling thirteen votes short. *Id.* at 1336.

January 9, 1969, Senator Frank Church (D-ID) and thirty-six supporters introduced the now familiar proposal for three-fifths cloture, preparatory to a fresh approach to ban closing debate by majority vote.<sup>297</sup> On January 14, Church filed a cloture motion under Rule XXII to bring his three-fifths proposal to a vote and asked Vice President Humphrey to rule that a simple majority of Senators could invoke cloture:

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?<sup>298</sup>

Humphrey obliged:

[I]f 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.<sup>299</sup>

On January 16, the full Senate voted to invoke cloture 51-47.<sup>300</sup> Humphrey announced that cloture had in fact been achieved and that debate would “proceed under the limitation provisions of rule XXII.”<sup>301</sup> Thus, Church was allowed to take advantage of the cloture procedure to curtail debate without being required to meet Rule XXII’s requirement for a two-thirds vote of Senators present.

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297. 91 CONG. REC. 357–58 (1969).

298. *Id.* at 593 (statement of Sen. Church).

299. *Id.* (statement of Vice President Humphrey) (citing advisory opinion of former Vice President Richard M. Nixon).

Humphrey explained that although the Senate Chair would normally refer such a constitutional question to the full Senate as he had done in 1967, the current procedural posture forced him to rule or risk biasing the vote:

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 these principles.

*Id.* (statement of Vice President Humphrey).

Accordingly, Humphrey put the Senate on notice that, in the view of the Chair, a simple majority in favor of Church’s resolution would be sufficient to invoke cloture. *Id.* (statement of Vice President Humphrey). Humphrey’s interpretation was open to appeal.

300. *Id.* at 994.

301. *Id.* (statement of Vice President Humphrey).

Senator Spessard Holland (D-FL), however, immediately appealed the ruling.<sup>302</sup> Humphrey framed the appeal in the traditional manner as he put the question to the Senate: “Is the decision of the Chair to stand as the judgment of the Senate?”<sup>303</sup> Once more, the majority and minority leaders joined forces to defeat the constitutional option, and the Senate overturned Humphrey’s ruling 45-53.<sup>304</sup> Reform advocates were thwarted again.

In 1971, Senators James Pearson (R-KS) and Church four times attempted to bring a three-fifths cloture resolution to a vote, only to fail each time. Reformers suffered their first set-back on January 26, when Vice President Spiro T. Agnew opted to stay out of the fray and following Vice President Johnson’s 1963 approach, refused to issue a parliamentary opinion on the constitutional option and indicated that he would submit the issue to the Senate as a debatable question.<sup>305</sup> Debate continued until March 9, with Pearson and Church forcing four cloture votes under Rule XXII. Although all four votes demonstrated that a majority wished to vote on three-fifths cloture reform, none received the needed two-thirds super majority, and the reform effort again failed.<sup>306</sup>

## 2. *The Leadership Forges a Three-Fifths Compromise (1975)*

By 1975, the liberal bloc had devoted twenty-two years and multiple failed attempts to three-fifths cloture reform. Finally, after a procedural duel lasting over two weeks and under the threat of the constitutional option, the Senate adopted a compromise resolution supported by both party leaders that allowed cloture by the vote of three-fifths of all Senators duly chosen and sworn.

As the 94th Congress opened in 1975, reform advocates noted that filibustering in the Senate was more common than it had been “3 years ago.”<sup>307</sup> Previously, all Senate legislation moved on “one-track,” so that filibustering Senators “had to hold the floor virtually

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302. *Id.* (statement of Sen. Holland).

303. *Id.* at 995 (statement of Vice President Humphrey).

304. *Id.* at 995.

305. 92 CONG. REC. 618 (1971) (statement of Vice President Agnew).

306. On four occasions, a majority, but less than two-thirds, of Senators voted for cloture. On February 18, 1971, the vote for cloture was 48-37. *Id.* at 3014. On February 23, 1971, the vote for cloture was 50-36. *Id.* at 3623. On March 2, 1971, the vote for cloture was 48-36. *Id.* at 4566. On March 9, 1971, the vote for cloture was 55-39. *Id.* at 5485.

307. 94 CONG. REC. 928 (1975) (statement of Sen. Cranston); *see also id.* at 1147 (statement of Sen. Kennedy) (“Half of all the cloture votes since 1917 have taken place in the past 5 years.”).

without interruption and without rest” and had to risk blame for making “[a]ll Senate business ... grind to a complete halt.”<sup>308</sup> By 1975, the Senate had implemented a “two-track system” for considering legislation, which allowed the Senate to “continue to work on all other legislation on one ‘track,’ while a filibuster against a particular piece of legislation [wa]s theoretically in progress on the other ‘track.’”<sup>309</sup>

Designed by then-Majority Whip Robert C. Byrd (D-WV),<sup>310</sup> the two-track system created potential new difficulties for proponents of the constitutional option. If the Senate debated the constitutional option on one track while operating under the prior Standing Rules on the other track, the Senate might be deemed to have acquiesced to those rules. Should that be the case, resort to the constitutional option might be precluded. Indeed, Vice President Nixon’s landmark 1957 advisory opinion stated that if the Senate began a new Congress by operating under existing rules, it would be deemed to have acquiesced to those rules for the remainder of that Congress and would forego use of the constitutional option for rules changes.

On January 14, 1975, Senators Walter Mondale (D-MN) and James Pearson (R-KS) attempted to resolve this dilemma. They announced that they were invoking the constitutional option and were not acquiescing to the prior Standing Rules, irrespective of any Senate action under those rules:

I wish to state, as has been traditional at the commencement of efforts to amend rule XXII, that, by operating under the Standing Rules of the Senate 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, the practice of this body, or certain rulings by previous Vice Presidents to amend rule XXII, uninhibited in effect by rules in effect during previous Congresses.<sup>311</sup>

The Senate adopted a unanimous consent agreement “to nail down doubly th[is] protection” and affirmed that Mondale and Pearson would not lose any rights due to Senate “delay in the consideration” of the constitutional option.<sup>312</sup>

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308. *Id.* at 928 (statement of Sen. Cranston); *accord* BINDER & SMITH, *supra* note 31 at 15.

