PROPOSED AMENDMENTS TO RULE XXII OF THE STANDING RULES OF THE SENATE

(RELATING TO CLOTURE)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON STANDING RULES OF THE SENATE

OF THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

FIRST SESSION

ON

S. Res. 6, S. Res. 8, S. Res. 16, and S. Res. 82

RESOLUTIONS PROPOSING AMENDMENTS TO RULE XXII OF THE STANDING RULES OF THE SENATE

FEBRUARY 23 AND MARCH 1, 1965

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PROPOSED AMENDMENTS TO RULE XXII OF THE STANDING RULES OF THE SENATE
(Relating to Cloture)

TUESDAY, FEBRUARY 23, 1965

U.S. SENATE,
SUBCOMMITTEE ON STANDING RULES OF THE
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m. in room 301, Old Senate Office Building, Senator Carl Hayden (chairman of the subcommittee) presiding.

Present: Senator Hayden.

Also present: Kent Watkins, staff director of the subcommittee; Gordon F. Harrison, staff director, Committee on Rules and Administration; Hugh Q. Alexander, chief counsel; Walter L. Mote, professional staff member; John P. Coder, professional staff member; Lew Hastings, professional staff member; Marian G. Moore, assistant chief clerk, and William R. Haley, legislative assistant to Senator Cooper.

Senator HAYDEN. This hearing has been called to carry out the intentions of the Senate when it adopted the following unanimous consent agreement on January 8, 1965: "Ordered, That the pending resolution (S. Res. 6) amending the Standing Rules of the Senate and the proposed resolution of Mr. Douglas (S. Res. 8) to amend rule XXII of the Standing Rules of the Senate relative to cloture, be referred to the Committee on Rules and Administration, which shall make its report on said resolutions to the Senate on March 9, 1965."

It is my understanding that this subcommittee shall report back to the full committee when these hearings are finished. In turn, a report by the full committee will send the two resolutions, Senate Resolution 6 and Senate Resolution 8—authored by Senators Anderson and Douglas, respectively—to the Senate to await its action.

I have taken the liberty of including in these hearings Senator Morse's Senate Resolution 16 and Senator Miller's Senate Resolution 82 because they are the only other similar measures referred to this subcommittee.

In order to save our witnesses from certain burdens, I have directed the staff to prepare statistical and historical material for insertion in the hearing record. This, of course, does not preclude anyone from including their own background matter. In addition, I suggest that the present rule XXII as it now operates in the Senate and the four resolutions before us be inserted.

(The texts of rule XXII, S. Res. 6, S. Res. 8, S. Res. 16, and S. Res. 82 are as follows:)

RULE XXII

PRECEDENCE OF MOTIONS

1. 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.

[Jefferson's Manual, Sec. XXXIII.]

2.[1] Notwithstanding the provisions of rule III or rule VI or any other rule of the Senate,[2] at any time a motion signed by sixteen 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 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 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 the 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 Senator present and voting,[2] 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 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 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.

3. The provisions of the last paragraph of rule VIII (prohibiting debate on motions made before 2 o'clock)[3] shall not apply to any motion to proceed to the consideration of any motion, resolution, or proposed to change any of the Standing Rules of the Senate.

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[1] As amended, S. Jour. 173, 81–1, Mar. 17, 1949.
[2] As amended, S. Jour. 37, 86–1, Jan. 12, 1959.
[3] As amended, S. Jour. 37, 86–1, Jan. 12, 1959.

89TH CONGRESS
1ST SESSION

S. RES. 6

IN THE SENATE OF THE UNITED STATES

JANUARY 6, 1965

Mr. ANDERSON (for himself and Mr. MORTON) submitted the following resolution; which was ordered to lie over under the rule

JANUARY 7, 1965

Ordered to be placed on the calendar

JANUARY 8 (legislative day, JANUARY 7), 1965

Referred to the Committee on Rules and Administration with instructions

RESOLUTION

Resolved, That rule XXII of the Standing Rules of the Senate is amended to read as follows:

"1. 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.

"2. Notwithstanding the provisions of rule III or rule VI or any other rule of the Senate, at any time a motion signed by sixteen 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 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 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 the 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 three-fifths of the Senators present and voting, 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 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 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.

"3. The provisions of the last paragraph of rule VIII (prohibiting debate on motions made before 2 o'clock) 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."

89TH CONGRESS
1ST SESSION

S. RES. 8

IN THE SENATE OF THE UNITED STATES

JANUARY 6, 1965

Mr. DOUGLAS (for himself, Mr. KUCHEL, Mr. CASE, Mr. CLARK, Mr. FONG, Mr. HART, Mr. JAVITS, Mr. MCCARTHY, Mr. MCNAMARA, Mr. MONDALE, Mr. MOSS, Mr. NELSON, Mrs. NEUBERGER, Mr. PROXMIRE, Mr. RANDOLPH, Mr. SCOTT, and Mr. WILLIAMS of New Jersey) submitted the following resolution; which was ordered to lie over under the rule

JANUARY 8 (legislative day, JANUARY 7), 1965

Referred to the Committee on Rules and Administration with instructions

RESOLUTION

Resolved, That rule XXII of the Standing Rules of the Senate is amended by adding a new section 3 as follows:

"3. If at any time, notwithstanding the provisions of rule III or rule VI or any other rule of the Senate, a motion, signed by sixteen 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 pursuant to this section, the Presiding Officer shall at once state the motion to the Senate, and one hour after the Senate meets on the fifteenth calendar day thereafter (exclusive of Sundays, legal holidays, and nonsession days) 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 further debate, submit to the Senate by a yea and nay vote the 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 a majority vote 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, debate upon the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto, and motions with respect thereto, shall be limited in all to not more than 100 hours, of which 50 hours will be controlled by the majority leader, and 50 hours will be controlled by the minority leader. The majority and minority leaders will divide equally the time allocated among those Senators favoring and those Senators opposing the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto, and the motions affecting the same: *Provided, however*, That any Senator so requesting shall be allocated a minimum total of one hour. It shall be the duty of the Presiding Officer to keep the time. The above provisions for time in this paragraph are minimum guarantees and the motion to bring the debate to a close may specify additional time for debate. 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."

Resolved, further, That section 3 of the Standing Rules of the Senate be redesignated as "section 4."

89TH CONGRESS
1ST SESSION

S. RES. 16

IN THE SENATE OF THE UNITED STATES

JANUARY 7, 1965

Mr. MORSE submitted the following resolution; which was referred to the Committee on Rules and Administration

RESOLUTION

Resolved, That subsection 2 of rule XXII of the Standing Rules of the Senate, relating to cloture, is hereby amended to read as follows:

"Notwithstanding the provisions of rule III or VI or any other rule of the Senate, if at any time at which any measure, motion, or other matter, or the unfinished business, has been pending before the Senate for not less than seven calendar days, a motion, signed by sixteen Senators, to bring to a close the debate upon that measure, motion, matter, or business, 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 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 the question:

"'It is 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 a majority of those voting, 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 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; except that any Senator may yield to any other Senator all or any part or the aggregate period of time which he is entitled to speak; and the Senator to whom he so yields may speak for the time so yielded in addition to any period of time which he is entitled to speak in his own right. It shall be the duty of the Presiding Officer to keep the time of each Senator who speaks. No dilatory motion, dilatory amendment, amendment not germane, or motion to table any germane amendment offered to the said measure, motion, matter, or business 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."

SEC. 2. Subsection 3 of such rule is hereby repealed.

89TH CONGRESS
1ST SESSION

S. RES. 82

IN THE SENATE OF THE UNITED STATES

FEBRUARY 25, 1965

Mr. MILLER submitted the following resolution; which was referred to the Committee on Rules and Administration

RESOLUTION

Resolved, That rule XXII of the Standing Rules of the Senate is amended by striking out the third paragraph of section 2 and by substituting in place thereof the following: "And if that question shall be decided in the affirmative by three-fifths of the Senators present and voting and also by a majority of the Senators affiliated with each of the two major political parties present and voting, 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."

Senator HAYDEN. I requested the Senate Parliamentarian to advise me what effects the changes in Rule XXII proposed by Senate Resolution 6 would have on the existing rules and precedents of the Senate. The Parliamentarian's reply is as follows:

U.S. SENATE,
OFFICE OF THE SECRETARY,
Washington, D.C., February 25, 1965.

Memorandum to Senator Hayden,
Suite 133 Senate Office Building:

In reply to your request, I find that Senate Resolution 6 of the 89th Congress, 1st session, is identical to that of Senate Resolution 9 of the 88th Congress, 1st session. Likewise, Senate Resolution 6 is exactly the same as Rule XXII with the exception of the number of Senators that would be required to invoke cloture—namely Senate Resolution 6 proposes that three-fifths of the Senators present and voting may invoke cloture instead of the present two-thirds requirement.

It does not appear that this change would have any other effect on the existing rules and precedents of the Senate with the possible exception of the "pairing" of Senators on such points. Of course, the custom of "pairing" is not provided for by the rules of the Senate but by the precedents and practices thereof. /This proposed change would obviously alter the ratio for pairing on such votes.

FLOYD M. RIDDICK,
Parliamentarian.

Senator HAYDEN. There may be some individuals who cannot be present at this or the other hearing on March 1, but who wish to be heard in some way. If this is so, they are welcome to submit a statement which can be included in the hearings record.

Now we will hear from Senator Douglas.

STATEMENT OF HON. PAUL H. DOUGLAS, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DOUGLAS. Thank you, Mr. Chairman.

Mr. Chairman, I appreciate the opportunity to appear before this subcommittee in support of Senate Resolution 8, which Senator Kuchel and I introduced on January 6 for ourselves and 15 other Senators: Mr. Case, Mr. Clark, Mr. Fong, Mr. Hart, Mr. Javits, Mr. McCarthy, Mr. McNamara, Mr. Mondale, Mr. Moss, Mr. Nelson, Mrs. Neuberger, Mr. Proxmire, Mr. Randolph, Mr. Scott, and Mr. Williams of New Jersey.

Senate Resolution 8 has a dual purpose: to protect and preserve the right of full consideration in the Senate but to provide a workable means by which a majority of the Senators, duly chosen and sworn, may bring proposals to a vote following the opportunity for full, free, and even prolonged debate.

FULL CONSIDERATION BUT MAJORITY ACTION

In my opinion, it is high time for this principle, of full consideration but ultimate majority action, to replace the current provision for minority rule through the filbuster and the threat of filibuster.

The change in rule XXII which we propose in Senate Resolution 8 does full justice to the principle of full debate in the Senate. As one of the sponsors of this resolution, I wish to have it very clear that no Senator respects more highly than I do the tradition of thorough debate in the Senate with every Senator having the right to be heard. But I also believe that the filibuster—which correctly defined is pro-

longed discussion and other delaying tactics intended to prevent a vote—mocks the Senate, its tradition, and the Constitution of the United States.

FILIBUSTER'S PURPOSE IS TO ULTIMATELY PREVENT A VOTE

There is a very real distinction between a filibuster; namely, an interminable discussion of a bill or motion in order to prevent a vote from ever being taken on it, and an extended debate for the limited purpose of alerting our colleagues and the people to the dangers which hasty action would conceal. Some of us who are sponsors of Senate Resolution 8, and who have always supported curbing the filibuster, have on occasion been accused of filibustering, ourselves. Some of us have spoken at length on some matters. In 1954, I spoke for 3 days against the offshore oil bill and, in 1956, for 4 days against the natural gas bill. In company with associates, we kept up the debates in each case for about a month, but voting did come eventually. Our purpose was to dramatize our case, to alert the people, and to convince our colleagues; but it was not to forever prevent a vote so that the Senate would give up and go on to other things.

Incidentally, in the case of the offshore oil bill, the debate was successful in getting the sponsors of that giveaway measure to relinquish the claim of the States over the Outer Continental Shelf, beyond the 3 mile and 3 league limit. But, by a fortunate turn of events, it so happens that the major portion of the oil which has been found is on that Outer Continental Shelf. The revenues from this oil are coming in at the rate of approximately $300 million a year and, in the years since that debate, the Federal Government has collected more than a billion dollars in revenue.

So I submit that that prolonged debate, which seemed at the time to be ineffective, was, in the long run, extremely effective.

A portion of the hostile press, however, frequently uses these cases to charge us with being hypocrites.

The question of who is for full Senate debate to influence a vote and who, on the other hand, is for prolonged debate to prevent a vote will be easily settled. Support for a change in the rules to guarantee full debate, but also to permit the Senate eventually to act, will be the proof of the pudding. That is the real test.

Senate Resolution 8 would add a new section to rule XXII.

I want to point out that it does not supersede the present provisions of rule XXII but adds to them an alternative method.

This resolution would permit limitation of debate by a majority of Senators duly chosen and sworn; namely, 51 of the full Senate membership of 100, not a majority of those voting but a majority of those elected and sworn, after 15 calendar days, exclusive of Sundays, legal holidays, and nonsession days, from the date on which a cloture petition is presented by 16 Senators.

FULL, FREE, AND EVEN PROLONGED DEBATE PROTECTED

Senate Resolution 8 would, therefore, protect and preserve the tradition of full consideration of a measure in the following manner:

First. In any but extreme cases of national emergency, and during the final days of a session, there would normally be at least 3 weeks of

debate—say 18 days, exclusive of Sundays—before a cloture petition would be filed.

Second. Following the filing of a motion to close debate, signed by 16 Senators, there would be 14 full calendar days, exclusive of Sundays, legal holidays, and nonsession days, before the vote would be taken on cloture.

Third. If a majority of Senators, duly chosen and sworn, decided in the affirmative, there would, thereafter, under Senate Resolution 8, be an additional 100 hours of debate. If used at a rate of 8-hour sessions each day, this would permit another 12 days of debate.

FULL USE OF THE 100 HOURS PROVIDED FOR

Mr. Chairman, I particularly point out to the subcommittee that, as an additional guarantee of full consideration, Senate Resolution 8 provides for the full use of the 100 hours permitted under cloture if necessary.

First, the rule would guarantee to each Senator, so requesting, a minimum total of 1 hour. That is the present provision.

Second, the portion of the 100 hours, which would remain after those Senators who wished a minimum of a full hour had so applied, would be under the control of the majority leader and the minority leader who would divide equally the time allocated among those Senators favoring and those Senators opposing the measure, motion, or other matter.

This element of flexibility, as opposed to the rigid maximum of 1 hour per Senator which is nontransferable at present as provided in section 2 of rule XXII, would permit the managers of the bill, the leaders of the opposition, and authors of amendments more than an arbitrary 1 hour in which to deal with amendments or important questions. Full and proper consideration of a measure would be thus encouraged, but the opportunity for a majority of the Senate to insist on a vote would be assured.

MORE THAN 100 HOURS OF DEBATE UNDER CLOTURE IF NECESSARY

Moreover, our resolution would further guarantee full consideration by permitting the sponsors of the cloture motion to specify additional time for debate on the motion. If some of the amendments pending, for example, appeared to require more time for consideration than the 100 hours would be likely to permit, additional time for debate could be specified in the cloture motion. Full consideration, but eventual opportunity to vote, is the principle of Senate Resolution 8.

FOR 44 DAYS OR MORE THAN SEVEN 6-DAY WEEKS OF DEBATE

Senate Resolution 8, therefore, would permit, in usual circumstances, about 44 days, or more than seven 6-day weeks, of debate before the vote on "final passage" of a measure. Even if the usual 3 weeks or more of debate prior to the filing of cloture were omitted, as would probably be judged necessary in a national emergency, there would still be a guarantee of (*a*) 14 actual days of debate prior to the cloture vote, and (*b*) 100 hours or some twelve 8-hour days of debate prior to final passage after cloture was voted. The minimum guarantee, therefore, would be some 26 days of ordinary length or, if around-the-clock ses-

sions appeared necessary, fourteen 24-hour days before cloture and four 24-hour days after cloture and before the final vote.

The tradition of full and free debate in the Senate is well protected, in my opinion, by a rule which permits one more than one-half of the Members of the Senate to finally bring a measure to a vote after 6 or 7 weeks of debate. Our resolution cannot be justly opposed on the alleged grounds that it would be a "gag rule," as is sometimes said. It provides for full consideration. It is flexible. It is just to the minority and to the majority.

EVEN FURTHER OPPORTUNITIES FOR EXTENDED DEBATE

May I also point out that even these guarantees of extended debate do not necessarily encompass all the opportunities for prolonged consideration. The Senate is not the only House of the Congress, we are not the only pebble on the beach. The House of Representatives also must pass on a measure of law. So there is further or prior consideration by that body in the first instance.

Moreover, if the House and the Senate are not in identical agreement on the language of a measure there must be further action by one House to recede in its disagreement with the other or a joint conference appointed to work out an agreement. The motions to agree to a House bill in place of the Senate's version or to request or agree to a conference are debatable. Further, while the motion to take up a conference report is not debatable, the motion to adopt a conference report is fully debatable. These concluding parliamentary steps very substantially augment the opportunity for prolonged consideration in the Senate.

You remember there was a filibuster conducted in the Senate in 1957 against the conference report on the civil rights bill of that year.

A filibuster against the adoption of a conference report is always a real and influential possibility.

DOUBLE INDEMNITY INSURANCE FOR FULL CONSIDERATION

And, Mr. Chairman, all these guarantees of full consideration of a measure—weeks of debate before a cloture petition is filed, 14 days of debate before a vote is taken on cloture, 100 hours or more of debate under cloture and new unlimited opportunities for debate on final agreements between the two Houses—would constitute only one-half the insurance against hasty action. The insurance policy is one of double indemnity because a minority may engage in prolonged debate not only on the bill or resolution itself, but also on the motion to take up or to consider a bill or resolution. The motion to take up is a separate question and as Senators know well is as easily subject to a filibuster as the main question. For that matter, so is the motion to agree to a conference report a separate question subject to a filibuster; there may even be triple indemnity, possibly even a quadruple idemnnity.

PROVIDING FOR 28 DAYS PLUS 200 HOURS OF DEBATE

Senate Resolution 8, therefore, provides a minimum guarantee of full consideration of double the 14 calendar days before cloture and the 100 hours thereafter or, in all, some 28 actual session days plus 200 actual hours.

PRESENT PROVISION FOR TWO-THIRDS CLOTURE RETAINED

The subcommittee will note that Senate Resolution 8 would not replace the existing section 2 of rule XXII, which provides for cloture by the affirmative decisions of two-thirds of those Senators present and voting 2 days after 16 Senators file a cloture petition. The use of this provision for nearly immediate cloture by two-thirds of the Senators may well be necessary in a national emergency or in the final hours of a session. But like the motion to table—which can be used to cut off the minority, and was so used during the debate on the Telstar bill in 1963—it will, I would hope, be used sparingly. Senate Resolution 8 would leave section 2 untouched, insert a new section numbered 3 providing as I have described, and renumber the present section 3 as section 4.

While the proposed section 3 and the present section 2 have some of the same ancillary provisions to make the rule effective in the end, the present provision for cloture, in fact, is more violative of the rights of a Senate minority to full and fair consideration than is the rule we propose. We would guarantee to any minority of less than one-half the Senate—even to a half dozen Senators—about 7 weeks of debate in usual circumstances or from 18 to 26 days on the motion to consider and again on the main motion even in the most pressing circumstances. But the existing rule permits the overriding of a small minority by the big majority of two-thirds which can limit debate to as little as 3 days. Section 2, as Senators know, provides that the vote on cloture takes place on the next calendar day but one following the filing of the cloture motion by 16 Senators, and strictly limits each Senator to a maximum of 1 hour under cloture. Thus, the present rule may permit the small minority as little as 2 days of debate prior to a cloture vote and only a few hours thereafter depending upon the size of the minority.

THE ISSUE IS THE RIGHT OF THE MAJORITY ULTIMATELY TO ACT; NOT UNFAIR LIMITATION OF DEBATE

The point is, Mr. Chairman, that the addition to rule XXII of the provisions of Senate Resolution 8 cannot be justly opposed on the grounds that they would unfairly limit the right of a minority to engage in full consideration of a measure; as a matter of fact, Mr. Chairman, paraphrasing Warren Hastings, I would say that I am astonished at our own moderation in this matter. It does permit an extraordinary amount of discussion. But the fact that debate eventually can be closed by majority vote will mean that the temptation to capricious delay will be greatly diminished.

The prospect of ultimate cloture will, therefore, have some restraining influence.

The provisions of Senate Resolution 8 can only be opposed on the grounds or belief that it is a right of a minority in the Senate to prevent the majority from acting. That is the issue: the right of the majority of Senators ultimatley to act versus the present power of a minority, under the rules, to prevent the majority from ever acting.

All the exceptions, in fact, not withstanding, our Republic and our system of government is founded on the principle of equality of citizenship and of ultimate rule by the majority tempered by respect

for the rights of the minority. That is the principle of the preamble of the Declaration of Independence.

A fundamental compromise to this principle, as well as a compromise in the practical or political sense, was agreed to by the framers of the Constitution. It was to give each State of the Union the equal representation of two Members in the Senate of the United States, absolutely regardless of the number of people in the State. Thus, today, the States with less than one-third of a million people have the same representation in the Senate as the States with 17 million people.

Senator HAYDEN. Senator, the Senate represents States. It does not represent people in the way the House does.

Senator DOUGLAS. I think that theory has been changed since the direct election of Senators, which came in about the time Arizona was admitted to the Union.

I am not at all certain that Senators represented only States at the beginning. But certainly, when the constitutional amendment was passed providing for the direct election of Senators by the people rather than by the legislatures, Senators then became representatives of the people.

Senator HAYDEN. Well, there is carved in bold letters upon the New Senate Office Building these words by Lyndon Johnson: "THE SENATE IS THE LIVING SYMBOL OF OUR UNION OF STATES."

Senator DOUGLAS. A symbol of the union of the population of our States.

Senator HAYDEN. But it does not say that.

Senator DOUGLAS. Well, I have great respect for President Johnson. But I submit that the Senators represent people, too.

A very considerable proportion of the Senators who are now here would not be here if they had to be elected by the legislatures of the States. They are here only because they can make an appeal to the people, and the people will elect them. This is a consequence both of the direct primary, and of the election of the Senators by the people in direct elections, rather than by legislatures in session.

In 1960, the nine largest States—New York, California, Pennsylvania, Illinois, Ohio, Texas, Michigan, New Jersey, and Massachusetts—had 51.4 percent of the population. The population was 180 million. About 92 million lived in these States. But they have only 18 votes in the Senate or less than one-fifth of the total. They have over one-half of the people, but less than one-fifth of the votes in the Senate.

Now, may I assure our revered President pro tem, that those of us from the big States will not try to change this agreement; in fact, of course, a State's equal representation in the Senate cannot be changed without its consent. It was the price of union. We are shackled, both our arms and legs are shackled with this rule. We are prisoners.

Senator HAYDEN. We would not have a United States without it.

Senator DOUGLAS. That is right. We recognize this. Why couldn't we have had a United States without it? Because the small States said they would not join the Union unless they were given disproportionate representation in the Senate. The Senator from Arizona has read Madison's notes on the Constitutional Convention of 1787, and he will remember how the delegate from Delaware, I think it was Gedding Bedford, who said that unless Delaware was granted equal

representation, Delaware would not only refuse to join the Union, but she would make a treaty with a foreign power. And this was the threat which hung over the whole Constitutional Convention.

Maryland took an almost similar attitude, though it didn't make an open threat. And in order to get the miniscule State of Delaware in, and other States which might have taken the same attitude, these small States were given equal representation in the Senate. And then to make doubly sure, there was inserted in the fifth article of the Constitution the provisions that no State could be deprived of equal representation without its consent. So that fastens it in forever. It is the one clause in the Constitution which is beyond amendment.

Now, as I say, we are shackled. We cannot rid ourselves of this chain. But we think that we can at least point out the handicaps to which we are subjected.

LESS THAN ONE-SIXTH OF THE POPULATION ELECTS A MAJORITY OF THE SENATE

I think it is fair to point out that because of this compromise less than one-sixth of the Nation's population already controls a majority of the votes in the Senate. We not only have minority rights, but we have minority rule—a small minority of the people can rule the Senate.

There is no justifiable further minority right, therefore, for an even smaller proportion of the population, a minority of this minority, to possess a veto over the Senate—and in actuality over the product of the entire Congress—through an even more discriminatory rule of procedure.

I ask unanimous consent that this table be printed at this point in my remarks.

Senator HAYDEN. It may be done.

(The table referred to follows:)

The 26 least populous States

I. The population of the least populous States:	*Population (1960)*
Alaska	226,167
Nevada	285,278
Wyoming	330,066
Vermont	389,881
Delaware	446,292
New Hampshire	606,921
North Dakota	632,446
Hawaii	632,772
Idaho	667,191
Montana	674,767
South Dakota	680,514
Rhode Island	859,488
Utah	890,627
New Mexico	951,023
Maine	969,265
Arizona	1,302,161
Nebraska	1,411,330
Total	[1] 11,956,189

[1] 6.96 percent of the total U.S. population.

The 26 least populous States—Continued

II. The population of the 26 least populous States (the 17 States above plus) :	*Population (1960)*
Colorado	1,753,947
Oregon	1,768,687
Arkansas	1,768,272
West Virginia	1,860,421
Mississippi	2,178,141
Kansas	2,178,611
Oklahoma	2,328,284
South Carolina	2,382,594
Connecticut	2,535,234
Total of 26 least populous States	[2] 28,532,239

[2] 15.91 percent of the total U.S. population.

NOTE.—1960 total U.S. population: 179,323,175.

Source: U.S. Bureau of the Census. U.S. Census of Population: 1960. Number of Inhabitants, U.S. Summary.

This table shows first the respective total population of the 17 least populous States according to the 1960 census, then the population of the 9 next least populous States providing the total population figure for the 26 least populous States.

In 1960, as the table shows, less than one-sixth of the population; namely the people of the 26 smallest States, elected 52, or 1 more than a majority, of the Members of the Senate. So for the great bulk of questions decided by a simple majority vote, this 16 percent or one-sixth of the population was in control over the other five-sixths of the people.

RULE XXII PERMITS ONLY 7 PERCENT OF THE PEOPLE TO CONTROL THE SENATE

But we all know that when many controversial matters arise the threat of a filibuster becomes very real and we are faced with the possible need for a two-thirds vote if the Senate is to be allowed to act. Since nearly unanimous attendance is likely at a vote on cloture, this means that only 34 Senators or those elected from only 17 States, can defeat a cloture motion. In 1960, the 18 smallest States had a population of about 11,960,000.

Ultimate control in the Senate, therefore, can be in the hands of those representing less than 7 percent or one-fourteenth of the people. These few can thwart the will of over 90 percent of the people by engaging in a filibuster under the present rules.

The sponsors of Senate Resolution 8 are willing to live with the unalterable provision of the Constitution which places control of majority action in the Senate in the hands of 16 percent of the population, and as years go by, very likely, in an ever-decreasing percentage of all the people.

I remember that when I discussed this issue 16 years ago—based on the population of 1940—the majority in the Senate could have represented approximately 20 percent of the population. Now it is only 16 percent.

But we believe the further dictatorship of the minority perpetuated by the filibuster—by a minority of 7 percent—violates both the spirit and letter of the Constitution.

RULE XXII IMPOSES ON THE SENATE AND THE COUNTRY JOHN C. CALHOUN'S DISCREDITED THEORY OF CONCURRENT MAJORITIES

As a freshman Senator during the debate on this same question exactly 16 years ago, I analyzed the sectional and political interests which were behind the amendment of the then Republican leader, Senator Wherry, to make cloture still more difficult by requiring the assent of two-thirds of the Senators chosen and sworn, rather than two-thirds of those voting.

That successful effort to defeat our proposals for majority cloture—because it was our proposal for a majority cloture which touched off the Wherry counterattack—although rescinded by a later Senate, strengthened the domination of the small States over the larger ones and made even more powerful the conservative coalition which in many matters has controlled the Congress, but particularly the Senate, since before World War II.

I suggested in that debate that the protection of the filibuster under rule XXII primarily served sectional interests, chiefly economic ones and also the opposition to national enforcement of the civil rights of Negroes. I pointed out that while the large industrial States of the North, the Midwest, and the Pacific coast contributed about four-fifths of Federal income taxes and had four-fifths of the people, the bulk of Federal expenditures for welfare and public works went to the less populous Southern and Mountain States which dominated the Senate.

While a number of rules and traditions, in addition to the constitutional provision, have perpetuated this domination by the small States, it is chiefly made possible by the power under rule XXII of one more than a third of the Senate to forever prevent the majority from acting.

What the Senate in effect has done in rule XXII is to conform to John C. Calhoun's theory of concurrent majorities under which a national majority in the Congress would not be permitted to pass legislation without the agreement of a majority in each and every section of the country. Calhoun's theory was never accepted, and the Civil War permanently rejected any claim that this theory is compatible with our Federal Republic.

Calhoun, despite the virtues which he might have had, was the open defender of slavery and inequality, and he wanted the rules of the Federal Government so arranged that slavery and inequality could not be eliminated against the will of any one section of the country.

The process of the Civil War, and the blood of hundreds of thousands of men, rejected this theory. But by a strange quirk of fate, it lingers on and finds its chief fortification in rule XXII.

Now, Mr. Chairman, we appealed to our colleagues, in that debate 16 years ago, to abandon the vestigal remains of the rule of concurrent majorities which shackles the Senate. We asked our colleagues of the small States, particularly of the mountain regions, to look beyond the immediate interests of their sections and to support, in the national interest, the right of the larger States to effectively participate in the Senate and to not have their representation arbitrarily cut to one-half of the already minimum weight set by the Constitution.

If I may make a personal note, Mr. Chairman, I voted for the admission to the Union of two small States, Alaska and Hawaii, although I knew that this would further dilute the already diluted powers of the large States, including my own. I did so because I believed it was in the national interest that these States, though small, should be admitted to the Union on equal terms with others.

I think, therefore, that I am entitled to ask the representatives of smaller States to yield a small portion of their power in the interests of the Nation as a whole.

It may be only a temporary shift, or a mellowing of my own perceptions, but I think this appeal is gaining wider acceptance. The lapse of time, the growth of new economic leadership and large urban populations, and the threats to our security from abroad have helped to heal old wounds and to dull the edges of sectional conflict. We are becoming a more unified Nation, and this is reflected in the Senate. Our colleagues from the small States outside the South have been increasingly willing to listen to our appeal that the majority should be permitted ultimately to act. Support for a modification of rule XXII along these lines is greater both in the country and in the Senate.

Now, the real test as to whether these hopes of mine are realities will be seen in the treatment which the committee and the Senate give to this question of the filibuster. If we are turned down summarily, my hopes will be dashed.

If the measure is reported out favorably, and is then acted upon favorably by the Senate, it will strengthen the hopes which not only I but others have.

CLOTURE ON CIVIL RIGHTS IN 1964 DOES NOT REMOVE THE NEED TO CHANGE RULE XXII

Now, Mr. President, the passage by the Senate of the Civil Rights Act of 1964 was a remarkable achievement. While initially it may seem to increase racial and sectional antagonisms in a few areas, I think the evidence already shows that the act has enabled the country to take the path to national solidarity as well as social justice.

For a decade and a half those of us who have sought modification of rule XXII have based our arguments in large part on the fact that rule XXII has made the Senate the graveyard of effective civil rights legislation. The Senate has been the graveyard, but rule XXII has been the gravedigger. The record on this could not be more clear: Until 1964 effective enforcement of the constitutional rights of Negroes was delayed for decades by the "concurrent majorities" requirement of rule XXII.

In my opinion, however, it would be a serious mistake to assume that because we were successful in voting cloture on the Civil Rights Act of 1964 and because that act is now on the books there is no need to modify rule XXII. First, we should recall that under the threat of a filibuster action on any comprehensive civil rights bill was in fact delayed for decades. Second, the difficulty of overcoming a filibuster delayed for a year or more action on the civil rights proposals of President Kennedy. Third, the filibuster caused nearly 4 months of further extended delay in the Senate even after the bill came over from the House: The bill was received and put on the Senate calendar

on February 26; the motion to take up was made on March 9 and debated until March 26; and the filibuster on the bill delayed Senate passage until June 17. Let there be no misunderstanding that cloture on this act was achieved only because of a remarkable combination or concatenation of factors which included the skilled and vigorous leadership of President Johnson, the moral indignation or uneasy conscience of the vast majority of the people sharpened by the assassination of President Kennedy, the educational efforts to dethrone the filibuster and pass civil rights legislation which were made over the years, and finally and not least, the vigorous yet responsible and restrained leadership in the Negro community.

This combination of forces or one of similar weight is unusual and short lived. But the majority in the Senate must not be forced by the filibuster to again wait decades before it can act on urgent proposals. The filibuster was forced into temporary retreat, but it still guards the legislative gate.

And the shadow of the filibuster still rests heavily over the Senate Chamber.

CHANGE IN RULE XXII NECESSARY TO PERMIT THE MAJORITY IN THE SENATE TO ACT THIS YEAR ON VOTING RIGHTS

Mr. Chairman, I had hoped very deeply that with the passage of the Civil Rights Act last year, there would be no immediate need for additional legislation to enforce the constitutional rights of the Negro. Many of us, I think, looked forward to a new era in which the burden of this divisive sectional problem would not so heavily weigh upon the Senate and the country. I think I have shown my readiness to help develop this reconciliation both within my party and within the Senate.

I don't know the degree to which one should insert party matters in a hearing of this type, but when I supported Senator Long for majority whip, I did so in the belief that this would hasten the reconciliation between the South and the North and indicate to the South that those of us who pushed very strongly for civil rights were not disposed to push the Senators from the Southern States into a rear position. I hoped it would help, possibly, to permit the South to emerge from the lines of action of the past into the broad sunlight of the future.

But now the evidence is mounting rapidly to prove that, for some areas at least, title I of the act does not effectively reach the unconstitutional denial to Negro citizens of the right to vote. Some of us were not satisfied with title I last year, but we hoped for the best and acquiesced in the judgment of some of the bill's managers that an amendment to provide for Federal registrars was unwise or unncessary.

As a matter of fact, in 1960, when the second voting rights bill was introduced, I joined other Senators in pointing out that the appointment by the court of judicial referees is extremely cumbersome, and would be ineffective. And I think that is the experience. I think all sides are pointing now to the necessity of Presidentially appointed Federal registrars.

As recent events have shown, the denial of voting rights in some parts of the South is flagrant and untouched by present law. A number of Senators, including myself, are convinced that the Congress

must enact this year new protections in this field including a system of Federal registrars. We strongly reject the suggestion that this matter should be dealt with by constitutional amendment, and we are prepared to introduce a bill now and to insist on legislative action by the Congress this year.

We understand the administration is considering a new voting rights bill. We are trying to work as closely as possible with the administration. We know that the administration has many grave problems, particularly the awesome problem of what to do in Vietnam and we have no desire to embarrass the administration in any sense. But I think it should be said that, in this respect, we intend to move whether or not the administration at the same time recommends such action.

We submit that the 15th amendment gives us ample power within which to move by legislation, and to do so for State as well as for national elections.

The hoped for era of reduced sectional conflict in the Senate may still be possible, but I do not believe it will come under the present filibuster rule. The Senate and the Congress should pass an effective voting rights law this year, and I do not believe it can do so without modifying Rule XXII to permit the majority to act or else taking the consequence of a bitter and protracted filibuster which, at best, will greatly retard the momentum of President Johnson's program for the Great Society.

Senate Resolution 8 should be adopted now, therefore, not only to correct a massive injustice to the largest States of the Union, but to permit the Congress to enact a plan for the effective enforcement of the right to vote without again subjecting the Senate to a bitter and prolonged filibuster.

THE RIGHT OF A MAJORITY BOTH TO ADOPT SENATE RESOLUTION 8 AND TO CLOSE DEBATE ON THIS QUESTION IS CLEAR

We are, of course, quite aware, Mr. Chairman, that those who wish to preserve the power of a minority, of a minority to veto Senate action will try to use this power to block action on Senate Resolution 8. They will bring up the irrelevant "continuing body" argument to assert that their filibuster against a change in the Senate rule is protected by rules never adopted by the present Senate, namely, Rule XXII. They will filibuster this resolution and the motions, rulings, and points of order which may be necessary to permit the Senate to vote and a majority to decide. In effect, they will insist on the dictum, wholly lacking in logic or constitutionality, that a majority of the Senate cannot establish a rule governing the limitation of debate if a minority of one-third plus one objects to it.

What we are contending for is the constitutional right of a majority of the Senate to frame its rules. This constitutional right was upheld in an opinion given by Vice President Nixon and in an earlier informal opinion given by Vice President Barkley.

While we will have to deal with these procedural questions in the Senate, Mr. Chairman, and while some witnesses may wish to discuss them here, in my opinion they are not the questions before your subcommittee or the Committee on Rules and Administration. The assignment of the Senate is that the committee "shall make its report

on (the Anderson and Douglas) resolutions to the Senate on March 9, 1965." Therefore, I will make only two brief comments on the procedural situation.

First, I believe there can be no valid doubt that no rule is binding on the Senate which obstructs the right of a majority to adopt a rule. The debates in the Senate at the beginning of this session makes this very clear. We have not established, nor acquiesced in, any rule which may block the Senate from reaching a vote and adopting a rule, both by majority vote under the Constitution.

I emphasize once again the constitutional right of a majority of the Senate to make its rules. And this should be an effective right, not merely a legal right. It can be denied if a two-thirds vote is required for us to even vote on the question as to whether a majority can proceed to adopt its rules.

THERE SHOULD BE NO FURTHER DELAY

Second, I believe that there should be no further delay, following the ordered report of this committee on March 9, in proceeding to reach a decision on a Senate rule providing for the limitation of debate. There has been delay for more than a decade in this matter, and however important any other proposal, before the Senate on March 9, may be, the questions of war or peace excluded, this question is among the most important questions which the Senate must decide.

Therefore, Mr. Chairman, I urge this subcommittee and committee to recommend the adoption by the Senate of Senate Resolution 8.

This resolution preserves and protects the right to full consideration of measures before the Senate. It permits a majority of the Senators chosen and sworn to ultimately bring proposals to a vote, but only following the opportunity for full, free, and even prolonged debate.

It will remove the onerous domination of the Senate by only 7 percent of the people of the country, thereby restoring undiluted to the people of the more populous States the representation established by the Constitution. It is already very much diluted, but rule XXII dilutes it still further.

It is necessary if a majority in the Senate is to reach a vote on important proposals, such as a new voting rights law and measures in the President's program for a Great Society, without the Senate being subjected to a divisive filibuster by a small minority and excessive delay in the progress of other legislation.

I urge the committee and the Senate to "strike off the rusty chains which bind us" to John Calhoun's discredited theory of concurrent majorities which the American people rejected in "blood, sweat, and tears" a century ago. I urge the people to demand the abandonment of 19th-century rules which tie the hands of their 20th-century Congress.

Senator HAYDEN. I would like to ask a question: As a native of Massachusetts, and a student at Harvard University, you may have had an opportunity to become personally acquainted with Henry Cabot Lodge. If not, I am sure you must have learned he was a very distinguished Senator from your home State.

Senator DOUGLAS. I know the chairman will not mind my pointing out that my home State is Illinois. I left New England at the age of 24, and went to the Midwest.

Senator HAYDEN. I will amend my statement: Your original home State.

Senator DOUGLAS. That is correct. I'm sure the Senator will agree that nearly a half century of residence in the Midwest—in Illinois—qualifies me as a Midwesterner.

Senator HAYDEN. In June 1918, the Senate had under consideration an amendment to rule XXII which was as follows:

Resolved, That, during the period of the present war, the rules of the Senate be amended by adding thereto the following: "No Member shall occupy more than 1 hour in debate, except by unanimous consent, on any bill or resolution, and not over 20 minutes on each amendment proposed thereto."

During the debate which resulted in the defeat of this proposed change in rule XXII, Senator Lodge said:

The case for free debate in the Senate has never been better stated than in a paragraph I am about to read from a well-known book. It is there said:

"The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes the demands of public opinion."

That, Mr. President, is taken from "Congressional Government," pages 303 and 304, written by the present President of the United States (Woodrow Wilson), and I think it would not be easy to find a more powerful exposition of that necessity for debate which, I think, is infringed on by this proposed rule.

The committee will appreciate any comments you may care to make on the paragraph quoted by Senator Lodge from the book entitled "Congressional Government," of which Woodrow Wilson was the author.

Senator DOUGLAS. Would you like to have a comment on that?

Senator HAYDEN. Yes.

Senator DOUGLAS. Well, first let me say that I subscribe to the general nature of the statement by Mr. Lodge, and I would point out that our proposed change in rule XXII would permit 44 days of discussion under usual circumstances—about 3 weeks before the cloture petition is filed, 14 days thereafter, and 100 hours under cloture—and even in periods of national emergency it would provide somewhere around 26 days of debate. So there would be ample time for discussion. And this could be multiplied by two or by three times, if the minority wants to take advantage of filibustering the motion to consider, and the motions relating to a conference.

This provision would grant full debate to a small minority; greater rights, in fact, than are now provided under section 2, rule XXII, which can be used pretty roughly, as we saw in the Telstar bill, on a relatively small minority.

It is because this provision, which I am urging, provides for both full and complete—some might even say excessive discussion, and yet gives to the majority the right of ultimate decision, that I think does justice to the two principles to which you have alluded.