309. *Id.* at 928 (statement of Sen. Cranston).

310. BINDER & SMITH, *supra* note 31 at 15.

311. 94 CONG. REC. 12 (1975) (statement of Sen. Mondale).

312. *Id.* (statement of Sen. Mansfield).

During January, Mondale and Pearson attempted to secure Senate action on the motion to proceed to the consideration of their cloture proposal, but this only yielded desultory debate.<sup>313</sup> On February 20, Pearson offered a self-executing cloture procedure<sup>314</sup> modeled on the motion first tried by “the Humphrey-McGovern axis” in 1967.<sup>315</sup> Substituting for the Rule XXII cloture process, Pearson’s motion required that: (i) without intervening debate, the Senate proceed to the consideration of his cloture procedure; (ii) under Article I, Section 5 of the U.S. Constitution, the Senate take an immediate vote on his cloture procedure; and (iii) upon adoption of his procedure by a simple majority vote, the Senate take an immediate vote on the motion to proceed to the underlying proposal for three-fifths cloture reform.<sup>316</sup> Like the liberals’ plans of 1967 and 1969, Pearson’s approach required favorable intervention from the Vice President to succeed: “[T]he ruling of the Vice President is crucial . . . . Past precedent makes it perfectly clear that, unless we have such a ruling, we will be presented with a filibuster that can last for months.”<sup>317</sup>

Majority Leader Mike Mansfield (D-MT) raised a point of order that Pearson’s motion violated rules XXII and XXXII.<sup>318</sup> He explained that he favored reducing the cloture requirement to three-fifths, not to a simple majority.<sup>319</sup> He stated that because Pearson’s motion would “invoke cloture by a simple majority vote” and disregard the Standing Rules, he opposed it.<sup>320</sup> Vice President Nelson Rockefeller referred Mansfield’s point of order to the Senate body, ruling that “the question of the continuation of the rules of the Senate from one Congress to the next and, more particularly, the procedure by which those rules may be amended, has been considered a constitutional question” and thus one for the full Senate to decide.<sup>321</sup>

A series of parliamentary inquiries followed, culminating in Senator Jacob Javits’s (R-NY) question:

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313. *Id.* at 932–51.

314. *Id.* at 3835 (statement of Sen. Pearson).

315. *Id.* at 2014 (statement of Sen. Allen).

316. *Id.* at 3835 (statement of Sen. Pearson). In contrast to McGovern’s 1967 motion, which allowed two hours of debate on the motion to proceed, Pearson’s motion required an immediate vote. *Compare* 90 CONG. REC. 918 (1967) (statement of Sen. McGovern), *with* 94 CONG. REC. 3835 (1975) (statement of Sen. Pearson).

317. 94 CONG. REC. 768 (1975) (statement of Sen. Mondale); *accord id.* at 763 (statement of Sen. Mondale).

318. *Id.* at 3836 (statement of Sen. Mansfield); *id.* at 3837 (statement of Vice President Rockefeller).

319. *Id.* at 3836 (statement of Sen. Mansfield).

320. *Id.*

321. *Id.* at 3837 (statement of Vice President Rockefeller).

May the Senator move to table the point of order, and if that tabling motion prevails, 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?<sup>322</sup>

Rockefeller responded that if the full Senate tabled Mansfield's point of order, "the Chair would have to interpret that as an expression by the Senate of its judgment that the [Pearson] motion to end debate is in all respects a proper motion" and that the Senate would then take an immediate vote on Pearson's motion.<sup>323</sup> Thus, Rockefeller ruled that a simple majority could force a vote on Pearson's self-executing motion—that is, could exercise the constitutional option.

Rockefeller's ruling caused an uproar. Senators Allen and Robert C. Byrd (D-WV) insisted that if the Senate tabled Mansfield's point of order, the next step would be for the Senate to return to debate on Pearson's motion, not to take an immediate vote pursuant to its provisions.<sup>324</sup> The motion to table might prevail, said Allen, but the Senate would not yet have agreed to adopt Pearson's procedure.<sup>325</sup> Taking a page from Vice President Humphrey's ruling in 1969, Rockefeller responded that a vote to table would be equivalent to a vote that Pearson's motion was constitutional and should be carried out, and, as such, he would be obligated to follow Pearson's cloture procedure.<sup>326</sup>

Allen accused the constitutional option proponents of having "their feet on both sides" of the fence in relation to Rule XXII, "taking one part that they like and seeking to discard the part they do not like."<sup>327</sup> He questioned why the Senators would offer an amendment to a rule they were claiming was no longer in effect.<sup>328</sup> Allen argued that if the proponents of the constitutional option truly believed that Rule XXII was unconstitutional and void, they would not be proceeding under any of its provisions.<sup>329</sup> He cited their decision to do so as "proof positive" that Rule XXII was still "in full force and effect."<sup>330</sup> Allen additionally cited the Senate's vote in 1969 to reverse Vice President

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322. *Id.* at 3839 (statement of Sen. Javits).

323. *Id.* at 3839–40 (statement of Vice President Rockefeller).

324. *Id.* at 3840 (statement of Sen. Allen); *id.* at 3841 (statement of Sen. Byrd).

325. *Id.* at 3840 (statement of Sen. Allen).

326. *Id.* (statement of Vice President Rockefeller).

327. *Id.* at 773–74 (statement of Sen. Allen).

328. *Id.* at 4123 (statement of Sen. Allen).

329. *Id.*

330. *Id.*

Humphrey's ruling in favor of the constitutional option. That vote, he argued, had decided the issue against the constitutional option.

Senator Edward Kennedy (D-MA) pointed out that although the 1969 vote may have reversed the prior ruling, that vote had been by a simple majority. Accordingly, Kennedy reasoned, the 1969 vote actually established the principle that the proponents of the constitutional option were advancing—that a simple majority has the right to decide issues of Senate procedure<sup>331</sup>:

But the logical flaw in Senator Allen's position is that, although a Vice President's ruling may have been reversed, the reversal was accomplished by a majority of the Senate. In other words, majority rule prevailed on the issue of the Senate's power to change its rules. In effect, a majority of the Senate decided that a two-thirds vote should be required to end debate on proposals to change the cloture rule.

Thus, Senator Allen's argument, upon analysis, actually proves to be support for the very ruling he opposes, and the precedent stands that a simple majority of the Senate can change its rules at the beginning of a Congress.<sup>332</sup>

The Senate tabled Mansfield's point of order 51-42.<sup>333</sup> This would mark the first of three times in 1975 that the Senate would go on record supporting the constitutional option.

For supporters of Mondale's three-fifths proposal, this success was to be short lived. Before Rockefeller could put Pearson's cloture procedure for an immediate vote, Senator Allen called for its division.<sup>334</sup> Allen argued the first part of the motion (moving to proceed to consider three-fifths cloture) was divisible from the second part (that no debate shall be in order), and that the first part, "not raising any constitutional question," was debatable.<sup>335</sup> Rockefeller ruled in Allen's favor, allowing debate on the first part of Pearson's motion.<sup>336</sup> The filibuster-reformers were back to square one: Allen and his allies filibustered the proposal, holding the floor until the Senate adjourned at the end of the day. That adjournment served to kill Pearson's motion.<sup>337</sup>

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331. *Id.* at 1148, 3849–50 (statement of Sen. Kennedy).

332. *Id.* at 1148 (statement of Sen. Kennedy); *see also id.* at 3849–50 (statement of Sen. Kennedy).

333. *Id.* at 3854.

334. *Id.* (statement of Sen. Allen).

335. *Id.* at 3861 (statement of Sen. Allen).

336. *Id.* at 3855 (statement of Vice President Rockefeller).

337. *Id.* at 3855–65.

On February 24, Senator Mondale offered a new self-executing cloture procedure. Mondale moved that (i) the Senate take an immediate vote on his cloture procedure with no intervening debate, motions, or amendments, and (ii) upon adoption of his cloture procedure, the Senate take an immediate vote on whether to proceed to consideration of the underlying proposal for three-fifths cloture reform.<sup>338</sup> Mansfield again raised a point of order, and Mondale again moved to table it, thus setting the stage for a replay of the February 20 vote affirming the constitutional option.<sup>339</sup> Allen, however, interrupted the proceedings with an extraordinary series of parliamentary tactics, including live quorum calls, motions to recess, roll calls on motions to recess, motions to reconsider previous roll calls, points of order, and appeals of points of order.<sup>340</sup> When the Senate was finally able to vote, it tabled Mansfield's point of order 48-40.<sup>341</sup> Thus, the Senate endorsed the constitutional option for a second time in 1975.

Allen remained undeterred. He launched into a new series of delaying tactics, including motions to recess,<sup>342</sup> motions to postpone,<sup>343</sup> live quorum calls,<sup>344</sup> points of order,<sup>345</sup> and lengthy speeches prolonged by questions from his allies.<sup>346</sup> This finally ended on February 26. Mansfield raised his third point of order against Mondale's cloture procedure, this time arguing the motion improperly "preclude[d] debate, intervening motions, and amendments."<sup>347</sup> The Vice President submitted the issue to the Senate,<sup>348</sup> and the Senate again tabled the point of order 46-43.<sup>349</sup> Thus, the Senate endorsed the constitutional option for a third time in 1975.

After this third defeat, Mansfield agreed to compromise.<sup>350</sup> On February 28, Byrd introduced a compromise proposal forged by the majority and minority leaders allowing cloture by three-fifths of all Senators, instead of three-fifths of Senators present as Pearson and

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338. *Id.* at 4108 (statement of Sen. Mondale).

339. *Id.* (statements of Sen. Mansfield and Sen. Mondale).

340. *Id.* at 4109–15.

341. *Id.* at 4116.

342. *Id.* (statement of Sen. Allen); *id.* at 4207 (statement of Sen. Allen).

343. *Id.* at 4209.

344. *Id.* at 4116.

345. *Id.* at 4207.

346. *Id.* at 4116–25; *see also id.* at 4206–26.

347. *Id.* at 4370 (statement of Sen. Mansfield).

348. *Id.* (statement of Vice President Rockefeller).

349. *Id.*

350. 31 CONG. Q. ALMANAC 38 (1975).

Mondale had proposed.<sup>351</sup> The conservative bloc, however, feared that future Senates would regard the three tabling votes as precedent for allowing a simple majority to cut off debate and force a vote. The Senate addressed this concern by agreeing that Senator Roman L. Hruska (R-NE) could move to reconsider the Senate's third, February 26 tabling vote.<sup>352</sup> Now on the path to reform instigated by the constitutional option, on March 3, the Senate voted 53-38 to reconsider the tabling vote, and then voted 40-51 to defeat the underlying motion to table.<sup>353</sup> On March 5, the Senate sustained Mansfield's underlying point of order against the Mondale motion 53-43.<sup>354</sup>

Some contended that this reversed any precedent in favor of the constitutional option.<sup>355</sup> Others argued that the February 20 and February 24 precedents for majority cloture were still effective.<sup>356</sup> Senator Allen feared the latter was correct and cited this as reason for members of the conservative bloc to continue to resist the rules change:

The point I am making, Mr. President, is that those Senators who felt that this precedent was being overturned, and thinking that, agreed to vote for the compromise,<sup>357</sup> are deluding themselves because the precedents are still there.

Through a series of parliamentary inquiries, Allen elicited an opinion from the Chair acknowledging that Mansfield's point of order, and thus the Senate's vote sustaining it, only overturned that part of Mondale's motion precluding debate, intervening motions, or amendments. The Chair agreed that the remaining part of Mondale's motion "that said that a majority could cut off debate"<sup>358</sup> still stood:

Mr. ALLEN. Would the Chair, for the information of the Senator, state what the Mansfield point of order is and as to what it is directed?

The PRESIDING OFFICER. The Mansfield point of order was directed against that part of the motion by the Senator from Minnesota [Mondale] that provided that the motion would not be

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351. *Id.*; 121 CONG. REC. 4817 (1975).

352. 31 CONG. Q. ALMANAC 38 (1975) (describing compromise); 121 CONG. REC. 4821 (1975) (statement of Sen. Hruska) (introducing motion to reconsider).

353. 121 CONG. REC. 4972 (1975).