Let me further say I do not regard discussion of legislation matters as an end in itself. It should be a basis for wiser action.

There is a danger frequently of making too hasty a decision. We must guard against that. But there is also a danger, and a much greater danger, of a small minority preventing the confirmed long-established and judicious opinion of the country from ever being registered in legislation.

I personally think that if we had passed the 1964 Civil Rights Act 10 years before we did, or 15 years before we did, that we would have been in a much healthier condition.

Senator HAYDEN. We thank you for your statement.

Senator DOUGLAS. Thank you.

Senator HAYDEN. Mr. Robertson?

STATEMENT OF HON. A. WILLIS ROBERTSON, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ROBERTSON. Mr. Chairman, I appreciate very much the honor and privilege of appearing before this committee in opposition to all three of the proposals to change the cloture rule.

At the outset, permit me to say that although the population of Virginia may be nearly four times as large as that of our sister State of Arizona, I fail to share the concern, or apparently the irritation of my distinguished colleague from Illinois, over the fact that the two Senators from Arizona have an equal voice in the Senate as the Senator from Virginia.

On the contrary, I would like to repeat my announcement of a statement made on the floor of the Senate some years ago, by my predecessor, Carter Glass, who said that, should the Constitution ever be changed to authorize each State to have three Senators, he would like to claim Carl Hayden as the third Senator from Virginia.

I am pleased to note some students in the audience today, and that reminds me of when I was in the public school in Virginia. In those days, students had to learn to write—that is no longer a requirement; I mean, so that you could read it—and, to learn to write, they would give us a copybook. Spencerian was the favorite. And the copybooks would have some mottoes in it, and you would just copy them over and over. And one of the mottoes was "Be not the first by whom the new is tried, nor yet the last to lay the old aside."

Now, if we had copybooks, and if students were required to learn to write these days, they would write, "Be the first to lay the old aside because it has no place in the Great Society."

All of which reminds me of the early days, before we had the United States of America, the days when my county went to the Mississippi River, included all of the State of Kentucky, and Virginia owned Illinois, and all the adjoining States up there—they were not States then, they were just a part of the Northwest Territory.

I take pardonable pride in the fact that it was a Virginian named George Washington, whose prestige enabled the 13 States to assemble in Philadelphia to frame a Constitution.

I take pardonable pride in the fact that it was a Virginian named James Madison who was the principal architect of that Constitution.

I take a pardonable pride in the fact that in the Virginia Convention of 1788, called to ratify the Philadelphia Constitution, I had three ancestors, and all of them voted to ratify it.

At that time, Virginia, outside of the Northwest Territory—and she had the legal title to it—was the largest State in the Union. If Virginia hadn't ratified, there couldn't have been a more perfect union formed, because the other States just could not operate without her.

There was a bitter debate in the Virginia Convention over ratifying the Constitution, but not one word was said about that wonderful compromise offered by Benjamin Franklin when the Convention was about to break up over the objection of such small States as Delaware, Rhode Island, and Connecticut, over going into a union with Virginia and New Jersey, on a one-man one-vote basis in which the big States could have completely dominated and run roughshod over the small States.

In my opinion, there has never been a more unfortunate decision in recent years—and we have had many unfortunate ones—than that one man one vote as applied to the redistricting of State senatorial districts. It is in hopeless conflict with both the spirit and the letter of our Constitution, under which we formed a more perfect union by agreeing that we would always be fair and just to minorities, and in what we sometimes call the upper body—and the House sometimes says that is just we up their appropriation—but say what you please, it was to be the cooling off body, a continuing body, a body in which every State could have equal representation.

And now the theme song of the previous witness is—that is obsolete, that is no part of a modern conception of democracy, a temporary majority must have the privilege to run roughshod over everybody whenever you have got a majority present, and it might be just 26 votes, under 1 suggested amendment, that would control the legislation.

Mr. Chairman, I always have been opposed to restricting Senate debate because the Senate is the one forum in our Government where minorities may appeal to the people against hasty and ill-advised legislation which at any given time may happen to muster the support of a majority.

My opposition is stronger than ever this year, because recent events have demonstrated how unnecessary it is to place any new restrictions on debate.

For many years the chief argument of those who advocated a tighter cloture rule was that they could not get action on civil rights bills under the existing rule XXII, which requires two-thirds of those present and voting to limit debate.

But since 1957 three civil rights laws have been put through the Senate without a tougher cloture rule, and the last one—in 1964—was so all-inclusive that I cannot imagine what further legislation in this field could be justified.

Less than a year ago, on June 10, 1964, the Senate voted 71 to 29 to invoke cloture, which brought a final vote 1 week later on the 1964 Civil Rights Act.

Less than 3 years ago, on August 14, 1962, the Senate invoked cloture by a vote of 63 to 27 to pass the Communications Satellite Act.

In the face of these recent developments, how can it be argued now that important legislation will be blocked unless the Senate reduces the two-thirds requirement for limiting debate?

Your honorable committee now has before it three proposals all designed to make it easier to curtail debate.

1. Senators Anderson, Democrat, of New Mexico, and Morton, Republican, of Kentucky, are sponsoring Senate Resolution 6, to permit three-fifths of those present and voting to apply cloture. Assuming a full attendance of 100 Senators, this would reduce from 67 to 60 the number required to limit debate.

2. A bipartisan group led by Senator Douglas, Democrat, of Illinois, is sponsoring Senate Resolution 8, which would permit a majority of all Senators "duly chosen and sworn" to invoke cloture. This would reduce the number required from 67 to 51.

3. Senator Morse, Democrat, of Oregon, has offered Senate Resolution 16, which provides that after the unfinished business has been pending before the Senate for not less than 7 calendar days, a simple majority of those voting could invoke cloture. Since 51 Senators constitute a quorum, adoption of the Morse plan would make it possible for 26 Senators to gag all of their colleagues.

In view of the fact that, even with the two-thirds requirement, cloture has been imposed twice in less than 3 years, this committee would be fully justified in reporting back to the Senate on March 9 that no change in rule XXII is necessary or desirable at this time.

It is true that the Senate went for a period of 35 years—from 1927 to 1962—without invoking cloture under the two-thirds requirement, and that during that period it rejected 16 cloture petitions. But these statistics only serve to point up the fact that the Senate traditionally has been reluctant to curb freedom of debate.

I would remind the advocates of rule changes that they will find it difficult now to convince that the opposition is merely a southern effort to block civil rights legislation, when every major facet of civil rights has already been brought under Federal control.

There is some talk about the possibility that this session of Congress may be asked to pass another civil rights bill to protect voting rights.

I can see no necessity for further action, in view of the voting safeguards written into the civil rights laws of 1957, 1960, and 1964. During that period we also have amended the Constitution to abolish the poll tax in Federal elections.

The 1957 Civil Rights Act extended the jurisdiction of the district courts to include any civil action designed to recover damages or secure relief in voting rights cases. This act also empowered the Attorney General to seek injunctions to prevent an individual from being deprived of voting rights.

The 1960 law allows the Attorney General to follow up civil suits brought under the 1957 act by asking the courts to make a separate finding that a pattern of discrimination in voting rights exists in certain areas. If a court found that such a pattern exists, any Negro in that area could apply to the court for an order making him eligible to vote, if qualified under State law.

In 1964 voting was the first issue dealt with in the comprehensive 11-part civil rights law. That law curbs literacy tests, protects registrants from being turned down because of immaterial errors on application forms, and requires election officials to apply the same standards for qualification to all applicants for voting rights.

I would also remind advocates of a new rule that in the years ahead many other issues will arise on which Senators who now clamor for a tighter rule may want to speak at length to prevent passage of some

measure they do not like. If they find themselves in the minority, they will want time in which to try to win the public over to their viewpoint.

But if these advocates of a new rule succeed now in reducing the number of votes required for cloture, they may be the first to suffer from their own newly forged weapon.

I recall that only last year a handful of Senators who did not want the Senate to interfere with the Supreme Court decision on reapportionment of both houses of State legislatures, exercised the right of unlimited Senate debate to prevent passage of a motion, seeking to give the States more time in which to comply.

And if it is not out of place, I might mention that the previous witness was one of those who took advantage of that opportunity to enlighten the country on the issues involved.

I mention this to show that when Senators find themselves in the minority they welcome the protection afforded them by freedom of debate, regardless of whether they fall into the category of liberal or conservative Senators.

Only a decade ago, in 1954, the Senate went through a grueling filibuster over an atomic energy authorization bill because some liberal Senators were disturbed over some of its features.

The original two-thirds cloture rule was placed on the books back in 1917, not because of civil rights, but as a result of a filibuster against arming American merchant ships, which were being exposed to German submarine attacks before the United States was drawn into World War I.

It must be remembered that when the cloture rule was drafted in 1917, and for many years thereafter, we still had the "lameduck" sessions of Congress every other year, which were tailor-made to aid filibustering.

These "lameduck" sessions convened in December, following the biennial election, and ended automatically at noon on March 4. Members who had been defeated for reelection in November continued to serve through the short session, and since it was necessary to jam all of the annual appropriations bills through both Houses in a 3-month period, Members could use the threat of a filibuster to get concessions from the leaders as the March 4 deadline approached.

I am sure our distinguished chairman remembers that very well. No one has been here longer in the Senate than he has.

But, thanks to a constitutional amendment, the "lameduck" sessions have been done away with. A new Congress, with its newly elected Members, convenes in January, and Congress may stay in session for the entire 12 months of each year, if the leaders so desire.

In practice, the sessions have been getting longer with the passing years, and this in itself has made it more difficult to defeat worthy legislation by filibuster. It has also lessened the need for a more stringent cloture rule.

In the early days of our Nation the first set of Senate rules included the right to move the previous question, which is the most drastic weapon for ending debate. But over a period of 17 years only four attempts were made to use that weapon, and only three succeeded.

This shows that from the start the Senate recognized that its function was to act as a balance wheel and a check upon hasty action on legis-

lation coming over from the House, where the larger membership makes limitation of debate necessary.

After the Founding Fathers agreed upon a House, to be elected by the people every 2 years, on the basis of population, the smaller States began to wonder how their rights could be protected from the whims of a majority in the House.

After long debate, at times acrimonious, the wise and venerable Benjamin Franklin came up with the solution of equal representation for all States in the Senate. In a further attempt to protect the Senate from passing waves of majority sentiment, the original Constitution provided for selection of Senators by the State legislatures.

Some of that protection for minorities in the original setup of the Senate was withdrawn when the Constitution was amended to provide for the direct election of Senators. This left freedom of Senate debate as the main protection for minorities.

When Senate rules were rewritten in 1806 the previous question motion was dropped. In 1807 debate on an amendment at the third reading of a bill was forbidden. For nearly 40 years thereafter no further limitations were placed on Senate debate.

In 1841 Henry Clay sought to revive the previous question, but had to abandon it in the face of strong opposition. He also proposed the "hour rule" to accomplish the same result, but this was also abandoned.

In the testimony of the previous witness, the distinguished chairman mentioned that hour rule that was once proposed.

In 1846 the Senate inaugurated the practice of limiting debate by unanimous-consent agreements, which are still used today. The unanimous-consent agreement has proved an effective method of preventing debate from dragging on needlessly when there is no serious opposition to passage. This device, however, has enabled Senators who want changes made in a bill to win concessions from the leaders by blocking unanimous-consent agreements until their amendments are adopted.

A distinguished Virginian, Senator Thomas F. Martin, played a leading part in the adoption of the two-thirds cloture rule in 1917. The rule has been modified twice, but without departing from the two-thirds principle.

In its original form the rule permitted two-thirds of those present and voting to limit debate on a "measure." This was held to mean that cloture could not be applied to "motions" to take up a bill.

In 1949 rule XXII was broadened to permit cloture to be invoked on any measure, motion, or other pending matter. At the same time, it was amended to require two-thirds of the entire membership instead of two-thirds of those present and voting to limit debate.

In 1959, when President Johnson was majority leader, the rule was liberalized by going back to the original yardstick, allowing two-thirds of those present and voting to invoke cloture.

In the 1959 resolution the Senate made another important change. It added to rule XXXII a flat declaration that the rules of the Senate continue from one Congress to another unless changed in accordance with existing rules.

This change was intended to fortify and strengthen the doctrine that the Senate is a continuing body. This doctrine has become a major issue in recent years, because some Senators who want to revamp

longstanding rules have advanced the argument that the Senate, like the House, has a right to adopt new rules at the start of each Congress.

At the start of each Congress for a decade or more, the advocates of a new cloture rule have attempted to present new rules on the floor on the opening day of the session and have them acted upon without delay.

This maneuver has had the dual objective of bypassing the Rules Committee and also avoiding the necessity of mustering the two-thirds required by the existing rules to limit debate on a proposed new rule.

Some of the advocates of this novel doctrine seek to rely on the constitutional provision that each branch of Congress shall make its own rules as the basis for their contention that in any given Congress the Senate should not be bound by the rules of a previous Senate, any more than the House, which readopts its rules for each Congress.

This argument glosses over the fact that when a new Congress convenes, there are no Members of the House until the entire membership is given the oath on opening day, whereas the Senate is never without two-thirds of its Members.

The Founding Fathers left no doubt that they wanted the Senate to be a continuing body by providing that only one-third of the membership should be elected every 2 years.

Even prior to 1959 there was an abundance of evidence to sustain the contention that the Senate is a continuing body, and the rule adopted that year merely confirmed the doctrine.

The passage in 1913 of the law creating the Federal Reserve System is one of the historical events which proves that the Senate is a continuing body. My distinguished predecessor, Carter Glass, who was then a Member of the House, had secured House passage of his bill, setting up the Federal Reserve System. After passing the bill, the House adjourned sine die. The Senate Finance Committee failed to report it out, and the Senate adjourned sine die.

But President Woodrow Wilson then called the Senate into special session, and the Democrats, being in control, created the Committee on Banking and Currency and placed at its head Senator Robert Owen, of Oklahoma, an authority on fiscal matters and banking.

Senator Owen put the Federal Reserve bill through the Senate at that special session, at a time when the House was not in session, and it has proved a valuable and effective agency for the management of monetary policy. Senator Owen was able to accomplish what he did in 1913 because the Senate was a continuing body.

Another incident in 1947 also served to demonstrate that the Senate is a going concern from the moment a new Congress convenes, because two-thirds of its Members are fully qualified to act as soon as the convening gavel falls.

The illustration I am going to cite, Mr. Chairman, is going to be of peculiar interest to the next witness, the Honorable John Stennis, of Mississippi, because it relates to his predecessor, Senator Bilbo.

On January 3, 1947, there were 36 Senators-elect waiting to be sworn in, 4 more than usual because of vacancies. A controversy had developed over the seating of Senator Bilbo, of Mississippi, which delayed the usual routine administering of the oath to new Senators.

Senator Bilbo's name was second on the alphabetical list, and, after swearing in one new Member—Senator Baldwin, of Connecticut—the Senate spent 2 days debating the procedure to be followed with regard to Senator Bilbo. During that debate there were several rollcall votes on procedural questions, while one-third of the Senators sat on the sidelines ineligible to vote. The Senate was functioning as a continuing body, with its holdover Members.

The reason I happen to remember that instance very clearly is because I had been sworn in the previous year, but I was a new member, and we were in the cloakroom, trying to get Senator Bilbo to let all the Republicans be sworn in who would then have a majority in the debate, and then let them vote on him. And Senator Bilbo said, "Well, gentlemen, just remember this. Daniel didn't volunteer to go into the lion's den—he was thrown in."

Well, anyway, the Senate, as a continuing body, voted to throw him in, and the practical effect was to throw him out. Senator Bilbo's health required him to go away. The Senate postponed action on his credentials and he never returned to qualify.

Now, every man who has served in both the House and Senate knows that, with a membership of 435 the House cannot let all of its Members air their views thoroughly in floor debate, or even ask all of the questions they would like to hear answered before a bill passes.

That is why it is important to preserve freedom of debate in the Senate, so that important and highly controversial issues may be thoroughly considered before they reach the final stage of conference between the two Houses.

President Johnson has presented an imposing workload to this Congress, including medicare for the aged, new Federal aids to health and education facilities, revision of excise taxes and measures to reduce the deficit in our balance of international payments. On top of these legislative proposals, we have all of the 12 or more annual appropriation bills to consider.

If the Senate becomes involved in a long controversy over its rules in mid-March, we may find ourselves laboring through the summer and fall on a backlog of administration measures, all of which, Mr. President, are far more important to the administration, to the people of this Nation, than a proposal to change the rules which from time immemorial have been established to protect the rights of minorities.

For those reasons, Mr. Chairman, I hope your committee will see fit to report to the Senate that no changes in those rules seem necessary or desirable.

Thank you, Mr. Chairman.

Senator HAYDEN. Senator Stennis?

STATEMENT OF HON. JOHN STENNIS, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator STENNIS. Thank you, Mr. Chairman.

Mr. Chairman, it is a privilege always to appear before this committee or any subcommittee thereof, and particularly before you. You started me out in the Senate in 1947. You were then the ranking Democrat, as you remember, of this committee, and then became chairman, as you will recall.

Certainly I will be in a lifelong indebtedness to you for the time you gave me then in suggestions and observations which proved to be not only so correct, but very, very valuable.

Mr. Chairman, I am fully satisfied that there will not be a more important issue before the Senate in this session than the proposal to change the provisions of rule XXII. This opinion is substantiated by the restaffing of this Subcommittee on Standing Rules for the first time in several years. I am pleased indeed that this action has been taken, because it constitutes a recognition of the absolute necessity of considering this proposed change in detail. I am also deeply pleased that this subcommittee is chaired by the distinguished Senator from Arizona who we all know has a great appreciation of the longstanding traditions and practices of the Senate.

Rule XXII now preserves the Senate as a distinct body in the legislative process. It is a basic and undeniable fact that the Senate, under our form of Government, is truly the forum of the States. It is not so much a matter of States rights, as that term is ordinarily understood, but the fact that the Senate is exclusively representative of the individual States as units of our Federal system. I am continually reminded of the inscription, indelibly preserved on the front of the New Senate Office Building, which says, "The Senate is the Living Symbol of our Union of States."

Mr. Chairman, that inscription was not placed there many, many years ago—it was placed there just a few years ago—showing that it still represents the idea and the ideal of the U.S. Senate.

With great deference to the Senator from Illinois—he said during his testimony that the larger States—and he was referring to his own State of Illinois—were shackled, shackled by the Constitution, in that provision which provides that each State would have two U.S. Senators, and that number could not be changed without the State's consent.

I had never thought about it in terms of any State being shackled. I believe that the Senate is the greatest forum of expression and freedom for a State that it has in the Federal system.

I do not criticize him personally at all. But it seems to me that to say that any State is shackled is not in keeping with the letter of the Constitution nor, I submit in the spirit, either.

Mr. Chairman, I continue to be impressed with the fact that during the Constitutional Convention, it was the compromise concerning the Senate which really led to the final approval of the Constitution. During that Convention, Delegate Benjamin Franklin, then a man 81 years of age, rose one morning and addressed the Chair, with George Washington presiding: Franklin pointed out that many weeks had passed in an attempt to agree on the Constitution and that no agreement on essential matters of substance had been reached. He then moved that they open the remaining sessions with a prayer. And that was done.

Out of that new earnestness, and with that new start, there came the great compromise which led to the establishment of a Senate, in which each State would be represented by two Senators, regardless of population of the State.

The Senate therefore became and remains, a distinct body in the legislative process, different from any other. It is here in this great continuing, deliberative body of our legislative system, that the people

of any State, regardless of its geographical size or its population, may be heard with the same strength and clarity as any other State. I submit, Mr. Chairman, that this will not long remain if the Senate modifies, makes more liberal, the provisions of rule XXII.

I am unwilling to believe that the Senate, entrusted as it is with its responsibilities in guiding the destinies of this Nation, would have tolerated any rule which would arbitrarily make it impossible for us to transact our important business. The change in rule XXII in 1959 was advanced as a rule change to end all rules changes. It was said that no further changes in rule XXII would be necessary. Indeed, there is no persuasive proof that such a change is in order, or that it is needed.

Only last year one of the most dedicated stands ever made against passage of legislation was made in the Senate in opposition to the so-called civil rights bill. Never in the history of the Senate has there been a stronger effort to prevent the passage of legislation which those opposing Senators sincerely felt should not be passed. After full and complete discussion, however, cloture was invoked and the bill was finally enacted. It is now law. In the course of the extended debate, there were a great many aspects of the bill discussed and explained that would not have been fully explored in the absence of full discussion.

There are many practical illustrations of the value of these extended discussions, Mr. Chairman, that have already come to light. The explanation of the bill provisions brought out in the debate, will be a great aid in the administration of the law. All people that are concerned and that will be affected by the application of that law, will find the Senate debate, to be very, very helpful indeed.

The undeniable fact is that, however, the opposition notwithstanding, cloture was invoked, and although many Members of the Senate felt the passage of the civil rights bill would not be in the Nation's interest, it was nevertheless enacted.

Mr. Chairman, I submit in all fairness that the civil rights issue is not at all involved in this proposed change in the rules. It has been clearly demonstrated by an overwhelming vote last year that on the subject of civil rights cloture can be invoked and bills can be passed. Because of this fact, I don't think there is any doubt that these efforts to amend rule XXII are no longer simply concerned with the passage of any particular legislation or any particular bill. To the contrary, these efforts go to the very heart and nature and substance of the Senate as an institution.

In proposing stronger cloture rules, the contention is continually made by the proponents that it is necessary at times to silence a dissenting minority in order that the will of the majority will be vindicated rather than frustrated. I have never been impressed with this contention because it postulates, in the face of evidence to the contrary, that the Senate is unable effectively to deal with its business. Historical fact, I believe, establishes the proposition that when the national will dictates, legislation is enacted. In my opinion, the cloture rule protects the rights of the majority and minority, but does not arbitrarily or unreasonably impede the legislative process.

The plain and simple fact is, that majority rule has not been nullified or defeated under our cloture rules. A case in point is, as I have

just mentioned, the Civil Rights Act of 1964, but that is not an isolated example. I refer to the Space Satellite Act which was before the Senate in 1962. That bill was reported to the Senate from the Committee on Aeronautics and Space Sciences. I attended the hearings and participated in the committee procedure under the leadership of the late Senator Kerr. I expected that, after a reasonable amount of debate, the bill would be passed by the Senate. But even though the debate continued day after day, and even though a small number of Senators participated in it, I never had a moment's distrust of any of them or a moment's impatience. I knew they were honest and sincere, and I admired them.

I was proud to see them carry on their fight, even though it was contrary to what I thought were the merits of the bill. They carried it on courageously, even though they were faced with tremendous odds. I had a chance to observe that debate while I was, for the most part, on the sidelines, instead of being very much a part of the fight. My appreciation of and admiration for the Senate rules increased throughout that discussion for I knew that they were dealing with some important fundamentals. That debate involved the right of those Senators to make their fight and their presentation and to be heard, and exhaust all of the remedies available to them. In the absence of rule XXII, they would not have been able to fully express their views. But the present cloture rule did not prevent the final passage of that important legislation.

As my experience in the Senate grows, as I learn the lessons that history teaches, I become more concerned about undue haste in the consideration of legislation. I recognize and appreciate the need and the absolute necessity for full and exhaustive debate and study of the many important and far-reaching proposals that come to the Congress, and particularly to the Senate, which will affect the very lives and welfare of the Nation and the world.

Mr. Chairman, I want to point out here, it is not just debate in the Senate. There is another outstanding illustration here of what deliberation and time has done for the country.

I was here at the time President Truman removed General MacArthur from command in the Far East. General MacArthur, as you will recall, came back here and made a memorable and very precious speech to the Congress of the United States. I understand the mail was heavier here to the Senators than it has been since, than it had been, perhaps, ever before. Certainly the country was at white heat. I remember there was a hearing by the Foreign Relations and Armed Services Committees. As it worked out, our beloved friend, Senator Russell, presided over those meetings most of the time. All sides were heard; everyone had a chance to express their opinion, every knowledgeable person, certainly every thought had a chance to be expressed and the committee considered all the testimony.

At the same time, the country had come to understand the matter; they appreciated the points on each side, more deference was accorded the views of others. And the Senators as a whole who heard that testimony were rather well satisfied. It was one of the outstanding illustrations of the rule of reason and time and patience and deliberation.

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Had there been some kind of a rule of the Senate that forced that committee to report back quickly, or should the Senate have so voted, there is no way to tell how far opinion might have swung one way and would have been in error. And the country was strengthened by the liberality of the rules—that fact that time and patience was taken and patience was used.

The fact that, for many years, we have required more than a simple majority to close off debate in the Senate springs from the long recognition that, in a democracy, minorities are endowed with rights which no majority should trample upon. One of these rights is the right fully to explain and to plead one's position. This has been recognized in many ways in the organization and functioning of our constitutional system. One of the reasons which brought the Senate to the conclusion that debate should not be curtailed, except by margins substantially larger than a majority, is the fact that although a course of action proposed by the majority may appear to be necessary and proper at that particular time, and under the particular circumstances existing at the time, such a course may, in fact, be found unacceptable after the most careful and detailed consideration.

Frequently it has been our experience that as we go home or as we travel the country, or as time passes, we discover that the opinions held by a majority of the Members of Congress were not necessarily those held by the people back home. We have been compelled to retrace our steps and to find a solution in new legislation. We have learned that one small voice, or several small voices, were more truly representative of the will and the needs of the people than the mood of the Senate, as expressed by the majority of the votes at the particular time the proposal was considered and passed.

All of us have lived long enough to witness the emergence of a minority rule as the one eventually accepted. This has been true in the Halls of Congress as well as in the bright and illustrious history of the law where many a brave dissent has later blossomed into acceptance by a majority of the Court. I do not intend by this to impute any necessary virtue to the minority simply because of its larger acceptance. Perhaps, in time, it may again bcome the minority. What I do point out is that this minority is always entitled to be fully heard. It may be the doctrine we eventually accept. Let the pendulum not swing too far in a given direction. If it does, it might also swing too far in the other direction. History teaches us that a sober middle course is not so susceptible of revolutionary change.

Free, full, and untrammeled debate is the very essence of our form of government that has survived so well and against so many attacks. Pondering the question of our strength and our continued solidarity, historians agree that our system of checks and balances within a tripartite form of government has been the very cornerstone upon which our ability to survive has depended. In other countries, one or another of the branches of government has become all powerful so that either political or military dictatorships have emerged. On the other hand, we have governed as the wise Founding Fathers planned it, so that no particular branch of government would get so strong as not to be subject to the counterforce and the ameliorating influence of the other branches.

An attack upon the rules of the U.S. Senate is, indeed, a frontal assault upon the orderly procedure, the custom, and the tradition of our legislative branch of government. It is a real and present danger to our form of government. While tradition is not sacred, longstanding custom and traditions do not become so without sufficient reason. Tradition is not established by edict or proclamation: it evolves from constant practice and acceptance by those whom it affects. It is not born; it is not created. It results from continued use, dependence, and reliance, and it becomes a foundation and cornerstone. Rule XXII is more than a rule, written and adopted. It is a fundamental part of the basic structure of the Senate. It was placed there because of the good judgment and wisdom of our predecessors. It has remained there because it has, through the years, become a necessary part of our procedure.

Under the checks-and-balance system which was so admirably set up in the Constitution and which has been followed during most of the history of our Government, this Nation has prospered and has become the greatest country in the world. Under the system of checks and balances, one branch of the Government acts as a leveling force upon the other to insure that logic, reason, and sound judgment will control the course of government. The idea is to make certain that one philosophy, whether espoused by a majority, a minority, or a single individual, is not overlooked or overrun by those who oppose it. That is the purpose of rule XXII as now written. It is a vital part of the checks-and-balance system of the U.S. Government.

To materially change it would change not only the Senate as an institution, but would be a fundamental change in the basic concept of our Government as it has operated.

It is my sincere hope that the Senate never reaches the point nor sees the time when legislation can be whisked through this body without full debate. If this should happen, it could be a step toward a disastrous end of the greatest system of government the world has ever known.

The Senate, like the framers of the Constitution, has decided and long followed the proposition that certain measures call for broad unanimity upon the part of its Members and has provided rule XXII as assurance that this will be done.

On many occasions, the rights of freemen have been preserved because they have been protected under the rule of free debate in the Senate. The continuity of our Government and the perpetuation of our liberty depends in great measure upon the retention of rule XXII. There is no right or liberty more essential and vital than the protection and representation of the minority.

I want to mention one thing here—it is not a personal matter—but I am thinking particularly of the new Members of the Senate that have just been entrusted with the responsibilities that go to this office.

If I were to have a chance to give them one solid counseling, if they should call upon me to make but one suggestion, it would be, with all the emphasis I have, for them to go very slow before they reduce the power and the responsibilities that go with the seat that has recently been entrusted to them—to go slow, indeed, before they reduce and de-

tract from the power that people have, that people of their State have in this Senate seat that has been so recently entrusted to them.

I hope that they never will vote to reduce or to change that power materially. But certainly not until they have fully understood, by experience, the workings and operation of the Senate—because then only can a person really fully understand and appreciate the wisdom of this rule.

Mr. Chairman, I thank you, again, for this time.

Senator HAYDEN. The committee will stand in recess until 2 o'clock tomorrow when consideration will be given to Senate Concurrent Resolution 2, introduced by Senator Monroney and other Senators.

(Whereupon, at 11:40 a.m., the subcommittee recessed, to reconvene at 2 p.m., February 24, 1965.)

PROPOSED AMENDMENTS TO RULE XXII OF THE STANDING RULES OF THE SENATE

(Relating to Cloture)

MONDAY, MARCH 1, 1965

U.S. SENATE,
SUBCOMMITTEE ON STANDING RULES OF THE
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 301, Old Senate Office Building, Senator Carl Hayden (chairman of the subcommittee) presiding.

Present: Senators Hayden, Cannon, and Cooper.

Also present: Kent Watkins, staff director of the subcommittee; Hugh Q. Alexander, chief counsel, Committee on Rules and Administration; Walter L. Mote, professional staff member; Lew Hastings, professional staff member; and William R. Haley, legislative assistant to Senator Cooper.

Senator HAYDEN. The committee will be in order.

Senator Anderson, we will be pleased to hear from you.

STATEMENT OF HON. CLINTON P. ANDERSON, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator ANDERSON. Mr. Chairman, the periodic efforts to bring about a more reasonable method for halting filibusters have become a hardy perennial on the Senate landscape. The attempt to reform cloture procedures pokes its head above ground in each Congress, never quite blooms, and then dies back for 2 years. But this particular reform effort has taken firm root.

After the change in rule XXII was adopted in 1949, further changes were proposed in 1951. But no action was taken and it was 1953 before the Senate voted on the issue of changing cloture methods.

On the 1st day of the 83d Congress, I had submitted a motion that the Senate proceed immediately to the adoption of rules for the new Congress. That motion was tabled quite decisively by a vote of 70 to 21. A reform amendment was introduced in 1955, but no action was taken. Two years later I moved to consider the adoption of new rules only to have that motion tabled by a 55-to-38 vote. In 1959, rule XXII was amended—amended but not reformed. And I will explain that in a minute. In 1961, after 7 days of debate, proposed amendments to rule XXII were sent to this committee by a vote of

50 to 46. In 1963, after my motion to take up the Anderson-Morton change in rule XXII was subjected to extensive debate, the majority leader's cloture motion failed adoption by a vote of 54 to 42, with the proponents of a more effective cloture rule in the majority, but lacking 10 votes of the two-thirds margin rules necessary for adoption.

I cite these votes over more than a decade to show (1) that the number of Senators who favor reforming rule 88 has increased steadily—indeed became more than a majority 2 years ago; and (2) that the Senate has not had an opportunity, because of its rules, to vote directly on substantial changes in the cloture rule.

Nor has the Senate had an opportunity to vote on what to me is the heart of the matter in this debate over rule XXII—the fundamental question of whether the Senate is able to exercise the constitutional power to adopt new rules if it so chooses for each Congress. That, Mr. Chairman, is more basic than any alteration in the number of Senators needed to invoke cloture.

Mr. Chairman, there is a rather substantial shelf of hearings and reports on proposed changes in rule XXII. The discourse on this issue has been long and I intend to be brief this morning. I would hope that the documents which come out of your hearings would embody some of the most significant and pertinent chronologies and statistics. These are valuable hearings and I appreciate the opportunity to appear.

The bedrock of my position is the principle—supported by the Constitution—that the Senate, at the opening of a new Congress, can change its rules free of the threat or actual use of the filibuster. When my associates and I have propounded this principle, the opposition has contended that the Senate is a continuing body. Boiled down, the theory means that the rules of the previous Senate carry over to the new Congress. This highly questionable doctrine was finally embodied in section 2 of rule XXXII, which was added in 1959 when the cloture rule was amended. Section 2 provides:

> The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

Section 2 of rule XXXII must be viewed alongside section 2 of rule XXII, which was adopted in 1949, and states:

> The provisions of the last paragraph or rule VIII (prohibiting debate on motions made before 2 o'clock) 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.

Those provisions are the stranglehold on rules reform. The rule they were designed to shield in perpetuity is XXII. I say that because those sections were added on the two most recent occasions when the cloture rule was amended—but not improved.

Thus, the debate over the "continuing body" idea is not an academic pursuit for political theoreticians. It is a concept that is hostile to a viable legislative body.

Nor is the continuing dispute over our rules a mere ritual of the liberals and moderates. As each of us knows, the parliamentary processes of the Senate often are crucial to legislation. Substance masquerades as procedure.

The rules ordain that any attempt to consider changing them on the floor is subject to unlimited debate, unless a two-thirds vote of the Senate shuts it off. This illogic in the past has led to motions to table and motions to commit, accompanied by pleas that the work of the Senate must go on and that those who believe in making each Senate in each new Congress its own master should cease and desist.

A witness before this subcommittee, testifying in opposition to any change in rule XXII, called our position on the carryover of rules a novel doctrine. There is nothing novel about our contention. Almost half a century ago, on the 1st day of the 65th Congress, Senator Owen, of Oklahoma, refused to allow a bill to be referred to a committee on the ground that committees were not in existence at the outset of a new Congress. The next day, Senator Walsh, of Montana, presented a resolution squarely contesting the idea that the rules carried over from Congress to Congress. Senator Walsh declared:

> A majority may adopt the rules in the first place. It is preposterous to assert that they may deny to future majorities the right to change them.

This action paved the way for adoption of the two-thirds cloture rule.

On January 3, 1953, for myself and 18 other Senators, I moved that the Senate take up for immediate consideration the adoption of rules for the Senate of the 83d Congress. If, in fact, the rules of the Senate of the earlier Congress had automatically carried over, this motion was out of order. What happened? Not a single member of the majority opposing the motion to take up rules raised a point of order against the motion, despite the fact that this would have been the proper parliamentary procedure if the group had cared to test whether the old rules carried over. Instead of a point of order, the then majority leader, Senator Taft, moved to lay the motion on the table—implicit recognition that the motion had been in order.

The adjectives "continuing" and "continuous" simply describe the fact that two-thirds of the Members of the Senate carry over from Congress to Congress. I do not dispute that fact. What is in contention is whether the majority of Senators meeting for the first time in the new Congress have the power to adopt their own rules free from obstructions laid down many years earlier. I want to make each Senate in each Congress equal in power to its predecessors. That power abides in the Constitution—in article I, section 5—which states: "Each House may determine the rules of its proceedings." It seems abundantly clear from the language and context that "each House" means not only the separate branches of the Congress—that is, the House and the Senate—but also the separate branches of each succeeding Congress. Both language and logic lead to the conclusion that the constitutional authority to make rules is granted to each House of each Congress. This conclusion was also reached on January 4, 1957, by Vice President Nixon. He spelled it out in his advisory opinion in response to a parliamentary inquiry from Senator Humphrey, stating:

> The Constitution also provided that "each House may determine the rules of its proceedings." This constitutional right is lodged in the membership of the Senate and it may be exercised by a majority of the Senate at any time. When

the membership of the Senate changes, as it does upon the election of each Congress, it is the Chair's opinion that there can be no question that the majority of the new existing membership of the Senate, under the Constitution, have the power to determine the rules under which the Senate will proceed.

* * * * * * *

It is the opinion of the Chair that while the rules of the Senate have been continued from one Congress to another, the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress.

Any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional. It is also the opinion of the Chair that section 3 of rule XXII in practice has such an effect.

Mr. Chairman, those who protest that we are trying to "gag" the Senate did not hesitate to shackle and in effect "gag" the majority. Suppose they had gone farther.

I was in the Senate when the "round robin" letter was used to win an earlier battle over a change in rule XXII. Suppose for a moment that the combination put together then had been less generous or more ruthless. There is nothing magic in a figure of two-thirds. Suppose the victors had made it four-fifths. That would have raised the number of votes now needed to stop a filibuster or to change our rules to 80. Would you have thought that fair?

Suppose that had not satisfied the mood of 1949. Suppose the figure had been nine-tenths. Would that have been fair? Couldn't the rule just as well have required unanimous consent to stop a filibuster over civil rights or a change in rules? The saving factor is that such a rule would have been so obviously improper that Senators even holding their noses couldn't have voted for it. We need some rule that stands the test of reason, and for that the three-fifths proposal should suffice.

Even a brief analysis of the operations of the Senate will show that the functions do not carry over from one Congress to the next, that the case for the continuing body rests on a rather slender reed. I ask that such an analysis be included at this point in my remarks.

(The analysis referred to follows.)

Analysis of the operations of the U.S. Senate

Activity	Senate acts anew in each Congress	Senate carries over from Senate of preceding Congress	Comment
1. Introduction of bills	X		See Senate rule XXXII.
2. Committee consideration of bills.	X		Do.
3. Debate on bills	X		Do.
4. Voting on bills	X		Do.
5. Election of officers	X		While the old officers carry over until new ones are elected, the carryover does not prove rules carry over. It is a mere convenience. Even in the House, the Clerk carries over until the new one is elected. Obviously this does not prove that House rules carry over; they do not. [1]
6. Consideration of validity of senatorial elections.	X		Although credentials of a Senator-elect are often presented to the Senate prior to the beginning of his term, the validity of the credentials can only be considered by the Senate to which he was elected and not before.
7. Consideration of treaties	X		See Senate rule XXXVII(2).
8. Submission and consideration of nominations.	X		See Senate rule XXXVIII(6).
9. Election of committee members.	X		See rule XXV. While old committees carry over until new ones are elected, the carryover does not prove rules carry over. It is a mere convenience. Even in the House, the Clerk carries over until the new one is elected. Obviously this does not prove that House rules carry over; they do not.
10. Adjournment	X		Adjourns sine-die. When Congress ends at noon of a particular day, and a special session of the Senate of the new Congress is called, the Senate adjourns at noon, and 1 minute afterward opens the new session.
11. Rules	?	?	Past practice of Senate on rules is ambiguous. It can be explained as acquiescence in past rules, which can either be repeated at the opening of the Senate of any new Congress by beginning to operate under them or which can be refused by the adoption of new rules.

[1] Similarly, the fact that the President pro tempore carries over until there is a change of party control of the Senate is no evidence of rules carryover. On the contrary, the fact that an election of a President pro tempore automatically follows a shift in party control (see 99 Congressional Record 9, Jan. 3, 1953) is evidence that the Senate of each new Congress responds to the will of the majority of the Senate of that Congress.

Some who espouse the continuing body theory argue that without it the Senate, at the start of a new Congress, would be unable to function because it would be without rules, or that the time required to agree on new rules would impede our legislative responsibilities. I find it impossible to accept this argument.

The experience of the House—operating under the Constitution and its rules, over the last 50 years in adopting rules has proved conclusively that the necessity for adoption at the opening of each new Congress does not delay either the organization of the legislative body or the prompt consideration of legislative business. The Senate is no less able to act than the House of Representatives.

Moreover, my position—and it is shared by associates in this effort—is that the rules now carry over from the previous Senate to the extent that they do not thwart the will of the majority and the power of the Senate of a new Congress to change its rules.

I have emphasized my belief in the principle that a majority of the Senate can determine the rules of the Senate at the beginning of a new Congress. That is fundamental; the ratio of Senators who can impose cloture is of secondary importance.

I would welcome a favorable report, however, from this committee on Senate Resolution 6, the resolution Senator Morton and I introduced to make cloture possible by an affirmative vote of three-fifths of the Senators present and voting, rather than the present two-thirds provided in rule XXII. Senate Resolution 6 fully protects the rights of Senators who may find themselves in a minority, anxious to state their position dramatically and in detail, so as to win support for their cause.

But Senate Resolution 6 will make it somewhat easier for the Senate to act to halt the reign of "King Filibuster." We are proposing that a maximum of 60 Senators, rather than 67, be able to invoke cloture. It is a quite modest change. There is nothing magic about the three-fifths ratio. I simply believe that it is a reasonable compromise between majority cloture and two-thirds, although the resolution embodying majority cloture safeguards the rights of whatever minority bloc desires to avail itself of the right to extended debate.

By only the farthest stretch of language can Senate Resolution 6 be called gag rule. Weeks of debate would ensue, no doubt, before 16 Senators would sign a cloture petition. Two more days would pass before a vote, and if cloture were voted, it would be entirely possible for another 10 days or so of debate to take place before the maximum 100 hours allowed by rule XXII would expire—should each Senator avail himself of 1 hour to talk. Those who regard the Senate as the last citadel of liberty should support this modest proposal—and the principle of majority right to adopt rules—as a means to protect the bastion from obsolescence.