354. *Id.* at 5251.

355. 31 CONG. Q. ALMANAC 38 (1975).

356. *Id.*

357. 121 CONG. REC. 5081 (1975) (statement of Sen. Allen).

358. *Id.* at 5251 (statement of Sen. Allen).

debatable, subject to intervening motions, or amendment.

Mr. ALLEN. It was not directed against that part of the Mondale debate choke-off motion that said that a majority could cut off debate?

The PRESIDING OFFICER. It was directed against what the Chair just stated.

Mr. ALLEN. And not what the Senator from Alabama [Allen] just stated?

The PRESIDING OFFICER. And nothing else.<sup>359</sup>

Byrd argued that the conservatives had no choice: If they did not endorse the “moderate” compromise proposal, “a different kind of result w[ould] ultimately but surely eventuate... majority cloture.”<sup>360</sup>

Senators Alan Cranston (D-CA), Javits, and Mondale maintained that it made no difference whether the March 3 and 5 votes overturned the precedents for majority cloture, because majority cloture was already guaranteed by the U.S. Constitution, which trumped any Senate precedent:

Upholding the Mansfield point of order only adds one tree to the jungle of precedents we reside in. But above and beyond that jungle stands the Constitution. And no precedent can reverse the fact that the Constitution supercedes the rules of the Senate—and that the constitutional right to make its rules cannot be challenged.<sup>361</sup>

On March 7, the Senate voted 56-27 to amend rule XXII to provide

359. *Id.* (statements of Sen. Allen and the Presiding Officer).

360. *Id.* at 5247–48 (statement of Sen. Byrd); *see also id.* at 5249 (statement of Sen. Byrd) (“Mr. President, I again say that Senators can argue these precedents any way they wish... . But at any time that 51 Members of the Senate are determined to change the rule and if they have a friendly Presiding Officer, and if the leadership of the Senate joins them—especially if it is the joint leadership—that rule will be changed, and Senators can be faced with majority cloture.”).

361. *Id.* at 5251 (statement of Sen. Cranston). Mondale added,

The Senator from Minnesota (Mr. MONDALE)—and no other Senator I know of who has asserted the article I, section 5 right during this debate—does not, by the adoption of this rule of the 94th Congress, seek to bind the Members of future Congresses. Nor do we waive our constitutional right in future Congresses. Nor do we waive the right of Members of future Congresses. Even if we wanted to, we could not, under the U.S. Constitution, bind a future Congress or waive the right of a future majority.

*Id.* at 5649 (statement of Sen. Mondale).

And Javits emphasized, “In adopting a new rule XXII today ... I want to make it clear that I have the right, as I did in 1959, to argue this question on constitutional grounds in the 95th Congress.” *Id.* at 5646 (statement of Sen. Javits).

for cloture by three-fifths of Senators duly chosen and sworn.<sup>362</sup>

*E. The Constitutional Option: An Action-Forcing Mechanism*

Each time the Senate rules have been amended, the body has followed the rules-change procedures set forth in the rules themselves. Yet, on at least four occasions those changes were forced by attempts to use the constitutional option. In 1917, 1959, 1975, and 1979 amendments to the Senate debate rules passed that might well not have happened but for the threat that the constitutional option might be exercised.

PART IV: THE CONSTITUTIONAL OPTION TO RENDER NEW RULES  
PRECEDENT

The Senate's constitutional rulemaking power can be exercised a second way: A simple majority could set a new Senate precedent that would alter the operation of a Standing Rule while leaving its text untouched. This exercise of the constitutional power could be applied to alter the interpretation and application of any Standing Rule, including Rule XXII's requirement of a super-majority for cloture. This second form of the constitutional option also might be used to facilitate a majority's efforts to exercise the first form: Majoritarian precedents could smooth the path toward a majority's enactment of formal rules changes.

*A. A Plan of Action*

First, a Senator would raise a point of order to close debate. For example, a Senator could state, "Debate on this matter having proceeded for 'x' hours, I make the point of order that any further debate is dilatory and not in order." Under Senate Rule XX, points of order not referred to the Senate are not debatable except at the sufferance of the Presiding Officer, although debate may generally be had on appeals.<sup>363</sup> If the Presiding Officer sustained the point of order, he would set a new, binding Senate precedent allowing Senators to cut off debate. That, however, would not end the matter. The minority could (and likely would) appeal the Presiding Officer's ruling. In a final step, the majority could move to table the appeal. The tabling motion would be non-debatable and subject to immediate

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362. *Id.* at 5651–52.

363. SENATE RULE XX, STANDING RULES OF THE SENATE, DOC. NO. 106-15, 106<sup>th</sup> Cong., 2d Sess. 14–15 (2000), available at <http://rules.senate.gov/senaterules/menu.htm>.

vote. If a simple majority voted to table the appeal, the Senate would affirm the Presiding Officer's ruling and thus allow Senators to cut off debate under the terms of the point of order.

### *B. The Plan in Action*

#### *1. An 1890 Variant of the Constitutional Option by Precedent*

The idea of curtailing debate through floor precedents is not new. It was first set in motion in January 1890 by northern Republicans in response to a Democratic filibuster on the Federal Elections Bill.<sup>364</sup> The bill authorized the federal government to oversee federal elections in the South and, if necessary, to use the military to enforce black citizens' voting rights in these elections.<sup>365</sup> The Republicans, having no cloture mechanism available to them<sup>366</sup> and having lost hope of defeating the filibuster by sheer endurance, switched strategies. Under the leadership of Senator Nelson Aldrich (R-RI), they formed a plan to end debate.<sup>367</sup> First, Aldrich would introduce a motion to close debate on the bill:

When any bill, resolution, or other question shall have been under consideration for a considerable time, it shall be in order for any Senator to demand that debate thereon be closed. On such demand no debate shall be in order, and pending such demand no other motion, except one motion to adjourn, shall be made . . . .<sup>368</sup>

Next, after some debate was had on his motion, Aldrich would "make a point of order that debate had gone far enough and that an immediate vote should be had."<sup>369</sup> The Republicans expected that the Vice President would overrule the point of order as having no foundation in the Standing Rules, and they would have to appeal the Vice President's ruling.<sup>370</sup> Aldrich hoped that the Vice President would rule that the appeal itself was non-debatable and put the appeal for an immediate Senate vote.<sup>371</sup> Then the Republicans could, by a simple majority vote, reverse the Chair's decision and thereby sustain Aldrich's point of order, forcing an immediate vote and setting a

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364. BURDETTE, *supra* note 24, at 52–57.

365. *Id.* at 52; BINDER & SMITH, *supra* note 31, at 138.

366. In 1890, the Senate had not yet amended Rule XXII to include a cloture mechanism. *See supra* Part II.C.

367. BURDETTE, *supra* note 24, at 56.

368. SENATE CLOTURE RULE, S. REP. 99-95, at 15 (1985).

369. BURDETTE, *supra* note 24, at 56.

370. *Id.*

371. *Id.*

precedent by which a simple majority could close debate.<sup>372</sup>

Aldrich, however, never progressed past step one of his plan. The Democrats, fearing Aldrich would succeed in imposing majority cloture and bringing the Federal Elections Bill to a vote, “worked desperately to win by some compromise or stratagem enough votes to displace the bill.”<sup>373</sup> The Democrats succeeded, and on January 26, 1890, the Senate voted 35-34 to consider other legislation.<sup>374</sup>

## 2. *Later Models To Change Senate Procedures by Precedent: Four Examples*

During his two terms as Senate Majority Leader,<sup>375</sup> Senator Robert C. Byrd (D-WV) initiated four precedents that allowed a simple majority to change Senate procedures without altering the text of any Standing Rule. Two of Byrd’s precedents overturned procedures then standing,<sup>376</sup> and two others would appear to contravene via reinterpretation the plain language of an existing Standing Rule.<sup>377</sup>

### a) *A Precedent To End Post-Cloture Filibusters (1977)*

In 1977, Byrd led a Senate majority in setting a precedent to address a loophole that then existed in Rule XXII’s cloture device—the post-cloture filibuster. Senators Howard Metzenbaum (D-OH) and James Abourezk (D-SD) had set out to filibuster a proposal to deregulate natural gas prices.<sup>378</sup> The Senate had invoked cloture, triggering Rule XXII’s provisions limiting each Senator to one hour of debate and prohibiting any “dilatory amendment, or amendment not germane,”<sup>379</sup> but to no avail. Metzenbaum and Abourezk circumvented these limits by proffering a slew of amendments without debating them (thus preserving their time for debate) and then forcing quorum calls and roll call votes for each proffered

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372. *Id.*

373. *Id.* at 57.

374. *Id.*

375. Byrd served as Senate Majority Leader from 1977-1980 and from 1987-1988. Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001210> (last visited Nov. 14, 2004).

376. These precedents were set in 1977 and 1980. 123 CONG. REC. 31,916–27 (1977); 126 CONG. REC. 4729–32 (1980).

377. These precedents were set in 1979 and 1987. 125 CONG. REC. 31,892–94 (1979); 133 CONG. REC. 12,252–60 (1987).

378. 123 CONG. REC. 31,916 (1977).

379. SENATE RULE XXII, STANDING RULES OF THE SENATE (1977), materials provided by Senate Historian Richard Baker, on file with author; *see also* SENATE CLOTURE RULE, S. REP. NO. 99-95, at 103–24 (1985) (setting forth legislative history of Rule XXII).

amendment.<sup>380</sup> Further, making points of order against the amendments would not save time or avert these filibusters by roll call. Although a point of order, if decided by the Chair, was not debatable, an appeal from the Chair's ruling was debatable.<sup>381</sup> Under the Senate's rules, the minority could appeal the Chair's ruling on the point of order, debate the appeal, and thereby continue their delaying tactics.<sup>382</sup> If a motion were made to table the appeal, Metzenbaum and Abourezk would secure a roll call vote on the tabling motion. The result was that by October 3, 1977, the Senate had spent "13 days and 1 night"<sup>383</sup> debating the natural gas bill, which included "121 rollcalls" and "34 live quorums."<sup>384</sup>

That day, Byrd set in motion a two-part plan to end this post-cloture filibuster. First, he sought partially to reverse the Senate procedure requiring the Chair to wait for a point of order before ruling on a procedural defect:

I make the point that when the Senate is operating under cloture the Chair is required to take the initiative under rule XXII to rule out of order all amendments which are dilatory or which on their face are out of order.<sup>385</sup>

The Vice President sustained Byrd's point of order:

[T]he point of order is well taken. 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[.]<sup>386</sup>

Abourezk criticized Byrd for attempting "to change the entire rules of the Senate during the heat of a debate . . . on a majority vote"<sup>387</sup> (that is, for attempting to exercise a variant of the constitutional option) and appealed the ruling.<sup>388</sup> Byrd responded with a tabling motion, which carried 79-14.<sup>389</sup> The result was that a majority of Senators had succeeded in altering Senate procedures without changing the text of a Standing Senate Rule.

Armed with this new precedent, Byrd began calling up

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380. See, e.g., 123 CONG. REC. 31,583-608, 31,749-55 (1977).

381. SENATE RULE XX, STANDING RULES OF THE SENATE (1977), materials provided by Senate Historian Richard Baker, on file with author.

382. *Id.*

383. 123 CONG. REC. 31,921 (1977) (statement of Sen. Byrd).

384. *Id.* at 31,918 (statement of Sen. Stevens).

385. *Id.* at 31,916 (statement of Sen. Byrd).

386. *Id.* at 31,919 (statement of Vice President Mondale).

387. *Id.* at 31,916 (statement of Sen. Abourezk).

388. *Id.* at 31,919.

389. *Id.* at 31,919-20.

procedurally defective amendments filed by Abourezk and Metzenbaum.<sup>390</sup> The Chair then ruled each amendment out of order without waiting for a Senator to raise a point of order against his ruling.<sup>391</sup> Despite Byrd's assurances to Senators Howard Baker (R-TN), Edmund Muskie (D-ME), and Abourezk that the right to appeal would remain untouched if his point of order were sustained,<sup>392</sup> Byrd exercised his Majority Leader's right of preferential recognition to call up the next amendment before Abourezk could appeal, thus mooting the possibility that Abourezk could appeal the earlier ruling.<sup>393</sup> Byrd called up thirty-three amendments in succession, foreclosing all appeals along the way, and the filibuster was broken.<sup>394</sup>

*b) A Precedent Limiting Amendments to Appropriations Bills (1979)*

In November 1979, Byrd led a majority of Senators present in setting a precedent that ran directly contrary to the plain language of Senate Standing Rule XVI, the rule governing consideration of general appropriations bills. The effect was to alter the operation of Rule XVI without touching its text.