If this committee had under consideration a resolution to adopt for the Senate the restrictive procedures the House applies on debate, I would be here to urge its defeat.

Last summer I joined those Senators who contended at some length against a proposal to nullify the Supreme Court decision on reapportionment. Some observers saw a certain irony in the fact that many of the Senators who spoke extensively against the Dirksen-Mansfield resolution were also in the ranks of those who champion an end to fili-

busters. The irony was an illusion, because we still favor an end to the filibuster rule.

I used the right of prolonged discussion to oppose a provision in the Tidelands Oil bill. I used the right of prolonged discussion to oppose the Dixon-Yates provision in the Atomic Energy Act of 1959.

Mr. Chairman, you and I come from States quite small in population. We would not want to surrender any device for protecting the rights of our States. Senate Resolution 6 completely safeguards those rights. But surely we must also safeguard the right of the Senate to act on behalf of all the States of all the people.

Thank you, Mr. Chairman.

Senator HAYDEN. As I understand it, the only change in rule XXII proposed in your amendment is from——

Senator ANDERSON. From two-thirds to three-fifths—from 67 to 60 required.

Senator HAYDEN. Now, that is a question, of course, this committee will have to very carefully consider.

We are very glad to have your statement at this time. I am sure the committee will very carefully examine it.

Senator ANDERSON. I am glad to present it, Mr. Chairman, because I have been working on this for a good many years, out of my conviction the Senate does have rights. We hear about voting rights of minorities in various parts of the country. Wouldn't it be nice if we gave Senators a chance to vote. Senators haven't had a chance to vote whether they want to change this rule or not.

Did the Senate have a chance to vote on that? I should say not.

I would like to have the Senators have a vote once in awhile, along with the minorities in the South, and people in other parts of the country.

Senator HAYDEN. My recollection is that the succeeding rights bill under Senator Johnson gave a ruling which was contrary to Vice President Nixon's.

Senator ANDERSON. I don't recall the ruling. The opportunity existed to give us a chance to vote on the adoption of rules at the beginning of the Congress. The filibuster started, the filibuster continued, and went on for weeks to come. And I, therefore, asked to have the constitutional question of whether Senators had that right to change the rules by majority vote submitted to the Senate. The Vice President submitted the question to the Senate, and the filibuster started again. Never a vote. And regardless of how any Vice President rules, it would seem to me that the chance should exist for Senators to have a vote on whether or not they want to adopt rules.

I pointed out that the original rule which was adopted could just as well have required 90 percent of the Senators voting for it. It could just as well have said everybody but one; it could just as well have said it takes unanimous consent to change the rules. They just happened to hit on the figure of two-thirds.

Senator HAYDEN. My recollection is that there are a number of provisions in the Constitution and otherwise that refer to two-thirds.

Senator ANDERSON. There are many things referring to two-thirds. There are many things referring to majority vote. You can make a good case for majority vote under cloture. I personally have felt that majority vote would be a little premature sometimes. There

ought to be protection for minorities. But I think 60 would leave a sufficient protection to minorities. I think it will come someday. I regret it has not come in the past.

Senator COOPER. May I ask a question?

Senator Anderson, I think it was agreed at the commencement of the Senate when this matter was referred to the Rules Committee, when the committee report, that a motion can be made then to consider the adoption of new rules without prejudice, as if it had been considered at the opening of the Senate. Is that correct?

Senator ANDERSON. Yes; I think that is correct. It certainly was the intent.

Senator COOPER. If you or someone should make a motion, then, to adopt new rules, that motion would be debatable.

Senator ANDERSON. Would be subject to unlimited debate.

Senator COOPER. But it is your contention that rule XXII would not apply to cutting off debate.

Senator ANDERSON. It is my contention it should not apply.

Senator COOPER. A rule could be changed by majority vote. And the rule would be debatable, also.

Senator ANDERSON. Yes.

Senator COOPER. I know you have given a great deal of thought to this subject. And I think at one time I joined you.

Senator ANDERSON. I am very happy to have a Senator from Kentucky as a cosponsor.

Senator COOPER. But for the purpose of the record, and to advise the committee, why do you consider that a three-fifths vote is preferable to a majority vote on rule XXII?

Senator ANDERSON. Well, I recognize that a great many Senators believe a majority vote is proper. I have merely taken the position that for some purposes it is desirable to have a little bit more than a majority in order to make sure that somebody doesn't run roughshod over a minority. For example, the Senate several years ago was made up of 49 on one side and 47 on the other. In fact, we thought it was 48–48 for awhile, almost. And at that time, if it had been, say, 49–47, it might have been possible for a majority of only 49 to have closed off all kinds of debate on various issues. I think that is too narrow a margin.

But I think when you have to say that 60 out of 100 must take a position, then I believe you have ample protection, so that minorities are not overriden.

That is my only concern.

I have been in minorities and majorities, and I think either situation is all right, as long as it is treated fairly. With a 60-percent provision, I believe you always make sure you are treated fairly.

Senator COOPER. You believe, then, the rule should give some assurance for reasonable debate on a measure before the Senate?

Senator ANDERSON. Oh, surely. I have long believed provision for reasonable debate is very desirable. And I referred to a couple of those instances. We spent a long time on the tidelands bill. We promised at the time it started, some of us did, there would be no filibuster, if a filibuster prevents a vote. We did feel the issue ought to be explored, and the rights of the Federal Government to land on the Continental Shelf should be fully ventilated. They were. The Con-

tinental Shelf was saved for all the Nation, not just for a particular State.

The result has been a very substantial amount of revenue will come to the Federal Government.

At that time, Senator Hill proposed that revenue be earmarked for education. If that had been done, there would be a vast difference in the story of how the bill for education would be financed.

Therefore, I think the debate was worthwhile.

I felt the same way about the Atomic Energy Act passed in 1954. There are many things in that, including things like Dixon-Yates, that I didn't think were desirable. We spent a long time discussing it, it went to conference, the conference voted it out, we started a discussion all over again, finally there were things put in the Atomic Energy Act of 1954 which were desirable, which were very much in the interest of the public.

I am glad there was extended debate, an opportunity to examine it fully.

I want that to happen.

But I think after a thing has been examined fully, there comes a time when you might as well vote.

Senator COOPER. Your proposition, then, for three-fifths, I judge, is based upon your experience that such a figure would assure a reasonable debate, full debate. It also would not stand in the way of cutting off debate finally and coming to a vote.

Senator ANDERSON. Yes, Senator Cooper.

When I first started on this, I found myself challenged on a great many sides, opinions which I expressed. I went back and read everything that I could find relating to the history of these rules, anywhere that I would find it. Significantly, some of the pages relating to the early history have disappeared in the last few years. But they would have been useful, I think, to have had. I believe very strongly after all the evidence is in, at least as far as I am concerned, that a three-fifths rule will not do violence to anybody—that a majority rule might—but three-fifths certainly would not. But two-thirds makes it somewhat difficult sometimes.

But, far more important, I believe, Senator Cooper, is the right of a Congress to make its own rules. I think it is wrong to say that a previous Congress, by whatever terms it used, could impose rules on the rest of us that we can never break as long as we live.

If I hadn't been here in 1949, when the round robin was circulated, when men promised to vote for a certain type of bill in order to stop filibuster—they could have written a different figure. It could have been four-fifths, or nine-tenths, or unanimous consent, and that would have been wrong, in my opinion.

Senator COOPER. I would like to ask a question about another matter, not comprehended on your proposal, or on any proposal.

Based on our past experience, I think we might agree, that after cloture has been obtained as it was in 1963, 1964—that the provision for 1 hour to be allocated to each one out of a total of a hundred hours, I think you will remember that we had members speaking 15 seconds on an amendment, one-half a minute, 5 or 10 seconds.

Do you think that if this rule should be changed to provide some better means to secure a debate upon important amendments after

cloture is obtained—for example, allocation of a part of the time to those who are the leaders in the opposition or proponents of a particular amendment.

Senator ANDERSON. Yes, Senator Cooper. I have long believed that the time can be better spent by allowing those who favor the motion and those who oppose the motion to have some control of the time, rather than just automatically providing an hour for each person.

Senator COOPER. I won't say that the debate wasn't good, but it was ridiculous for a man to be limited to 15 or 10 seconds on an important amendment, if he had just that much time left to him.

Senator ANDERSON. I think so. I didn't use any time myself in that discussion. But I think if you are going to let a man speak, he should have a chance to develop his thought, and about 5 minutes is a minimum. With the membership in the House, sometimes the time limit is so short that a man has no chance whatever to express himself.

Senator COOPER. My point is that if the committee should decide to make a change in rule XXII with regard to the number required to cut off debate, I think it also could profitably look into the question of getting a better provision about the 100 hours that are available after cloture is obtained.

Senator ANDERSON. I am sure it could.

Senator COOPER. Thank you.

Senator ANDERSON. Thank you very much.

Senator HAYDEN. Senator Javits?

STATEMENT OF HON. JACOB K. JAVITS, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator JAVITS. Mr. Chairman, and members of the committee, the Senate is now approaching an historic confrontation with its most debilitating self-restriction, rule XXII, which enforces upon the Senate—unlike almost every other representative body in the world, including the House of Representatives—ultimate control of its legislative activity by a minority of one-third of its membership. Now, for the first time in more than a decade of efforts to change rule XXII, the Senate has before it a dramatic, full-scale demonstration of what the rule really means and what makes even the threat of its use so powerful a weapon. The fact that the Senate had to be tied up for 3 months last year to pass the Civil Rights Act should answer once and for all the argument that rule XXII is not really an "impediment" to a determined majority.

It demonstrates that—a determined minority, even less than a third, can tie up the Senate and, therefore, tie up the Nation's business in a very real way for a very long period of time. Three months can be a tremendously long time in the life of a nation. For example, the Congress is now considering a proposed constitutional amendment regarding to Presidential succession and disability, which calls for congressional action in times of great national stress. Now, think of what 3 months would mean under those circumstances. And yet the Senate is powerless to act in the Nation's interest for such extended periods of time in the face of any really determined opposition.

I point out, too, that we were very lucky in 1964, and that we didn't have during that 3-month period some grave national emergency requiring immediate action, particularly in view of the fact that you cannot even take down a bill once it is the pending business except by a motion which could itself be filibustered. It was only the restraint of the Negro community in the United States with respect to demonstrations, which were voluntarily called off during the time we were considering the bill, that prevented the emergency from being even greater than the one we faced. I think the Nation is really jeopardizing itself very seriously by allowing this rule, which is really archaic in its consequences, to remain upon the books.

I have not, Mr. Chairman, sought to deal with every aspect of the rule XXII controversy in this statement, out of respect for the committee, which has heard the facts and figures many times, and I would like to have unanimous consent, if I may, to file my statement as part of my testimony. I would also like to call to the attention of the committee a report of a two-man subcommittee of the Rules Committee, appointed in the 85th Congress by our beloved and departed colleague, Tom Hennings, consisting of Senator Talmadge, of Georgia, and myself, in which, as you might have expected, we split completely, but which nonetheless illuminated and developed the opposing points of view on this issue. It is very significant to me, and I hope the Chair will allow me the pardonable pride in uttering it, that following the report, the committee, by close vote but a majority, reported a material modification of the rule very much in accordance with what I have contended for. I do urge the committee to consider that factual report. We took very extensive testimony at that time.

If the Chair wishes me to, I would offer for the record a copy of that report. But, of course, it is in the proceedings of this very committee, and I must leave that to the discretion of the Chair, as to whether it would be useful to have that in this volume of testimony.

Senator HAYDEN. There would be no objection.

Senator JAVITS. I thank the Chair, and I, therefore, would include it.

(Senator Javits' individual views as expressed in the above-mentioned report may be found at page 95 of these hearings.)

Senator JAVITS. Now, another point, other than the question of what light is cast on this matter by the 1964 Civil Rights Act situation, is the often heard charge by opponents of the so-called Douglas plans, which calls for cloture after 15 days' debate by a constitutional majority of the Senate, 51 Senators, of which I am a cosponsor—I have been a cosponsor to the Douglas plan ever since he developed it—that this represents gag rule.

I would like to point out, Mr. Chairman, that such a rule would involve, when you take the 2 weeks provided for, which excludes Sundays, holidays, and other times when there would not be actual debate, and a hundred hours of debate after cloture, a total of not less than 4 weeks. That 4 weeks is longer than we took to ratify the Nuclear Test Ban Treaty in 1963, or to pass the antipoverty program in 1964, or to deal with any one of the $50 billion defense appropriations bills in recent years, or to pass the tax cut bill in 1964.

So that it seems to me that on the test of what it takes to illuminate a subject, it is very clear that a period of 4 weeks or thereabouts is very adequate for the purpose.

The third argument by opponents is that seductive argument that if you didn't have rule XXII you would have a lot of new legislation against which a minority in opposition would have no weapons and no ability to arouse public opinion.

Now, Mr. Chairman, I speak on that rather feelingly, being a member of two minorities: one, a minority in the Senate, on the Republican side, and the other a minority, probably, in my own party sometimes. I am a double minority, or at least a member of it, with other valued colleagues.

Filibusters under rule XXII have been most used by Southern Senators in opposition to civil rights bills. But it has been on occasion employed by the liberal group, the communications satellite was the most striking example.

I am willing to accept that such a restriction on myself and other liberals, among whom I class myself. Four weeks, I think, is adequate time to expose a question and marshall public opinion on it.

I point out, Mr. Chairman, that many of us, when we make an important speech, come back to our offices and find that very afternoon and the next morning, an absolute flood of comment, indicating how fast things are transmitted to people around the country. I have found stacks of telegrams on my desk just when I have come from the floor, having just made a speech, because things get out to the country now very, very rapidly.

It seems to me that all of that knocks the bottom out of any argument that you need rule XXII as it is now in order to give yourself the opportunity to expose a question adequately to the country. I think it can be very adequately exposed within the time of roughly 4 weeks, perhaps a little more, which would be afforded by a fair cloture rule, such as the Douglas rule.

Thank you, Mr. Chairman.

(The prepared statement of Senator Javits follows:)

STATEMENT OF HON. JACOB K. JAVITS, A U.S. SENATOR FROM THE STATE OF NEW YORK

The Senate is now approaching a historic confrontation with its most debilitating self-restriction, rule XXII, which enforces upon the Senate—unlike almost every other representative body in the world, including the House of Representatives—ultimate control of its legislative activity by a minority of one-third of its membership. Now, for the first time in more than a decade of efforts to change rule XXII, the Senate has before it a dramatic, full-scale demonstration of what the rule really means and what makes even the threat of its use so powerful a weapon. The fact that the Senate had to be tied up for 3 months last year to pass the Civil Rights Act should answer once and for all the argument that rule XXII is not really an impediment to a determined majority.

I am a cosponsor of Senate Resolution 8, introduced by Senators Douglas and Kuchel along with 14 other cosponsors, and I strongly urge this subcommittee and its parent committee to report that resolution favorably when it acts, as it must under the unanimous-consent agreement of January 8, 1965, to report back to the Senate. The arguments for majority rule in the Senate, after full and fair debate, have been repeated so many times and are so obviously correct under our constitutional form of government that I will not now repeat them again. I appear today only to answer some of the spurious arguments which continue to hamper this effort; an effort which I rank as one of the most significant in our entire range of Senate problems.

First, attempts are made to characterize the majority rule proposal as a "gag rule." The fact is that Senate Resolution 8 calls for a full measure of debate, actually longer than is taken to debate the most serious questions considered by the Senate in the course of a session. After a petition to close debate is filed by 16 Senators, a vote on ending debate is not to be taken until after 15 days of debate, excluding Sundays, legal holidays, and nonsession days. This is more time than the Senate took to ratify the Nuclear Test Ban Treaty in 1963, or to pass the antipoverty program in 1964, or any of the $50 billion defense appropriation bills in recent years, or the tax cut bill in 1964. Even after the 15 days had elapsed, and the Senate by a constitutional majority; that is, by more than 50 Senators not just by more than half of those present and voting, has voted to end debate, the debate would still go on for another 100 hours. This could amount to another 2 weeks of debate. How can this total of at least 4 weeks of actual debate be considered "gag rule?"

Second, it is argued that passage of the 1964 Civil Rights Act demonstrated that cloture can be invoked on a civil rights bill and, consequently, there is no longer any reason to change rule XXII. Again, the 3-month stranglehold, which rule XXII imposed on all legislative business during that filibuster, certainly cannot be anyone's idea of a rational way to legislate.

Any highly controversial measure which is opposed by at least a third of the Senate, determined enough to speak for 4 hours during a 24-hour day, can bring the Nation's business to a complete standstill. Already it is patently clear that additional civil rights legislation will be necessary in the field of voting registrars—in the field of excessive police action. The proposed constitutional amendment on presidential succession and disability calls for congressional action in times of great national stress. There are a host of similar situations in which the national safety and welfare could be gravely jeopardized by the threat of the use of the filibuster. We were lucky in 1964 that no great emergency arose during the Civil Rights Act filibuster. But think what a determined minority of 34 could do to our Nation under rule XXII in a moment of real emergency.

The fact that cloture has been invoked in a handful of cases, since the rule was adopted in 1917, does not mean that the threat of its potency does not have a serious effect on the way this body operates. This was recognized in 1963 when, after the imposition of cloture on the communications satellite bill in 1962, a majority of the Senate went on record in favor of liberalizing rule XXII.

Finally, the most seductive argument for the status quo is that without it there will be a flood of new legislation against which a minority in opposition will have no weapons and no ability to arouse public opinion. The fact is quite the contrary: the period of debate proposed by Senate Resolution 8 prior to cloture is clearly long enough for a vocal minority to make its position clear to the Nation, and for the reaction to be felt in the Congress, particularly in this age of electronic communications. I am sure there is no Senator who has not experienced the marvel of giving a speech on the Senate floor and, the same day, receiving telegrams from constituents reacting to his speech. Apart from this very practical observation is the basic constitutional one that the protections for the minority on any given issue in this Nation are manifold, and they were certainly never intended to include the spectacle of endless talk on the Senate floor.

The basic protection is the bicameral system itself, with both Houses required to act on every public law and one House, the Senate, apportioned not on population but with an equal number of representatives from each State. To this has been added, by the rules of both Houses, the necessary delays inherent in the committee system. And over all these legislative checks are added the power of veto in the President and the power in the Federal judiciary to check congressional enactments against the Constitution.

Given all these explicit constitutional protections for the opponents of legislation, there is no need and no justification whatever for the further roadblock of rule XXII. The proof of this is that very little difference would have been made by a majority rule, had it been in effect, in the outcome of filibusters since 1917. In 30 attempts to invoke cloture under rule XXII, cloture has been invoked only 6 times. Had a rule such as is embodied in Senate Resolution 8 been in effect, cloture would have been invoked in only five additional instances. Particularly as the member of the present minority party in the Senate I should be most sensitive to the argument that minority rights would be impaired. I think the argument is without foundation.

In my judgment this Nation cannot achieve a Great Society when a minority of its highest deliberative body can and often does strangle its processes with endless, useless talk.

I urge the subcommittee to report Senate Resolution 8 favorably.

Senator COOPER. Senator Javits, I think it is implicit in your statement that you believe that there should be full, adequate, and comprehensive debate.

Senator JAVITS. Without any question.

And not only that, but it should be at a pace and of an amplitude which is inherent in the fact that the Senate is a smaller body and has an equal number of representatives from every State. So that I thoroughly agree that we should not try to utilize the procedures of the House of Representatives with its quick cutoff of debate through a motion for the previous question.

Senator COOPER. I should like to address a question to you that I just addressed to Senator Anderson.

Referring to the debate on the Communications Satellite Act, and also on the Civil Rights Act—it is my judgment that once cloture has been achieved, that the provisions for debate afterwards were not very satisfactory.

Have you thought about any change in the 1 hour which affords to each Member the opportunity to speak 1 hour?

My reasoning is this: You remember—it is a fact that it is not until after cloture that we got down to voting upon the amendments, and some were quite important. It seemed to me that at that point, that the debate could not be very adequate, because of this question of allocation of time, 1 hour to each Member, which meant that those who were very interested in certain amendments, and important amendments, at that point might have 5 minutes, 10 minutes—sometimes I remember they were speaking one-half minute.

Do you think it would be possible to change that part of the rule so that there could be an allocation at least of part of that time?

Senator JAVITS. I believe that this is an entirely proper subject for the committee. I would suggest this, Mr. Chairman—that the absolute privilege of 1 hour for each Member should not be taken away. I think that is a Member's protection, and he should not have to depend upon the majority or minority leader to assign him time.

It is for that reason that I fully agree with the plan which is contained in the resolution of Senator Douglas, to which I am a party, providing for a division of the time following cloture into 50 hours each to the majority and minority leader, but with a minimum of 1 hour for each Member who requests it. Probably the 1 hour would not be used entirely. Also the resolution provides as a possibility that the cloture resolution itself may contain additional time for the minority and majority controlled by the respective leaders on each side. I do not believe if there are some additional hours involved—let's say another 10, 20, 30, 40 hours, or even 50 hours—that that extension of debate would be material to resolving the issue.

When you get to the point that cloture has been voted, then you see the end. If you need more hours in order to debate fairly what is left to be debated legitimately, I don't think that ought to be denied. But I do fear taking away a certain time which is controlled by every Member when the cutoff comes.

Senator COOPER. I would agree, also, that the 1 hour be retained. But I would think that there should be some additional time given so that amendments which were of great importance could be considered more thoroughly.

Senator JAVITS. There the analogy would be with the House of Representatives, where the House votes a rule for each bill and the rule generally contains the terms of debate. Now, if you considered the cloture motion a rule, you could contain in the cloture motion whatever hours in addition to the 1 hour per Member were desired. And if the Senate didn't like the time, if it thought it was too great or too small, it would vote down the cloture motion on that ground, and there would have to be another motion.

I think this would provide an inducement to have that time reasonably apportioned to what the Senate would feel is fair.

Senator COOPER. Thank you.

Senator HAYDEN. Thank you.

Senator JAVITS. Thank you very much, Mr. Chairman.

I thank my colleague, Senator Case, who is senior to me, for being gracious enough to yield.

Senator HAYDEN. Senator Case?

STATEMENT OF HON. CLIFFORD CASE, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator CASE. Mr. Chairman, members of the subcommittee, I couldn't help but think, when I was listening to Senator Javits, that we have been at this business, to my knowledge, once every 2 years for five times, and I can only say I hope this is the last time we have to do it.

I appear, of course, Mr. Chairman, in support of Senate Resolution 8, of which I am a cosponsor, and which would, in our judgment, protect the basic constitutional function of the Senate, that is to say its right, its responsibility to legislate.

The Constitution states that responsibility, of course, in the final paragraph of article I, where it says—

> to make all laws which shall be necessary and proper for carrying into execution the foregoing powers * * *.

Even after 10 years of membership in the Senate, I am unable to accustom myself to the notion that the Senate can be prevented from even considering a bill or measure, including one unanimously reported by one of its own committees, by a small but determined minority of its members.

By preventing endless filibusters, Senate Resolution 8 would make it possible for the Senate, after reasonable debate—a minimum of 15 days, plus the number of days which it would take to exhaust the hundred hours which are allowed after cloture voting—to vote, up or down, on a matter on which a majority of the Senate wishes to act.

The Constitution is clear that "* * * a majority of each (House) shall constitute a quorum to do business." With certain limited exceptions, the Senate as well as the House acts by majority vote. The Constitution also says that each House shall make its own rules. And it is a truism that no Congress can bind future Congresses. Yet, in

every Congress since I have been a Member of the Senate, the opening has been marked by a battle over the constitutional right of a majority of the Senate to consider and act on the rules which shall govern its proceedings during the next 2 years.

The defenders of the filibuster argue that the constitutional right of a majority of the Senate is overridden by rules in force in the previous session. And they are aided by the fact that it is difficult for the public to understand how the Senate of the United States can be rendered impotent by a procedural rule.

They should come down here, Mr. Chairman, and see.

Unfortunately, because the issue involves technical procedural questions, it has usually been obscured by a cloud of parliamentary dust, much of it kicked up by debate over such irrelevant issues as whether the Senate is a continuing body.

Of course, the Senate is in some aspects a continuing body. For example, two-thirds of its membership carries over into the succeeding Congress. But in other ways, it is not a continuing body. All legislation that has not been finally acted upon dies at the end of a Congress; Members are assigned anew to committees at the beginning of each Congress. But, whatever one's view on this question, it can hardly affect the Senate's right to act at the beginning of the session unless one is prepared to accept the argument that the Founders intended to allow the Senate of the First Congress to limit—of course, by majority vote—the right of future Senate majorities in perpetuity to act.

The constitutional issue was well stated in the advisory opinion first rendered by then Vice President Nixon as he presided over the Senate in the opening days of the 85th Congress in 1957. He said:

> It is the opinion of the Chair that while the rules of the Senate have been continued from one Congress to another, the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress.
>
> Any provision of Senate rule adopted in a previous Congress which has the expressed or practical effect of denying the majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional. It is also the opinion of the Chair that section 3 of rule 22 in practice has such an effect.

In 1961, Vice President Nixon restated the position:

> * * * It is the opinion of the Chair that, at the beginning of each new session of Congress, the Senate does operate under and begins its business with the rules adopted in previous sessions of the Senate; but the Chair holds that any provision of the rules previously adopted which would restrict what the Chair considers to be the constitutional right of the majority of the Members of the Senate to change the Senate's rules, or to adopt new rules, would not be applicable.

On both these occasions, the senior Senator from Minnesota, now Vice President, strongly espoused this view and in 1963, at the opening of the 88th Congress, was a persuasive advocate in its behalf. He was right each time and, should the need arise, he will be so again, I trust. And the need may well arise, for, as the members of this subcommittee know, the reference to committee of Senate Resolution 8 and the other pending resolutions was made reserving the rights of all Members as they existed at the opening of the session.

It is my hope that it will not be necessary once again to engage in protracted debate on this point. Rather, I hope the subcommittee and

its parent committee will act favorably on Senate Resolution 8, which is so clearly in accord with constitutional provisions.

I just mentioned the question of the importance of the Vice President's attitude in this matter—I want again to emphasize that if—and I am sure that we will—we get to the point where this matter is before the Senate as a whole, and the question comes—can we get to a vote on this matter?—the crucial ruling will be made by the Vice President, sitting as our presiding officer.

If he refers the matter to the Senate, instead of ruling on it himself, it is quite probable that we shall not pass any change in the rules. Only if he does rule on the question in a way which makes it possible for the Senate, by majority vote, to end debate on the question, will we have a chance to act on this most important matter.

I am sure on the basis of his previous positions, his agreement with Vice President Nixon on the occasions I have referred to in my statement, that we can expect the Vice President to take the sort of action which will not leave the Senate impotent in regard to the changing of its rules.

Specifically, Senate Resolution 8 would require at least 15 days of debate before a vote to impose cloture could be taken.

We don't change the existing rule, under which after 2 days, after a petition is filed for cloture, two-thirds of the Members of the Senate present and voting could impose cloture. That would stand as it is.

In effect what we do is provide after 15 days of debate, a majority would have the same right—a majority not of those present and voting, but a majority of the total membership of the Senate.

Moreover, once cloture were invoked, each Senator would be entitled to 1 hour to express his views on the pending measure. On the assumption that the Senate met for 8 hours each day, this would provide an additional 12 days of debate—27 days in all, or better than a month if the Senate met 6 days a week.

Surely, a vote taken after this length of time could hardly be called hasty action. Yet while this procedure would provide for the extended debate on which we rightly place high value, it would assure that at some point the Senate could come to a vote on a measure on which a majority of its Members wanted to act. And that, I reiterate, is what we are talking about—the right of the Senate as a whole eventually to come to a vote on an issue if a majority so desires.

I suggest we already face an issue which, if the past is any guide, will evoke a determined effort to frustrate any action by the Senate. That is legislation to put real meaning and assurance behind the constitutional guarantee of the citizens' right to vote.

After all, in the Senate we don't exercise this privilege of voting, this responsibility, on our own right. It is something belonging to us when we act on behalf of those whom we are elected to represent. A denial of any right of any individual Senator, including the denial of the majority's right to legislate, is a denial of his constituent's constitutional right.

In Selma, Ala., Dallas County, Ala., and elsewhere, the denial of constitutional right is blatant. The determination of some local officials, and regrettably some members of the judiciary, to evade the clear mandate of the Constitution and the Congress is manifested in harassment and abuse of those seeking to exercise their right to the

franchise. In the name of law enforcement, the law is being brazenly flouted for all the country and the world to see. It has become an intolerable situation and the need for legislation has been acknowledged by the President.

I welcome this support by him in our efforts to get some action, where action is so sorely needed, in support of rights which have been so long and so cruelly denied.

The right of Negroes to vote in Selma, Ala., is inescapably tied to the right of Members of the Senate itself to vote.

At the opening of the last Congress, well over 50 Senators, more than a majority of the Senate, expressed their support for a change in rule XXII. Unfortunately, we could do so only by joining in a statement submitted to the Senate, since we were denied the opportunity to vote directly on the matter. I believe that today an even larger number of Senators would wholeheartedly support the subcommittee in recommending a rule change to do away with the threat of filibusters. For the possibility of paralyzing the Senate by interminable talk is a threat not only to the effectiveness of the Senate as a representative and responsible legislative body but to the progress and stability of the Nation as a whole.

I thank you, Mr. Chairman.

I shall, of course, be happy to answer any questions the subcommittee may wish to ask.

Senator HAYDEN. Any questions?

Senator CANNON. I don't have any questions, Mr. Chairman—just simply an observation. I don't quite agree with the witness of how the denial of the right to vote to Negroes in Selma, Ala., could in any way, shape, or form have any relationship to this proposed change here before us now.

Senator CASE. Perhaps that statement does need a little development.

To me, it is very clear. We need a change in the present laws of the country in regard to voting rights. The laws that we have adopted in 1957 and 1960, 1961, and 1964 are not adequate, they are not working. We have got to have additional legislation. The President has recognized it. He through his Attorney General, specifically promised Dr. Martin Luther King that this would be done.

I suggest that if we don't get a change in the Senate rules we are not likely to get effective action in respect of this particular matter, and that is a direct connection, in my opinion.

Senator CANNON. I have no questions, Mr. Chairman.

Senator COOPER. No questions.

Senator CASE. Thank you, Mr. Chairman.

Senator HAYDEN. Prof. Joseph Cooper.

STATEMENT OF JOSEPH COOPER, ASSISTANT PROFESSOR OF GOVERNMENT, HARVARD UNIVERSITY

Mr. COOPER. My name is Joseph Cooper. I am an assistant professor of government at Harvard University. In approaching the problem on cloture in the Senate, I should like to talk first, of the nature and purpose of democratic government in the United States; second, of the distinctive role of the Senate in American democracy; and then finally, of the nature of the limitations to be imposed in Senate debate.

Democracy should not be approached simply as a process of decisionmaking in which majorities have a sovereign and unchallengeable right to rule. There is no defensible reason why 51 percent of the people should always, and under all circumstances, have the right to impose their will on the other 49 percent. To assume this is to assume that a majority, no matter how limited or how transient, always knows the public interest. It is also to assume that democratic government is primarily a matter of will—that laws which substantial minorities of the people oppose should and can be enforced despite the degree and intensity of opposition to them. Both propositions are false. Bare or simple majorities do not necessarily have special or greater insight into the public interest. As even John Locke recognized, the justification for decisionmaking by majority rule is technical rather than basic. It relates to the need for governments to be able to make decisions, rather than to any superior insight in the majority. And this in turn means, as the Constitution recognizes, that though the need for decision may justify reliance on the majority principle as a rule for decisionmaking in many areas, it does not necessarily justify it as a rule for decisionmaking in all cases. Nor is democratic government simply a matter of will and force. Actions that bare majorities favor should not and in reality cannot be enforced if substantial minorities of the people intensely oppose them.

How then should democratic government be conceived? The aim of democratic government should be to alleviate the tensions and coercions of social life and by so doing help groups and individuals in the society better attain the kind of life they wish to lead. However, since democracy does not presume that the insight of any one group into the public interest is superior to that of any other and since it also recognizes that force needs to be supplemented by agreement if there is to be compliance with law, democracy must seek to construct political institutions which allow all claims and grievances to be represented in fair proportion and then to see solutions to these grievances through a process of decisionmaking in which interests and claims are accommodated in the light of shared values or common purposes. Democracy, thus, is not a system in which 51 percent of the people imposes its will on the other 49 percent. It is rather a system in which the aim of the political processes is to accommodate differences and to maximize agreement. It is a system that realizes that 51 percent of the people may not know what is right—that laws should be based on an accommodation of interest both because from an overall systemic point of view, all interpretations of what our shared values demand must be presumed to be equally valid and to have an equal right to affect the nature of political settlements and because as a practical matter a large proportion of the individuals and groups which are penalized or disadvantaged by particular laws must in some sense be able to see the relation between the law and their values as citizens of the state, if the law is to have effect.

All this, of course, is not to say that democracy must wait until there is perfect agreement before it can act. It is, however, to say that the primary aim is not simple majority rule—but rather to balance two conflicting needs—the need to maximize agreement and accommodate interests and the need to act so that the tensions and coercions suffered by individuals and groups in the society can be relieved. And this

is no easy problem. It is complicated not only because it involves imprecise or indefinite quantities, but also because it involves questions of quality. That is to say that not only number but intensity must be taken into account. For accommodation involves the satisfaction of feelings or views and in this task not only the number of people holding these feelings or views matters, but also the intensity with which they are held.

With these points in mind, let us pass now to the role of the Senate in American democracy. It should be noted first of all that no 1-to-1 relationship can or should exist between constituency opinion and action in a legislative body. It cannot exist because the constituency speaks as a whole only at infrequent intervals and even then only in very broad and imprecise terms. It should not exist because the job of the legislator is to do much more than simply reflect what he believes to be constituency sentiment. Though legislators must have a finely tuned sense of what will be acceptable to their constituents, their job is a far more creative and educative one than simply that of mouthpiece. Accommodation requires the exploration and understanding of opposing positions, a search for means of optimizing the realization of conflicting desires, and an ability to modify one's own position in the light of what our shared values as American citizens seem to require. This in turn requires creative thought and action on behalf of one's constituents rather than sterile reflection of views, as well as at least a modicum of objectivity.

Thus, we can add a fourth principle to the principles we have already enunciated regarding the aims of democracy, the need to balance accommodation and action, and the need to take intensity as well as number into account. This principle is that deliberation is vital to democratic decisionmaking and that democracy must provide institutions and processes that protect and foster deliberation.

If we can conclude, then, that democracy requires the accommodation of interests, effective action, a regard for intensity as well as number, and deliberation in decisionmaking, we can also conclude that the Senate plays a very crucial and special role in American democracy. For it is the Senate which functions as the prime insurer that intensity of opinion as well as number will count in decisionmaking and also as prime insurer that decisions made will be deliberate ones. This is so for a number of reasons that we need only to allude to—its small size, the existence of 6-year terms, representation on the basis of States (and the State's relatively lax formal or organizational structure which allows each individual Senator to count for a great deal and to exercise great influence its its decisionmaking.

If this then is the distinctive role of the Senate in American democracy, what kinds of rules should govern the conduct of its debate. This is a question over which reasonable men can differ in good faith. As I have argued, balancing the needs of accommodation and action is not a question that can be answered with mathematical certainty, or precision. I, however, would reject majority cloture. In the first place, though it can be argued that adequate protections for accommodation, deliberation, and intensity already exist in the system, this contention is quite questionable. The President because of the nature of his constitutency is primarily attuned to certain, selected interests—which though broad and majoritarian are not the sum and total of the Nation. The House, though far from being completely centralized,

is still far more centralized and controlled than the Senate. In the House the leadership, when backed by a determined majority, can invariably get what it wants. There is thus great value in having a body in which minorities have protections and sources of leverage which they do not possess in other parts of the system.

In the second place, the absence of majority cloture does not mean minority rule. Even aside from the fact that cloture can be imposed by a two-thirds vote, there are substantial political limits on a minority. As the vote on the communications satellite bill and the recent civil rights bill indicate, minorities have to have a certain critical size before they can block action or even force substantial concessions. In addition, a filibuster is always a distasteful tactic, even to those who employ it. It is not a tactic that can be employed or even threatened frequently—but rather one that must be reserved for those areas in which minority feeling is extremely intense. Moreover, there are limits to the extent to which a filibuster can be repeatedly employed in a policy area. As experience with the civil rights bill indicates, the efficacy of the filibuster declines in some proportion to the extent of its use. To the extent that it is continually relied upon in a particular policy area, it reinforces the buildup of strength on the other side.

Third and last, the ultimate consequences of imposing majority cloture are not at all clear. In the House the imposition of majority cloture was followed by the development of a very stringent body of rules and regulations controlling action. It can be argued that this occurred to a significant extent because individual Members lost the incentive to be cooperative and rather began to feel that they had nothing to lose by engaging in dilatory tactics indiscriminately. The Senate, of course, is much smaller than the House. But it is nonetheless true that the relatively lax procedures of the Senate rest on the willingness of Members to cooperate and that the incentive for cooperation might be lessened, if the possibility of obstructing hated measures through debate was removed.

In closing, I should like to say a few words about the proposal to change the cloture rule so as to require only a three-fifths rather than two-thirds majority to end debate. This is a far more difficult question, for me at least, than the question with regard to majority cloture. For it does not do away with the possibility of obstructing through debate but only limits it to a greater degree. Again this is a question over which reasonable men can differ in good faith. It involves a balancing of the needs of accommodation and the needs of effective action and should be decided in terms of some estimation of whether the present two-thirds rule has overly interfered with the necessity for effective governmental action to relieve tensions and coercions in the society. My guess would be that it has—that there is a need to temper the leverage minorities possess in the Senate and that by adopting the three-fifths proposal this can be done while still preserving a meaningful amount of protection for minorities.

Senator HAYDEN. The specific question before this committee, at this moment, is whether it should require a two-thirds or a three-fifths vote to bring debate to a close.

Which of those do you prefer?

Mr. COOPER. I think this is a difficult question: it involves balancing the need for accommodation and the need for action. As I said, I

think it should be determined in terms of some estimation of whether the present two-thirds rule has overly interfered with the need for action. And my guess would be that it has and that a change to three-fifths would be preferable.

Senator CANNON. Doctor, that is rather interesting—when you say you think that it has overly interfered—because, since the rule was changed from two-thirds of the entire body to two-thirds of those present and voting, there have been now two cloture actions imposed just within a very short period of time. How do you reconcile your statement?

Mr. COOPER. Well, that is true. But it took great and overwhelming majority sentiment in the Senate to impose those actions. It is just a question of where you are going to draw the line; how much of a majority you are going to require before you impose cloture.

Senator CANNON. What other issue would you say came up then that perhaps cloture should have been imposed that you were not able to impose it because of the two-thirds rule versus the so-called three-fifths?

Mr. COOPER. I think it is arguable that the civil rights bill was desirable at an earlier date and that, because of the two-thirds cloture rule, it was impeded for several years.

Senator CANNON. You are saying that it could have come faster with three-fifths versus two-thirds? That is a pretty fine margin, isn't it?

Mr. COOPER. Well, some of these issues, I think, are decided by pretty fine margins. The whole problem is there is a need for accommodation, but there is also a need for action. Groups in the society are disadvantaged and unhappy. They have to be brought in and made to feel a part of the American community. And there is this need not to keep postponing action.

Senator CANNON. Of course you recognize that the next move of the people that favor the type of proposal that is here is to reduce it from three-fifths down to a bare majority, which you have already said that you don't agree with. You do recognize that?

Mr. COOPER. I am not sure. I would suspect, if the three-fifths rule were adopted, there would probably be very little pressure for majority cloture. I think that would satisfy most Senators and would prove to be the kind of compromise that would appeal to the sense that most Senators have of the need to balance "accommodation and action."

Senator CANNON. I might say that is one of the arguments that was advanced in changing it from two-thirds of the body to two-thirds of those present and voting—just the same argument that you are using there—that this would perhaps satisfy the need, and that there would not be this pressure to continue to make it——

Mr. COOPER. Well, it is always hard to be a prophet for the future. I think that there probably is some need to readjust the balance. There is still strong sentiment against majority cloture in the Senate—if the cloture rule were a little more reasonable I don't think the Senators would press toward majority cloture, given their feeling for the nature of the Senate as an institution, and the greater effectiveness of the three-fifths rule.

Senator CANNON. You have the feeling that last year, for example, that other cloture moves would have been proposed had the rule been

to require three-fifths rather than two-thirds of those present and voting?

Mr. COOPER. Last year, probably not; no.

Senator CANNON. So that you recognize that this is a tool that would very seldom have occasion to be used?

Mr. COOPER. Right.

Senator CANNON. And you yourself have pointed out, I think very ably, that the principal aim of democracy is not simply to foster simple majority rule. I think you have made a very good point there.

Mr. COOPER. Thank you.

Senator CANNON. Thank you, Mr. Chairman.

Senator COOPER. Dr. Cooper, I believe you said you had written articles and books on this subject.

Mr. COOPER. I have written an article on the previous question and its status as a precedent for cloture in the Senate.

Senator COOPER. Do you have that article with you?

Mr. COOPER. I do not have it with me.