Prior to November 9, 1979, Senators frequently proposed legislative amendments to appropriations bills. Legislative amendments on appropriation bills violated Senate Rule XVI, which exists in part to separate authorizations from appropriations. However, the bar was not absolute. If the House acted first to legislate on an appropriations vehicle, the Senate could respond with legislative amendments of its own. Thus, when legislative amendments were proposed in the Senate, they would be challenged with a point of order and their sponsor would frequently raise the defense that the amendment was germane to the underlying House vehicle. Under Rule XVI, "all questions of relevancy of amendments" had to "be submitted to the Senate and be decided without debate."<sup>395</sup> If the Senate deemed the amendment germane, the point of order would fail and the sponsor would achieve success without needing to

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390. *Id.* at 31,927–28.

391. *Id.*

392. *Id.* at 31,917 (statements of Sens. Baker, Muskie, and Byrd).

393. *Id.* at 31,927–28. By Senate precedent, the majority leader has priority of floor recognition. RIDDICK & FRUMIN, *supra* note 140, at 1091, 1098, *also printed at* S. DOC. NO. 101-28 (1990).

394. 123 CONG. REC. 31,927–28 (1977).

395. SENATE RULE XVI, STANDING RULES OF THE SENATE (1979), materials provided by Senate Historian Richard Baker, on file with author.

overturn the Chair.

On November 9, Byrd set out to curb this practice. The Senate was debating a Defense appropriations bill when Senator William Armstrong (R-CO) proffered an amendment that would “lift the cap which the administration has imposed upon military pay.”<sup>396</sup> Appropriations Chairman John Stennis (D-MS) raised a point of order that the amendment constituted legislation on an appropriation bill.<sup>397</sup> When Armstrong asserted the defense of germaneness,<sup>398</sup> Byrd interjected with a point of order:

I make the point of order that this is a misuse of the precedents of the Senate, since there is no House language to which this amendment could be germane and that, therefore, the Chair is required to rule on the point of order as to its being legislation on an appropriation bill and cannot submit the question of germaneness to the Senate.<sup>399</sup>

The Presiding Officer noted that Byrd’s motion raised “a question of first impression” and sustained the point of order:

Since there is no House language in this bill for the amendment to be germane to, the Chair thinks the point of order is well taken and, therefore, sustains it.<sup>400</sup>

Armstrong appealed, and Byrd moved to table the appeal. In a vote that ran almost entirely along party lines, Byrd prevailed 44-40,<sup>401</sup> thus setting a precedent that has caused the Senate to operate in manner contradicting the plain language of Rule XVI.

*c) A Precedent Governing Consideration of Nominations (1980)*

In March 1980, Byrd led the Senate Democrats in changing the Senate’s procedures for the consideration of nominations. The Senate’s Executive Calendar lists both treaties and nominations, in that sequence.

Prior to March 1980, it had “been determined by a precedent that a motion to go into executive session, being nondebatable, [would] automatically put the Senate on the first treaty.”<sup>402</sup> A motion to

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396. 125 CONG. REC. 31,877 (1979) (statement of Sen. Armstrong).

397. *Id.* at 31,892–93 (statement of Sen. Stennis).

398. *Id.* at 31,893 (statement of Sen. Armstrong).

399. *Id.* (statement of Sen. Byrd).

400. *Id.* (statement of the Presiding Officer).

401. Senator Thad Cochran (R-MS) was the only Republican to support Byrd, and Senators George McGovern (D-SD), Spark Matsunaga (D-HI), and Paul Tsongas (D-MA) were the only Democrats to oppose him. *Id.*

402. 126 CONG. REC. 4,731 (1980) (statement of Sen. Byrd).

proceed to any other Executive Calendar matter would be debatable. This well established procedure presented potential difficulties for Byrd, who wished to push through the confirmation of Robert E. White as Ambassador to El Salvador.<sup>403</sup> Byrd would “run the risk of a double filibuster—one on the motion to proceed to the nomination and then a filibuster on the nomination itself.”<sup>404</sup> Accordingly, Byrd set out to alter Senate procedure to allow the Senate to proceed directly to White’s nomination with one, non-debatable motion.

On March 5, 1980, Byrd offered a motion:

Mr. President, I move the Senate go into executive session to consider the first nomination on the Executive Calendar.<sup>405</sup>

Senator Jesse Helms (R-NC) raised a point of order against the motion:

The Senator can move to go into executive session but he cannot under the rules specify what we shall consider. The Senate determines its order of business in executive session only after going into executive session. It is not in order to determine the order of executive business while in legislative session.<sup>406</sup>

The Presiding Officer immediately sustained Helms’s point of order:

Under the rule, rule XXII, paragraph 1, and precedents thereunder, only a motion to go into executive session is in order.<sup>407</sup>

Byrd appealed the ruling, arguing that there was no logical reason for the Senate to distinguish between a motion to proceed to the first

403. *Id.* at 4729.

404. *Id.* at 4731.

405. *Id.* at 4729.

406. *Id.* (statement of Sen. Helms).

407. *Id.* (statement of the Presiding Officer). Rule XXII, paragraph 1 provided (and still provides):

When a question is pending, no motion shall be received but—

To adjourn.

To adjourn to a day certain, or that when the Senate adjourn it shall be to a day certain.

To take a recess.

To proceed to the consideration of executive business.

To lay on the table.

To postpone indefinitely.

To postpone to a day certain.

To commit.

To amend.

Which several motions shall have precedence as they stand arranged; and the motions relating to adjournment, to take a recess, to proceed to the consideration of executive business, to lay on the table, shall be decided without debate.

nomination and a motion to proceed to the first treaty.<sup>408</sup> Senator James McClure (R-ID) protested that the proper method for altering Senate procedure was by proposing “amendments of the rules,” “not simply by changing the rules by majority vote to meet a particular situation,” and urged the Senate to affirm the ruling of the Chair.<sup>409</sup>

That same day, the Senate rejected the ruling of the Chair by 38-54, almost completely on party lines.<sup>410</sup> Due to Byrd’s new precedent, motions to proceed to nominations are no longer debatable.

*d) Precedents Concerning Rule XII’s Voting Procedures (1987)*

In 1987, a Byrd precedent once again changed Senate procedure to run contrary to the plain text of a Standing Senate Rule. A Republican minority had launched a campaign of delay to prevent the Senate from taking up a Defense authorization bill. The minority invoked Senate Rule XII, which requires that during a roll call, if a Senator declines to vote on a call of his or her name, that Senator must give reason for doing so and the Presiding Officer must put a non-debatable question to the Senate on whether the Senator shall be excused from voting.<sup>411</sup> During a roll call on a Byrd motion to approve the *Journal*,<sup>412</sup> Senator John Warner (R-VA) declined to vote, explaining that he had “not read the Journal.”<sup>413</sup> In accordance with Rule XII, the Presiding Officer then initiated a vote to determine if Senator Warner should be excused.<sup>414</sup> Before a vote could be announced, Senator Dan Quayle (R-IN) declined to vote on whether Warner should be excused.<sup>415</sup> A vote followed on whether to excuse Quayle, during which Senator Steve Symms (R-ID) declined to

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408. 126 CONG. REC. 4730 (1980) (statement of Sen. Byrd).

409. *Id.* (statement of Sen. McClure).

410. *Id.* at 4,732.

411. Rule XII stated (and still states), in pertinent part:

When a Senator declines to vote on a call of his name, he shall be required to assign his reasons therefor, and having assigned them, the Presiding Officer shall submit the question to the Senate: “Shall the Senator for the reasons assigned by him, be excused from voting?” which shall be decided without debate; and these proceedings shall be had after the roll call and before the result is announced; and any further proceedings in reference thereto shall be after such announcement.

SENATE RULE XII, STANDING RULES OF THE SENATE, S. DOC. NO. 100-4, at 7-8 (1987); STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, 106<sup>th</sup> Cong., 2d Sess. 8 (2000), available at <http://rules.senate.gov/senaterules/rule12.htm> (last visited Nov. 14, 2004).

412. 133 CONG. REC. 12,252 (1987) (statement of Sen. Byrd).

413. *Id.* (statement of Sen. Warner).

414. *Id.* (statements of the Acting President pro tempore).

415. *Id.* (statement of Sen. Quayle).

vote.<sup>416</sup> At that moment, four votes were stacked: the vote on Senator Byrd's original motion to approve the *Journal*; within it, the vote on whether Warner should be excused; within that vote, a vote on whether Quayle should be excused; and within that vote, a vote on whether Senator Symms should be excused. The tactic could be employed endlessly.

Byrd countered with a point of order. He posited that during a roll call on a motion to approve the *Journal*, repeated requests by Senators to be excused from voting were dilatory and out of order:

Mr. President, I make a point of order that the request of the Senator to be excused from voting is for the purpose of delaying the conclusion of the vote that the Journal be approved to date; that in amending rule IV, the Senate intended that a majority of the Senate could resolve the question of the reading of the Journal; I make my point of order that a request of a Senator to be excused from voting on a motion to approve the Journal is, therefore, out of order and that the Chair proceed immediately, without further delay . . . .<sup>417</sup>

Through a series of votes that ran almost entirely along party lines, Byrd succeeded in establishing three precedents that radically changed voting procedures under Rule XII. Prior to that day, dilatory actions were deemed out of order only after cloture had been invoked. Although cloture had not been invoked on the pending measure, Byrd's new precedents established:

First, a point of order may be made during a rollcall vote on, or subsumed by a vote on, a motion to approve the Journal that repeated requests by Senators to be excused from voting on any such vote is out of order as dilatory.

Second, repeated requests by Senators to be excused from voting on a vote on, or subsumed by a vote on, a motion to approve the Journal, when they are obviously done for the purpose of delaying the announcement of the vote on the motion to approve the Journal, are out of order.

Third, a Senator has a limited right to explain his reasons for

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416. *Id.* (statement of Sen. Symms).

417. *Id.* (statement of Sen. Byrd). Rule IV provided (and still provides), in pertinent part, that

the Journal of the preceding day shall be read unless by nondebatable motion the reading shall be waived, the question being, "Shall the Journal stand approved to date?", and any mistake made in the entries corrected.

SENATE RULE IV, STANDING RULES OF THE SENATE, S. DOC. NO. 100-4, at 3 (1987); STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, 106<sup>th</sup> Cong., 2d Sess. 3-4 (2000), available at <http://rules.senate.gov/senaterules/rule04.htm> (last visited Nov. 14, 2004).

declining to vote, but may not go on “forever” stating his reasons for not voting.<sup>418</sup>

Although the precedents were technically limited to proceedings on a motion to approve the *Journal*, Senator Alan Simpson (R-WY) argued that their reach was far broader. He noted that Rule XII barred all motions and unanimous-consent requests to suspend its provisions.<sup>419</sup> Simpson pointed out that the Senate had, in establishing three precedents that contradicted Rule XII, violated this provision. This, he explained, set a precedent that “a simple majority” could constrain debate even when the Standing Rules appeared to prohibit such an outcome.<sup>420</sup>

#### PART V: CHANGING SENATE PROCEDURES VIA STANDING ORDERS

Standing Orders, either entered into by unanimous consent or legislatively enacted by the Senate, represent another potential avenue for exercising the constitutional rulemaking power to alter Senate procedures. Just as in the past a majority has used Standing Orders to alter the application of Senate rules and precedents governing conference reports, so a future majority could use a Standing Order to alter the application of Senate rules and precedents governing cloture of debate.