Senator COOPER. Mr. Chairman, I would like to ask if he would file the article with the committee.

Mr. COOPER. It is a Senate document in the 87th Congress.

Senator COOPER. Very well.

Drawing from your study of this question, you do take the position that the role of the Senate in debate and decisionmaking is somewhat different from that of the House.

Mr. COOPER. Yes; I do.

Senator COOPER. Because of size, it is necessary for the House to have limited debate. In the Senate, each State is represented by two Members and, in that way, the Senate does not reflect—at least from the standpoint of population—equality of representation.

I think you concluded with a statement which has not been brought out very clearly before—that majorities are fleeting—and that these majorities could also change with the voting population.

I understand it is your conclusion that there should be opportunity for comprehensive debate; an opportunity which would not be limited by arbitrary action of the majority.

Mr. COOPER. That is correct.

Senator COOPER. And I would think it would follow that you believe that that would give assurance that the sentiments and beliefs of the country are actually represented through fuller debate.

Mr. COOPER. That is true, Senator. I see the Senate as the prime place in the institutional system where intensity and deliberation come into play, and that this is the unique role of the Senate, and that majority cloture would impair this unique role that the Senate now plays.

Senator COOPER. Thank you. I gather from your statement that you think it is the duty of the committee and the Senate to provide a rule which would give assurance of the kinds of aggressive debate which is needed and, at the same time, give more assurance that the will of the people is reflected in our decision.

Mr. COOPER. I think that it is a matter of practical judgment to draw this very difficult line in balancing on the one hand your desire to accommodate and have agreement, and on the other hand, the necessity to take some actions to relieve problems in the society.

And that this is a question over which reasonable men can differ—because it is essentially a question of estimating the extent to which action has been overly impeded by the present two-thirds rule.

Senator COOPER. You have indicated that you believe that a three-fifths rule would be better to balance the interests than either the two-thirds or simple majority rules.

Mr. COOPER. This is my feeling. I would not want to say, however, that I have come to this conclusion in the way you would deduce a geometrical therorem.

Senator COOPER. The important thing, though, is that the decision of the Senate in voting, once it can vote, should reflect the actual position of the majority of the people of our country.

Mr. COOPER. The actual position with regard to what?

Senator COOPER. The majority of the people—what the position of the majority of our people is on a particular question.

Mr. COOPER. Well, I think that the role of the legislator is to seek out areas of agreement, and then to go back and help his constituents understand why certain actions have been done, so that in a large sense the legislators job as representative is not to be merely tied to his constituents, but to be creative.

Senator COOPER. His position may not perhaps always reflect the feeling at the moment of the country as a whole.

Senator HAYDEN. I have had an opportunity to look over the document to which you have referred.

Is there any objection to including it in the record?

Mr. COOPER. No. I would regard it as a high compliment.

Senator HAYDEN. The document will be included.

(Mr. Cooper's dissertation entitled "The Previous Question" may be found as exhibit 3 in the appendix to these hearings.)

Senator HAYDEN. Roy Wilkins, and Mr. Rauh.

Do you want to appear together?

We are pleased to hear from you.

STATEMENT OF ROY WILKINS, CHAIRMAN OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. WILKINS. My name is Roy Wilkins. I am executive director of the National Association for the Advancement of Colored People and chairman of the leadership conference on civil rights. I am accompanied this morning by Mr. Joseph L. Rauh, Jr., who is vice chairman for civil rights of Americans for Democratic Action, and also very active in the leadership conference on civil rights. I appear here today on behalf of the NAACP and more than 40 other constituent members of the leadership conference whose names are attached to this statement. They have assented to the presentation of this statement on their behalf.

The leadership conference has long been on record as favoring majority rule in the Senate. We believe that this position is one shared by a vast majority of Americans. The passage of the Civil Rights Act of 1964 was possible because a great national consensus was formed, not only for passage of this law, but against the practice of unlimited talk in the Senate. We believe that this consensus was not merely in favor of ending the talkathon against the Civil Rights Act, but against the institution of the filibuster itself.

We do not believe that the passage of the Civil Rights Act of 1964 in any way lessens the need for a change in rule XXII. The fight against the passage of the act demonstrated just how hard it is under present Senate rules to pass necessary and urgent legislation when a small minority of the Senate, representing a smaller minority of the Nation's population, is determined to obstruct the will of the body and of the majority of the Nation's population.

The debate of over 75 days last spring produced no important changes in the bill. It altered few, if any, votes; it kept the Senate for this period from consideration of other legislation vital to the national interest. It demonstrated that unless it is altered, rule XXII may prove to be the device that will keep Congress in continuous year-round sessions.

The major effect of the filibuster was to prevent the Senate from considering on their merits efforts to strengthen or extend coverage of the legislation. Thus the Senate was reduced to a rule of affirming or vetoing the bill that had been sent to it by the House of Representatives.

Since 1957, when rule XXII ceased to be an absolute veto on civil rights legislation, it has served as a vehicle—and some of you will remember that prior to 1957 rule XXII did have an absolute veto on civil rights legislation because of the provision that it could not be amended except through the operation of unanimous consent—even one dissenter would serve to freeze it.

Rule XXII since then has served as a vehicle for preventing Members of this body from utilizing their own constructive approaches to the problems of civil rights and has limited them to a search for compromise that will appease the obstructive minority.

We saw this in 1957 when the vital part III of the civil rights bill of that year was deleted, a loss that has not as yet been fully compensated for. We saw it in 1960 when the Federal registrar proposal was rejected in favor of the unworkable court-appointed referee plan. We saw it in the passage of the act of 1964, in that every Senate-adopted amendment was either of a clarifying or limiting nature. The filibuster prevented even the offering of strengthening amendments.

Those who favor the retention of rule XXII recognize the effect of the rule in forcing the defeat, delay, or compromise of civil rights, social welfare, and economic legislation. In a minority report opposing any change in rule XXII in the 85th Congress, Senator Carl Curtis, of Nebraska, observed:

"I believe that unlimited debate tends to slow down and prevent the passage of legislation * * *."

We in the leadership conference agree with Senator Curtis on the effect of the filibuster much as we disagree with him on the preservation of it.

Even when it is not used in its ultimate form, the threat of the filibuster can and does result in the delay or watering down of vital legislation in the social welfare-economic fields.

This was long ago recognized by Vice President Dawes, who as presiding officer of the Senate, remarked:

The right of filibuster does not affect simply legislation defeated but, in much greater degree, legislation passed, continually weaving into our laws, which should be formed in the public interest alone, modifications dictated by personal and sectional interest as distinguished from the public interest.

Although civil rights legislation may bear the brunt of any filibuster tactics in this Congress, other needed legislation of the Great Society will be affected by the threat of filibuster legislation in which constituent members of the leadership conference in their own independent capacities have a great interest: the antipoverty program, minimum wage changes, immigration liberalization, labor laws, foreign aid, to name but a few. A filibuster against any one piece of this legislation such as the filibuster conducted last year could disrupt the whole legislative program of the administration—foreign and domestic alike—simply by limiting the time of its consideration.

The recent revelations at the Civil Rights Commission's Mississippi hearings of the shameful denial of the vote and other abuses (though not new to us) and the disgraceful events in Selma and elsewhere in Alabama cry out for a voting law that will provide an easy, safe, and speedy process for registering voters. We expect, and we shall insist upon a Federal law creating Federal registrars at this session.

We believe a majority of the people and a majority of the Senate favor such legislation. The question before this session is whether a majority of the Senate must go through an ordeal of attrition in order to express its will or whether rule XXII shall be amended to assure the Senate an opportunity to bring this vital issue to a vote after reasonable debate.

If a proposal for voting legislation sets off a filibuster, so be it. We are prepared to mobilize those forces—the chief among them the conscience of America—that made possible the passage of the Civil Rights Act of 1964. But we would prefer to do this with a more enlightened, with a more workable, rule XXII. We believe the Nation would also prefer this. We believe the Senate would prefer this.

To this end we endorse Senate Resolution 8, the bipartisan rule change sponsored by Senators Douglas and Kuchel, and Senators Case, Clark, Fong, Hart, Javits, McCarthy, McNamara, Mondale, Moss, Nelson, Mrs. Neuberger, Proxmire, Randolph, Scott and Williams of New Jersey.

The adoption of this resolution would bring about a long overdue constructive change in the procedures of the Senate—a change that would make possible the consideration by the Senate of legislation affecting the national interest after a reasonable period of rational debate. It would bring an end to the practice of obstruction solely for the sake of obstruction.

In endorsing Senate Resolution 8 we are not, as is charged by its opponents, proposing a "gag rule." Its provisions allow for ample debate before a final vote is taken. In the normal course of events we could expect a minimum of 2 weeks of debate before 16 Senators would file a petition to end debate under its provisions. The vote on ending debate would not be taken until 15 more days of debate had passed. Based on past experience, this proposal would tend to assure at least a month's full and focused debate on the pending issue. Then if cloture is adopted by the vote of 51 Senators, 100 additional hours of debate will be permitted. Assuming that all of this were to be used at the rate of 10 hours per day, an additional 10 days would be available for discussion. We can see no possibility of a bill being passed with less than 5 weeks of debate. This is adequate both for Senators to consider the merits and the Nation to make known its views, both essential steps in the passage of legislation.

Let us not lose sight of the fact, however, that the entire purpose of debate is to enable the Senate to arrive at a conclusion; to legislate. We care little how long a debate runs so long as the Senate has an opportunity to vote. We are as concerned with the right of the Senate to vote as we are with the voting rights of the citizens of Mississippi. We agree with Henry Cabot Lodge when he said—

To vote without debating is perilous, but to debate and never vote is imbecile.

We do not agree with those who hold that the filibuster is a necessary protection of minority rights. We concede that such protections are necessary, but believe they are already written into the Constitution—the Bill of Rights, the 13th, 14th, and 15th amendments, the bicameral system, the allotment of two Senators to each State regardless of size, the veto power of the President, and court review of legislation. The filibuster has served long as an extra-constitutional device, not for protection of the minority, but as a means of imposing the will of the minority on the majority. In effect it has, in certain areas of our national life, guaranteed rule by the minority.

The time has come for the Senate, once and for all time, to throw off the shackles that have prevented it from legislating freely in these restricted areas. The time could not be more opportune. It will now consider a change in rules under its constitutional authority to determine the rules of its proceedings, free from any procedural obstructions. It will be considering the proposed rule changes as if the Senate had just convened, because of the manner in which the Senate has agreed to proceed. We have the opinions of two distinguished past Vice Presidents, one from each political party, Messrs. Barkley and Nixon, that under these circumstances a majority of the body may constitutionally adopt its rules. In other years the Senate has asserted its authority to determine its rules, but avoided its duty to do so by motions to table, to refer to committee, and other procedural devices. The time has come for the Senate to meet this issue on its merits, and we urge it to do so.

In passing, it is pertinent to note that the House of Representatives has to some extent met a similar problem by liberalizing its rules in this session of Congress to accelerate consideration of legislation. In a world of vast and rapid change, one of the tests of survival is whether we can adapt to necessary changes prudently and with dispatch. We believe that to meet the challenge of change, the least the Senate can do at this time is to reject those procedures that are shown to be outmoded and obstructive. The first step in this necessary reform would be the adoption of Senate Resolution 8.

I would offer one last word. Already rumors abound that the Senate will not take up the rules change when this committee files its report, but will delay consideration. The history of delay is the history of defeat. We know from bitter experience that the refusal to meet this issue early in the session of Congress means it will not be met.

We remember the many times when attempts to change the rule late in a session of Congress have been frustrated by the Senate's urge to adjourn. We cite as an example 1961 when the proposed change, despite having considerable support in the Senate, was tabled after only 2 days of debate because it was being considered in September, when the urge to leave Washington was irresistible.

This Senate has a full legislative schedule before it. Unless it meets the problem of the rules change now, that schedule, we fear, will preclude its being met. For this reason, we urge that once this committee's report is filed, the Senate proceed to its consideration without delay.

Mr. Rauh has some legal thoughts to add to this presentation.

STATEMENT OF JOSEPH L. RAUH, JR., VICE CHAIRMAN FOR CIVIL RIGHTS OF AMERICANS FOR DEMOCRATIC ACTION AND GENERAL COUNSEL OF THE UNITED AUTOMOBILE WORKERS

Mr. RAUH. Thank you, Mr. Chairman, Senator Hayden, Senator Cannon, Senator Cooper.

My name is Joseph L. Rauh, Jr., I am vice chairman for civil rights of Americans for Democratic Action and general counsel of the United Automobile Workers. I appear here this morning to assist Mr. Wilkins in presenting the viewpoint of the constituent members of the Leadership Conference on Civil Rights.

I would like to ask that the list of 42 organizations which is attached to the joint statement of Mr. Wilkins and myself be included in the record at the close of our 2 statements, so that persons reading the hearings will recognize the tremendous support for the position we are taking.

Senator HAYDEN. Is there any way of obtaining the addresses of these organizations?

Mr. RAUH. Yes, sir; we would be happy to supply the addresses. As a matter of fact, we will supply them to Mr. Watkins this afternoon, so they will not hold up the printing of the record.

(The list referred to follows:)

COOPERATING ORGANIZATIONS OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS ENDORSING STATEMENT OF ROY WILKINS BEFORE THE SENATE RULES COMMITTEE, MARCH 1, 1965, IN SUPPORT OF SENATE RESOLUTION 8

Amalgamated Clothing Workers of America, Mr. Jacob S. Potofsky, general president, 15 Union Square, New York, N.Y.

American Civil Liberties Union, John Pemberton, Jr., executive director, 156 Fifth Avenue, New York, N.Y.

American Jewish Committee, Morris B. Abram, 165 East 56th Street, New York, N.Y.

American Jewish Congress, Rabbi Joachim Prinz, president, 15 East 84th Street, New York, N.Y.

American Veterans Committee, Dr. Paul P. Cooke, national chairman, 1830 Jefferson Place, NW., Washington, D.C.

Americans for Democratic Action, Leon Shull, national director, 1341 Connecticut Avenue, NW., Washington, D.C.

Anti-Defamation League of B'nai B'rith, Benjamin R. Epstein, national director, 315 Lexington Avenue, New York, N.Y.

B'nai B'rith Women, Mrs. Ruth Mondschein, 1640 Rhode Island Avenue, NW., Washington, D.C.

Catholic Interracial Council, Mr. George K. Hunton, 20 Vesey Street, New York, N.Y.

Congress of Racial Equality, Mr. James Farmer, 38 Park Row, New York, N.Y.

Council for Christian Social Action, United Church of Christ, Mr. Walter S. Press, chairman, 289 Park Avenue, South, New York, N.Y.

Dalta Sigma Theta Sorority, Allene Tooks, executive director, 1814 M Street NW., Washington, D.C.

Episcopal Society for Cultural and Racial Unity, John B. Morris, executive director, 5 Forsyth Street NW., Atlanta, Ga.

Industrial Union Department—AFL–CIO, Mr. Walter P. Reuther, president, Solidarity House, 8000 East Jefferson, Detroit, Mich.
International Union of Electrical, Radio & Machine Workers, Mr. James B. Carey, president, 1126 16th Street NW., Washington, D.C.
Iota Phi Lambda Sorority, Ossie Ware Mitchell, national president, 722 South Oporto Avenue, Birmingham, Ala.
Japanese-American Citizens League, Masau Satow, national director, 1634 Post Street, San Francisco, Calif.
National Alliance of Postal Employees, Mr. Ashby Smith, president, 1644 11th Street NW., Washington, D.C.
National Association for the Advancement of Colored People, Mr. Roy Wilkins, 20 West 40th Street, New York, N.Y.
National Association of Colored Women's Clubs, Inc., Mrs. Mamie B. Reese, 1601 R Street NW., Washington, D.C.
National Association of Negro Business & Professional Women's Clubs, Inc., Mrs. Marion E. Bryant, national president, 652 Bryn Mawr Road, Pittsburgh, Pa.
National Catholic Social Action Conference, Rev. William A. Ryan, president, 1312 Massachusetts Avenue NW., Washington, D.C.
National Catholic Conference for Interracial Justice, Mathew Ahmann, executive director, 21 West Superior Street, Chicago, Ill.
National Council of Catholic Men, Mr. Frank H. Heller, president, 100 Branifle Airway Building, Dallas, Tex.
National Council of Catholic Women, Margaret Mealey, executive director, 1312 Massachusetts Avenue NW., Washington, D.C.
National Council of Jewish Women, Mrs. Joseph Willen, president, One West 47th Street, New York, N.Y.
National Council of Negro Women, Mrs. Dorothy Height, president, care of National YWCA, Lexington Avenue, New York, N.Y.
National Jewish Welfare Board, Moe Hoffman, Washington representative, 1637 Massachusetts Avenue NW., Washington, D.C.
National Newman Club Federation, Mr. Julius C. Gilbertson, president, 1312 Massachusetts Avenue NW., Washington, D.C.
National Urban League, Mr. Whitney Young, Jr., executive director, 14 East 48th Street, New York, N.Y.
Southern Christian Leadership Conference, Rev. Martin Luther King, Jr., 334 Auburn Avenue, Atlanta, Ga.
State, County & Municipal Employees, Jerry Wurf, president, 815 Mount Vernon Place NW., Washington, D.C.
Transport Workers Union of America, Mr. Michael Quill, president, 210 West 50th Street, New York, N.Y.
Union of American Hebrew Congregations, Albert Vorspan, director, 838 Fifth Avenue, New York, N.Y.
Unitarian Universalist Fellowship for Social Justice, Mr. Robert E. Jones, executive director, 245 Second Street NE., Washington, D.C.
Unitarian Universalist Association—Commission on Religion and Race, Mr. Robert Jones, 245 Second Street NE., Washington, D.C.
United Auto Workers of America, Mr. Walter P. Reuther, president, Solidarity House, 8000 East Jefferson, Detroit, Mich.
United Steelworkers of America, Mr. David McDonald, president, 1500 Commonwealth Building, Pittsburgh, Pa.
United Transport Service Employees of America, George P. Sabattie, president, 444 East 63d Street, Chicago, Ill.
Women's International League for Peace & Freedom, Milnor Alexander, 123 Maryland Avenue NE., Washington, D.C.
Workers Defense League, Rachelle Horowitz, executive secretary, 112 East 19th Street, New York, N.Y.
Young Women's Christian Association of the U.S.A., Miss Ethlyn Christensen, National Board, YWCA, 600 Lexington Avenue, New York, N.Y.
Zeta Phi Beta Sorority, Dr. Deborah P. Wolfe, grand basileus, 1734 New Hampshire Avenue NW., Washington, D.C.
National Federation of Settlement & Neighborhood Centers, Winslow Carlton, president, 232 Madison Avenue, New York, N.Y.

Mr. RAUH. Mr. Wilkins has presented an unanswerable argument for a change in rule XXII to make majority rule prevail in the U.S. Senate as it does in other legislative bodies.

I should like only to add a single point, one that might be termed a legal point. It is simply this: The Senate, when it takes up the matter of changes in rule XXII later this month, has the power to make its decision on what those changes should be, unfettered by any restrictive rules of earlier Congresses.

Of course the Senate may never reach the question just posed. When Majority Leader Mansfield calls up the matter of changing rule XXII, it is hoped that the opponents of change will allow the Senate to work its will without a filibuster. We hope that at long last this much-debated and little-decided issue can be determined by the Senate on its merits.

But, if the opponents of change in rule XXII should undertake a filibuster against such change, then there will indeed come the moment of truth for the U.S. Senate. A majority of the Senate of the 89th Congress has the right to terminate the filibuster under the Constitution and to determine what rules shall govern the Senate during the period of the 89th Congress. The civil rights movement has the duty to see that that right is exercised.

When the Senate takes up changes in rule XXII, the legal situation will be exactly as it was on the opening day of Congress, January 4. On January 8, a unanimous consent agreement was adopted sending the Anderson-Morton (S. Res. 6), and Douglas-Kuchel (S. Res. 8), resolutions to the Committee on Rules and Administration with full protection of "all existing rights" at the opening of Congress.

The legal situation of the Senate when it takes up rule XXII will thus be as it was on January 4: that the Members of the Senate at the opening of the 89th Congress have undiluted power to determine the manner in which they will operate during that Congress. What the Senate of some earlier Congress did cannot affect what a majority of the Senate of this Congress can do. The basic principle is rooted both in article I, section 5, of the Constitution and in the historic democratic principle that the elected representatives of the people shall determine the destiny of the Nation unhampered by the dead hand of the past. Just as the Senators of the 1st Congress, meeting in 1789, had undiluted power to determine the rules under which they would operate, so the Senators of the 89th Congress, meeting in 1965, have undiluted power to determine the rules under which they will operate. No rules of the Senate of an earlier Congress protecting filibusters can obstruct this right to adopt rules to govern the transaction of business. As Vice President Nixon said in his advisory rulings in 1959—

> the majority has the power to cut off debate in order to exercise the right of changing or determining the rules (105 Congressional Record 8–9)—

and—

> at the beginning of a new Congress the Senate can proceed to adopt new rules or to amend old rules without being inhibited by any previous rule which might restrict or deny the constitutional right or power of a majority of the membership of the Senate to determine its rules (105 Congressional Record 102).

Having paid this tribute to the Republican leader of the Senate some years back, I should also mention, as did Mr. Wilkins, that Vice President Barkley informed persons that he was prepared to make this same advisory ruling, but the matter was tabled with such dispatch

that it never came up. But both Vice Presidents Barkley and Nixon did make clear that this was the view on which they would operate.

And, of course, Vice President Humphrey was the leader of the group which started this whole assumption of the right of the Senate of a new Congress to act, and there can be no doubt what his views are on this matter as well.

I think Senator Case read them into the record at this hearing this morning.

So, if a filibuster should develop against a change in rule XXII—and we hope it does not—a majority of the Members of the Senate now sitting can terminate that filibuster. As soon as the supporters of change in rule XXII believe that there has been full and fair debate they have a right under the Constitution and under the Nixon and other Senate precedents to move to terminate debate, and this motion will be voted up or down by a majority of the Senate.

The 100 Senators now elected and sitting have a right to determine the rules to govern them in this Congress. We cannot urge too strongly that this legal right be exercised now and that majority rule be reestablished in this great body.

Senator HAYDEN. Any questions?

Senator COOPER. Mr. Rauh—I can only state my personal view. I agree, also, that the Senate can make its rules at the opening of a new session, and further that any rule can be changed by a majority vote.

But I am interested in your statement when you say that—on page 2—

> as soon as supporters of change in rule 22 believe there has been full and fair debate they have a right under the Constitution and under the Nixon and other Senate precedents to move to terminate debate— and this motion will be voted up or down by a majority of the Senate.

I would agree it can be voted up or down by a majority of the Senate. But how could it be terminated, the debate?

Mr. RAUH. I believe—and this was the view of Vice President Nixon and, I believe, Vice President Barkley and the clearly expressed view of Vice President Humphrey—that if Senator Cooper, for example, moves to terminate debate under the Constitution and Senate precedents, it is the obligation of the Vice President to put that matter up to the Senate for a vote, not for debate.

If Vice President Humphrey believes, as Senator Humphrey said as a Senator, that this matter should be put to the Senate for a vote, then the Vice President, with or without a statement of his views on the law, which he could give or withhold as he saw fit—Vice President Nixon gave it—would place the matter before the Senate for a vote.

What I believe a Vice President should do, what Vice President Nixon in effect said he would do if such a motion were made is this:

> If a motion is made to cut off debate, I will hold that in order and put it to the Senate for a vote.

This was the view taken by Vice President Humphrey as a Senator.

Therefore, I would presume that if one or more Senators, after debate, and convinced there is a filibuster, moves under the Constitution to close debate, that Vice President Humphrey would put that motion to the body for a vote—not for simply interminable debate. And that is what I understand Vice President Nixon to have said, that is what I

understand Vice President Humphrey's position to be on the basis of his previous statements. I have not discussed it with him since he became Vice President.

Senator COOPER. What you are saying, then, is that you would believe that a Vice President, on his own motion, at any patricular time could hold that there had been enough debate upon this question.

Mr. RAUH. No, sir; I think that it can only be done on the motion of a Senator, and then it would be decided by the Senate—because, for example——

Senator COOPER. I know there would have to be a motion. But that would come into conflict immediately with views held by him that they should have the right to speak upon it.

Mr. RAUH. Well, if you were to say that a motion to close debate under the Constitution is debatable forever, you are saying in effect that what happened in the 1949 Congress determines the rules under which this body acts, and that a majority of this body can never close debate.

Now, I have more respect for the U.S. Senate than to feel that it can be fettered by what happened before.

Suppose in 1789 the first Senate had passed a rule that you can never close debate and can never change that rule. Obviously no one would think that that rule could prevent a majority of the body elected and serving in 1965 from acting. But that is exactly what it results in if you say that the Vice President, when a Senator moves under the Constitution at the opening of Congress to close debate, cannot put that motion to the Senate for a vote—because if you say he cannot put it to the Senate for a vote—you are then saying the Senate is impotent to act by majority will at the opening of a new body, and is bound by what happened long ago.

I don't believe this. I believe that article I, section 5 of the Constitution, which provides that each House may make its own rules not only applies to the House and the Senate, but applies to each new election period. Just as the House determines its rules at the opening of each Congress, so the majority of the new Senate has the right to determine its rules.

You also have the right to leave it alone. For example, if no one had moved on opening day to change the rules, going ahead under the old rules would have been ratification. But once there is an effort to prevent ratification, then the new body, the Senate of the new Congress, must have a way under the Constitution of exerting its majority power to adopt rules.

I do not agree with Professor Cooper's statement made here a little while ago that there is nothing in our Constitution or our democratic processes that makes a majority any better than anything else. I think we live by majority rule, with protection for minorities. But in America we do live by majority will. And I cannot accept his interpretation of that.

Senator COOPER. What you are really saying is that the rules do not apply in any way, and that if a Member of the Senate, after debate upon this question of taking up the question of changing the rules, then moved to close debate, you believe that it is inherent in the power of the Senate, to close debate by a majority vote.

Mr. RAUH. Precisely, sir.

Mr. WILKINS. You see, Senator Cooper—I want to say I deeply appreciate your attitude over the years on this matter. But essentially, the adoption of this point of view that you have stated—namely, the belief of some Senators that this is a debatable motion—in effect would reinstate the rule which the Senate threw out in 1957, the second section of which said that a motion to impose cloture cannot have cloture applied to it. In other words, it cannot be terminated in any fashion.

Now, the Senate, in 1957, felt that this statement of impotency was unworkable, and threw it out. It adopted a two-thirds rule.

Now, in effect, saying that a motion to terminate debate is debatable, and presumably with no rule applying to the termination of debate, you will revert to this position in which the Senate as one person expressed, locked itself in.

Senator COOPER. I understand the dilemma. That is the reason I asked the question.

Turning back to Mr. Wilkins' testimony—as I say, I appreciate very much your comment—I recognize, in my service in the Senate, the filibuster, of course, has been used chiefly, and I would say almost altogether against civil rights legislation. I think you know I have supported civil rights legislation. But that is not the question before us.

I find on page 2 of your testimony, the last paragraph, where you suggest certain legislation which would come before the Congress, and in your judgment should be passed. I might agree with parts and might not agree with parts. Others the same way.

I think this is one problem that is an assumption by some people or some groups of people that there is certain legislation that ought to be passed, and that they are making this judgment—and, after all, it is the judgment of the Congress as to whether this legislation or any other type of legislation should be passed.

I don't think it is the strongest argument, for a change in rule XXII to take the assumption that there is certain types of legislation that ought to be passed, and, therefore, we need the change in rule XXII—accepting your judgment about civil rights legislation.

But I think you appreciate what I am saying. You say "because we think this ought to be passed, therefore the Congress ought to change rule XXII to assure that it be passed."

Mr. WILKINS. Well, Senator, I can understand that, and I sympathize with that view. But I am sorry, I don't interpret this language as being our assumption that this legislation ought to pass. I interpret the language as characterizing legislation which has been advanced by certain other people; namely, the administration and its supporters, as being "needed" legislation. That is not our characterization—although in most of these categories, we would agree that this is desirable legislation.

Senator COOPER. I am not trying to say now that I oppose or support the particular bills you have discussed. I don't think that is the point—even though the President recommends them. It is a question of whether they will finally be approved or not by the Congress. And I must say that I don't think it is the strongest argument for a change in rule XXII.

Mr. WILKINS. It is an effort, of course, to enlist as much support for the position as possible among those who do conceive this type of legislation to be needed. And we won't characterize them except to say that these people have supported the concept of the Great Society. And we, like you, reserve the right to say whether any particular list of legislation is regarded as needed.

Senator CANNON. Senator Cooper has made a very good point there. I think your choice of language in that first paragraph at the top of page 3 is very unfortunate where you say, "We expect and we shall insist upon a Federal law creating Federal registrars in this session."

I want to remind you it is the prerogative of the Congress to decide what is going to be passed, whether you expect and insist it is going to be passed or not. I may agree with you completely. But I say that type of language in my opinion is rather an ill choice or poor choice of language to come before the Congress and say, "We would like to see rule XXII changed."

Now, another point—a point that Senator Cooper raised here in the legal aspects—how do you actually find authority for terminating debate?

You are imposing the judgment of the Presiding Office and the one man who makes the motion to terminate debate. Assuming that we proceed on the assumption that none of the rules heretofore in existence are binding, where is your basic assumption of authority to terminate debate at that point?

Mr. RAUH. That authority resides in the same place that it resided in 1789, when the Senate first started to make its rules.

Let us say that in March 1789, when the Senate met for the first time, that one or two of the Senators from States that didn't want the Senate to operate, had started to filibuster before you had rules. I would say that the Constitution of the United States, which created a Senate, created a body that can function. Therefore, if one of the great Senators of 1789 had arisen and said, "Under the Constitution, we have the right to organize; we have the right to set rules; we have the right to function—I, therefore, move we close debate on the rules," that that motion should properly have been put by the Vice President to the then body to decide if they wanted to close debate and it would be decided by majority rule, the basic principle of the Constitution.

And I say today it is the same because today you have a body which has a right to determine its own rules. And I don't see that the situation is any different than it was if you had had a filibuster to try to prevent the determination of rules on March 4, 1789.

Senator CANNON. But isn't it inherent in the process of determining its own rules—isn't it inherent that you have to debate what those rules might be?

Mr. RAUH. Of course, Senator.

Senator CANNON. So, when a motion to terminate debate on the rules is proposed, this gives me difficulty. How does the Presiding Officer rule: "All right, I am going to shut off debate, and we are going to put this to a vote."

Mr. RAUH. He doesn't shut off debate. He puts it to a vote of the Senate whether they want to shut off debate. The Presiding Officer never shuts off debate. What he does is to put it to the Senate for a vote.

Now, let's suppose something: Suppose Senate Majority Leader Mike Mansfield calls up Senate Resolution 6 or 8 and, an hour later, a Senator moves to shut off debate under the Constitution. Well, of course, the Senate would vote that down. As a Senator, I would vote "No." The Vice President would not be shutting off debate. He would be putting it to the Senate to determine its will. And, of course, if it came too soon, it would be voted down.

But if, after a month of debate, Senator Cooper arises and says "Under the Constitution, I think we have a right to determine our rules," then if the Vice President, as he should, puts it to the Senate for a vote, presumably, the Senate would uphold the motion to close debate.

Senator CANNON. You say "presumably." You are getting to the practical solution rather than the legal solution that I am looking for And I am saying here: As the Presiding Officer, suppose the Senator gets up and moves to terminate debate, and another Senator tries to get the floor—recognition—to debate on that particular motion.

Now, this is the legal problem that gives grave difficulty. And I can agree with you that as a practical solution undoubtedly if this process is followed, and the debate has gone on for a month or so, then perhaps at some point there you would not run into the problem. But if you do run into the problem, what does the Presiding Officer do—when a man is striving to get recognition on the floor? Does he say "I am going to put the question," and ignore the man that is trying to receive recognition?

Mr. RAUH. I will say on this, Senator Cannon, that I have written some of the briefs that have been used since 1953 on this, I have read all the discussions of it, including the great statements by Senator Thomas Walsh in 1917, when he made the same point I am making. I always thought there was something new you could dig up. But after I made this proposition, we did some research, and Senator Walsh had said everything that I am now saying, much better, back in 1917.

But it seems to me that the Vice President has got a decision to make. He can only go one of two ways. He can say, "I can't cut that man off and put it to a vote," which means that the Senate can never get to a vote as long as it cannot meet the two-thirds rule of a previous Congress. Or the Vice President can say "Under the Constitution, I consider this body has the same full powers as it had in 1789, and, therefore, I will put it to the Senate to decide whether it wants to cut off debate."

The Vice President has the choice.

I say, frankly, that Vice Presidents Nixon and Barkley took one position. Now, President Johnson took a different position. I am sure that all were honorably choosing their courses when they did this.

I am only saying that it seems to me that logic and constitutional law support the position that Vice President Nixon, Vice President Barkley, and Vice President Humphrey when he was a Senator, took—namely, that in this conflict between saying the Senate can never shut off debate without the two-thirds, or the alternative of putting it to the Senate for a vote under the Constitution, I think the latter is clearly correct.

Mr. WILKINS. The alternative, Senator is interminable debate.

Senator CANNON. I am not thinking about what the alternative is. I am thinking from the standpoint of the presiding officer—and I have had a little experience in that, and you are sitting there, and the motion has been put, and you have possibly six Senators trying to get recognition on the floor. This would be certainly a very, very difficult decision to make, to say, "I am not going to recognize those six Senators." As a matter of fact, it might be questionable as to whether or not you could get a vote under those circumstances, if you have half a dozen people trying to get recognition on the floor.

Mr. RAUH. Presumably, Senator, in that situation a majority of the Senate would vote not to do it at that point, and then the motion would be defeated. Presumably the filibuster would go on, and another month later Senator Cooper would make the motion again. Maybe that time it would pass.

I am only saying that a majority of the Senate at some time has the power to act.

You are not impotent. And, therefore, I really feel that we have done a service here in presenting the method by which the Senate can, if it decides, close debate.

Senator COOPER. I think what you are saying is that the Vice President, if he so rules, in effect would be using the precedent of the previous question, and would consider the motion by moving the previous question. Then the Senate itself would vote whether or not his ruling was in order; that is, whether debate could be cut off at that point. And if it voted, a majority could cut off debate. If not, there would be further debate.

Isn't that about the situation?

Mr. RAUH. Yes, sir.

Senator COOPER. Let me say that I have made a study of that. In fact, that is the procedure followed in the House of Commons. The Speaker, after what he considers to be a reasonable time, either on motion or without motion, declares there has been enough debate, and then a vote is taken upon that.

Mr. WILKINS. Mr. Chairman, Senator Cannon previously raised a question on language in connection with a voting bill.

Senator, I am not certain that the language is perfectly chosen. But I would like to say this: As used within the general context of this rules change, the type of legislation and the conditions which everybody recognizes ought to have some remedy, these factors do have a bearing on the consideration of the procedure by which you attain the objectives. And if the language outlining the voting situation seems to be a little preemptory—I don't concede that it is—but if it seems to be, I offer only the excuse that this language addresses itself to a condition in our democracy which cannot be tolerated, and for which a remedy, if it means altering procedures, ought to be sought forthwith.

The registrar proposal has been made only after a demonstration of the most crass and widespread disenfranchisement in the South. And I would like to point out that the registrar proposal was first made, the recommendation was first made by the Federal Civil Rights Commission, in which two southern Members joined four nonsouthern Members in a unanimous recommendation. They had seen first hand the conditions there, and they recommended the voter registrar proposal.

Now, perhaps in our zeal to secure the revision of rule XXII, the language might have been a little excessive. When you consider it in relation to the objective, it is not excessive; in fact it is very restrained, when it addresses itself to disenfranchisement.

I offer only that as a comment on it, and not as an excuse for that language.

Senator HAYDEN. Any further questions?

Mr. WILKINS. I would like to express appreciation, Senator Cannon, for your vote for cloture, and the interest that the chairman has expressed in this matter over many years. Of course Senator Cooper has voted for cloture and voted for this matter. But Senator Cannon, we are very grateful for your support, also.

Senator HAYDEN. Thank you.

Senator Thurmond?

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you today and express my views on the three proposals which you have pending before you designed to amend rule XXII of the Senate.

The first of these proposals is Senate Resolution 6, introduced by the senior Senator from New Mexico (Mr. Anderson) for himself and the senior Senator from Kentucky (Mr. Morton). This resolution would amend rule XXII to provide that cloture could be invoked by three-fifths of the Senator present and voting, instead of the requirement that two-thirds of the Senators present and voting are necessary to invoke cloture.

The second proposal before this subcommittee is Senate Resolution 8, introduced by the senior Senator from Illinois (Mr. Douglas) on behalf of himself and numerous other Senators. The main feature of this proposal is to allow cloture to be invoked by a simple majority of the Senate—51 Senators. If cloture is successfully invoked, thereafter debate on the particular measure under consideration would be limited in all to not more than 100 hours, which time would be equally divided between the majority and minority leaders.

And finally, the third proposal before this subcommittee is Senate Resolution 16, introduced by the senior Senator from Oregon (Mr. Morse), which would amend subsection 2 of rule XXII which would allow cloture to be invoked by a simple majority of the Senate after a particular measure or motion has been pending before the Senate for 7 calendar days.

Needless to say, Mr. Chairman, all three of these resolutions represent a clear and present danger to the continuation of the Senate as the most effective deliberative legislative body the world has ever known.

Extended debate, or if you prefer, filibuster, is a weapon as old as parliamentary procedure and is justified as man's last defense against what Aristotle first recognized as the "tyranny of the majority." It is impossible to determine when its use first began, when the first "leather lunged, iron legged" men began to stand up in forums and literally talk to death public measures they deemed obnoxious.

When Julius Caesar was praetor (according to Suetonius), he staged one of the first recorded filibusters. Alone of the Roman senators, he was bitterly opposed to a measure to condemn and execute the Catiline conspirators. Caesar began what started out as an argument against conviction, and quickly developed into a full-fledged filibuster against the measure. After some time, the Roman guard entered the chamber with loud threats against Caesar's life, began thrusting at him with their swords, until his friends, fearing for his life, covered him with their togas and ushered him from the senate.

As consul, Caesar himself was victimized by this same stratagem practiced by Cato the younger. Caesar was anxious to pass a farm bill, and Cato the younger started to filibuster against it. Outraged by the same practice he had indulged, Caesar ordered the sergeant at arms to eject Cato from the chamber. When this officer performed his duty, the entire senate left the chamber with Cato, as a demonstration of their disapproval of this arbitrary conduct. Thereafter, to the end of the Roman Republic, there was no attempt to limit debate in the senate, and filibusters flourished on many occasions.

The Romans undoubtedly carried the art and practice with them through western Europe and into England, where we next find filibusters used defensively against tyranny of a majority in forums. In 1604, the British Commons sought to curb filibusters by providing for "submission of the previous question," and while this had the result of terminating debate and bringing the issue to a conclusion, ways were still found to debate and delay extreme proposals for legislative enactment.

Edmund Burke, Parnell, and other members of the Commons were adept at finding parliamentary means of opposition. They used mostly the ruse of forcing rollcalls or divisions. Parnell, a great and fearless Irishman, led the famout battle of 1881 to obstruct all business of Commons and compel public attention to the Irish home rule bill. With a little group of 24, Parnell dominated the house, forced endless rollcalls, raised nearly 2,000 points of order, and made over 6,000 speeches.

It was on this occasion that Speaker Brand declared:

> under the operation of the accustomed rules and methods of procedure, the legislative powers of the House are paralyzed. A new and exceptional course is imperatively demanded * * *.

Then the House adopted the rule of "urgency" under which the Speaker might put the main question, in itself a form of cloture against which the opposition fought, without success, tooth and nail.

France, too, had her troubles. In fact, "cloture" (as opposed to English closure) is a French word. It was introduced in the French parliamentary procedure in 1814.

The United States borrowed "filibuster" from the English, and gave it its name. The word itself is derived from "filibusteros," West Indian pirates who sailed in small vessels called filibotes or fly boats. Tracing the derivation of the term, former Congressman Luce, of Massachusetts, in "Legislative Procedure," recounts that the term "came to be applied to all military adventures, and then to legislative minorities who used what the majority deemed piratical, disorderly, lawless methods."

Filibustering began in the Continental Congress, and the history of legislative procedures since 1789 is a recitation of the attempts of minorities to thwart "the tyranny of the majority." There was a protracted filibuster during the fight to locate the Capital of the United States, a debate so long that Fisher Ames wrote to Timothy Dwight of "this despicable grogshop contest, whether the taverns of New York or Philadelphia shall get the customs of Congress * * *." There was another long filibuster on the impeachment of Judge Chase, 1803, and over the revival of the Non-Intercourse Act of 1809.

It is not surprising that by the time the National Government was formed, there were many men like John Randolph, of Virginia, John Marshall, and others who were adept at thwarting a willful majority of the moment. In nearly every State legislature, as early as 1650, the filibuster was a common device, and it was used extensively in a number of the State conventions called to ratify the Constitution.

Members of this committee are all too familiar with the history of attempts to limit debate in the U.S. Senate. The matter has been discussed in the Senate repeatedly, particularly in the last few years. rule XXII was the first real inroad on the right of unlimited debate in the Senate. The constitutional majority requirement has now been weakened by permitting limitation of debate or cloture by a vote of two-thirds of the Members present and voting.

The history of the operation of the existing cloture rule demonstrates beyond question that the Senate can, under this rule, invoke cloture when there is a majority consensus to end debate. The Senate invoked cloture on the communications satellite bill, and it subsequently invoked cloture on the so-called civil rights bill. If it could invoke cloture on a measure so injurious to the interest of a major section of the country, if not the entire country, and on a bill which so flagrantly abused constitutional principles, as was the case with the so-called civil rights bill—there can be little doubt of the Senate's ability to invoke cloture on any measure for which there is a loud public clamor combined with determined administration support.

Experience demonstrates that the present rule XXII does permit—at least from a practical standpoint—to a minority opposition the opportunity to express its views at some length. To further weaken the minority's right of debate would not substantially enhance the ability of a majority to enact any particular piece of legislation, but it would further impede the now remaining right of the minority to present its case in public debate.

I would remind the committee that for the first time in years, the division between the parties in the Senate is such that the majority party is large enough to command a constitutional majority of two-thirds of the membership, although only a two-thirds majority of those present and voting is necessary to invoke cloture. Further inroads on the right of the minority to conduct extended debate can only be interpreted, therefore, as an attempt to convert our political structure toward a one-party system. Since the opposition is now lacking the votes to block legislation, its sole effect would be to stifle the very voice of criticism by the minority party.

Our Government owes much of its success to the fact that the exercise of sovereignty by the people is facilitated by the Senate's full and free debate on public issues. To further curtail this basic function of the

Senate would be to weaken further the entire political system on which our Nation has based its hope for freedom and prosperity. I urge the committee to reject all of the pending proposals to amend rule XXII, lest our country fall victim to that historical nemesis of freedom, self-government, and statehood—the "tyranny of the majority."

I wish to thank the able Senator and the members of this subcommittee for their courtesy in hearing me.

Senator HAYDEN. Thank you.

The committee will stand in recess until 2 o'clock this afternoon.

(Whereupon, at 12:20 p.m., the committee recessed, to reconvene at 2 p.m., the same day.)

AFTERNOON SESSION

Senator HAYDEN. The committee will be in order.

We will be pleased to hear you, Senator Miller.

Senator MILLER. Thank you, Mr. Chairman.

Senator HAYDEN. As I understand, you propose to amend the third paragraph of rule XXII by substituting words.

We will place the language to be stricken in the record, and then place your amended language thereafter.

(The amendment referred to follows:)

[Omit the part in black brackets and insert the part printed in italic]

[And if that question shall be decided in the affirmative by two-thirds of the Senators present and voting, 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.] *And if that question shall be decided in the affirmative by three-fifths of the Senators present and voting and also by a majority of the Senators affiliated with each of the two major political parties present and voting, 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.*

STATEMENT OF HON. JACK MILLER, A U.S. SENATOR FROM THE STATE OF IOWA

Senator MILLER. May I say that I understand that really the basic resolution being considered by the committee is Senate Resolution 6.

My purpose in appearing before the committee is to suggest that the committee consider not only Senate Resolution 6 but, also, my Senate Resolution 82 or, possibly, alternatively consider amending Senate Resolution 6 by the substance of my Senate Resolution 82.

Mr. Chairman, my proposal I do not believe has heretofore been made. We did some research on this subject and we could not find that a similar proposal has been made during the many occasions on which amendments to Senate rule XXII have been considered.

My philosophy of this is that the subject matter of any unlimited debate in the Senate—which is so important as to result in what might be called a filibuster, or very extended debate—should be such that, if we are to close off debate, it ought to represent strong bipartisan feeling.

I think it would be most unfortunate if the day would come when, under the rules of the Senate, the majority side of the aisle could choke off debate by the minority side of the aisle.

I might say that since I have been in the Senate—this is now my fifth year—that I have observed that when we have voted to invoke cloture that the vote has been supported by a majority of the members of each of the two major parties.

I think that that is a very healthy indication of the sentiment of the country. This was done in the case of the civil rights bill; it was done in the case of the communications satellite bill, proposed by the late President Kennedy.

I might say it is my recollction that, in connection with the latter, I do not recall that any of the members of the minority party participated in the filibuster.

But be that as it may, Mr. Chairman, my proposal is that we reduce from two-thirds of the Members of the Senate present and voting to three-fifths of the Members of the Senate present—the statutory membership of the Senate, the requirement for invoking cloture, with this added proviso—that a majority of the Members of the Senate, from each of the two major political parties, join in that vote.

Senator HAYDEN. That would be an amendment to the proposal by Senator Douglas.

Senator MILLER. Yes, sir. I might say last year, when this was a matter before the Senate, I offered an amendment to the pending resolution by Senators Anderson and, I believe, Morton, which called for a three-fifths vote. My amendment, then, would have provided for the three-fifths vote, with the proviso that a majority of the members of each of the two major political parties also join in the vote on cloture.

It is just that simple but I think that it is important. Because, as I said earlier, the failure to muster a majority of the Members of each of the two major political parties in invoking cloture might prove very detrimental to the harmony needed in the U.S. Senate to implement whatever legislation is being subjected to this consideration.

I don't believe that the simple vote of a majority party is adequate for this purpose. One of the reasons for the extended debate in the Senate is to protect minority interests in the States and in the population. Minority interests exist in the case of the minority party. And wheher it is Republican today or Democratic tomorrow, I think that those minority interests ought to be protected. They could not be protected if a three-fifths vote was all that was necessary to invoke cloture, and three-fifths of the Members of the Senate consisted of Members of the major political party or majority political party and they decided to choke off the debate by the Members of the minority party.

That, in brief, Mr. Chairman, is my proposal.

I would be most happy to attempt to answer any questions that the chairman or any of the other members of the committee might have.

Senator HAYDEN. Frankly, I never had an occasion to examine into this matter. I assure you this will receive very serious consideration from the committee.

Senator MILLER. Thank you.

Senator COOPER. As I understand it, Senator Miller, what you propose in addition to a three-fifths vote is that a majority of each party must have voted favorably—and joined in the three-fifths vote.

Senator MILLER. That is correct.

Senator COOPER. You are thinking in terms of protecting the minority interests of the parties, as well as any other minority interest.

Senator MILLER. Well, may I say—that might be one way to state it, Senator Cooper. But I think that I would rather put it that I am thinking in terms of the minority interests of the people represented by that minority group, rather than the party.

Actually, it might not even work out that way, because I am sure we can envision a situation in which the Members of the minority side of the aisle in the Senate might come from more populous States, and in fact represent the majority thinking of the people of the United States.

Here, again, my proposal would cover, or offer that protection.

Senator COOPER. Thank you.

Senator HAYDEN. We thank you for your appearance.

Senator MILLER. Thank you, Mr. Chairman.

Senator HAYDEN. The subcommittee has received written statements from Senator John L. McClellan, Senator Hugh Scott, Senator John Sparkman, and Prof. William Buchanan.

Also, Senator Herman E. Talmadge has requested that, in lieu of a written statement, his individual views as expressed in the report of the Special Subcommittee on Amendments to rule XXII to the Committee on Rules and Administration during the 85th Congress be included in these hearings. In addition, during his testimony before the subcommittee, Senator Jacob K. Javits asked that his individual views from the same report be placed in the record.

Those statements and individual views will be inserted at this point in the record.

(The statements and individual views referred to above are as follows:)

STATEMENT OF HON. JOHN L. MCCLELLAN, A U.S. SENATOR FROM THE STATE OF ARKANSAS

I appreciate the opportunity to voice my opposition to the resolutions pending before this committee to amend rule XXII of the Standing Rules of the Senate. These resolutions would further liberalize, and thus weaken, rule XXII, keystone in the foundation of the Senate, the last great deliberative body of the world.

The words of Thomas Jefferson on the subject of unlimited Senate debate are as cogent, as important, and as applicable today as they were when he first spoke them, and I would urge that we heed and adopt the views he expressed in the following language:

> The rules of the Senate which allow full freedom of debate are designed for the protection of the minority, and this design is part of the warp and woof of the Constitution. You cannot remove it without damaging the whole fabric. Therefore, before tampering with this right, we should assure ourselves that what is lost will not be greater than what is gained.

I insist that we will surely lose much more than we ever gain by seeking a further curtailment of free debate such as is proposed by the resolutions pending before this committee. It has been a constant source of amazement to me that those who allegedly seek with great diligence to further the causes of minorities in this country are the very ones who are in the anomalous position of seeking, with the same

diligence, to change rule XXII which, in the words of Jefferson, are designed for the protection of the minority.

Rule XXII has served as an imposing bulwark of true democracy. Through the years it has served to safeguard the liberties of our people and has afforded them the right of thorough expression by their chosen representatives in the U.S. Senate. Although seriously weakened in 1959, rule XXII, in its present form, still stands as a bulwark of liberty. Weaken it further, and you will strike down and destroy this fortress, this last bastion of free and unlimited debate in the greatest legislative body in the body.

I am aware that the views of a southern Senator on cloture are cavalierly dismissed in some quarters simply because of the geographic area represented. In answer to that let us look at what some former distinguished Members of the Senate from other areas of the country had to say about cloture. Senator George F. Hoar, of Massachusetts:

> There is a virtue in unlimited debate, the philosophy of which cannot be detected upon surface consideration.

Senator Albert J. Beveridge, of Indiana, urged those who endorsed cloture to point out "a single great wrong that has been perpetrated upon the American people" because of unlimited Senate debate, and to name a "single benefit which has been denied the American people" because of it.

Senator Key Pittman, of Nevada, declared:

> The Senate was founded as a part of our institutions for the protection of minorities, not alone minority parties, but minority populations and minority principles. To establish a cloture such as they have in the House would nullify the very purpose of the U.S. Senate.

And to that I might ask when is it a vice in a democracy to expose controversial legislation to the light of free and unlimited debate? Are we to be told that a democracy cannot afford to educate and inform our citizens of the full aspects of legislation that might infringe on their rights?

Senator Robert M. La Follette, Sr., of Wisconsin, said of cloture:

> Sir, the moment the majority imposes the restrictions contained in the pending rule upon this body, that moment you shall have dealt a blow to liberty, you shall have broken down one of the greatest weapons against wrong and oppression that the Members of this body possess.

In 1917 two distinguished California Senators, Hiram Johnson and James D. Phelan, said respectively:

> The last place in all this world where freedom obtains, the place where freedom of speech may be abused, abused, abused, and abused again, but the last free forum in that day will then have been destroyed and we here this day have commended and made easy that destruction.
>
> Men are carried away by passion, heat, and rancor and they enact laws thoughtlessly. Again they enact laws ignorantly. Debate restrains passion. Debate restains heat. Debate restraints rancor. At the same time debate demands deliberation. Therefore, I oppose arbitrary rule and stand for the power and dignity of the Senate, which has served this country so well in this war.

Senator Henry Cabot Lodge, the elder, of Massachusetts, also opposed cloture saying:

> Careful and thorough consideration of legislation is more often needed than the limitation of debate.

Most of these Members served long years and in most cases reached the convictions cited above after first holding contrary views during their early years of service in the Senate.

I hold that free debate is a virtue in a democracy, not a vice; it is a necessity, not a luxury, it is truly a weapon in the arsenal of democracy and is as vital to the protection of freedom as all other armaments devised by man.

Those who are waging this unrelenting attack on free debate in the Senate should pause and take heed of this Nation's position in the world today. For, to me, if there was ever a time when unlimited deliberation is needed it is now when we have farflung commitments throughout the world; now when we seek to conquer space; now when we are dealing with massive problems on the domestic front; now when, indeed, America stands as the leader of the free world.

Our States and our constituents need a forum where the voices of their representatives can be raised—and heard—on the many vital issues and involvements confronting our Nation today.

Mr. Chairman, I urge that we not follow a course that will weaken the remaining vestiges of rule XXII; but, instead, let us preserve and strengthen it.

STATEMENT OF HON. HUGH SCOTT, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, the question of legislative responsibility is once again before us. Senate Resolution 8, of which I am a cosponsor, would amend rule XXII to permit a majority of the Senate to terminate debate on an issue and bring it to a vote.

It can no longer be argued that a resolution allowing a constitutional majority to impose cloture is offered merely, and for the single purpose of facilitating the passage of civil rights legislation. We cleared that hurdle in 1964 when two-thirds of the Senate demanded that the majority be permitted to work its will, and the civil rights bill was enacted into law, although an excessive period of legislative time was expended in the effort.

Senate Resolution 8 is not intended to assist any particular type of legislation. Its clear purpose is to assure, after full and fair debate, that the principle of majority rule will be recognized in the business of the Senate. What we have now is neither majority rule nor responsible rule.

The Constitution does not require the assent of two-thirds of the membership except under certain specified circumstances, such as to override a presidential veto. In the absence of such specified circumstances, the framers of the Constitution intended that the body should operate subject to the will of the majority. As it is now constituted, rule XXII frustrates the fundamental principle of majority rule. It provides a recalcitrant minority with a veto as effective as the determination of that minority.

The issues which this Nation faces in this decade no longer permit us the luxury of detached political gamesmanship. Solutions are re-

quired to the pressing problems of our day—questions which demand responsible answers from a responsible legislature. This responsibility can be achieved only through a revision of rule XXII to conform to the principle of majority rule as prescribed by the Constitution.

Statement of Hon. John Sparkman, a U.S. Senator From the State of Alabama

Mr. Chairman, I have opposed down through the years any and all proposals to change rule XXII of the Standing Rules of the Senate. In 1959 we witnessed a change which liberalized this rule from a requirement of two-thirds of the entire membership of the Senate to invoke cloture, to a requirement of two-thirds of those present and voting to invoke cloture, or close debate. This threw us back approximately to where we were in the Senate in 1917 when the cloture rule was first adopted. This action followed a period of well over a hundred years, after the previous question rule was discarded in 1806, in which the Senate functioned under the principle of unlimited debate except through limitation by unanimous consent started in 1846.

The 1917 two-thirds rule applied only on a "measure" however. Thus "motions" to take up a bill were not subjected to cloture until 1949 when the rule was broadened to include them and to require a full constitutional two-thirds vote to invoke cloture. Thus, with over a century of traditional use, the principle of unlimited debate in the Senate became a tradition of this body. It was looked to by the public and by historians and students of government as a last bastion of protection of the rights of minorities against ruthless, arbitrary, and sudden government by bare majority rule or the will of the caucus in executive session.

I stand for this protection of the rights of minorities today and trust that the Senate will not further liberalize the rule for closing debate.

This committee has before it three proposals. They are: (1) Senate Resolution 6, sponsored by Senators Anderson and Morton, which would permit cloture by a three-fifths vote of those present and voting. In other words, if there were a full attendance, 60 Senators instead of 67 could close debate. (2) Senate Resolution 8, sponsored by Senator Douglas, and others, which would permit a bare majority of all Senators to close debate. This proposal would allow 51 Senators to invoke cloture. (3) Senate Resolution 16, sponsored by Senator Morse, which provides that after 7 calendar days of pending unfinished business a simple majority of those voting could invoke cloture. Under this proposal as few as 36 Senators might invoke cloture because 51 Senators constitute a quorum.

I believe that all of these proposals are without merit and that this committee should approve none of them, but should report back to the Senate on March 9 with a recommendation that there should be no change in rule XXII.

I will not labor the committee unduly with detailed arguments which I have made before on several occasions on the floor of the Senate against restricting freedom of debate. I intend fully to repeat these arguments if and when necessary to safeguard a principle and a

tradition that I hold so vital to our form of government. My position is consistent, forthright, and outspoken, and I have no intention of deviating from it.

It occurred to me that it might be somewhat refreshing to this committee to go back 50 years and hear and consider the words of Senator Elihu Root in the Senate on February 15, 1915, as reported in volume 4, Congressional Record, page 3792, when he spoke in favor of unlimited debate and against the suggestion that the rules of one Congress do not hold over and bind the subsequent Congress:

> Now, Mr. President, the Senator from Kentucky asks "Shall we be bound by these old dead hands?" Yes; unless we see fit to change the rule. Nor is it the dead hand alone that binds us; it is the observance and recognition of the rule at every session of the Senate for these 108 years. Time and again in this body you, Mr. President, have declared Senators in order or out of order; their motions and their steps in parliamentary procedure permissible or forbidden with reference to these rules and to the precedents which in the construction of them have been built up year by year in every session of the Senate during all the century. Bound by men of a hundred years ago? No; bound by all the great and patriotic and wise and able men who have made the Senate of the United States for that century. The purpose of rules is to establish a course of conduct which shall be a protection to the minority and preserve them in the performance of their duties against arbitrary repression on the part of the majority.

Mr. Chairman, the voice of the past is among us now. It is warning us not to throw caution and traditions to the wind and subject ourselves and our constituents to irreparable harm through arbitrary, quick, majority rule. The proposals before the committee would each be a step in that direction.

It is difficult for me to follow, or find consistency in, many of the arguments of the proponents of liberalizing rule XXII. Some of the proponents have engaged in extended debates or filibusters themselves. When a bill is especially obnoxious to them or if it affects their State too adversely, they may in the future, as in the past, be among those who wish to protect minority views by extended debate.

For years many of the proponents of the types of proposals now before this committee have argued that cloture should be liberalized because a civil rights bill could not pass without changing the rule. Yet since 1957 three civil rights bills have become law without lessening the requirements of rule XXII to the levels they sought. On June 10, 1964, the Senate invoked cloture on a 71-to-29 vote, and the result was the passage of such an all inclusive civil rights bill that I cannot imagine that the proponents would dare to suggest with propriety that civil rights legislation is the basis any longer for wanting to change rule XXII.

The ultimate diagnosis seems to be a desire on the part of some Senators not to be bound by the traditions and rules of the past but to draw the Senate ever nearer to the complexion of the House of Representatives and ultimately to bare majority rule at all times. This to me is contrary to the purpose of the Senate under our Constitution and is not in the interest of well-balanced and good democratic government.

STATEMENT OF PROF. WILLIAM BUCHANAN, UNIVERSITY OF TENNESSEE (KNOXVILLE)

THE UNIVERSITY OF TENNESSEE,
DEPARTMENT OF POLITICAL SCIENCE,
Knoxville, March 1, 1965.

Mr. KENT WATKINS,
Staff Director, Subcommittee on Standing Rules of the Senate, Committee on Rules and Administration, U.S. Senate, Washington, D.C.

DEAR MR. WATKINS: * * *

I know that the Senate rules comprise a complex and delicate mechanism which may be fully understood only from long experience. Therefore I shall not attempt to appraise the parliamentary consequences of these resolutions or their language, but rather will express my opinions upon their manifest effect, which I assume to be as follows:

Both resolutions would limit debate to 100 hours, more or less, after affirmative action upon a motion of 16 Senators. Both provide that any Senator who wishes may then speak for as much as an hour. Both specifically prohibit dilatory tactics.

Senate Resolution 6 would require 1 day's notice before vote and require a majority of two-thirds of those present and voting for cloture.

Senate Resolution 8 would allow 15 days of debate to elapse after introduction and then would require 51 votes for cloture. Party leaders would allocate the 100 hours for debate.

The significance of these resolutions turns upon an evaluation of the institution of unlimited debate, which exists in few legislative bodies other than the U.S. Senate, and the functions of this institution has served and is now serving in that body.

The assumption made by most evaluations of this institution is that after the study given a measure in committee and the discussion in the normal course of floor debate, where those Senators who so wish declare their position and the reasons for taking it, the extended remarks of a few Senators determined to prevent passage do not, by their persuasiveness alone, influence the opinions of other Members. The fact that they are making such extensive remarks may demonstrate their determination, and their determination may influence their colleagues, but what they say in the course of the debate does not ordinarily persuade.

If this assumption is correct, then the consequence of unlimited debate is to provide minority Members with sort of an extraordinary vote, or "supervote" of which they may avail themselves under certain circumstances. When they use this tactic, their influence upon the legislative process is greater than their normal single floor vote. The circumstances surrounding the use of this extraordinary vote are as follows:

1. It is a negative vote, which may be used only for preventing passage of legislation.

2. It is useful only to the minority, since other techniques of preventing legislation (the committee process, tabling, recommittal, etc.) are available to the majority. "Minority" is used here in both senses

of the word: Those who oppose the measure constitute less than half the Members, and they are not—at least as far as this measure is concerned—a part of the formal party majority structure. If they were, it is highly unlikely that the bill would have reached the point where only a filibuster could prevent its passage.

3. The weight of this extraordinary vote cannot be precisely calculated, but it enables just over a third of the body to accomplish what normally requires the votes of half the Senate. Appeal to the the tradition of unlimited debated in the past has sometimes persuaded other Senators to vote against cloture, enabled less than one-third of the Members to secure sufficient strength to deny it, and, again accomplish what would normally require a majority. Roughly, then, resort to unlimited debate doubles a Senator's effectiveness at this stage of the process. His one vote increases to two votes, more or less. This is a protection for minority rights.

4. The extension of one's influence by this method is costly. It is costly to the supporters of the legislation, preventing passage or securing major alterations in the measure. It is costly to the majority leadership, since it may result in other legislation dying on the calendar. It is costly to the Nation since it diverts senatorial attention that otherwise would be given to scrutiny and debate of other bills. Whether these other bills pass in the late session rush or never reach the floor, their fate is determined without the attention which the body gives to most measures which reach the floor in the normal course of affairs.

Because of these costs, unlimited debate is an ultimate weapon, somewhat like unlimited war in international affairs, or the strike in labor-management disputes, or like a violent demonstration or revolution in domestic policy. Such tactics cost one side more than the other. It is hard to predict which side will bear the costs more heavily, but the tactic costs both sides a great deal more than if it had not been resorted to. For this reason, unlimited debate is not frequently attempted; it has occurred roughly once every 2 years throughout recent history.

5. Like other ultimate weapons, it is more effective when it secures its objectives through threat of use, rather than use. This costs the user nothing, for his opponent may make substantial concessions to prevent a situation in which both parties would lose substantially.

6. It is, or may become, a resort to public opinion. It communicates dramatically the message: "Here is a matter of such deep concern to me and those I represent that it lies beyond the usual process of legislative compromise. In view of the importance of the matter to us, will the citizenry please reconsider, and make an exception of this particular item from their mandate to the majority?" As a matter of record, such appeals have not often been well received. The usual public response is disinterested silence. Occasionally, it is a verdict against the filibustering minority. There remains the possibility that the conscience of the Nation will be aroused, and this has been a persuasive reason for preserving the institution.

7. The costs to the majority increase as the session nears its end. In the light of these characteristics of the institution, the presence of two resolutions before your committee indicates that certain Members now wish to reduce the cost and the possible cost advantages to the minor-

ity that enhances its voting power by resort to the technique. Senate Resolution 6 would reduce the majority from two-thirds to three-fifths. This would leave the technique available, but require a larger group to effect it, thus reducing the incremental vote to be gained by the Members of a determined minority. The minority would have to be larger. This would probably decrease the incidence of unlimited debate, and the costs. In effect, as I understand the proposal, it would head off the possibility of extended debate, since it might be put into effect early in the procedure, assuming the requisite two-thirds majority is available. This would make it most economical in terms of time costs.

Senate Resolution 8 would allow 15 days of full debate after it became apparent that dilatory tactics were in operation or were threatened, but would require only a simple majority to put cloture into effect.

Either of these measures would reduce the costs to the Nation and the Senate in time spent on debate. I believe that such a reduction in costs is increasingly important. In the 19th century, with fewer decisions to make, a less complex Government and economy to direct, a less threatening international environment to face and a somewhat smaller chamber to manage, the use of dilatory techniques to prevent action which outraged a minority was more justified. The costs to the majority and the Nation were not disproportionate to the gain in minority rights. I think the situation has changed, and the fact that the Senate invoked cloture in two quite different circumstances in 1962 and 1964 demonstrates an awareness of these increasing costs. If I read Congressional Quarterly correctly, there are now only 23 Senators in this body who have had the opportunity to vote on cloture measures and have not at one time or another supported a cloture petition. The reaction to the delay of the 1964 Civil Rights Act by both the public and the Senate is evidence that there is a consensus that the costs of such tactics now outweigh their advantages.

Of the two proposals, I prefer Senate Resolution 6. It does not eliminate the ability of a determined minority to enhance its power to prevent legislation in extraordinary circumstances, although it does provide that such a minority must be somewhat larger than in the past. Thus it preserves the institution of unlimited debate as a parliamentary tactic, in modified and less expensive form. The fate of a measure, whether it is sure to be lost or has a chance, is apparent at an early stage.

Senate Resolution 8 does not reduce the costs so much, since a normal period of debate might then be followed by 15 days of extended debate and this by 100 hours or more of individual speeches, before the matter could be determined.

May I add my suggestion that these resolutions should be sent to the floor early this year or the next, so that they may be debated *under the present rules* at whatever length proves necessary to convince the Senate and the public that these restrictions on an ancient and honorable tradition are inescapable necessities in the light of a changing world.

Finally, may I add that these opinions are entirely my own views as a student of American government, and do not represent any institution with which I may be affiliated.

Yours sincerely,

WILLIAM BUCHANAN, *Professor.*

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INDIVIDUAL VIEWS OF SENATOR HERMAN E. TALMADGE AS EXPRESSED IN THE REPORT OF THE SPECIAL SUBCOMMITTEE ON AMENDMENTS TO RULE XXII TO THE COMMITTEE ON RULES AND ADMINISTRATION DURING THE 85TH CONGRESS

Any proposal for further limiting debate in the United States Senate is a matter of grave consequence which, by its very nature, demands that it not be acted upon capriciously or without the benefit of thorough study and full consideration of all its ramifications.

It is out of that deep conviction that I have insisted upon comprehensive hearings on the eight pending resolutions seeking that end, that I have given long and careful study to the transcript of testimony taken at those hearings and to all related materials, and that I herewith set forth in the most earnest terms at my command the compelling reasons why Senate rule XXII must be upheld as written.

Although the question of cloture has been a recurring issue before the Senate since 1917 and hearings previously have been held on the subject in 1947, 1949, and 1951, it was not until 1957 that any effort was made to determine the thinking and wishes of the American people on this issue so fundamental to the protection and preservation of their constitutional freedoms.

At my urging a Special Rules Subcommittee composed of Senator Jacob K. Javits of New York and myself held extensive hearings during last June and July and heard, either in person or by prepared statement, from 132 Senators, spokesmen for organizations with national memberships, and other knowledgeable individuals. While previous hearings had been confined largely to testimony from Senators and paid spokesmen for partisan pressure groups, the 1957 hearings heard from such well-known and respected organizations as the American Legion, the Veterans of Foreign Wars, and the Sons and Daughters of the American Revolution.

As the result of the labors of the subcommittee a printed transcript of 364 pages—which unquestionably is the most comprehensive document of its kind ever assembled—now is a matter of official record and, for the first time, Senators have as a basis for informed action on this subject a presentation which encompasses the grassroots sentiments of their constituents.

It must be recognized that the Senate of the United States, as an instrumentality of the States and their citizens, is the property of

every American and does not belong to the individuals who transiently occupy the seats in its Chamber. Individual Senators have no proprietary rights in the operation of the Senate except as they act as creatures of the will of the States and constituents they represent.

Therefore, it is certain that no Senator honestly seeking to be responsive to the will of those he serves will wish to close his mind on this issue before giving careful study and consideration to the transcript compiled by this special subcommittee and the unmistakable conclusions of public opinion it affords.

An analysis of that transcript discloses that more than three-fourths of those presenting their views to the subcommittee expressed approval of Senate rule XXII as it now stands and confidence in it as the major bulwark of the people in the maintenance of constitutional government and individual liberty in this Nation.

Further analysis makes plainly evident the fact that those favoring a further erosion of freedom of speech on the floor of the United States Senate could offer no sounder reason for their position than their desire to see enacted into law force legislation of the character which was resoundingly defeated by the 1st session of the 85th Congress.

Those who predicated their support of changes in Senate rule XXII on the contention that no civil rights measure could be enacted under its present provisions saw their argument exploded in the action of the 1st session of the 85th Congress in placing the Civil Rights Act of 1957 on the statute books without resort to rule XXII.

That argument thus disposed of, there is only one conclusion which can be drawn logically and dispassionately from the actions of those who persist in their efforts to change rule XXII: That their onslaught to stifle freedom of speech on the floor of the Senate is an attack not only on the Senate itself but also on the stature, perquisites, and prerogatives of each Senator in national affairs and every other responsibility incident to the senatorship.

It is an attack which threatens the whole fabric of our form of government and strikes at the very vitals of representative government.

It is an attack which seeks to destroy the constitutional balance of Federal and State power and deal a death blow to the States as political entities.

It is an attack which seeks to make big government bigger and to centralize more and more power in Washington in a government less responsive to the wishes of the citizenry.

It is an attack which seeks to eliminate the spirit of compromise and respect for divergent views which has characterized the Senate for more than one and one-half centuries and to substitute for it the brute force of numbers.

It is an attack which seeks to put Congress only a short step from the unicameral system and which has as its ultimate aim the destruction of the seniority system which has given Congress its stability and sense of responsibility over the years.

Standing Senate rule XXII is a wise rule—the result of compromise—which protects full and free discussion of legislative proposals yet serves as a barrier to thwart those few Members who would abuse the privilege of free speech.

Standing Senate rule XXII is fair and to change it again would be to militate against the historic tradition of unlimited debate in the Senate.

The first change in rule XXII to authorize cloture was adopted in 1917 following a bitter controversy over the failure in the Senate of a proposal for arming American merchant ships prior to this Nation's entry into World War I. It was offered by Senator Martin as a "war measure" and, after debate at length, was adopted March 8, 1917, by an overwhelming vote of 76 to 3.

It required the votes of two-thirds of the Senators present and voting to invoke cloture.

Under a later ruling in 1948 by President Pro Tempore Arthur H. Vandenberg, it was held that the words "pending measure" in the Martin cloture amendment to rule XXII applied only to bills and resolutions and not to motions. That meant, of course, that debate on a motion to take up a bill was not subject to cloture under any circumstance.

It was in 1949 that the compromise on rule XXII was effectuated whereby its provision for cutting off debate was extended, not only to apply to any "pending measure" but also to "any measure, motion, or other matter pending before the Senate," and the requirement of "two-thirds of those voting" was changed to "two-thirds of the Senators duly chosen and sworn."

That was the compromise which still is in effect today.

While the two-thirds vote requirement to shut off debate was strengthened by the compromise, at the same time the dread threat of gag rule was extended over every facet of Senate procedure.

Those now attempting to make cloture easier and thus ultimately destroy freedom of debate in the Senate are not satisfied with what is a fair and reasonable compromise.

They complain that standing rule XXII in its application thwarts the wishes of the majority. However, authoritative observers of the American legislative process hold that a determined majority of Senators can find ways of passing any measure it desires without resorting to changing the very character and complexion of the body itself. The 1st session of the 85th Congress affords a case in point.

To argue that rule XXII by holding forth a threat of prolonged debate serves to prevent Senators from insisting upon legislation with controversial features is to challenge the depth and sincerity of the convictions of all 96 Senators.

Ample means are available at present to overcome what a majority at any time may feel to be needless obstruction in debate. The use of protracted sessions and strict enforcement of all Senate rules afford adequate safeguards to bring to an end even the most determined and prolonged debate. Whenever any issue of overriding importance to the welfare of the Nation arises, it goes without saying that debate will be limited accordingly.

Standing rule XXII permits limitation of debate by two-thirds of the Senate membership (64 Senators) 2 days after a petition has been submitted by 16 Senators. Thereafter debate is limited to 1 hour for each Senator. Cloture cannot be applied to a proposal to change the rules.

Of the 8 pending resolutions to change the existing rule, the 2 principal ones are:

Senate Resolution 30 (Knowland-Johnson proposal)—which would permit limitation of debate by two-thirds of those present and voting

and would make cloture applicable to attempts to change the rules. However, it also would provide that—

the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

Senate Resolution 17 (Douglas proposal)—which would permit limitation of debate by two-thirds of those present and voting 2 days after a petition has been submitted by 16 Senators or by a majority of Senate membership after 15 days. Cloture would be applicable to "any measure, motion, or other matter pending before the Senate, or the unfinished business" which would include proposals for rules changes.

Frankness compels the observation that the ultimate objective of opponents of free debate in the Senate is cloture by a simple majority vote of Senators present at any given time. Eventual adoption of such a rule would make it possible for 25 Senators, a majority of a quorum, to impose gag rule.

Historically, freedom of debate in the Senate is not a party or sectional device. It has served the whole country and both political parties well at one time or another. History records the fact time and again that the benefits of free debate far outweigh the few instances where the privilege to speak thoroughly may have been abused—and only the most partisan would not admit there have been some abuses.

Any further concession on the part of proponents of free debate in the form of either Senate Resolution 30 or Senate Resolution 17 will have the disastrous eventual result of majority cloture. Then the process of erosion will turn to the seniority system and other long established and heretofore unchallenged procedures and precedents.

Under our plan of government the United States Senate is the great safety valve. It is a body which can prevent impasses from developing in our Nation and it is the best instrument for resolving seemingly irreconcilable conflicts. It has afforded a permanent basis for American unity; and that basis has its foundation in the right of every Senator, regardless of the size of the State from which he comes, to talk things out before the country.

The only real protection remaining for States which find themselves from time to time in the minority on any given issue in the Senate is a safe two-thirds rule on limiting debate.

Through the medium of free debate, the Senate provides the machinery by which all measures affecting the lives, fortunes, and sacred honor of the American people can be put to the critical test of unhurried examination by the collective intellect of a body expressly created as one of our governmental checks and balances.

Those who would destroy this right contend it imperils democracy and thwarts the wishes of the majority. In their zeal they forget that its very purpose is to provide a restraint upon the abuses of unbridled majority rule and, even more important, to protect the rights of the minorities of this Nation.

Our wise Founding Fathers were aware that the excesses of democracy can be as fearful in their consequences as are the excesses of totalitarianism. To safeguard against both extremes they gave us our republican form of government with its delicately contrived system of checks and balances of which freedom of debate in the Senate is at least an implied, if not actual, part.

If minority rights are trampled in the Senate there is only one remaining remedy available to those who do not happen to be with the majority; that is, affiliation with a multiplicity of splinter parties. No greater catastrophe could befall our country than such enforced destruction of the two-party system and substitution of a countless number of political parties.

It does not take much vision to perceive that under such circumstances a small militant minority, exercising the balance of power, could be catapulted into a position of leadership where it could inflict great harm on constitutional government and democratic processes.

Since its establishment the Senate of the United States has refused to be bound in a straitjacket. Its rules have had the flexibility the nature of the body demands.

Despite the protestations of some of its detractors, it is respected as the guardian of fundamental liberty in this country and enjoys the confidence and admiration of the masses of this Nation and of the world.

By and large, the Senate has adhered to the cardinal rule that no extreme or far-reaching legislation affecting the basic rights of the people of the United States be adopted without substantial unanimity and support of the Senators and their constituents.

Union, not division, has been the Senate goal.

The right of every Senator to freedom of debate is the great buffer which protects both the smaller and larger States from imposing upon each other.

Freedom of debate is the only effective screen which the people have against hidden defects, both unintentional and calculated, which escape detection in the hasty process of passage by the House of Representatives. Without this backstop for the people, unfairness, discrimination, and special privilege for the favored few might well come to be the rule rather than the exception.

Even a cursory study of constitutional history and an examination of contemporary documents penned at the time of the drafting of the Constitution and its approval by the States show beyond any doubt that the creation of the Senate, as a continuing council of States wherein each has an equal voice, was the price of forming the General Government.

At the formation of this Government the Constitutional Convention stood for the protection of private economic interests; a stronger central authority; a stabilized monetary policy; orderly legal processes; and for a republican form of government as opposed to an unlimited democracy.

The whole motivating spirit of the Convention—not expressed but clearly understood—was to make the Nation safe from the tyranny of unchecked majorities. The intention is unmistakable as one may deduce from James Madison's own notes and also from the papers of most of the delegates.

No doubt if Madison, Thomas Jefferson, Alexander Hamilton, and John Jay could return to the scene today they would be shocked at the manner in which some of their writings have been distorted out of context, particularly with reference to the question of the nature of the Senate and freedom of debate therein.

A favorite device of the advocates of gag rule is to quote Alexander Hamilton's contributions to the Federalist in support of their position.

An examination of these quotations in the light of context and the

theme of the entire series of letters reveals such quotation to be a complete distortion of truth.

The whole spirit pervading The Federalist and the elucidation of its component letters regarding the foundation of the Senate cry out for the maintenance of freedom of debate in that body.

Properly assaying the true meaning of The Federalist requires an understanding of the times in which the letters were written.

It must be borne in mind that Hamilton and the other patriots of that day were writing about inadequacies of the loosely drawn Articles of Confederation and in favor of the adoption of a clear-cut new Constitution. In the quotations most frequently attributed to Hamilton on this subject, he was detracting from the Articles of Confederation in a concerted effort to convince the people that the new Constitution was good for the country and should be ratified by the States.

Hamilton is often quoted from letter XXII in which he stressed the weakness of the requirement that legislation adopted by the Continental Congress receive the approval of three-fourths of all the States. That quotation, while applicable to that situation, by no stretch of the imagination can rightly be applied to free debate in the Senate.

Another quotation frequently attributed to Hamilton by proponents of majority cloture is the one referring to the treaty-making power and other "resolutions." There must have been strong sentiment for a constitutional two-thirds requirement before Senate approval, for Hamilton sought to allay the fears of the people urging the view that a simple two-thirds would be sufficient in any circumstance for protection against abuses.

By no rule of logic can the language quoted from Hamilton in letter LXXV be applied to the fundamental right of a State to be heard from fully through its Senators in Senate debate.

Thus, it is a gross distortion when we have those of the present seeking to apply the words of the great patriots of the past in an effort to detract from the Constitution and the principles of government which they established when, in reality, those quotations when written were in reference to the Articles of Confederation.

There is no comfort for any proponent of gag rule in the Senate in the words of any of these founders of our system of government. Jefferson, for example, wrote in his Manual of Parliamentary Procedure:

> The rules of the Senate which allow full freedom of debate are designed for protection of the minority, and this design is a part of the warp and woof of our Constitution. You cannot remove it without damaging the whole fabric. Therefore, before tampering with this right, we should assure ourselves that what is lost will not be greater than what is gained.

Hamilton foresaw just such a day as this when he wrote in The Federalist:

> * * * There are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?

It is significant that, in urging the adoption of the Constitution by the States, Hamilton emphasized that the Senate is far more than an "upper house" in the commonly accepted sense of the term:

> I am not unaware of the circumstances which distinguish the American from other popular governments, ancient as well as modern * * * Many of the defects, as we have seen, which can only be supplied by a senatorial institution, are common to a numerous assembly frequently elected by the people, and to the people themselves * * * The people can never willfully betray their own interests; but they may possibly be betrayed in the hands of one body of men, than where the concurrence of separate *and dissimilar* bodies is required in every public act.

Another phase of this question is whether the United States Senate is a continuing body and whether the Senate is the sole judge of the rules under which it functions.

The Federalist sheds important light on these subjects.

For instance, Hamilton in letter LXII stresses that the Senate is more than just an extended version of the House. He alludes to the qualifications required of Senators, the nature of the senatorial trust as contradistinguished from membership in the lower branch, and emphasizes the "necessity of some stable institution in the Government."

In letter LXIII he wrote:

> * * * An assembly (the House of Representatives) elected for so short a term (2 years) as to be unable to provide more than one to two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result, any more than a steward or tenant, engaged for one year could be justly made to answer for plans or improvements, which could not be accomplished in less than half a dozen years.
>
> The proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.

Those words adequately describe the role of the Senate and prove beyond all doubt the deliberate intent of the framers of our Government to create it as a continuing body.

Now, as to the question of whether the rules of the Senate carry over from session to session and are permanent, valid, and subsisting until changed by proper procedure, let us look to John Jay's Federalist letter LXIV for the incontrovertible answer:

> It was wise, therefore, in the (Constitutional) Convention to provide, not only that the power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns, *and to form and introduce a system* of the management of them. The duration prescribed, is such as will give them an opportunity of greatly extending their political information, and of rendering their accumulating experience more and more beneficial to their country.
>
> Nor has the Convention discovered less prudence in providing for the frequent elections of Senators in such a way, as to obviate the inconvenience of periodically transferring these great affairs entirely to new men—for, *by leaving a considerable residue of old ones in place, uniformity and order, as well as a constant succession of official information will be preserved.*

That language shatters once and for all time the contention that the life of the Senate is only 2 years and that its rules must be altered from session to session.

The system *"formed and introduced"* in the Senate to manage and resolve grave issues of national concern has served the country well.

The tragic inconvenience of periodic upheaval in this institution of the Government has been prevented; *"uniformity and order"* insured.

How has this been done?

There can be only one answer in the light of history: this body has functioned through wise and just rules that have withstood the tortuous test of time.

It is only reasonable and logical, therefore, that any proposed change in those rules should be open to the fullest and most completely unfettered debate.

If freedom of debate, the committee system, and the seniority system are destroyed or weakened in the Senate, this body will become nothing more than a useless appendage of the House of Representatives.

There has been much ado about the authority for moving the previous question having been included in the early rules of the Senate.

Though such was the case, the rule was resorted to only 4 times and used only 3 times in 22 years.