Often, the Senate and the House of Representatives will pass different versions of the same bill.<sup>421</sup> The two chambers commonly resolve their differences by appointing a conference committee of selected Senators and House Members to negotiate a compromise bill.<sup>422</sup> The committee issues its compromise proposal in the form of a conference report, and if both chambers ratify it, the compromise bill is passed and submitted to the President.<sup>423</sup>

In October 1996, as now, Senate Rule XXVIII provided that conference committees, when issuing a conference report, “shall not insert in their report matter not committed to them by either

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418. 133 CONG. REC. 12,259 (1987) (statement of Sen. Byrd).

419. Rule XII states, in pertinent part:

No motion to suspend this rule shall be in order, nor shall the Presiding Officer entertain any request to suspend it by unanimous consent.

STANDING RULES OF THE SENATE RULE XII, S. DOC. NO. 100-4, at 7-8 (1987); STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, 106<sup>th</sup> Cong., 2d Sess. at 8 (2000), available at <http://rules.senate.gov/senaterules/rule12.htm>.

420. 133 CONG. REC. 12,258 (1987) (statement of Sen. Simpson).

421. Senate Legislative Process ch. 4, [http://www.senate.gov/legislative/common/briefing/Senate\\_legislative\\_process.htm](http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm) (last visited Nov. 14, 2004).

422. *Id.*

423. *Id.*

House.”<sup>424</sup> A Senator could enforce this provision by “a point of order . . . against the report, and if the point of order is sustained, the report is rejected or shall be recommitted to the committee of conference if the House of Representatives has not already acted thereon.”<sup>425</sup> Twice a simple majority of Senators has altered the application of this provision – initially by setting a contrary precedent, and later by adopting a corrective Standing Order.

In the fall of 1996, after “the Federal Aviation Administration bill was passed by the House and Senate, and . . . went to conference,” the committee issued a conference report that included a provision amending the Railway Labor Act, even though that provision had not “been considered either by the House or the Senate.”<sup>426</sup> It seemed indisputable that the conference committee had acted outside of its authority in violation of Rule XXVIII.<sup>427</sup> Consistent with Rule XXVIII, a point of order was raised against the report<sup>428</sup> and sustained by the Chair.<sup>429</sup> This ruling, however, was overturned on appeal by a 56-39 vote,<sup>430</sup> thus setting a binding Senate precedent.

For more than four years, this precedent was interpreted to negate Rule XXVIII’s ban against including unrelated subject matter in conference reports.<sup>431</sup> Then, on December 21, 2000, the Senate adopted a Standing Order to overturn the effects of the precedent and thus revive the pre-1996 application of Rule XXVIII: “Beginning on the first day of the 107th Congress, the Presiding Officer of the Senate shall apply all of the precedents of the Senate under Rule XXVIII in effect at the conclusion of the 103d Congress.”<sup>432</sup> The Standing Order was attached as an amendment to the Fiscal Year

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424. SENATE RULE XXVIII, STANDING RULES OF THE SENATE (1996), materials provided by Senate Historian Richard Baker, on file with author; *accord* SENATE RULE XXVIII, STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, 106<sup>th</sup> Cong., 2d Sess. 20 (2000), available at <http://rules.senate.gov/senaterules/menu.htm>.

425. *Id.*

426. 142 CONG. REC. 27,158–59 (1996) (statement of Sen. Specter).

427. *See, e.g.*, 142 CONG. REC. 27,159 (1996) (statement of Sen. Specter) (describing the conference committee’s action as a “breach of our rules”); 142 CONG. REC. 27,148 (1996) (statement of Sen. Kennedy); 142 CONG. REC. 27, 148–49 (1996) (statement of Sen. Stevens).

428. 142 CONG. REC. 27,148 (1996) (statement of Sen. Lott).

429. 142 CONG. REC. 27, 150 (1996) (statement of the Presiding Officer) (“[I]t is the opinion of the chair that the conference report exceeds the scope, and the point of order is sustained.”).

430. 142 CONG. REC. 27,151 (1996).

431. 146 CONG. REC. S11,856 (2000) (statement of Sen. Byrd); *see also* 146 CONG. REC. S11,860 (2000) (statement of Sen. Byrd).

432. Consolidated Appropriations for Fiscal Year 2001, Pub. L. No. 106-554, § 903 (2000), 114 Stat. 2763, 2763A-198.

2001 Appropriations Bill for the Departments of Commerce, Justice, and State,<sup>433</sup> and when a majority passed that bill, it passed the Standing Order as well. As a result, the Senate again altered its application of Rule XXVIII.

That same appropriations bill included a second Standing Order providing that “the reading of conference reports is no longer required, if the said conference report is available in the Senate.”<sup>434</sup> This Standing Order overturned a long line of precedents that permitted a single Senator to demand that a conference report be read before the Senate could consider and vote on the report. Thus, under those precedents, Senators could filibuster a conference report merely by demanding its reading. By adopting a Standing Order, however, a simple majority was able to eliminate this dilatory tactic.

Like the Senate of December 2000, the current Senate could alter the application of the Senate’s Standing Rules and precedents by adopting a Standing Order. A majority could thereby override Rule XXII and establish a time-limit for debate on certain matters. Such an Order could be attached as an amendment to a pending bill (as it was in 2000) or could be passed in isolation. Regardless, the effect would be the same – to alter Senate procedures governing debate by majority vote.

#### CONCLUSION

Article I, Section 5 of the U.S. Constitution empowers the Senate to “determine the Rule of its Proceedings.” In 1917 and on many occasions since 1917, the Senate has debated whether this constitutional rulemaking power allows a simple majority to alter the Senate’s Standing Rules at will. At least four times, changes to the Senate Standing Rules were influenced by attempts to use the constitutional option. And throughout Senate history, a simple majority has changed Senate procedures governing debate by setting precedents or adopting Standing Orders that altered the operation of the Standing Rules without amending their actual text. Over two centuries, the Senate’s constitutional rulemaking power has been

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433. *Id.*; see also 146 CONG. REC. S11,856 (2000) (statement of Sen. Byrd).

434. Consolidated Appropriations for Fiscal Year 2001, Pub. L. No. 106-554, § 903 (2000), 114 Stat. 2763, 2763A-198.

exercised in a variety of ways to change Senate procedures. As Senate parliamentary process further evolves, this power plainly will be exercised again. At issue is when, how, and to what effect.