It can safely be concluded from that experience that any limitation on free expression was obnoxious to the patriots of that day. Certainly, it may be assumed further that this was the underlying reason that the rule was dropped by the Senate during the time Jefferson was President.

The fact of the rule being in existence during these first years is hardly significant. It means merely that it was carried over automatically from the Continental Congress and was later discarded.

It is argued by the opponents of free debate that the Senate of the United States is the only place in the world where the gag rule does not prevail.

My answer to that is: "So what?"

The patriots who established this Government were free men and did not elect to surrender their new and hard-won liberties nor to copy the governments of foreign lands where freedom either did not exist or came and went with the political tide.

The point also has been made that the Senate's cloture rule is more liberal than similar rules of most State senates. To make such a comparison is to misconstrue totally the unique position which the United States Senate occupies in our Federal-State structure.

As we have seen from Alexander Hamilton's writings, the Senate is not an "upper house" of a national legislature in any sense of the word.

The Senate exercises quasi-executive functions in relation to the treaty-making power.

The Senate sits as a judicial body in impeachment proceedings.

The Senate must give its advice and consent to the appointments of the Executive.

The Senate is the repository of State sovereignty on the National level.

The Senate cannot legitimately be compared in any terms with either State senates or with the assemblies of foreign nations.

One reason given by those advocating that the Senate of the United States surrender its freedom of debate is that the House of Commons of the British Parliament has done so.

What they either forget or choose deliberately to ignore is that much of the difficulty experienced by Great Britain as a nation and as a world power has stemmed directly from the loss of freedom of

debate in the House of Commons and a steady diminution in the power of the House of Lords.

The British system of government is not and never has been comparable to the constitutional system of government created here.

Every right the Englishman has is at the mercy of a majority in the House of Commons.

It was not always so.

A little over 75 years ago unlimited debate in Commons and the veto power in the House of Lords served as mighty barriers against the evils of state socialism. Those two safeguards restrained competing political parties from inflicting too great harm on each other or on the country, but they were thorns in the flesh of the Liberal and later the Labor Party.

The former Deputy Prime Minister of the Labor Government, Herbert Morrison, writes in his book, Government and Parliament, of how free debate was lost in the House of Commons:

> * * * Although there had been talk about the need to expedite business by curtailing Private Members' rights, it was only in the panic which followed the successful Irish obstruction in the 1880's that the House parted with its long preserved liberties. One of the most far-reaching of these reforms was the closure (that is to say, the motion "That the Question be now put"). It was first used by Mr. Speaker Brand, on February 2, 1881, who, in the course of long debate and considerable obstruction, decided to put the question without further debate. (Before the introduction of the closure Members could proceed with debate indefinitely.) * * * And it was eventually decided that a 3 to 1 majority would be required for a closure in a house of not less than 300 members.

Mr. Morrison goes on to explain that the standing order governing closure in Commons today requires only a simple majority which cannot be less than 100 members.

Before 1911, Lords possessed absolute veto power over Commons. As a result of the rejection of the finance bill of 1909 by the Lords, the Liberal Government of that day appealed to the people and won a majority on the issue. A measure to curb the powers of Lords was offered, and a promise obtained from the King that, should the Lords reject the bill, he would create a sufficient number of peers to insure its passage.

The threat was effective and in 1911 the Parliament Act became law. By it the veto of Lords was curtailed for a period of 2 years for bills passed by the Commons in three successive sessions (whether of the same Parliament or not) and was abolished altogether in respect to appropriations.

The Labor Party in its pre-election platform of 1945 stated:

> We give clear notice that we will not tolerate obstruction of the people's will by the House of Lords.

On October 31, 1947, the Parliament bill was presented to the House of Commons and passed on December 10. It was rejected by the House of Lords on June 9, 1948.

The bill provided that, in the future, such legislation might be passed into law, notwithstanding the rejection of the House of Lords, if (1) it had been passed by the House of Commons in 2 successive sessions, instead of 3 as provided for by the Parliament Act of 1911, and (2) 1 year (instead of 2 years) had elapsed between the date of the first second reading in the House of Commons and the date on which it was passed finally by Commons for a second time.

The bill further restricting the power of Lords was again passed by the Commons on September 21, 1948, and again rejected, September 23, 1948.

The bill was passed for the third time by the Commons on November 14, 1949. It was rejected by the Lords on November 29, but received the royal assent and became law on December 16, 1949, under the terms of the Parliament Act of 1911.

Thus was removed from the Government of Britain a great measure of its stability and strength and the whole world was the loser.

We know the rest and those who have the vision to see beyond the transitory objectives of political advantage should be able to detect the grave danger of this bit of history repeating itself in the United States today.

It is interesting to note in retrospect that the House of Lords—although liquidated in all but name by an unbridled majority in its sister chamber—has clung steadfastly to the principle of freedom of debate. It still has only two standing rules governing debate: that a peer can speak only once on the same motion and debate must be relevant to the question before the House.

Much has been made of the fact that standing rule XXII gives "power" to the individual Senator which those so contending maintain should be possessed by the majority, right or wrong. Such a view is contrary to the origin of the Senate as the voice of the individual States in the Federal establishment.

There is no escaping the fact that proposals for further limiting debate in the Senate would have the effect of negating the power, the prestige, and the perquisites of the Senator as an individual office-holder and of the Senate as a protective instrumentality of the Federal Government.

The smaller States rightly were given equal representation in the Senate but this influence will be dissipated in direct proportion to the degree of any revision of rule XXII.

During the last quarter of a century we have seen an unending encroachment on the powers of Congress by both the executive and judicial branches. One by one its powers, and the prerogatives of its Members, have been dissipated either by delegation or acquiescence.

Congressional powers over the purse, over patronage, over the budget, over trade, over war powers and all other phases of government operation have slipped away or have been greatly reduced.

It is time to reverse this trend and the proper place to start is by refusing to surrender the right of freedom of speech on the floor of the Senate.

No more eloquent defense of the right of the individual Senator to the power which comes through freedom of debate has ever been penned than that written by the distinguished and erudite journalist, William S. White of the New York Times, in his book, Citadel—The Story of the United States Senate. It is appropriate that his conclusions be considered here:

> Conscious though one is of the abuse of senatorial power, one glories nevertheless in the circumstances that there is such a place, where big Senators may rise and flourish from small States.
>
> For the Institution protects and expresses that last, true heart of democratic theory, the triumphant distinction and oneness of the individual and of the little State, the infinite variety in each of which is the juice of national life.

It is perhaps often forgotten that the democratic ideal is not all majority; that, indeed, at its most exquisite moments the ideal is not for the majority of all but actually for the minority of one.

The Senate, therefore, may be seen as a uniquely constitutional place in that it is here, and here alone, outside the courts—to which access is not always easy—that the minority will again and again be defended against the majority's most passionate will.

This is a large part of the whole meaning of the Institution. Deliberately it puts Rhode Island, in terms of power, on equal footing with Illinois. Deliberately by its tradition and practice of substantially unlimited debate, it rarely closes the door to any idea, however wrong, until all that can possibly be said has been said, and said again. The price sometimes is high. The time killing, sometimes, seems intolerable and dangerous. The license, sometimes, seems endless; but he who silences the cruel and irresponsible man today must first recall that the brave and lonely man may in the same way be silenced tomorrow.

* * * For illustration, those who denounce the filibuster against, say, the compulsory civil rights program, might recall that the weapon has more than one blade and that today's pleading minority could become tomorrow's arrogant majority. They might recall, too, that the techniques of communication, and with them the drenching power of propaganda, have vastly risen in our time when the gaunt aerials thrust upward all across the land. They might recall that the public is not always right all at once and that it is perhaps not too bad to have one place in which matters can be examined at leisure, even if a leisure uncomfortably prolonged.

* * * It is, in the very nature of the Senate, absolutely necessary for the small States to maintain the concept of the minority's veto power, having in mind that it is only within the Institution that his power can be asserted or maintained.

* * * Where a powerful majority really wants a bill it will find means to have its way, cloture or no cloture.

In considering the implications of "majority rule," one must not lose sight of a few simple facts about the origin and composition of the Senate.

It is impossible to apply to the Senate with any degree of accuracy the principle of popular majority rule as we usually consider it. The very composition of the United States Senate where all States have an equal vote prevents such an application.

It is possible for various combinations of 40 Senators to represent anywhere from 20 to 80 percent of the population of the Nation.

All of the great injustices of history have been committed in the name of unchecked and unbridled "majority rule." The late Senator James A. Reed of Missouri, in one of the most forceful speeches ever delivered before the Senate, observed with great truth:

The majority crucified Jesus Christ.
The majority burned the Christians at the stake.
The majority drove the Jews into exile and to the ghetto.
The majority established slavery.
The majority chained to stakes and surrounded with circles of flame martyrs through all the ages of the world's history.
The majority jeered when Columbus said the world was round.
The majority threw him into a dungeon for having discovered a new world.
The majority said that Galileo must recant or that Galileo must go to prison.
The majority cut off the ears of John Pym because he dared advocate the liberty of the press.

Some of the terms of reference to standing rule XXII are both shocking and disturbing not only because they insult the intelligence and integrity of those privileged to serve their States in the Senate but also because of the manner in which they distort facts and ignore history to support partisan ends.

A few choice current examples are that Senate rule XXII—

Must be changed to conform with the challenge of Russian missiles and sputniks.

Paralyzes decision in the Senate.

Is archaic.

Would have been opposed at the time of the adoption of the Constitution.

Is contrary to the views of the Founding Fathers.

Violates fundamental parliamentary law.

Is at odds with early Senate procedures.

Is not supported by the national interest.

Is not supported by common sense.

Is not supported by history.

Stultifies Congress.

Violates the Constitution.

Is offensive to the dignity of the Senate.

Has destroyed the Senate's deliberative function.

Thwarts discipline in the Senate.

These and many more similar unfounded assertions and puerile implications which could be cited are offensive to the character of every Member of the Senate and to the memory of those now departed who either served under or helped draft standing rule XXII.

I am indignant at the implication that I, or any other Member of the Senate, would consent to serve under, let alone defend, any rule of procedure which could to any degree be as reprehensible and alien to the American concept as opponents of standing rule XXII would picture it to be.

Now is no time to forget the lessons of history.

Before tearing down a chamber that has served the United States and its people well, Senators should search for truth by asking themselves:

Are we so blind as not to realize that if free debate perishes in the Senate our leaders in the future will be rising like jacks-in-the-box to move the previous question?

Do we not know that this evil thing will become the weapon of the majority party or coalition to be resorted to habitually in stifling all opposition?

Do we not know that when such an event comes to pass minority thought and opinion will lie prostrate and defenseless against the tyrannical abuses of any transient majority that might for the moment occupy the seats of the Senate?

Have we forgotten that everyone, at one time or another, belongs to a minority?

Have we lost sight of the unchanging truth that unbridled majority sway without proper restraint is mob rule?

Are our memories so short that we have forgotten the maxim that free government destroying dissenting opinion, thereby destroys itself?

Have we forgotten that in such circumstances dictatorship of one form or another steps into the vacuum thus created to wrest all rights from the people, minorities and majorities alike?

The alternative to unlimited debate is gag rule, which was aptly defined by the late Senator Reed as "the last resort of the legislative scoundrel."

The issue at stake here is far more fundamental than any mere question of legislation. It is as basic as our freedom itself. Gag rule, and its stepchild, censorship, are abhorrent to and incompatible with our American heritage.

The Senate has proved itself worthy of the rules by which it now operates.

Commonsense and the Nation's survival dictate that our time-honored procedures should not be subjected to whimsical tampering on the slightest provocation.

It is essential to our interests as a nation that we keep vital and inviolate our system of checks and balances.

With unlimited debate in the United States Senate, all Americans have the assurance that no act jeopardizing their rights will ever be proposed without some Member of the Senate having the opportunity to resist it and to warn the Nation of its consequences.

Franklin D. Roosevelt, while Governor of New York, foresaw just such dangers to the Republic, in a radio address on States rights, delivered March 2, 1930, when he warned:

> The moment a mere numerical superiority by either States or voters in this country proceeds to ignore the needs and desires of the minority, and, for their own selfish purposes or advancement, hamper or oppress that minority or debar them in any way from equal privileges and equal rights—that moment will mark the failure of our constitutional system.

His warning, valid then, is even more so today.

It is a concern Americans share fullest in this hour.

It is a concern which the Senate can ignore only at its own peril.

It is a concern which the Senate can allay only by upholding standing rule XXII as written.

INDIVIDUAL VIEWS OF SENATOR JACOB J. JAVITS AS EXPRESSED IN THE REPORT OF THE SPECIAL SUBCOMMITTEE ON AMENDMENTS TO RULE XXII TO THE COMMITTEE ON RULES AND ADMINISTRATION DURING THE 85TH CONGRESS

The Senate Committee on Rules and Administration on June 12, 1957, appointed a special subcommittee consisting of Senator Herman E. Talmadge, of Georgia, and Senator Jacob K. Javits, of New York, as cochairmen to hold public hearings on and consider proposed amendments to rule XXII of the Standing Rules of the Senate. This subcommittee held extensive hearings on June 17, 24, 25, and 28 and July 2, 9, and 16, 1957.

The two Senators at the time of their appointment were known to be of divergent points of view on the subject. Other hearings on rule XXII have been held before—in 1947, 1949, 1951—and the Committee on Rules and Administration has recommended amendment in its reports of April 3, 1947, February 17, 1949, March 6, 1952, and May 12, 1953. In January 1957 the subject was most recently debated on an unsuccessful motion to adopt new Senate rules. But it was believed by my colleague, Senator Talmadge, that certain points of view, witnesses, and organizations were not adequately heard before. Certainly, the record now before us of the current hearings is complete, and every interest which wished to be heard has been heard exhaustively. We were able to conduct the hearings in a spirit of most friendly cooperation but we could not compose our points of view. The divergency not having been composed, I respectfully submit this report containing my individual views and recommendations to the full Committee on Rules and Administration for its consideration.

SUMMARY STATEMENT

After careful study of the hearing testimony and of the historic conceptions of the function of the Senate, I am convinced that rule XXII needs amendment to end its veto power on behalf of a small minority; while at the same time assuring the opportunity for full debate and discussion of any subject in the Senate, which has been called the greatest deliberative body on earth.

I do not believe that the present rule XXII serves the purpose of deliberation within the Senate or of education of the public generally No one questions those two objectives. What I do question is a delegation of the power and responsibility of the majority to a determined minority, which has been and can be again and again an arbitrary block to action, contrary to the will of the majority of this body and of the people to whom they are responsible. Indeed, it seems to me prophetic that this report is filed at an hour of basic crisis in the defense of our country when the weapons which challenge us are precisely so mortally dangerous because of the speed with which they may be effectively used to destroy us. In such a time—and there is nothing temporary about this new frame of reference—there is a justifiable demand for making our organs of decision conform to the challenge. How appropriate, then, to consider now a rule of debate which can and has paralyzed decision in the Senate and which can be

used by a determined minority to paralyze it on any subject—not alone civil rights. Rule XXII as now written was archaic long before the first Russian earth satellite was launched and is even more so now.

Careful research on the development of the United States Government from its initial period under the Articles of Confederation, through the Constitutional Convention of 1787, when studied in the light of the contemporaneous writings of the Founding Fathers, convinces me that the power which now stems from rule XXII was not even contemplated at the time. On the contrary, from the expressed views of Madison, Hamilton, and others, a method of parliamentary procedure premised on rule XXII would have been violently opposed had it been suggested.

For the premise of rule XXII violates fundamental parliamentary law. It is at odds with early Senate procedures, British Parliamentary practice, and, almost without exception, is contrary to all our State legislative rules of procedure.

In the early Senate, simple majority cloture was used and the "previous question" as a parliamentary device was available under Senate rules and in Jefferson's Senate Manual to close debates. Even after reference to the "previous question" was dropped from the standing rules (in 1806), the presiding officer's power to rule on questions of relevancy and order could have prevented abuse through unrestrained irrelevancies. The conjunction of the lack of cloture and the lack of enforcement of a rule of relevancy (after 1872) made possible the modern veto-type filibuster.

Its fullest development and its most flagrant abuses have occurred following the Civil War in opposition to civil rights legislation—mostly in the last 35 years.

While rule XXII did not prevent enactment of the Civil Rights Act of the last session, I believe it did profoundly affect its final formulation, as I shall set forth in more detail subsequently.

Neither national interest, history, nor commonsense support the retention of the present provisions of the Senate rule, and I recommend it be amended for the reasons set forth in this report.

PRESENT RULE—CONTEXT OF PROBLEM

Rule XXII as it now reads provides that 2 calendar days after presentation to the Senate of a written motion for cloture signed by 16 Senators, cloture may be imposed by affirmative vote of two-thirds of the Senators "duly chosen and sworn" (i. e., 64). If such cloture motion be adopted each Senator is thereafter limited to a total of 1 hour's time in debate on the pending matter. The rule further provides that even this difficult cloture may *not* be imposed on any motion or resolution to change any of the standing rules of the Senate including rule XXII itself. (This further restriction is probably beyond the power of the Senate to adopt, as the advisory opinion of Vice President Nixon, January 4, 1957, concluded.)

Rule XXII prevents the imposition of cloture unless 64 Senators *appear* and *vote* in favor of a cloture motion.

It is important to bear in mind that under the present rule a Senator does not have to vote against a cloture motion to help prevent its adoption. If fewer than 64 Senators vote in favor of cloture it is not imposed. All that is needed under the present rules to prevent

a limitation on debate is for 33 Senators either to vote against the cloture motion or to fail to be present to vote for it. Absence is made equivalent to a vote against cloture.[1]

The realistic effect of the present rule is that a small minority of Senators (far fewer than 33 as a practical matter), if sufficiently determined, can by use of a filibuster absolutely prevent the Senate from taking action (in the only way it can—by voting) even though a great majority of Senators desires to come to a vote. Voting is the final method of resolution of national issues contemplated in the Constitution. Protracted speaking which is not intended to illuminate that decision, but to prevent its occurrence, makes a mockery of freedom of speech by confusing it with freedom to obstruct. It does not require great imagination to grasp the significance of this potential power in the hands of Members bent on influencing enactment or the course of particular proposals, without the necessity for persuasion.

ISSUE

The basic issue underlying the problem of cloture is whether we shall permit the Senate, resting as it does on the premise of majority rule, to function at all; to fulfill its legislative purpose; or whether we shall permit the Congress to be stultified by the undemocratic and, in essence, unparliamentary device of filibuster in the Senate—even though cloaked in the senatorial toga of rule XXII.

In analyzing their impact on representative government, I would hazard at least three classifications of filibusters:

1. Those conducted by a very few Senators, sometimes by only one Senator. The speeches may or may not be relevant, but, relevant or not, although they are not utilized to convince, neither can they usually prevent action.

2. Those conducted by a substantial number of Senators and, again, usually not intended to prevent action, but only to delay it, while the people of the country become better acquainted with the issues (either through senatorial exposition or upon independent reflection), and obtain an opportunity to make their views known to their Senators.

3. Those conducted by a substantial minority of Senators organized and intended to prevent Senate action—to stop it absolutely or materially to alter its character, not through Senate persuasion or public awareness, but simply through the filibuster—or even the threat of it, expressed or implied. (These are the stultifying filibusters with which this report is primarily concerned.)

My colleague, Senator Douglas of Illinois, has said that the term "filibuster" should properly be applied only to this stultifying variety. While I think this is accurate, the term has been used to cover all types of speeches where the length of the speech is not reasonably designed for persuasion.

The first two types in any given situation may be a waste of the Senate's time or a great benefit, depending on one's own point of view, in the circumstances; but, at least, neither of them prevents the Senate from seasonably acting, and if immediate action is not vital,

[1] The average voting attendance on motions to impose cloture in the Senate between the initiation of the rule in 1917 and the 1949 amendment was 84. Two-thirds of those voting would be 56. The 1949 requirement of 64 affirmative votes, therefore, greatly increased the previous difficulty of imposing cloture under the 1917 rule. On the basis of this experience the change meant three-fourths of the Senators "present and voting" would have to favor cloture in order to impose it. The 1949 amendment, therefore, in this respect, was a retrogressional step.

these, at worst, are tolerable and at best are an enlargement of the opportunity for full discussion, so characteristic of the Senate.

THE POWER OF THE FILIBUSTER AS A VETO, WITH A CASE HISTORY OF THE CIVIL RIGHTS BILL OF 1957

The ability to carry on a filibuster can affect the kind of legislation passed by the Senate even though no actual filibuster is undertaken. The incidence of a filibuster or the certain knowledge that a filibuster would be organized has made the majority come to terms before. The mere threat that a filibuster of great length would be undertaken against some proposal or unless amendment to a bill was accepted has in effect resulted in the majority of the Senate acquiescing in changes in legislation which otherwise they would probably not have considered wise or desirable.

Careful study of the legislative background and history of the civil rights bill of 1957 and the changes that occurred during the long Senate debate bears out this conclusion and illustrates the pervasive and subtle effect of rule XXII. The bipartisan effort which bypassed the usual procedure of referral of the House bill to committee clearly showed that the majority of Senators were determined to act upon civil rights legislation. It was generally conceded that a reasonable time would be allocated to the discussion of whether the Senate should adopt the procedure of bypassing the committee. No actual filibuster took place at this point—although, clearly, the possibility had to be reckoned with. The vote for direct Senate consideration of the House bill as opposed to committee referral was 45 to 39.

Following this vote, it became apparent that a bloc of Senators had selected part III as the most objectionable feature of the bill from their viewpoint; and that they were prepared to use every parliamentary device to prevent the enactment of a law which would contain the authorization for the Attorney General on his own motion to enforce through civil action (as an alternative to criminal prosecutions in existing law) the provisions of the 14th amendment to the Constitution. I believe that a number of Senators, among whom were some who favored the retention of part III, felt that insistence on part III would inevitably force the Senators from the South into a filibuster, with the ensuing possibility that no bill at all might be passed. That may well have been the case, although personally I believed then, and I believe now, that the risk should have been taken. In my mind it had become clear that the Federal Government had the responsibility of assuring reasonable civil enforcement powers under the 14th amendment; especially since a number of States in the South had passed laws which had the effect of making privately initiated litigation very difficult—the so-called antibarratry and similar statutes. Thus, I felt that justice and conscience required the issue to be met on principle; and not on the sole ground of procedural difficulties which such a fight would entail. The vote which struck part III was 52 to 38.

The reasons which motivated the Senators to vote against part III undoubtedly were many and varied. Certainly, no one can say for sure that without the threat of organized filibuster, part III would have been retained; but, it is my belief that a critical number of Senators did become convinced of the impossibility—or at least the

improbability—of passing a bill with part III, and that their views were necessarily affected by this consideration. It must remain conjectural why part III was lost to the legislation. I have no doubt that if part III had been retained in the bill the Senate would have faced the necessity of a long filibuster which could be blocked only if a large majority were sufficiently determined to sit out the long dreary months that would have been involved. In that interim, no other business could have been transacted and Congress would have been at a standstill. In these times, with important pending legislation, this was a risk to which, naturally, Members of the Senate should give thoughtful consideration. The determined proponents of part III were fully aware of consequences of insisting upon it. Schedules were worked out for around-the-clock coverage of the Senate floor, Members had beds installed in their offices, the staff details were worked out for a 24-hour operation. Senator Russell of Georgia, the leader of the southern bloc of Senators, was interviewed on a nationwide television program, Face the Nation, on July 21, 1957. Pertinent excerpts of the interview transcript inserted in the Congressional Record of July 22, 1957, indicate clearly the position of the minority:

Mr. SHADEL. But, Senator, is there any feeling in the Senate that this bill is going to go through, as is, without modifications?

Senator RUSSELL. Not on my part because I will certainly die fighting it in my tracks before this vicious bill could go through, and I would feel the same way if it were aimed at any section of the country. * * *

* * * * * * *

Mr. LAWRENCE. Well, would it be the intention of the South, under the circumstances that I can foresee and that you can foresee at the moment, to talk this bill to death?

Senator RUSSELL. I can't say that, Mr. Lawrence, without seeing the bill and if it has these very vicious provisions in it, well, you may be sure that we will use every means at our command to fight it to the very death because it is a very vicious piece of legislation in its present form.

Decision by ordeal was imminent.

No one who participated in the Senate's deliberations could escape the sense of drama, or the mounting tension and concern over the threat inherent in a filibuster. It was in this atmosphere that crucial decisions were made resulting in a number of changes in the legislation, including the elimination of part III.

There were other amendments to the civil-rights bill, although not as vital as part III, which demonstrated the power of the filibuster possibilities inherent in rule XXII to condition and to modify legislation. Even the proponents of a strong civil-rights bill joined in amending the bill to grant additional power over commission staff selection to the Senate or remove certain features which were felt most objectionable to the southern Members. These amendments, although they have not yet proved crucial, reflected again the power of the filibuster threat. They included striking out of the specific power of the President to enforce Federal court decrees. As demonstrated by developments in Little Rock, this specific grant of power was unnecessary. The President retained the power as a necessary incident of his Executive responsibility. The appointment of the Executive Director of the Commission was made subject to Senate confirmation, with the practical effect of giving additional authority to the opponents of civil rights who are powerful members of the committee which will initially pass upon his selection. These amendments were approved, among other reasons, to help insure no filibuster.

Once part III had been eliminated and the other concessions given, and even after the Senate had interposed the jury trial requirement in the voting rights provision, it was not at all clear that there would not be a filibuster against the remaining bill. But, ironic as it may seem, at this point rule XXII well may have had an unexpected effect upon the chances for passage of the bill. Rule XXII is the final inner citadel of the opponents of civil-rights legislation. It is the last fortress in the legislative arm for a determined minority to prevent altogether or to water down substantially legislation that they violently oppose. As a consequence, there came a point at which the minority had to face the realization that reckless opposition to a very mild civil-rights bill would build up tremendous forces for a direct assault on rule XXII itself. Having drawn a number of teeth from the civil-rights bill the decision was seemingly made to keep rule XXII as impregnable as possible by permitting the bill to come to a vote.

On the one hand, without question the southern Senators on the civil-rights issue had accomplished a great deal, from their point of view. Senator Russell of Georgia summed up this matter for the opposition in retrospect on August 30, 1957, when he said in the Senate:

> When it is considered that there were only 18 out of 96 Senators, all of us suspect because we were from the South, who were willing to wage an all-out fight on this bill, I think that I can, in all modesty, say for myself and my associates that the legislative history of the Senate does not reveal as great a victory from so small a group as the one we attained.

At the same time, Senator Russell admitted that the use of the filibuster was often discussed by the southern bloc, but that it was generally decided to avoid it. This decision was not universally accepted. Senator Thurmond established a record of speaking for over 24 hours—a feat which turned out to be completely unrelated to effective opposition to the final version of the bill. It did, however, serve to emphasize, if it were necessary, that rule XXII contains a coercive power that could not be underestimated. The other southern Members who did not join in a filibuster had apparently weighed its use against graver consequences. My cochairman, Senator Talmadge, following Senator Thurmond's recordbreaking stint, stated the dilemma thus (on August 30, 1957):

> Because of the present complexion of the Rules Committee, it is well known that any filibuster attempt would result in the reporting of one or more of these pending resolutions and the imposition of a much stronger cloture rule, which would further limit the ability of individual Senators to protect their constituents.

On August 7 in the Senate, Senator McNamara, of Michigan, stated the case somewhat differently:

> The defenders of segregation have won a great defensive victory which, in the opinion of some of us, will cost our country dearly, internally and in our standing among the nations and peoples of the world.
>
> The defenders of segregation fought with skill and determination. They were united. They were able to win the support of many who were and, I believe, still are, opposed to the continuance of segregation and first- and second-class citizenship in this country. Why?
>
> Without attempting to detract from the skill, stamina, and success of those who are opposed to civil-rights legislation, it must be said that their victory was won, not on July 24, when part III was stricken from the House bill by a vote of 52 to 38, nor on August 1 when part IV was largely nullified for Negroes in large

areas of the South by the 51-to-42 vote for the so-called jury-trial amendment, but on January 4, 1957. That was when the Senate voted, 55 to 38, to put King Filibuster back on his invisible but very real throne overlooking and dominating this Chamber.

I believe that the Senate will not pass needed civil-rights legislation until rule XXII has been modified so that it no longer holds its effective restraint on this body in the area of enforcing constitutional rights.

In closing on this point, I should like to add that Little Rock has demonstrated that the decision taken by the Senate to eliminate part III was unwise and that the risk of a stubborn filibuster should have been faced in the last session.

Close observers of the legislative process in Congress are aware of this force—of the filibuster—in other legislative compromises which have been adopted, and could cite other examples of the effect of the filibuster on legislation. Vice President Charles G. Dawes, a keen student of Senate proceedings, described the effect of the filibuster in the following words:

> The right of filibuster does not affect simply legislation defeated but, in much greater degree, legislation passed, continually weaving into our laws, which should be framed in the public interest alone, modifications dictated by personal and sectional interest as distinguished from the public interest.

It is no answer to say, as some do say, that such power prevents or softens bad legislation. Of course, it may do that; because legislative proposals subject to a successful filibuster do not get enacted. If any specific action is bad, inaction may be preferred. If all change were bad, then whatever inhibited it would be wise. But the millennium is not here and events do not wait, even if governments do. This built-in stalemate as a permanent method of procedure is opposed to our American spirit and genius.

If the men who conceived our Constitution had thought we needed the concurrence of the majority of two Houses, the assent of the President, and in addition the forbearance of 33 Senators to make law, I assume they would have said so. If this additional check on governmental action is necessary, let us amend the Constitution. The standing rules of the Senate were not drafted in Philadelphia in 1787. The American people neither concurred in them nor agreed to be bound by them—nor did the States. In each Congress, as adopted or acquiesed in, and, to the extent they are constitutional, they bind our Senate procedure so long as they remain unchanged, but they are not the supreme law. They are not the bulwark of free speech and States rights; nor are they immutable.

IN ANSWER TO PRINCIPAL ARGUMENTS FAVORING RULE XXII

In my study I have given close attention to the arguments put forward by many of those opposed to any change in rule XXII and who appeared before our subcommittee. Some of these are superficial and based upon an erroneous conception of our Government. However, there are impressive lines of reasoning employed in defense of the present wording of rule XXII, and much of this, too, was brought out during the hearings. One of the most distinguished arguments in opposition to a change in the rule in my opinion was made by my

colleague, Senator Stennis of Mississippi. Excerpts from his testimony follow:

> Now, the phrase "State rights" is often used. I am thinking of this in terms of States powers. We are down to the last nub of representation of States as States * * *
>
> It is only in the Senate that the States as such have representation. Their rights and powers are deposited in the Senate Chamber. It is their only forum in Government. It is the only place where their rights and powers, which were not delegated but were reserved under the 9th and 10th amendments, find their protectors.
>
> If this be true, and it is true, then it must follow that the Senators elected from their States are the trustees of their States rights and powers.
>
> Members of the Senate had nothing to do with creating these rights and powers. That was accomplished when the Bill of Rights was adopted.
>
> They have a responsibility, where legislation involves the creation of new Federal power, to see that their States rights are protected * * *
>
> They have a duty to go forward in protecting the rights of States which have entrusted them with the power of a senatorial vote.
>
> On the specific issues which come before the Senate, I feel that the question of support or opposition to any measure should depend not only on the individual Member's opinions on the effect of this legislation at the national level, but should also reflect the searching of his conscience as to whether the power of the State he represents would be effectively diminished in derogation of the constitutional balance and whether, in effect, he is violating the trust placed in him by the people of the State he represents by assenting to a loss of some incident of sovereignty of the State * * *
>
> I think that the Government must be kept close to and responsible to the people, and that the effectiveness of local and State government should not be further diminished by ill-considered and unwise legislation * * *
>
> This rule, and the underlying principle of full and free discussion of major national issues, more than any other single thing determines the power of the States in their representation in the Senate. As much as any other single thing, the principle of free discussion without the threat of a gag rule determines the nature of the Senate and contributes to its stability.
>
> Now there is your Senate as an institution.
>
> If this rule were eliminated and cloture were made possible by a mere majority vote of the Senate, the deliberative function of the Senate would be destroyed. It would be a mere annex of the House of Representatives, and would be merely another legislative body * * *

The heart of this argument against amendment is contained in the rhetorical questions (1) whether "the power of the State he [a Senator] represents would be effectively diminished in derogation of the constitutional balance and whether, in effect, he is violating a trust by assenting to a loss of some incident of sovereignty of the State"; (2) whether "the deliberative function of the Senate would be destroyed."

On the first question, one may, of course, argue that the existence of rule XXII by which any substantial group of Senators can conduct a filibuster so as to act as a veto, constitutes a "power" which may be exercised on behalf of the States represented by the filibustering Senators; but it is the power neither of persuasion nor of public education. It is an arbitrary power unsanctioned by the Constitution and indeed in direct conflict with its spirit.

Far from securing any constitutional balance, rule XXII seriously disturbs it. The Constitution, in article I, section 5, clause 1, states that—

> A majority of each [House] shall constitute a quorum to do business.

That is, 49 Senators are sufficient for the transaction of legislative business. A majority of this quorum is required to assent to the passage of a normal bill. Yet cloture may not be invoked unless at least 64 Members are present and vote for cloture. Legislation of the

most profound national effect requires the assent of fewer than half of those required to bring a filibuster to a reasonable close so that that very legislation may be acted upon. I fail to see what balance is here maintained by continuance of the present rule. Alexander Hamilton in arguing, in the Federalist Papers, for the adoption of the Constitution he had helped frame, set forth the need for a totally different balance (Federalist Papers No. 22):

> To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser * * * This is one of those refinements which, in practice, has an effect the reverse of what is expected from it in theory. The necessity of unanimity in public bodies, or of something approaching toward it, has been founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of the Government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority * * * The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good, and yet, in such a system, it is even happy when such compromises can take place: for upon some occasions things will not admit of accommodation; and then the measures of government must be injuriously suspended, or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savor of weakness, sometimes border upon anarchy * * *
>
> When the concurrence of a large number is required by the Constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely to be done; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary; and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.

To be sure, there are times when more than a majority is required under the Constitution; but even in these instances only two-thirds of those present is required on any vote. Strangely enough it takes more Senators to shut off a filibuster by one Senator than it takes to expel a Member from the Senate.

There was a great question of the proper balance of State representation in the Congress in 1787. A study of the debates of the Constitutional Convention shows very clearly that the decision to establish 2 Houses, one to be based on a reference to population, and the other to have 2 Senators from each State regardless of size or population, was the compromise between the delegates from big States and the delegates from the small States. This was the only basis on which the small States would agree to join the Federal Union. This was the great compromise that gave the small States an equal measure of legislative power with the more populous States in this body.

As far as the big States are concerned, according to Madison and others devoted to the principle of proportional representation, they had given enough and more than enough when they finally agreed that each State should have two votes in the Senate. No one then dreamed that in the future Senators would want to upset this balance and add an additional check by a small minority of one-third upon the power of a majority of the Senate as so constituted. This, of course, was long prior to the time when John C. Calhoun developed his theory of concurrent majorities under which legislation favored

by a majority in the country as a whole or in the Congress would be subject to the veto of a majority of each and every sectional interest in the country.

This kind of balance, which the opponents of civil-rights legislation wish to retain in the Senate, is a modern version of Calhoun's "concurrent majorities." It was such a sectional right of veto and interposition that Calhoun and other States-rights advocates urged during the debates, in and out of Congress, that led up to the Civil War. This type of imbalance, however, finds no support in the Constitution nor in current practice outside of rule XXII.[2]

On Senator Stennis' second point: that to make cloture easier would bring about "gag rule" and destroy the unique characteristic of the Senate—its role as a deliberative body—I wish first to note that I, too, consider the United States Senate a great deliberative body and with great pride serve as a Member.

I submit, however, that the Senate is a distinguished body, not because of filibusters or the license to engage in them enjoyed under the present rules, but in spite of them and in spite of the present license to engage in them. No one who has examined some of the filibusters in the Senate would seriously describe them as scenes of great deliberation in keeping with the dignity and prestige of the Senate.

Those who have used the filibuster as an instrument of veto have been under no illusion that they were always thereby contributing to a "full and free discussion" of national issues. Some former Senators have been quite candid about the purpose of the filibuster. In 1922 Senator Underwood of Alabama said, with respect to the filibuster against the Dyer antilynching bill, as follows:

> We are not disguising what is being done on this side of the Chamber. It must be apparent, not only to the Senate but to the country, that an effort is being made to prevent the consideration of a certain bill, and I want to be perfectly candid about it. It is known throughout the country generally as a "force" bill. * * *
>
> *I do not say that captiously. I think all men here know that under the rules of the Senate when 15 or 20 or 25 men say that you cannot pass a certain bill, it cannot be passed.* * * *
>
> I want to say right now to the Senate that if the majority party insists on this procedure they are not going to pass the bill, and they are not going to do any other business. * * *
>
> You know you cannot pass it. Then let us go along and attend to the business of the country. [Emphasis supplied.]

Shortly thereafter he posed the dilemma which the Senate faced even more concisely:

> There is but one way for the Senate now to get down to work and transact the business of the Government before the 4th of March, and that is to get a final disposition of this force bill before anything else is done. Pass it if you can; abandon it if we force you to do so. * * *
>
> So long as the Senate has the rules that it has now, you know just as well as I know that I am standing here that you cannot pass it; and, more than that, the country does not want you to pass it.

The reality of the use of the filibuster as a veto has been borne out by the experience of the intervening years.

As my colleague, Senator Kuchel, of California, put it last summer in the hearings before this subcommittee:

> How can any reasonable person uphold such tactics as those which occurred some years ago when the Senate ludicrously debated for 2 weeks a motion to amend the Chaplain's prayer?

[2] The paralyzing effect of the minority veto is clearly evident in the deliberations of the United Nations Security Council.

Permitting a Senator or a group of Senators to talk for hours and days on any conceivable subject or on no subject in order to consume time and prevent the Senate from voting, affords no dignity to the Senate and adds nothing to its deliberative function. Reading recipes for "pot licker," "fried oysters," quoting from Aesops Fables,[3] and otherwise talking in utter irrelevancies does nothing to enhance the Senate's standing as a great deliberative body.

Senators have a right—and freely exercise it—to express their views on any question before the Senate or before the country. Without doubt it would be a violation of the letter and the spirit of the Constitution to deny or even seriously abridge the right of debate. But, it is also a most flagrant violation of the spirit of the Constitution to clothe this body with forms of procedure by which it may be blocked in the exercise of the legislative powers, and thereby suspended of every other function except that of speaking. The Senate has a duty to debate, but it is likewise a constitutional duty of a majority of this body to act, and with some reasonable expedition. We are obligated not only to pass laws, but also to pass them in time to meet the public need and the general welfare of the country.

Some observers have declared that, far from enhancing the Senate's deliberative function, the right to filibuster has all but destroyed it. Vice President Dawes, for example, said of the veto power of the filibuster:

> The Senate is not and cannot be a properly deliberative body, giving due consideration to the passage of all laws, unless it allots its time for work according to the relative importance of its duties, as do all other great parliamentary bodies. It has, however, through the right of unlimited debate surrendered to the whim and personal purposes of individuals and minorities its right to allot its own time. Only the establishment of majority cloture will enable the Senate to make itself a properly deliberative body. This is impossible when it must sit idly by and see time needed for deliberation frittered away in frivolous and irrelevant talk, indulged in by individuals and minorities for ulterior purposes.

Yet, the Senators who argue that rule XXII should be retained in its present form support this retention as necessary to its deliberative character. I certainly agree that the Senate is a forum of great debate, deliberation, and revision; but I submit that it owes nothing to rule XXII for achieving this distinction. It has achieved that eminence despite the rule.

HISTORY OF THE PREVIOUS QUESTION AND CLOTURE

Having considered why the present rule serves neither the constitutional balance of States rights nor the deliberative function of the Senate, it is useful to review the development of cloture and the closely connected motion for the "previous question" in order to evaluate the pending proposals for amendment of rule XXII.

In Mason's Manual of Legislative Procedure (1953) the motion is described thus:

> The previous question may be used to close debate on any debatable question * * *. The effect of the motion, if adopted, is to require that the question [before the legislative body] be put to vote immediately. It would be more aptly designated "vote immediately" * * *.

[3] During the filibuster against the extension of a skeletonized NRA, Senator Long discussed various recipes at great length. This talk continued for 15½ hours and included the reading of long passages from works of Victor Hugo and a reading and discussion of the United States Constitution, article by article, without any necessary reference to the pending business. (See vol. 79, pt. 8, pp. 9122 et seq.)

On June 20, 1936, Senator Rush D. Holt of West Virginia successfully filibustered against passage of a coal conservation bill by reading Aesops Fables to the Senate. The Senate finally adjourned, sine die, without ever voting on the bill.

While the result of passing a motion for the previous question under general parliamentary law is to bring on the main question for immediate vote, the effect of defeating it is to postpone the main question. The almost universal use of the motion in American parliamentary bodies is to bring about cloture.

It was recognized in the early days that a motion for the previous question could close debate in both Houses of the Congress. This is to be expected when one studies the proceedings in the British Parliament, which was the model for our own. The use in that body of the motion for the previous question apparently dates from 1604, and after 1640 it became a prime instrument of cloture.

Its use to end debate and force a vote in the House of Representatives and States legislatures has been incorrectly called a perversion of the British practice. Fortunately, due to the thorough scholarship of Irving Brant, the eminent biographer of James Madison,[4] we now have an accurate historical review of this motion practice in the British Parliament and in the United States Senate. I think it would be helpful to quote from testimony given by him before the special subcommittee. Mr. Brant said:

As is well known, the United States House of Representatives began to limit debate in 1811 by means of the motion for the previous question. It was confronted with persistent filibustering against the "measures short of war" that preceded the War of 1812.

The alternatives were to surrender to the minority, or to use the power of the majority to end a purely obstructive debate. The majority acted, not arbitrarily, but after many day-and-night sessions, with the clock running toward a compulsory sine die adjournment.

The United States Senate had a previous-question rule from 1789 until 1806, when it was dropped. The rule read as follows:

"The previous question being moved and seconded, the question from the Chair shall be: 'Shall the main question be now put?' And if the nays prevail, the main question shall not then be put."

The previous question was moved in the Senate on four occasions. In 1789, the nays won and the subject was postponed. In 1792, the question was worded in reverse. It was moved "That the question be not now put." This carried and resulted in postponement. In 1799, the question was moved in the wording required by the rules, "Shall the main question be now put?" The affirmative won, producing cloture. The main question was then put, and it also carried.

On the fourth and last occasion, in 1804, the previous question was moved during the impeachment trial of Judge Pickering. The complicated details of this controversy are set forth in my memorandum on the previous question, and may be found on page 5963 of the Congressional Record of May 9, 1957. Instead of summarizing them here, I shall merely quote two sentences from the diary of Senator John Quincy Adams concerning thse proceedings:

"On this resolution it was not without the utmost difficulty that any discussion whatsoever could be obtained."

Again:

"The next struggle was to prevent all debate upon the resolution."

The majority actually did cut off the debate and proceeded at once to defeat the resolution.

Looking into British treatises on parliamentary practice, I found the previous question described as a method of postponement in which the mover voted

[4] Mr. Brant, a former newspaper editor and editorial writer, has been engaged for many years in historical research and writing. Five volumes of his Life of James Madison have been published.

Henry Steele Commager, professor of history at Columbia University and Amherst College, describing Mr. Brant's scholarship, said:

"Brant's Madison, which has now reached five volumes, is, by universal agreement of American historians, one of the most impressive achievements of American historical writing of our generation. Thorough, critical, judicious, comprehensive, well-written, it has the quality that so few biographies have, of doing the job so completely and so well that it does not have to be done over. What is perhaps most impressive about Brant's work is that it is based entirely on original research, that it takes nothing for granted but goes to the sources, that it maintains the very highest standards of rigid scholarship. Whatever may be said of Brant's interpretations—and there will always be differences of interpretation—this can be said with confidence, that Brant's historical scholarship is impeccable and unimpeachable."

against his own motion. But if the motion should happen to carry, the effect would be to cut off debate and force an immediate vote on the main question.

I therefore examined the Journals of the House of Commons from 1604 down to the present time and found a truly remarkable record. In the 20th century, the previous question has been moved only twice in the House of Commons, and not once since 1911. In the 17th century, it was moved 736 times. It resulted in cloture 491 times and in postponement 235 times.[5]

Now, it may be asked, why was it that when the House of Commons came to establish a cloture rule, it didn't simply utilize the previous question for that purpose? Well, that is what it did. On February 25, 1881, a year and a half before the word "cloture" was applied to the practice, the wording of the motion for the previous question was employed for the avowed purpose—a purpose set forth in the Journals—of stopping debate, and the motion is recorded in the index as a motion for the previous question.

A year later, the House incorporated some special provisions and changed the name to "cloture." Thus we have before us, not an American perversion of the British motion, but a kindred line of development in both countries.

To this, let me add one more fact. Before the House of Commons converted the motion for the previous question into a cloture rule, it had been dealing with obstructive debate for some years by treating it as contempt of the House, punishable by suspension. That was done under parliamentary practices dating back to 1604, which gave the Speaker power to stop "superfluous motions, and tedious or impertinent speeches."

These same rules were incorporated in Jefferson's Manual, as a guide to Senate conduct, at a time when the Vice President had unappealable power to decide points of order. *Here is evidence, then, that if the question of altering the Rules of the Senate comes before that body under the general rules of parliamentary practice, it will make no difference whether those general rules are looked for in the practices of our 48 State legislatures or in the British House of Commons.* [Emphasis supplied.]

The question of cloture in the Senate must be considered in relation to the nature of that body. The Senate can control the filibuster, it can free itself from the will of a rampaging minority, without the slightest danger of acquiring the ills that afflict the House of Representatives [Mr. Brant has reference to the large membership of the House] and without any possibility of moving into the discipline that marks the [still larger] House of Commons.

Various theories have been advanced to explain why the practice of filibustering as a power of veto developed much more slowly in the Senate than in the House. In fact it was largely brought under control in the House long before it reached the peak of its development in the Senate. One of the reasons that it has been difficult to discover with certainty the history of the early period is that during its first 5 years the Senate sat in secret behind closed doors and only occasionally published extracts from the journal of its proceedings. What knowledge we have of this period has been gained almost entirely from diaries, letters, and other documents written during the period. Furthermore, neither House published verbatim accounts of its proceedings until 1873 and therefore the evidence for some of the early periods is rather meager. In spite of the research difficulties, certain facts have clearly emerged.

The motion for the previous question was from the beginning available in both Houses to close debate and bring an issue to a vote. All that was required was a majority vote. In both Houses the motion for the previous question was itself originally open to debate but not, as some have contended, "without let or hindrance." Certainly, in the early Senate the presiding officer could, pursuant to Jefferson's Manual, rule a Senator out of order for speaking "im-

[5] In a supplementary letter to me, dated December 21, 1957, Mr. Brant made an exhaustive historical analysis of the prevalent misconception that the "previous question" was used primarily in the British House of Commons for the purpose of postponement, showing clearly that the motion was in fact primarily used for cloture.

pertinently or beside the question, superfluously, or tediously." [6] In other words, the Senate originally had the motion for the previous question, supplemented by the unappealable authority of the Vice President to rule on questions of order, to prevent a filibuster. When necessary, a majority in the early Senate could, with the cooperation of the Vice President, end filibustering tactics and act on legislation.

Thus the early Senate (from 1789 to 1806) had at its disposal the motion for the previous question, supplemented by the Vice President's unappealable authority to stop a Senator in debate for using speech as a dilatory device. The previous question motion, used apparently only four times, was omitted from the rules when they were given a general revision at the beginning of a session in 1806. The deletion occurred without any recorded comment or debate. The reason for dropping this motion from the amended rules in 1806 may well have been that it was not needed to control obstructive speech, which was little used. Also order remained subject to control through the unappealable rulings of the Chair on relevancy and obstruction. The technique of the filibuster as a powerful weapon of obstructing and defeating the majority will in the Senate was still in the future.

Until 1828, the unappealable authority of the Vice President to rule on questions of order remained unchanged. This power to prevent filibusters was supported by the long previous tradition of Senate dignity which frowned on tedious and impertinent speech.[7]

In the House of Representatives, protracted speech, while used to some extent in a mild form prior to 1800, did not become an obvious instrument for obstruction until developed by the erratic genius, John Randolph of Virginia, between 1806 and 1811. After extreme provocation by Randolph and others acting with him, the House in desperation, on February 11, 1811, by a vote of 66 to 33 reversed its previous position and decided that a majority vote in favor of a motion for the previous question closed debate on the pending issue. The written rules of the House were thereafter amended on December 21, 1811, to conform to this decision.

In December 1825, John Randolph was elected to fill an unexpired Senate term. He came over to the Senate from the House bringing with him his penchant for irrelevant and lengthy speeches. John C. Calhoun, then Vice President, refused to maintain the same rigid discipline over debate that most of his predecessors had done.

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[6] Both John Adams and Thomas Jefferson were forceful presiding officers during their service as Vice President. It is apparent that they maintained the dignity and decorum of debate in the Senate by vigorous application of the rules.

In sec. XVII of Jefferson's Manual of Parliamentary Practice, Jefferson stated the guiding rule to be: "No one is to speak impertinently or beside the question, superfluously, or tediously," citing precedents from the British Parliament.

In the preface to his manual written while he was serving as Vice President (1797 to 1801), Jefferson said:

"The Constitution of the United States, establishing a legislature for the Union under certain forms, authorizes each branch of it 'to determine the rules of its own proceedings.' *The Senate has accordingly formed some rules for its own government but these going only to few cases, it has referred to the decision of its President, without debate and without appeal, all questions of order arising either under its own rules or where it has provided none.* This places under the discretion of the President a very extensive field of decision and one which, irregularly exercised, would have a powerful effect on the proceedings and determinations of the House. * * *

"Considering, therefore, *the law of proceedings in the Senate* as composed of the precepts of the Constitution, the regulations of the Senate, and, where these are silent, of the rules of Parliament, I have here endeavored to collect and digest so much of these as is called for in ordinary practice, collating the parliamentary with the senatorial rules, both where they agree and where they vary." [Emphasis supplied.]

[7] From the records of the debate in February 1828 concerning the powers of the Vice President to rule on points of order, two propositions emerge:

(1) In the opinion of the presiding officers of the Senate after Jefferson they had the authority to rule a Senator out of order for irrelevant speech and they generally considered Jefferson's Manual controlling on the point; and

(2) The tradition of the Senate for dignity in debate down through 1828 at least was a heavy deterrent against filibustering.

As a result of Calhoun's failure to control irrelevant and tedious debate, the Senate amended the rule to provide explicitly that the Vice President had this authority on his own initiative and made his rulings subject to appeal. In making the Vice President's rulings appealable the Senate did not intend to weaken Senate discipline but rather, in all probability, to strengthen it by adding the weight of the majority to the decision on questions of order when an appeal was taken.

This change in the rules in 1828 apparently restored to the Senate discipline which had been temporarily lost, and the question of controlling debate in this body was not again a subject of major discussion until 1841. This fact suggests the vigor with which presiding officers after 1828 enforced the rules to prevent obstructive delays. In 1841 during an extra session of Congress called by President Harrison to consider the Government's fiscal policy and the rechartering of the national bank, Henry Clay, the Whig leader in the Senate, threatened the minority with bringing forward some form of cloture rule. The records of this session indicate that while debate was extended no real filibuster took place and probably for this reason no such rule was adopted. At this time the rule of relevancy was still available, and as late as the year 1848 the Senate voted (27 to 2) to require a Senator to take his seat for being out of order because of irrelevancy.

But by 1872, when Vice President Schuyler Colfax ruled that "under the practice of the Senate the presiding officer could not restrain a Senator in remarks which the Senator considers pertinent to the pending issue," the Senate abandoned its effective control over debate.

From 1872 to 1917, there was neither any cloture rule nor any enforced rule of relevancy. It was during this period that the filibuster matured more or less into its present form.

The first formalized modern cloture rule was not adopted until March 8, 1917. From 1917 until 1949 rule XXII provided that limitation of debate could only be imposed by two-thirds of those Senators voting. In 1949 this percentage was increased to require two-thirds of the entire membership of the Senate to be present and affirmatively voting to end debate. The 1949 revision also amended the rule to subject "any measure, motion, or other matter," or the unfinished business, to cloture control. By such change the Senate was no longer bound by former decisions which had held, in brief, that limitation on debate could be had only on a pending "measure." The 1949 revision thus eliminated correction of the Journal and presentation of credentials, both highly privileged matters, as well as motions to take up new business, as possible sources of filibusters. It also added subsection 3 to rule XXII, which provides in effect that debate could not be limited on any proposal to amend the Standing Rules of the Senate. (See appendix A, p. 35.)

Since 1917 twenty-two votes have been had under rule XXII. On only four occasions was such cloture invoked. Had the 1949 version of the rule been in effect during this time it would have been successful only three times.[8]

[8] Under the 1917 requirement of two-thirds of those voting the motion for cloture succeeded four times:

	Vote
(1) 1919—Treaty of Versailles	78 to 16
(2) 1926—World Court	68 to 26
(3) 1927—Branch banking	65 to 18
(4) 1927—Bureau of Customs and Bureau of Prohibition	55 to 27

Under the present rule requiring 64 affirmative votes the last cloture motion would have failed by 9 votes.

Such a self-imposed obstacle to legislation is rare in the history of parliamentary development. All but 12 States of the Union expressly permit the motion for the previous question to close debate in their upper legislative chambers; 4 of these 12 States have another form of cloture rule. Apparently, only in the senate in Utah and Vermont is the use of the previous question specifically prohibited. It is ironical that many of the Senators most opposed to a reasonable limitation on filibusters have the most effective rules for limiting debate in the upper chambers of their own State legislatures. (A tabulation referring to the rules of State senates is set forth in appendix B to this report (p. 35.))

The British Parliament accepts a specialized form of the previous question as a cloture rule and even the Senate of the Confederate States of America in 1862 provided for the previous question as a method of cloture.

SUBSECTION 3 OF RULE XXII

Subsection 3 deserves separate attention for it is a built-in filibuster device which, if held valid, makes the whole rule so unjust as to require it to fall of its own weight of unfairness. Difficult as it is to obtain the affirmative vote of 64 Senators to limit a filibuster on the usual subjects, on a motion to change rule XXII itself (or for that matter any rule of the Senate), because of this provision unanimous consent is required—short of forcing physical exhaustion. It raises minority control to such a degree that the Vice President found it offended the Constitution.

In an advisory opinion the Vice President on January 4, 1957, held in part as follows:

> The Constitution also provides that "each House may determine the rules of its proceedings." *This constitutional right is lodged in the membership of the Senate and it may be exercised by a majority of the Senate at any time.* When the membership of the Senate changes, as it does upon the election of each Congress, it is the Chair's opinion that there can be no question that the majority of the new existing membership of the Senate, under the Constitution, have the power to determine the rules under which the Senate will proceed.
>
> Any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying the majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional. It is also the opinion of the Chair that section 3 of rule XXII in practice has such an effect. [Emphasis supplied.]

Pursuant to the Constitution each House determines its own rules of procedure, and in this context action by each House means a majority of each House. A practical delegation of that power to 1 Senator or to 33 Senators is beyond the power of this body. Its responsibilities are derived from the Constitution and, short of amending that document, there is no way of qualifying this power.

The Supreme Court has held that a House of Congress "may not by its rules ignore constitutional restraints" (*U. S.* v. *Ballin*, 144 U. S. 1, 5).

To illustrate, assume that the Congress passes a statute which by its terms provides that it may not be amended except by unanimous consent of both Houses. Surely no one would thereafter contend that that law might not be amended by a simple majority vote. In other words, Congress cannot impose such a limitation on itself or on future Congresses which is not imposed by the Constitution. In *Newton* v.

Board of County Commissioners (100 U. S. 548), the Supreme Court has held in reference to legislation:

"Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

As a question of power a majority of a quorum of this body may at any time abolish its rules or change its rules. Whatever the rules may say they can be changed by the same power that adopted them. As a matter of power this is necessarily so. That it exists is shown by the fact that on the two most recent occasions efforts to change the rules (1953 and 1957) were defeated by motions to lay on the table, both decided by a majority vote. Of course, Senators may choose to be bound by any restrictions which they care to follow.

I recognize that the problem cannot be solved on the basis of constitutional power alone but must be worked out within both the parliamentary law and the traditions of this body. I am convinced that this can be done, but I think it is important to set at rest any possible question of power to change the rules. The restriction attempted in practical effect in subsection 3 is unconstitutional precisely because it seeks to limit the power granted by the Constitution inherent in the Senate and the responsibility that goes with it.

If subsection 3 is unconstitutional, the method of so deciding, according to the opinion of the Vice President, would be by determination of the Senate itself. Obviously this determination would be by a majority vote. Assuming that it is unconstitutional and therefore of no effect, then it follows that on any motion to change the rules under which the Senate is operating the present cloture provisions of rule XXII, inadequate as they are, nevertheless are available for closing debate which is simply and obviously a filibuster against any proposed change in that rule.

PENDING PROPOSALS

A number of resolutions proposing amendments to rule XXII were introduced during the 1st session of the 85th Congress. They are before the special subcommittee, and may be summarized as follows:

Senate Resolution 17 provides that debate may be limited by a vote of two-thirds of the Senators present and voting 2 days after 16 Senators have filed a petition for this purpose. It further provides that 15 days, exclusive of Sundays and holidays, after the presentation to the Senate of a petition signed by 16 Senators, the Senate by a majority vote of those "duly chosen and sworn" (49 of the 96 Senators) may also impose cloture. Moreover, it eliminates the exemption to any form of cloture of a motion to change the Senate's standing rules (subsec. 3). As in the present rule, even after cloture is voted each Senator may speak for 1 additional hour before the vote.

Senate Resolution 19 would amend rule XXII by providing that cloture may be imposed by a favorable vote of two-thirds of the Senators present and voting, but in no case less than a majority of Senators "duly chosen and sworn."

Senate Resolution 21 would provide for cloture by a majority of Senators voting (if a quorum be present). It would also permit any Senator to yield to another Senator all or part of the 1 hour time for debate allotted to him after cloture is imposed. This resolution also eliminates subsection 3.

Senate Resolution 28 would make cloture subject to an affirmative vote of a majority of the authorized membership of the Senate (49 Senators) after a waiting period of 12 calendar days (excluding Sundays and legal holidays) following the filing of a written motion for cloture signed by 16 Senators. It would also delete subsection 3.

Senate Resolution 29 would simply declare subsection 3 of the rule unconstitutional.

Senate Resolution 30 permits cloture by a vote of two-thirds of the Senators present and voting and eliminates the exception contained in subsection 3. But, in addition, Senate Resolution 30 provides that the Standing Rules of the Senate would continue from one Congress to the next unless duly changed. This last provision attempts to resolve a question of great complexity which is outside the immediate substantive concern with cloture, although being intimately connected with past and future attempts to deal with the problem.

Senate Resolution 32 would provide a waiting period of 5 days (exclusive of Sundays and legal holidays) in lieu of 2 days under the present rule and would then permit two-thirds of the Senators present and voting to impose cloture. Senate Resolution 32 would also delete subsection 3.

Senate Resolution 171 would allow two-thirds of the Senators present and voting to bring about cloture in lieu of the present rule.

These eight resolutions, even with very considerable differences, have one characteristic in common. They all would make the imposition of cloture easier. Senate Resolution 29 does not do this directly, but does ease the way to change the rule in order to do it.

As I have previously pointed out, since 1917, when the first standing rule on cloture was adopted, there have been 22 votes on motions to impose cloture, but only 4 have been successful. Merely changing a constitutional two-thirds to two-thirds of those voting would have had no effect on the historical results—only four would still have won. By requiring a constitutional majority, a significant difference occurs; nine attempts would have been successful. If only a simple majority had been required, the motion would have carried 15 times.

I do not believe the simple change to a two-thirds voting requirement of Senate Resolutions Nos. 19, 30, 32, and 171 makes significant enough change. I believe the simple majority rule of Senate Resolution 21 is too great a departure to reasonably expect this body to undertake. A table showing the effect of each resolution on past cloture votes follows:

The success of the various proposals if applied to rule XXII cloture votes since 1917

S. Res. 17	9 out of 22 (constitutional majority)
S. Res. 19	4 out of 22 (two-thirds voting)
S. Res. 21	15 out of 22 (majority voting)
S. Res. 28	9 out of 22 (constitutional majority)
S. Res. 29	(Only effect is to eliminate subsec. 3 from rule XXII.)
S. Res. 30	4 out of 22 (two-thirds voting)
S. Res. 32	4 out of 22 (two-thirds voting)
S. Res. 171	4 out of 22 (two-thirds voting)

On balance, I recommend approval of Senate Resolution 17 as being both moderate and effective. I believe it will enhance the dignity of this body.

As a practical matter we know from the history of the Senate that 16 or more signatures cannot be secured on any cloture petition unless the debate has already become a filibuster.

CONCLUSION

I am a new Member of the Senate and cannot pretend to be an expert in its procedures and traditions, but I have had considerable parliamentary experience in my public life and I have studied constitutional history and the development of Senate procedures to the best of my ability. In addition, I have had the unique opportunity of serving in the Senate at the time of enactment of the first significant civil rights legislation since that enacted immediately following the Civil War.

I respectfully emphasize to the full Committee on Rules and Administration in its deliberations of suggested amendments to rule XXII that neither freedom of speech nor the right of full debate in the Senate is at issue. In advocating a change in rule XXII to permit effective cloture while allowing for full and adequate debate, I seek no abridgment of the liberty of speech, but a just and necessary restraint upon an abuse which hinders or frustrates the performance by the Senate of its constitutional duty and perverts the reasonable function and objective of the spoken word.

The deep responsibility which rests on the Committee on Rules and Administration in this matter is highlighted by the emergency character of issues facing our country, issues of peace or oblivion, issues which the United States Senate will play a leading role in resolving. As our country and our world move forward at this rapid pace, we cannot permit a procedural roadblock that can paralyze the functioning of the Senate. Important at any time, that fact is of a crucial nature now. I deem it our committee's duty to report to the floor of the Senate a recommendation to eliminate that roadblock.

I submit that Senate Resolution 17 would work a reasonable and necessary change in the rule against filibusters and I recommend that the committee report it favorably to the Senate as soon as possible.

(Whereupon, the subcommittee recessed at 2:15 p.m., subject to the call of the Chair.)

44-406 O - 65 - 9

APPENDIX

EXHIBIT 1

[NOTE.—The following document has been brought up to date by the subcommittee staff. All subcommittee revisions are indicated by the use of italic type.]

88TH CONGRESS } SENATE { DOCUMENT
1st Session } { No. 30

SENATE CLOTURE RULE

LIMITATION OF DEBATE IN THE UNITED STATES SENATE

Legislative Reference Service
Library of Congress

and

LEGISLATIVE HISTORY OF PARAGRAPHS 2 AND 3 OF THE STANDING RULES OF THE SENATE (CLOTURE RULE)

Office of the Legislative Counsel
United States Senate

PRESENTED BY MR. HAYDEN

August 15, 1963.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
22-269 WASHINGTON : 1963

S. Res. 184

IN THE SENATE OF THE UNITED STATES,
August 15, 1963.

Resolved, That there be printed as a Senate document certain portions of the compilation entitled "Limitation of Debate in the United States Senate", prepared by the Legislative Reference Service, Library of Congress; together with a memorandum entitled "Legislative History of Paragraphs 2 and 3 of Rule XXII of the Standing Rules of the Senate (Cloture Rule)", prepared by the Office of the Legislative Counsel, United States Senate.

Attest:

FELTON M. JOHNSTON,
Secretary.

CONTENTS

(Excerpt)

LIMITATION OF DEBATE IN THE UNITED STATES SENATE

By George B. Galloway
Senior Specialist in American Government
Legislative Reference Service
Library of Congress

(Revised August 12, 1963)

PREFACE

This report is in effect a revision of an earlier public affairs bulletin prepared in response to the request of several Senators for a historical study of filibustering in the U.S. Senate and of efforts to control it. It contains the following material:

1. Present Senate rules relating to debate.
2. A chronological history of efforts to limit debate in the Senate, 1789–1963.
3. A list of outstanding Senate filibusters, 1841–1962.
4. Legislation delayed or defeated by filibusters—A list of 36 bills between 1865 and 1950 which were delayed or defeated by obstruction in the Senate.
5. Senate votes on invoking the cloture rule—a record of the 28 votes on cloture petitions in the Senate since 1917.

* * * * * * *

The text of the present Standing Rules of the Senate relating to debate is taken from the current edition of the Senate Manual.

The chronological history of efforts to limit debate in the Senate since 1789 is based, for the most part, upon the Senate Journal, the Congressional Record, and the article on "Legislative History of Cloture Rules in the Senate" from the Congressional Digest for November 1926. This history sketches the principal developments in the Senate on this question during the intervening period.

The list of outstanding filibusters mentions more than 40 famous examples of this device during the past century.

The list of bills delayed or defeated by filibusters in the past, while incomplete, includes the major legislation in this category. There have been at least 36 such bills of varying degrees of importance. In addition, many appropriation bills have either been lost in the last-minute jam caused by filibusters or were talked to death because they failed to include items desired by particular Senators or because their grants were considered excessive. A list of 82 such appropriation bills that failed of passage between 1876 and 1916 appears in the Congressional Record for June 28, 1916, on pages 10152–10153.

Analysis of the 28 cloture votes since 1917, when a cloture rule was first adopted, indicates that 5 petitions received the required two-thirds majority; 11 obtained a majority of the entire membership of the Senate; 17 obtained a majority of those present and voting; 10 obtained only a minority of those present and voting; and 1 resulted in a tie vote. The cloture rule of 1917 was drafted by a conference committee of five Democrats and five Republicans named by their respective party organizations. This committee stated that its purpose was to formulate a rule that would "terminate successful filibustering."

If the purpose of the cloture rule is "to terminate successful filibustering," experience shows that it has failed to achieve its purpose in 23 out of 28 times. Experience also shows that a majority (of the entire membership) cloture rule would have failed of such a purpose 17 out of 28 times. Experience further shows that a simple majority cloture rule would have been successful in 17 of the cases in which cloture has been invoked since 1917.

* * * * * * *

The principal sources of information on the limitation of debate in the Senate used in this report are:

Bendiner, Robert. Battle of filibustering: new round opens. New York Times Magazine, Sept. 14, 1952.

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Both the original report and this revision were prepared by George B. Galloway, senior specialist in American Government. Walter Kravitz, analyst in American National Government, assisted in this revision.

HUGH L. ELSBREE,
Director, Legislative Reference Service.

PRESENT SENATE RULES RELATING TO DEBATE

Rule VII—Morning Business

3. Until the morning business shall have been concluded, and so announced from the Chair, or until the hour of 1 o'clock has arrived, no motion to proceed to the consideration of any bill, resolution, report of a committee, or other subject upon the Calendar shall be entertained by the Presiding Officer, unless by unanimous consent; and if such consent be given, the motion shall not be subject to amendment, and shall be decided without debate upon the merits of the subject proposed to be taken up: *Provided, however*, That on Mondays the Calendar shall be called under Rule VIII, and during the morning hour no motion shall be entertained to proceed to the consideration of any bill, resolution, report of a committee, or other subject upon the Calendar except the motion to continue the consideration of a bill, resolution, report of a committee, or other subject against objection as provided in Rule VIII. [Jefferson's Manual, Sec. XIV.]

5. Every petition or memorial shall be signed by the petitioner or memorialist and have indorsed thereon a brief statement of its contents, and shall be presented and referred without debate. But no petition or memorial or other paper signed by citizens or subjects of a foreign power shall be received, unless the same be transmitted to the Senate by the President. [Jefferson's Manual, Sec. XIX.]

7. The Presiding Officer may at any time lay, and it shall be in order at any time for a Senator to move to lay, before the Senate, any bill or other matter sent to the Senate by the President or the House of Representatives, and any question pending at that time shall be suspended for this purpose. Any motion so made shall be determined without debate. [Jefferson's Manual, Sec. XIV.]

Rule VIII—Order of Business

At the conclusion of the morning business for each day, unless upon motion the Senate shall at any time otherwise order, the Senate will proceed to the consideration of the Calendar of Bills and Resolutions, and continue such consideration until 2 o'clock; and bills and resolutions that are not objected to shall be taken up in their order, and each Senator shall be entitled to speak once and for five minutes only upon any question; and the objection may be interposed at any stage of the proceedings, but upon motion the Senate may continue such consideration; and this order shall commence immediately after the call for "concurrent and other resolutions," and shall take precedence of the unfinished business and other special orders. But if the Senate shall proceed with the consideration of any matter notwithstanding an objection, the foregoing provisions touching debate shall not apply. [Jefferson's Manual, Sec. XIV.]

All motions made before 2 o'clock to proceed to the consideration of any matter shall be determined without debate. [Jefferson's Manual, Sec. XIV.]

Immediately after the consideration of cases not objected to upon the Calendar is completed, and not later than 2 o'clock if there shall be no special orders for that time, the Calendar of General Orders shall be taken up and proceeded with in its order, beginning with the first subject on the Calendar next after the last subject disposed of in proceeding with the Calendar; and in such case the following motions shall be in order at any time as privileged motions, save as against a motion to adjourn, or to proceed to the consideration of executive business, or questions of privilege, to wit:

First. A motion to proceed to the consideration of an appropriation or revenue bill.

Second. A motion to proceed to the consideration of any other bill on the Calendar, which motion shall not be open to amendment.

Third. A motion to pass over the pending subject, which if carried shall have the effect to leave such subject without prejudice in its place on the Calendar.

Fourth. A motion to place such subject at the foot of the Calendar.

Each of the foregoing motions shall be decided without debate and shall have precedence in the order above named, and may be submitted as in the nature and with all the rights of questions of order. [Jefferson's Manual, Secs. XIV, XXXIII.]

Rule X—Special Orders

2. When two or more special orders have been made for the same time, they shall have precedence according to the order in which they were severally assigned, and that order shall only be changed by direction of the Senate.

And all motions to change such order, or to proceed to the consideration of other business, shall be decided without debate. [Jefferson's Manual, Secs. XVIII, XXXIII.]

Rule XI—Objection to Reading a Paper

When the reading of a paper is called for, and objected to, it shall be determined by a vote of the Senate, without debate. [Jefferson's Manual, Sec. XXXII.]

Rule XIX—Debate

1. When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent, and to obtain such consent he shall first address the Presiding Officer; and no Senator shall speak more than twice upon any one question in debate on the same day without leave of the Senate, which shall be determined without debate. [Jefferson's Manual, Secs. XVII, XXXIX.]

2. No Senator in debate shall, directly or indirectly, by any form of words impute to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator. [Jefferson's Manual, Sec. XVII.]

3. No Senator in debate shall refer offensively to any State of the Union.

4. If any Senator, in speaking or otherwise, transgress the rules of the Senate, the Presiding Officer shall, or any Senator may, call him to order; and when a Senator shall be called to order he shall sit down, and not proceed without leave of the Senate, which, if granted, shall be upon motion that he be allowed to proceed in order, which motion shall be determined without debate. [Jefferson's Manual, Sec. XVII.]

5. If a Senator be called to order for words spoken in debate, upon the demand of the Senator or of any other Senator, the exceptionable words shall be taken down in writing, and read at the table for the information of the Senate. [Jefferson's Manual, Sec. XVII.]

Rule XX—Questions of Order

1. A question of order may be raised at any stage of the proceedings, except when the Senate is dividing, and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate. When an appeal is taken, any subsequent question of order which may arise before the decision of such appeal shall be decided by the Presiding Officer without debate; and every appeal therefrom shall be decided at once, and without debate; and any appeal may be laid on the table without prejudice to the pending proposition, and thereupon shall be held as affirming the decision of the Presiding Officer. [Jefferson's Manual, Sec. XXXIII.]

Rule XXII—Cloture

2. Notwithstanding the provisions of rule III or rule VI or any other rule of the Senate, at any time a motion signed by sixteen 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 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 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 the 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 present and voting, 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 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 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.

3. The provisions of the last paragraph of rule VIII (prohibiting debate on motions made before 2 o'clock) 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.

RULE XXVII—REPORTS OF CONFERENCE COMMITTEES

1. The presentation of reports of committees of conference shall always be in order, except when the Journal is being read or a question of order or a motion to adjourn is pending, or while the Senate is dividing; and when received the question of proceeding to the consideration of the report, if raised, shall be determined without debate [Jefferson's Manual, Sec. XLVI.]

CHRONOLOGICAL HISTORY OF EFFORTS TO LIMIT DEBATE IN THE SENATE

In 1604, the practice of limiting debate in some form was introduced in the British Parliament by Sir Henry Vane. It became known in parliamentary procedure as the "previous question" and is described in section 34 of Jefferson's Manual of Parliamentary Practice, as follows:

"When any question is before the House, any member may move a previous question, whether that question (called the main question) shall not be put. If it pass in the affirmative, then the main question is to be put immediately, and no man may speak anything further to it, either to add or alter."

In 1778, the Journals of the Continental Congress also show that the "previous question" was used. Section 10 of the rules of the Continental Congress reading: "When a question is before the House no motion shall be received unless for an amendment, for the previous question, to postpone the consideration of the main question, or to commit it." In the British Parliament and the Continental Congress the "previous question" was used to avoid discussion of a delicate subject or one which might have injurious consequences.

1789—The first Senate adopted 19 rules of which the following relate to debate in, and taking the time of, the Senate:

2. No Member shall speak to another, or otherwise interrupt the business of the Senate, or read any printed paper while the Journals or public papers are reading, or when any Member is speaking in any debate.

3. Every Member, when he speaks, shall address the Chair, standing in his place, and when he has finished shall sit down.

4. No Member shall speak more than twice in any one debate on the same day, without leave of the Senate.

6. No motion shall be debated until the same shall be seconded.

8. When 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.

9. The previous question being moved and seconded, the question from the Chair shall be: "Shall the main question be now put?" And if the nays prevail, the main question shall not then be put.

11. When the yeas and nays shall be called for by one-fifth of the Members present, each Member called upon shall, unless for special reasons he be excused by the Senate, declare, openly and without debate, his assent or dissent to the question.

1806—When the rules were modified in 1806, reference to the previous question was omitted. It had been moved only four times and used only three times during the 17 years from 1789 to 1806. Its omission from the written rules left its status in general parliamentary law unchanged.

1807—In the following year, 1807, debate on an amendment at the third reading of a bill was also forbidden and from this time until 1846 there were no further limitations on debate in the Senate.

1841—On July 12, 1841, Henry Clay brought forth a proposal for the introduction of the "previous question," which he stated was necessary by the abuse which the minority had made of the privilege of unlimited debate. In opposing Clay's motion, Senator Calhoun said, "There never had been a body in this or any other country in which, for such a length of time, so much dignity and decorum of debate had been maintained." Clay's proposition met with very considerable opposition and was abandoned. Clay also proposed adoption of the "hour rule" for the same purpose, but his proposal was not accepted.

1846—A species of closure is the unanimous consent agreement. This is a device for limiting debate and expediting the passage of legislation which dates back to 1846 when it was used to fix a day for a vote on the Oregon bill. Such agreements are frequently used to fix an hour at which the Senate will vote, without further debate, on a pending proposal.

1850—On July 27, 1850, Senator Douglas submitted a resolution permitting the use of the "previous question." The resolution was debated and laid on the table after considerable opposition had been expressed.

1862—As the business to be transacted by the Senate increased, proposals to limit debate were introduced frequently in the following Congresses, but none were adopted until the Civil War. On January 21, 1862, Senator Wade introduced a resolution stating that "in consideration in secret session of subjects relating to the rebellion, debate should be confined to the subject matter and limited to five minutes, except that five minutes be allowed any member to explain or oppose a pertinent amendment." On January 29, 1862, the resolution was debated and adopted.

1868—In 1868 a rule was adopted providing that: "Motions to take up or to proceed to the consideration of any question shall be determined without debate, upon the merits of the question proposed to be considered." The object of this rule, according to Senator Edmunds, was to prevent a practice which had grown up in the Senate, "when a question was pending, and a Senator wished to deliver a speech on some other question, to move to postpone the pending order to deliver their speech on the other question." According to Mr. Turnbull the object of the rules was to prevent the consumption of time in debate over business to be taken up. The rule was interpreted as preventing debate on the merits of a question when a proposal to postpone it was made.

1869—A resolution pertaining to the adoption of the "previous question" was introduced in 1869, and three other resolutions limiting debate in some form were introduced in the first half of 1870.

1870—Senate, on appeal, sustained decision of Chair that a Senator may read in debate a paper that is irrelevant to the subject matter under consideration (July 14, 1870).

—On December 6, 1870, in the 3d session of the 41st Congress, Senator Anthony, of Rhode Island, introduced the following resolution: "On Monday next, at one o'clock, the Senate will proceed to the consideration of the Calendar and bills that are not objected to shall be taken up in their order; and each Senator shall be entitled to speak once and for five minutes, only, on each question; and this order shall be enforced daily at one o'clock 'till the end of the calendar is reached, unless upon motion, the Senate should at any time otherwise order." On the following day, December 7, 1870, the resolution was adopted. This so-called Anthony rule for the expedition of business was the most important limitation of debate yet adopted by the Senate. The rule was interpreted as placing no restraints upon the minority, however, inasmuch as a single objection could prevent its application to the subject under consideration.

1871—On February 22, 1871, another important motion was adopted which had been introduced by Senator Pomeroy and which allowed amendments to appropriation bills to be laid on the table without prejudice to the bill.

1872—Since a precedent established in 1872 the practice has been that a Senator cannot be taken from the floor for irrelevancy in debate.

1872—On April 19, 1872, a resolution was introduced, "that during the remainder of the session it should be in order, in the consideration of appropriation bills, to move to confine debate by any Senator, on the pending motion to five minutes." On April 29, 1872, this resolution was finally adopted, 33 yeas to 13 nays. The necessity for some limitation of debate to expedite action on these annual supply measures caused the adoption of similar resolutions at most of the succeeding sessions of Congress.

1873—In March 1873, Senator Wright submitted a resolution reading in part that debate shall be confined to and be relevant to the subject matter before the Senate—etc., and that the previous question may be demanded by a majority vote or in some modified form. On a vote in the Senate to consider this resolution the nays were 30 and the yeas 25.

1879—Chair counted a quorum to determine whether enough Senators were present to do business.

1880—From 1873 to 1880 nine other resolutions were introduced confining and limiting debate in some form. On February 3, 1880, in the 2d session of the 46th Congress, the famous, Anthony Rule which was first adopted on December 7, 1870, was made a standing rule of the Senate as rule VIII. In explaining the rule, Senator Anthony said: "That rule applies only to the unobjected cases on the calendar, so as to

relieve the calendar from the unobjected cases. There are a great many bills that no Senator objects to, but they are kept back in their order by disputed cases. If we once relieve the calendar of unobjected cases, we can go through with it in order without any limitation of debate. That is the purpose of the proposed rule. It has been applied in several sessions and has been found to work well with the general approbation of the Senate."

1881—On February 16, 1881, a resolution to amend the Anthony rule was introduced. This proposed to require the objection of at least five Senators to pass over a bill on the calendar. The resolution was objected to as a form of "previous question," and defeated. Senator Edmunds in opposing the resolution said: "I would rather that not a single bill shall pass between now and the 4th day of March than to introduce into this body (which is the only one where there is free debate and the only one which can under its rules discuss freely measures of importance or otherwise) a provision which does in effect operate to carry a bill either to defeat or success with only a 5 or 15 minutes' debate and one or two Senators on a side speaking. I think it is of greater importance to the public interest, in the long run and in the short run, that every bill on your calendar should fail than that any Senator should be cut off from the right of expressing his opinion and the grounds of it upon every measure that is to be voted upon here * * *."

—Senate agreed for remainder of session to limit debate to 15 minutes on a motion to consider a bill or resolution, no Senator to speak more than once or for longer than 5 minutes (February 12, 1881).

1882—On February 27, 1882, the Anthony rule was amended by the Senate, so that if the majority decided to take up a bill on the calendar after objection was made, that then the ordinary rules of debate without limitation would apply. The Anthony rule could only work when there was no objection whatever to any bill under consideration. When the regular morning hour was not found sufficient for the consideration of all unobjected cases on the calendar, special times were often set aside for the consideration of the calendar under the Anthony rule.

—On March 15, 1882, a rule was considered whereby "a vote to lay on the table a proposed amendment shall not carry with it the pending measure." In reference to this rule Senator Hoar (Massachusetts, Republican), said: "Under the present rule it is in the power of a single Member of the Senate to compel practically the Senate to discuss any question whether it wants to or not and whether it be germane to the pending measure or not. * * * The proposed amendment to the rules simply permits, after the mover of the amendment, who of course has the privilege, in the first place, has made his speech, a majority of the Senate if it sees fit to dissever that amendment from the pending measure and to require it to be brought up separately at some other time or not at all." This proposed rule is now rule XVII, of the present Standing Rules of the Senate.

1883—On December 10, 1883, Senator Frye, of Maine, chairman of the Committee on Rules, reported a general revision of the Senate rules. This revision included a provision for the "previous question." Amendments in the Senate struck this provision out.

1884—On January 11, 1884, the present Senate rules were revised and adopted.

On March 19, 1884, two resolutions introducted by Senator Harris were considered and agreed to be the Senate as follows:

(1) "That the eighth rule of the Senate be amended by adding thereto: 'All motions made before 2 o'clock to proceed to the consideration of any matter shall be determined without debate.' "

(2) "That the 10th rule of the Senate be amended by adding thereto: All motions to change such order or to proceed to the consideration of other business shall be decided without debate."

From this time until 1890 there were 15 different resolutions introduced to amend the Senate rules as to limitations of debate, all of which failed of adoption.

—Senate agreed (March 17) to amend rule 7 by adding thereto the following words:

"The Presiding officer may at any time lay, and it shall be in order at any time for a Senator to move to lay, before the Senate any bill or other matter sent to the Senate by the President or the House of Representatives, and any question pending at that time shall be suspended for this purpose. Any motion so made shall be determined without debate."

1886—Senate agreed to strike out the words, "without debate," from that part of rule 13 which provided that "every motion to reconsider shall be decided by a majority vote" (June 21, 1886).

1890—Hoar, Blair, Edmunds, and Quay submitted various resolutions for limiting debate in various ways (August 1890).

—On December 29, 1890, Senator Aldrich introduced a cloture resolution in connection with Lodge's "force bill," which was being filibustered against. The resolution read, in part, as follows: "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 * * *." There were five test votes on the cloture proposal which "commanded various majorities, but in the end it could not be carried in the Senate because of a filibuster against it which merged into a filibuster on the 'force bill.' "

1893—Platt, Hoar, Hill, and Gallinger introduced resolutions for cloture by majority action during a filibuster against repeal of the silver purchase law, which evoked extended discussion.

—Sherman (Ohio) urged a study of Senate rules with a view to their revision and the careful limitation of debate.

1897—Chair ruled on March 3, 1897, that quorum calls could not be ordered unless business had intervened.

1902—Senate agreed (April 8) to amend rule 19 by inserting at the beginning of clause 2 thereof the following:

"No Senator in debate shall directly or indirectly by any form of words impute to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator.

"No Senator in debate shall refer offensively to any State of the Union."

1908—Three important interpretations of the rules were adopted in the course of the filibuster against the Aldrich-Vreeland currency bill: (1) the Chair might count a quorum, if one were physically present, even on a vote, whether or not Senators answered to their names; (2) mere debate would not be considered business, and therefore more than debate must take place between quorum calls; (3) Senators could by enforcement of the rules be restrained from speaking on the same subject more than twice in the same day.

1911—April 6, 1911, Senator Root, of New York, submitted a resolution requesting the Committee on Rules to suggest an amendment to the Senate rules whereby the Senate could obtain more effective control over its procedure. No action was taken on the resolution.

1914—Smith (Georgia) proposed a rule of relevancy.

—Senate decreed, September 17, that Senators could not yield for any purpose, even for a question, without unanimous consent; but reversed itself on this ruling the next day, September 18.

1915—February 8, 1915, Senator Reed, of Missouri, introduced a resolution to amend rule XXII whereby debate on the ship purchase bill, "S. 6845 shall cease, and the Senate shall proceed to vote thereon. * * *" The resolution did not pass in this session.

1916—From December 1915, to September 8, 1916, the first or "long" session of the 64th Congress, there were five resolutions introduced to amend rule XXII. The resolutions acted upon were Senate Resolution 131 and Senate Resolution 149. On May 16, 1916, the Committee on Rules reported out favorably (S. Res. 195) as a substitute for Senate Resolution 131 and Senate Resolution 149, which had been referred to it, and submitted a report (No. 447). The resolution was debated but did not come to a vote.

1916 and 1920—Democratic national platforms for both years included a statement that: "We favor such alteration of the rules of procedure of the Senate of the United States as will permit the prompt transaction of the Nation's legislative business."

1917—March 4, 1917, President Wilson made a speech in which he referred to the armed ship bill, defeated by filibustering. The President said in part, "The Senate has no rules by which debate can be limited or brought to an end, no rules by which debating motions of any kind can be prevented. * * * The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. * * * The only remedy is that the rules of the Senate shall be altered that it can act. * * *"

—On March 5, 1917, the Senate was called in extraordinary session by the President because of the failure of the armed ship bill in the 64th Congress.

On March 7, 1917, Senator Walsh, of Montana, introduced a cloture resolution (S. Res. 5) authorizing a committee to draft a substitute for rule XXII, limiting debate. Senator Martin also introduced a resolution amending rule XXII similar to S. 195, favorably reported by the Committee on Rules in the 64th Congress. The Martin resolution was debated at length and adopted March 8, 1917, 76 yeas, 3 nays, as the current amendment to rule XXII.

1918—On May 4, 1918, Senator Underwood introduced a resolution (S. Res. 235) further amending rule XXII, reestablishing the use of the "previous question" and limiting debate during the war period.

On May 31, 1918, the Committee on Rules favorably reported out (S. Res. 235) with a report (No. 472).

June 3, 1918, the Senate debated the resolution and Senator Borah offered an amendment.

June 11, 1918, the Senate further debated the resolution and a unanimous-consent agreement was reached to vote on the measure.

June 12, 1918, the resolution was further amended, by Senator Cummins.

June 13, 1918, the Senate rejected the resolution, nays, 41; and yeas, 34.

1921—From March 4, 1921, to March 4, 1923, during the 67th Congress, five resolutions were introduced to limit debate in some form. These were referred to the Committee on Rules.

1922—On November 29, 1922, upon the occasion of the famous filibuster against the Dyer antilynching bill, a point of order was raised by the Republican floor leader against the methods of delay employed by the obstructionists which, had the Chair sustained it, would have established a significant precedent in the Senate as it did in the House. The incident occurred as follows:

Immediately upon the convening of the Senate, the leader of the filibuster made a motion to adjourn. Mr. Curtis made the point of order that under rule III no motion was in order until the journal had been read. He also made the additional point of order that the motion to adjourn was dilatory. To sustain his point, Mr. Curtis said: "I know we have no rule of the Senate with reference to dilatory motions. We are a legislative body, and we are here to do business and not to retard business. It is a well-stated principle that in any legislative body where the rules do not cover questions that may arise general parliamentary rules must apply.

"The same question was raised in the House of Representatives when they had no rule on the question of dilatory motions. It was submitted to the Speaker of the House, Mr. Reed. Speaker Reed held that, notwithstanding there was no rule of the House upon the question, general parliamentary law applied, and he sustained the point of order."

The Vice President sustained Mr. Curtis' first point of order in regard to rule III but did not rule on the point that the motion was dilatory.

—Senate Republicans voted 32 to 1 in party conference on May 25 for majority cloture on revenue and appropriation bills.

1925—On March 4, 1925, the Vice President, Charles G. Dawes, delivered his inaugural address to the Senate, in which he recommended that debate be further limited in the Senate.

On March 5, 1925, Senator Underwood introduced the following cloture resolution (S. Res. 3) embodying the Vice President's recommendation on further limitation of debate, which was referred to the Committee on Rules.

"*Resolved*, That the rules of the Senate be amended by adding thereto, in lieu of the rule adopted by the Senate for the limitation of debate on March 8, 1917, the following:

"1. There shall be a motion for the previous question which, being ordered by a majority of Senators voting, if a quorum be present, shall have the effect to cut off all debate and bring the Senate to a direct vote upon the immediate question or questions on which it has been asked and ordered. The previous question may be asked and ordered upon a single motion, a series of motions allowable under the rules, or an amendment or amendments, or may be made to embrace all authorized motions or amendments and include the bill to its passage or rejection. It shall be in order, pending the motion for, or after previous question shall have been ordered on its passage, for the presiding officer to entertain and submit a motion to commit, with or without instructions, to a standing or select committee.

"2. All motions for the previous question shall, before being submitted to the Senate, be seconded by a majority by tellers if demanded.

"3. When a motion for the previous question has been seconded, it shall be in order, before final vote is taken thereon, for each Senator to debate the proposition to be voted for one hour."

Other resolutions introduced in the 1st session of the 69th Congress limiting debate were: Senate Resolutions 25, 225, 217, 59, 77, and 76, which were also referred to the Committee on Rules.

1925—Robinson (Arkansas) said: "No change in the written rules of the Senate is necessary to prevent irrelevant debate. Parliamentary procedure everywhere contemplates that a speaker shall limit his remarks to the subject under consideration. The difficulty grows out of the failure of the presiding officer of the Senate to enforce this rule."

—Jones (Washington) proposed a threefold plan of reform: (1) extend the existing rule which forbids amendments not germane to appropriation bills to general legislation; (2) compel Senators to confine their remarks to the subject under consideration unless permitted by unanimous consent to do otherwise; (3) limit debate on measures other than revenue or appropriation bills after they have been under consideration 10 days and it has been impossible to reach a unanimous consent agreement for their disposal

—Fess and Jones introduced resolutions for a rule of relevancy.

1926—Underwood (Alabama) offered a resolution to limit debate by majority vote on appropriation and revenue bills.

1933—Adoption of 20th amendment (February 6, 1933), by doing away with short sessions, would eliminate filibusters, so Norris believed. But subsequent events demonstrated that filibustering minorities are still able to delay urgent legislation. The final sessions of the 73d and 74th Congresses, the first two to function under the amendment, ended in filibusters.

1935—Chair ruled that a quorum call is the transaction of business and that Senators who yield for that purpose lose the floor. Under this ruling, a speaker yielding twice for quorum calls, if they are in order, while the same question is before the Senate is unable to regain the floor on that question during the same legislative day.

1939—Reorganization Act of 1939 (Public Law 19, 76th Cong., 1st sess.) limited debate to 10 hours, to be divided equally between those for and against, upon a resolution to disapprove a Presidential reorganization proposal.

1945—The Reorganization Act of 1945 (Public Law 263, 79th Cong., 1st sess.) contained the same "antifilibuster rule" as the Reorganization Act of 1939. This rule reads: "Debate on the resolution shall be limited to not to exceed 10 hours, which shall be equally divided between those favoring and those opposing the resolution. A motion further to limit debate shall not be debatable. No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to."

1946—Republican Steering Committee delegated Senator Saltonstall to prepare an amendment to rule 22 "so that the various dilatory methods of preventing its application can be eliminated" (May 21, 1946).

—Knowland proposed (S. Res. 312) new standing rule prohibiting the receipt or consideration of any amendment to any bill or resolution which is not germane or relevant to the subject matter thereof. Referred to Rules Committee (July 25, 1946).

—Moses urged thorough study of the rules of the Senate "to the end of completely revising them." He also submitted a resolution (S. Res. 314) directing the Parliamentarian of the Senate to "prepare a complete and annotated digest" of its precedents (July 25, 1946). Referred to Rules Committee. (The precedents and practices of the Senate have recently been compiled by the Parliamentarians of the Senate and published. See "Senate Procedure," by Charles L. Watkins and Floyd M. Riddick, 1958.)

1947—Saltonstall, Knowland, Morse, and Pepper introduced resolutions to amend rule 22 so as to make cloture apply to any measure or motion or other matter pending before the Senate by a majority vote of those voting or by a majority vote of the entire membership of the Senate. Rules Committee on April 3, 1947, reported a resolution (S. Res. 25) amending

rule 22 by making cloture apply to "any measure, motion, or other matter pending before the Senate or the unfinished business," but making no change in the current voting requirements of rule 22 or in the limitation of debate after cloture is invoked.

—Pepper (Florida) revived suggestion that Senate adopt a new rule making irrelevant debate out of order. He also proposed to limit debate on a motion to make any subject the unfinished business of the Senate, to make such a motion privileged, and have it decided by majority vote.

—Holland (Florida) suggested that majority cloture be adopted only for the closing day or days of a session and that two-thirds cloture be required at other times.

1948—On July 28 Tobey introduced (S. Res. 270) "that during the present special session of the Congress, in the interests of efficiency and conservation of time, no Senator shall speak more than once, on any subject, and no more than 30 minutes thereon." No action.

—Vandenberg, President pro tempore, in sustaining point of order against petition to close debate on motion to consider the antipoll tax bill, expressed his belief that:

"* * * in the final analysis, the Senate has no effective cloture rule at all * * * a small but determined minority can always prevent cloture, under the existing rules * * * a very few Senators have it in their power to prevent Senate action on anything * * * the existing Senate rules regarding cloture do not provide conclusive cloture. They still leave the Senate, rightly or wrongly, at the mercy of unlimited debate ad infinitum." (August 2, 1948).

—Republican conference appointed committee of 10 Senators to consider and recommend revision of existing cloture rule (August, 1948). Members of this committee were: Brooks (chairman), Wherry, Hickenlooper, Knowland, Lodge, Jenner, Bricker, Ives, Ferguson, Saltonstall.

1949—During the 81st Congress eight resolutions were introduced to amend the cloture rule: five in the first session and three in the second session. Nineteen Senators joined in sponsoring these resolutions: Myers, Morse, Saltonstall, Knowland, Ferguson, Ives, Hayden, Wherry, Pepper, Humphrey, Lehman, Murray, Thomas (Utah), Magnuson, McMahon, Kilgore, Neely, Douglas, Benton. The resolutions were: Senate Resolutions 11, 12, 13, 15, 19, 283, 322, 336. All were referred to the Committee on Rules and Administration which held public hearings on the first five resolutions on January 24, 25, 26, 28, 31, and February 1, 1949. After a move to discharge the committee, it reported (Rept. No. 69) without amendment the Hayden-Wherry resolution (S. Res. 15) on February 17. A motion to take up Senate Resolution 15 was considered in the Senate at intervals from February 28 to March 17, 1949, when it was amended and agreed to. On March 10 a motion was presented to close debate on the motion to consider Senate Resolution 15. Mr. Russell made a point of order against the cloture motion

which was overruled by the Chair. On appeal from the decision of the Chair, the decision of the Chair was not sustained on March 11 by a vote of 41 to 46.

1950—During the 2d session of the 81st Congress three resolutions were introduced to liberalize the colture rule adopted in 1949. They were Senate Resolution 283, by Mr. Saltonstall, on May 22, 1950; Senate Resolution 322, by Mr. Morse and Mr. Humphrey, on August 2, 1950; and Senate Resolution 336, by Mr. Lehman and nine others, on August 24, 1950. All these resolutions were referred to the Committee on Rules and Administration, which took no action upon them.

—On May 5, 1950, Senator Lucas moved to proceed to the consideration of the FEPC bill (S. 1728). On May 19 a motion to close debate on the motion to take up the FEPC bill was defeated by a vote of 52 yeas to 32 nays. Under the 1949 cloture rule it would have required the votes of 64 Senators—two-thirds of those duly elected and sworn—to close debate. This was the first test of the cloture rule as amended in 1949. Republicans voted 33 for cloture, 6 against. Democrats voted 19 for cloture, 26 against. Twelve Senators were absent of whom nine were Democrats and three were Republicans. One of the absentees—Senator Withers, Democrat, of Kentucky—was formally announced as opposing application of cloture. (For discussion of the failure of the new cloture rule on its first try, see Congressional Record, May 19, 1950, pp. 7300–7307.)

—On July 12, 1950, a second attempt to invoke cloture on the motion to permit consideration of the FEPC bill (S. 1728) was defeated by a vote of 55 to 33, 9 votes short of the required number. (For further discussion of the pros and cons of the 1949 cloture rule, see Congressional Record, July 12, 1950, pp. 9976–9985.)

1951–52—During the 82d Congress four resolutions to amend the Senate cloture rule were introduced:

Senate Resolution 41, by Mr. Morse and Mr. Humphrey, providing for simple majority cloture;

Senate Resolution 52, by Mr. Ives and Mr. Lodge, providing for constitutional majority (49) cloture;

Senate Resolution 105, by Mr. Lehman and 10 others, providing for simple two-thirds cloture after a waiting period of 48 hours or, alternatively, for simple majority cloture after 15 days of debate; and

Senate Resolution 203, by Mr. Wherry, providing for cloture by two-thirds of those present and voting.

Cloture rule and resolutions compared

Resolution	Author	Voting requirement	Effectiveness in closing debate
Rule XXII		64 votes	3 out of 21 times.[1]
S. Res. 52	Ives-Lodge	49 votes	9 out of 21 times.[2]
S. Res. 203	Wherry	2/3 voting	4 out of 21 times.[2]
S. Res. 41 and 105	Morse-Lehman et al.	Majority voting	14 out of 21 times.[2]

[1] Since 1917.
[2] Potential effectiveness had this been the rule since 1917.

These resolutions were referred to the Committee on Rules and Administration which held hearings on them on October 2, 3, 9, and 23, 1951. On March 6, 1952, the committee reported favorably on Senate Resolution 203, with an amendment lengthening the time limit between the filing of a cloture motion and the vote thereon from 1 to 5 intervening calendar days (S. Rept. 1256, 82d Cong., 2d sess.).

Senate Resolution 203, if adopted, would restore the voting requirement for cloture which was in effect from 1917 to 1949, i.e., two-thirds of those Senators present and voting instead of two-thirds of those duly chosen and sworn. Senate Resolution 203 leaves subsection 3 of the present rule XXII unaltered, which means that debate would remain unlimited on proposals to change any of the Standing Rules of the Senate.

Dissenting views were filed by Mr. Lodge who felt that Senate Resolution 203 "will make no practical difference insofar as the prevention of future filibusters is concerned"; by Mr. Hendrickson who urged adoption of a simple majority cloture rule; and by Mr. Benton who favored Senate Resolution 105. No further action was taken on the subject during 1952.

1953-54—During the 83d Congress four resolutions to amend the Senate cloture rule were introduced:

Senate Resolution 20, by Mr. Jenner, providing for cloture by two-thirds of those present and voting;

Senate Resolution 31, by Mr. Ives, providing for cloture by a majority of the Senate's authorized membership; a 12-day interval (exclusive of Sundays and legal holidays) between the filing of a cloture petition and the vote thereon; and deleting subsection 3 of rule 22 and all reference to it in subsection 2;

Senate Resolution 63, by Mr. Lehman and seven others, repealing subsection 3 of rule 22 and providing two methods of cloture: by two-thirds of those voting after 1 intervening day following filing of the petition, or, if this failed, by a majority of those voting following an interval of 14 days; and

Senate Resolution 291, by Mr. Morse, providing for cloture by a majority of those voting and repealing subsection 3 of rule 22.

These resolutions were referred to the Committee on Rules and Administration which, after consideration, favorably reported Senate Resolution 20 to the Senate with an amendment (S. Rept. 268). The resolution was placed on the calendar, but no further action was taken. Senate Resolution 291 was ordered to lie on the table, July 22, 1954. Individual views were filed by Mr. Green and Mr. Hennings (S. Rept. 268). Floor consideration of Senate Resolution 20 was objected to on four calendar calls during the 1st session and on six calendar calls during the 2d session of the 83d Congress.

The major event of the 83d Congress as regards efforts to limit debate in the Senate was the Anderson motion. At the opening of the 83d Congress advocates of majority rule in the Senate challenged the conception of the Senate as a continuing body. They based their strategy on the contention of Senator Walsh in 1917 that each new Congress brings with it a new Senate, entitled to consider and adopt its own rules. They proposed to move for consideration of new rules on the first day of the session and, upon the adoption of this motion to propose that all the old rules be adopted with the exception of rule 22. Rule 22 was to be changed to allow a majority of all Senators (49) to limit debate after 14 days of discussion.

Accordingly, on January 3, 1953, Senator Anderson, on behalf of himself and 18 other Senators, moved that the Senate immediately consider the adoption of rules for the Senate of the 83d Congress. Senator Taft then moved that the Anderson motion be tabled. In the ensuing debate the Anderson motion was supported by Senators Douglas, Humphrey, Lehman, Ives, Hendrickson, Neely, Morse, and Murray.

Senator Douglas told the Senate that the Anderson proposal was the only method with any hope of success. The 1949 rule, he said, "ties our hands once the Senate is fully organized. * * * For under it any later proposal to alter the rules can be filibustered and never permitted to come to a vote. * * * Therefore, if it be permanently decided that the rules of the preceding Senate apply automatically as the new Senate organizes, we may as well say farewell to any chance either for civil rights legislation or needed changes in Senate procedure" (Congressional Record, Jan. 7, 1953, p. 203).

Opponents of the Anderson motion centered principally on the argument that the Senate is a "continuing body," bound by the rules of earlier Senates. They said that this thesis was proved because—

(1) Only one-third of the Senate is elected every 2 years.

(2) The Constitution did not provide for the adoption of new rules every 2 years.

(3) If the Senate had had the power to adopt new rules, it had lost that power through disuse.

(4) The Supreme Court, they said, had decided that the Senate was a "continuing body."

Debate against the rules change was led by Senator Taft who announced that the Republican Policy Committee had voted to oppose it in caucus; and by Senators Russell, Saltonstall, Stennis, Ferguson, Smith (New Jersey), Butler (Maryland), Maybank, and Knowland.

The Anderson motion was finally tabled by a vote of 21 to 70, taken on January 7, 1953. Taft was opposed by 15 Democrats, 5 Republicans, and 1 Independent. He was supported by 41 Republicans and 29 Democrats. One additional Democrat was paired against the Taft motion; and one additional Republican was paired for it.

1955–56—During the 84th Congress only one resolution to amend the cloture rule was presented to the Senate. This was Senate Resolution 108, by Mr. Lehman, on June 14, 1955. On that day it was referred to the Committee on Rules and Administration; and on June 29 to the Subcommittee on Rules. No further action was taken on the Lehman resolution. Senate Resolution 108 provided (*a*) for cloture by a two-thirds vote of those voting "on the following calendar day but one" after the presentation of a petition to close debate; and (*b*) for cloture by a majority of those voting "on the 14th calendar day thereafter."

1957–58—At the opening of the 85th Congress, on January 3, 1957, Senator Anderson moved to consider the adoption of new rules. Senate Majority Leader Johnson immediately moved to table the Anderson motion. On January 4 the Anderson motion was tabled by a rollcall vote of 55 to 38. During the debate preceding this vote, Vice President Nixon said he believed the Senate could adopt new rules "under whatever procedures the majority of the Senate approves." He said that in his opinion the current Senate could not be bound by any previous rule "which denies the membership of the Senate the power to exercise its constitutional right to make its own rules." Nixon said he regarded as unconstitutional the section of rule 22 banning any limitation of debate on proposals to change the rules, but added that the question of the constitutionality of the rule could be decided only by the Senate itself.

1959–60—At the opening of the 86th Congress, Senate Majority Leader Johnson offered a resolution (S. Res. 5) to amend Senate rule 22 which was adopted on January 12, after 4 days of debate, by a 72-to-22 rollcall vote. Senate Resolution 5 amended rule 22 so as to enable two-thirds of the Senators present and voting to shut off debate on any matter, including proposals for rules changes. It also amended Senate rule 32 by adding this language: "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."

1961—At the opening of the 87th Congress two resolutions to amend rule 22 were introduced in the Senate: Senate Resolution 4, by Senator Clinton P. Anderson, to allow curtailment of debate by three-fifths (instead of two-thirds) of those present and voting; and Senate Resolution 5, by Senators Humphrey and Kuchel, providing for majority cloture. At the outset of the debate on these resolutions, Vice President Nixon reaffirmed his 1957 "advisory opinion" that the constitutional right of a majority of the Senate to adopt new rules at the beginning of a new Congress could not be inhibited by the two-thirds requirement of rule 22 regarding cloture. After 7 days of debate on a Mansfield motion to consider Senate Resolution 4, Senators Mansfield and Dirksen moved to refer the matter to the Committee on Rules and Administration; their motion was adopted on January 11, 1961, by a rollcall vote of 50 to 46. Eight other resolutions to change Senate rules were also referred by voice vote

to the committee, including proposals for a rule of germaneness and the previous question. On September 5, 1961, the committee reported Senate Resolution 4 without recommendation and on September 16 Mansfield moved to take it up. On September 19, after 2 days of debate, the Senate refused to impose cloture on debate of Mansfield's motion by a 37 to 43 rollcall vote. Then Mansfield moved to table the original motion and this carried, 46 to 35.

1963—Two proposals to liberalize rule XXII were made at the opening of the 88th Congress: Senator Anderson's for three-fifths cloture; that of Senators Humphrey and Kuchel for constitutional majority (51) cloture. On January 15 Senator Anderson moved to take up his resolution (S. Res. 9) to permit three-fifths of those present and voting to invoke cloture. Faced by a southern filibuster against Anderson's motion, a bipartisan group of liberal Senators sought to close debate by majority vote under a motion which in effect held that a filibuster was unconstitutional when it blocked attempts to change the rules at the beginning of a new Congress. On January 31 the Senate, by a vote of 53 to 42, tabled this approach. On February 5 Senator Mansfield filed a cloture petition, moving to invoke cloture on the motion to take up Senate Resolution 9. On February 6 he moved to table the pending question, but the Senate rejected his motion by a 92 to 5 rollcall vote. Southerners said they opposed tabling because it ended debate more swiftly than cloture. On February 7, on a rollcall vote, the Senate rejected, 54 to 42, Mansfield's cloture motion. The vote was 10 short of the two-thirds majority needed for cloture.

1964—On the opening day of the 89th Congress, Senator Clinton P. Anderson, of New Mexico, announced his intention to submit a resolution dealing with changes in rule XXII. Two days later, January 6, 1965, he and Senator Thruston Morton, of Kentucky, submitted a resolution, Senate Resolution 6, which under rule XIV was ordered to lie over 1 day. Its basic amendment was in changing the number of Senators deciding a previous question motion from the "two-thirds present and voting" to "three-fifths present and voting."

The same day Senator Paul Douglas, of Illinois, together with several others, sent a resolution (S. Res. 8) to the desk and asked for immediate consideration. The resolution contained several changes and additions, including an alternative for the number of Senators deciding a previous question motion being a "majority duly chosen and sworn." When objection was made, Senator Douglas submitted a notice of motion to amend. Senator Anderson followed a similar path.

Procedurally, Majority Leader Mansfield obtained a unanimous consent agreement on January 6 to carry on business. This was modified on January 7, but its effect remained the same, as ruled by the President pro tempore. After the morning business of that day, Senate Resolution 6

was brought up and Minority Leader Dirksen, of Illinois, moved to send it to the Committee on Rules and Administration. Senator Anderson amended this to include a day certain—January 25—for reporting back to the Senate. After considerable debate and several parliamentary rulings, a unanimous consent agreement was reached on January 8, which stated:

Ordered, That the pending resolution (S. Res. 6) amending the Standing Rules of the Senate and the proposed resolution of Mr. Douglas (S. Res. 8) to amend rule XXII of the Standing Rules of the Senate relative to cloture, be referred to the Committee on Rules and Administration, which shall make its report on said resolutions to the Senate on March 9, 1965.

Senator Anderson subsequently questioned the majority leader: "Do I correctly understand that the request of the majority leader would protect all existing rights?" Senator Mansfield replied: "Yes, of course."

24

OUTSTANDING SENATE FILIBUSTERS FROM 1841 TO 1962

1841—A bill to remove the Senate printers was filibustered against for 10 days.

—A bill relating to the Bank of the United States was filibustered for 14 days and caused Clay to introduce his cloture resolution.

1846—The Oregon bill was filibustered for 2 months.

1863—A bill to suspend the writ of habeas corpus was filibustered.

1865—Reconstruction of Louisiana bill was filibustered for 5 days.

1876—An army appropriation bill was filibustered against for 12 days, forcing the abandonment of a rider which would have suspended existing election laws.

1879—A 4-day filibuster halted repeal of election laws.

1881—A measure to reorganize the Senate was filibustered from March 24 to May 16, 26 session days by an evenly divided Senate, until two Senators resigned, giving the Democrats a majority.

1890—The Blair education bill was filibustered for 26 days.

—The "force bill," providing for Federal supervision of elections, was successfully filibustered for 29 days. This resulted in the cloture resolution introduced by Senator Aldrich which was also filibustered and the resolution failed. Total filibuster time: 33 calendar days.

1893—An unsuccessful filibuster lasting 46 days was organized against a bill for the repeal of the Silver Purchase Act.

1901—Senator Carter successfully filibustered a river and harbor bill because it failed to include certain additional appropriations; 1 day.

1902—There was a successful filibuster against tristate bill proposing to admit Oklahoma, Arizona, and New Mexico to statehood, because the measure did not include all of Indian territory according to the original boundaries.

1903—Senator Tillman (South Carolina) filibustered against a deficiency appropriation bill because it failed to include an item paying his State a war claim. The item was finally replaced in the bill.

—River and harbor bill filibustered 1 day.

1907—Senator Stone filibustered 2 days against a ship subsidy bill.

1908—Senator La Follette led a filibuster lasting 28 days against the Vreeland-Aldrich emergency currency law. The filibuster finally failed.

1911—Senator Owen filibustered a bill proposing to admit New Mexico and Arizona to statehood. The House had accepted New Mexico, but refused Arizona because of her proposed constitution. Senator Owen filibustered against

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the admission of New Mexico until Arizona was replaced in the measure; 2 days.

—The Canadian reciprocity bill passed the House and failed through a filibuster in the Senate. It passed Congress in an extraordinary session but Canada refused to accept the proposition.

1913—A filibuster was made against the omnibus public building bill by Senator Stone of Missouri until certain appropriations for his State were included.

1914—Senator Burton (Ohio) filibustered against a river and harbor bill for 12 hours. Total filibuster time on this bill was 11 days.

—Senator Gronna filibustered against acceptance of a conference report on an Indian appropriation bill.

—In this year also the following bills were debated at great length, but finally passed: Panama Canal tolls bill, 30 days; Federal Trade Commission bill, 30 days; Clayton amendments to to the Sherman Act, 21 days; conference report on the Clayton bill, 9 days.

1915—A filibuster was organized against President Wilson's ship purchase bill by which German ships in American ports would have been purchased. The filibuster, which lasted 33 days, was successful and as a result 3 important appropriation bills failed.

1917—The armed ship bill of President Wilson was successfully filibustered for 23 days, and caused the defeat of many administration measures. This caused the adoption of the Martin resolution embodying the President's recommendation for a change in the Senate rules, on limitation of debate.

1919—A filibuster was successful against an oil and mineral leasing bill, causing the failure of several important appropriation bills and necessitating an extraordinary session of Congress.

1921—The emergency tariff bill was filibustered against in January 1921, which led Senator Penrose to present a cloture petition. The cloture petition failed, but the tariff bill finally passed.

1922—The Dyer antilynching bill was successfully filibustered for 4 days by a group of southern Senators.

1923—President Harding's ship subsidy bill was defeated by a filibuster lasting 2½ months.

1925—Senator Copeland (New York) talked at length against ratification of the Isles of Pines Treaty with Cuba, but the treaty was finally ratified.

1926—A 10-day filibuster against the World Court protocol was ended by a cloture vote of 68 to 26, the second time cloture was adopted by the Senate.

—A bill for migratory bird refuges was talked to death by States rights advocates in the spring of 1926, a motion for cloture failing by a vote of 46 to 33.

1927—Cloture again failed of adoption in 1927 when it was rejected by 32 yeas and against 59 nays as a device to end obstruction against the Swing-Johnson bill for development of the Lower Colorado River Basin (5 days).

1927—One of the fiercest filibusters in recent decades succeeded in March 1927, in preventing an extension of the life of a special campaign investigating committee headed by James A. Reed of Missouri. The committee's exposé of corruption in the 1926 senatorial election victories of Frank L. Smith in Illinois and of William S. Vare in Pennsylvania had aroused the ire of a few Senators who refused to permit the continuance of the investigation despite the wishes of a clear majority of the Senate.

1933—Early in 1933 a 2-week filibuster was staged against the Glass branch banking bill in which Huey Long first participated as a leading figure. "Senators found him impervious to sarcasm and no man could silence him." Cloture was defeated by the margin of a single vote. Finally, the filibuster was abandoned and the bill passed.

1935—The most celebrated of the Long filibusters was staged on June 12–13, 1935. Senator Long spoke for 15½ hours, a feat of physical endurance never before excelled in the Senate, in favor of the Gore amendment to the proposed extension of the National Industrial Recovery Act. But the amendment was finally tabled.

—The antilynching bill was filibustered for 6 days.

1938—A 29-day "feather duster" filibuster in January–February 1938, defeated passage of a Federal antilynching bill, although an overwhelming majority of the Senate clearly favored the bill.

1939—An extended filibuster against adoption of a montary bill. extending Presidential authority to alter the value of the dollar, continued from June 20 to July 5, 1939, 16 days, but finally failed by a narrow margin.

1942, 1944, 1946, 1948—Four organized filibusters upon the perennnial question of Federal anti-poll-tax legislation were successful in these years. An attempt to pass fair employment practice legislation in 1946 was also killed by a filibuster. The Senate cloture rule proved ineffective in these cases as a device for breaking filibusters.

1949—A motion to take up a resolution (S. Res. 15) to amend the cloture rule was debated at intervals in the Senate from February 28 to March 17 when it was amended and agreed to.

1950—A motion to take up the FEPC bill (S. 1728) was debated in the Senate May 8–19, 1950, a total of 9 days. Ten Senators spoke in favor of the motion to take up (really in support of the bill) and eight Senators spoke against the motion. According to a rough calculation, the proponents of the motion and bill used 35 percent, and the opponents used 65 percent, of the space in the Congressional Record devoted to the subject. During the 9-day period 3,414 inches of the Record were consumed with discussion of FEPC and 2,835 inches with other matters.

—Mr. Malone filibustered for 11 hours against the conference report on the slot machine bill (S. 3357) in December 1950.

1953—A prolonged *filibuster* by economic liberals took place on the so-called tidelands offshore oil bill (*H.R. 4198*). It began April 1 and ended May 5. The tidelands debate lasted for 35 days,

one of the longest on record. During this debate Senator Morse established a new record for the longest single speech. On April 24–25 he spoke for 22 hours and 26 minutes.

1954—An extended *filibuster by economic liberals* occurred in July 1954, on a bill to amend the Atomic Energy Act of 1946 (S. 3690). The debate lasted 13 days. On July 26 Senator Knowland sought to invoke cloture on S. 3690, but his motion failed by a vote of 44 yeas to 42 nays. *The bill was subsequently modified and passed.*

1957—On August 28–29, during the debate on the civil rights bill of 1957, Senator Strom Thurmond made a 24-hour-18-minute speech, the longest in Senate history.

1960—The Senate debated civil rights from February 15 to April 11. Actual debate on civil rights consumed 37 days, during which 45 rollcall votes were taken. Eighteen southern Senators conducted a systematic filibuster. In an effort to break the filibuster, around-the-clock sessions were held from February 29 through March 8. The Senate was in continuous session for 9 days, or a total of 157 hours and 26 minutes, with two breaks.

1961—At the opening of the 87th Congress on January 3, Senate liberals sought to redeem the pledges of both party platforms to revise congressional procedures so that (in the language of the Democrats) "majority rule prevails and decisions can be made after reasonable debate without being blocked by a majority of the Senate has a constitutional right to adopt new rules at the beginning of a new Congress by moving the previous question, two resolutions to amend the cloture rule (S. Res. 4, sponsored by Senator Anderson, for three-fifths cloture, and S. Res. 5, sponsored by Senators Humphrey and Kuchel, for majority cloture) were referred to the Committee on Rules and Administration on January 11 by a 50-to-46 rollcall vote on motion of Senator Mansfield, the new majority leader.

1962—In May a southern filibuster against an administration bill (S. 2750) to make anyone with a sixth grade education eligible to pass a literacy test for voting in Federal elections ran on for 10 days. Two cloture motions, filed by Senators Mansfield and Dirksen, failed to receive the necessary two-thirds vote. The votes against cloture were 43 to 53 on May 9 and 42 to 52 on May 14.

—An intermittent 2-month filibuster was conducted (June 14 to August 14) by a group of 10 "economic liberals" against the administration's communications satellite bill (H.R. 11040). Finally, on August 14, a Mansfield-Dirksen motion to invoke cloture was adopted by a rollcall vote of 63 to 27. Republicans voted 34 to 2 for cloture; Democrats 29 to 25. The 63 votes in favor were 3 more than the two-thirds necessary to invoke cloture. This was the first time since 1927, and only the fifth time in Senate history, that the Senate voted to close debate on a bill.

1963—From January 15 to February 7, the Senate debated changes in rule XXII. However, proponents for a change fell short by 10, 54 to 42, in applying a cloture motion to the filibuster.

1964—The Senate debated H.R. 7152 for 57 days until, for the first time in its history, cloture on a civil rights measure was voted on June 10, 71 to 29. Thus, twice in 3 years cloture had been successful, compared to four in the previous 45 years.

—Urban liberals filibustered a Mansfield-Dirksen reapportionment amendment to the foreign aid bill (H.R. 11380). It began August 13 and ended September 23 on the adoption of a milder "sense of Congress" compromise.

Legislation delayed or defeated by filibuster[1]

Bills	Year	Length of filibuster
Reconstruction of Louisiana	1865	5 days.
Repeal of election laws	1879	4 days.
Force bill (Federal elections)	1890–91	33 days.
River and harbor bills (3)	1901	1 day.
	1903	Do.
	1914	11 days.
Tristate bill	1903	
Colombian Treaty (Panama Canal)	1903	
Ship subsidy bills (2)	1907	2 days.
	1922–23	2½ months.
Canadian reciprocity bill	1911	
Arizona-New Mexico statehood	1911	2 days.
Ship purchase bill	1915	33 days.
Armed ship resolution	1917	23 days.
Oil and mineral leasing bill and several appropriations bills	1919	
Antilynch bills (3)	1922	4 days.
	1935	6 days.
	1937–38	29 days.
Migratory bird bill	1926	
Campaign investigation resolution	1927	
Colorado River bills (Boulder Dam project) (2)	1927, 1928	
Emergency officers retirement bill	1927	
Washington public buildings bill	1927	
National-origins provisions in immigration laws, resolution to postpone	1929	1 day.
Oil industry investigation	1921	2 days.
Supplemental deficiency bill	1935	1 day.
Work relief bill ("prevailing wage" amendment)	1935	
Flood control bill	1935	Do.
Coal conservation bill	1936	Do.
Anti-poll-tax bills (4)	1942	9 days.
	1944	4 days.
	1946	3 days.
	1948	5 days.
Fair employment practices bills (2)	1946	18 days.
	1950	
Reapportionment of State legislatures	*1964*	*41 days.*

[1] *37* bills appear in this incomplete list, not including the many appropriation bills that have either been lost in the jam that resulted from filibusters or were talked to death because they failed to include items that particular Senators desired for the benefit of their States or because grants they made were considered excessive. Several successful filibusters have sought and achieved the enactment of legislation favored by the filibusters. Filibusters have succeeded not only in preventing the passage of legislation, but also in preventing the organization of the Senate, the election of its officers, and the confirmation of Presidential appointees. They have also succeeded in modifying the terms of legislation; in delaying adjournment of Congress; in forcing special sessions, the adoption of conference reports, or neutrality legislation, and of a ship subsidy; in postponing consideration of legislation, and in raising the price of silver. Legislation has also often been defeated or modified by the mere threat of a filibuster. All the bills listed above, however, except the force bill, the armed ship resolution, and the so-called civil rights bills, were eventually enacted in some form.

NOTE.—Numerous appropriation bills. For a partial list of 82 such bills that failed from 1876 to 1916 see Congressional Record, June 28, 1916, pp. 10152–10153.

Of the *37* measures listed above, all but 11 eventually became law, in some cases after compromises had been made in their provisions following the failure of cloture. The table below, prepared at the direction of Senator Hayden, shows the later action on 35 filibustered bills.

The 36th measure (the second FEPC bill) was filibustered in 1950, subsequent to the table that follows.

Later action on 35 filibustered bills

Bills	Filibustered	Passed	Not passed
Reconstruction of Louisiana	1865	1868	
Election laws	1879	1909 (repealed)	
Force bill	1890-91		X.
River and harbor bills (3)	1901, 1903, 1914	At intervals	
Tristate bill	1903	1907, 1912	
Colombian treaty	1903	1903 [1]	
Ship subsidy bills (2)	1907, 1922-23	1936	
Canadian reciprocity bill	1911	1911 [1]	
Arizona-New Mexico statehood	1911	1912 (admitted)	
Ship purchase bill	1915	1916	
Armed ship bill	1917		X.
Mineral lands leasing bill	1919	1920	
Antilynch bills (3)	1922, 1935, 1937		X.
Migratory bird conservation bill	1926	1929	
Campaign investigation resolution	1927	1927 [1]	
Colorado River bills (2)	1927, 1928	1928 [1]	
Emergency officers retirement bill	1927	1928	
Washington public buildings bill	1927	1928	
Resolution to postpone national-origins provisions of immigration laws.	1929	1929	
Oil industry investigation	1931	1935	
Supplemental deficiency bill	1935	1936	
Prevailing wage amendment to work relief bill	1935	1936	
Flood control bill	1935	1936	
Coal conservation bill	1936	1937	
Anti-poll-tax bills (4)	1942, 1944, 1946, 1948	*1962*	
FEPC bill	1946	*1964*	

[1] In special or subsequent sessions.

NOTE.—Numerous appropriation bills—at intervals—passed in special or later sessions.

Source: Limitation on debate in the Senate. Hearings before the Committee on Rules and Administration, U.S. Senate, 81st Cong., 1st sess., on resolutions relative to amending Senate rule XXII relating to cloture, January and February 1949, p. 42.

Senate votes on invoking cloture rule [1]

Congress, session, and date	Subject	Senator offering motion	Yeas	Nays	Congressional Record		Cloture
					Volume	Page	
66th, 1st: Nov. 15, 1919.	Treaty of Versailles	Lodge	76	16	58	8555–8556	Yes.
66th, 3d: Feb. 2, 1921.	Emergency tariff	Penrose	36	35	60	2432	No.
67th, 2d: July 7, 1922.	Fordney-McCumber tariff	McCumber	45	35	62	10040	No.
69th, 1st:							
Jan. 25, 1926	World Court	Lenroot	68	26	67	2678–2679	Yes.
June 1, 1926	Migratory bird refuges	Norbeck	46	33	67	10392	No.
69th, 2d:							
Feb. 15, 1927	Branch banking	Pepper	65	18	68	3824	Yes.
Feb. 26, 1927	Retirement of disabled emergency officers of the World War.	Tyson	51	36	68	4901	No.
Do	Colorado River development.	Johnson	32	59	68	4900	No.
Feb. 28, 1927	Public buildings in the District of Columbia.	Lenroot	52	31	68	4985	No.
Do	Creation of Bureau of Customs and Bureau of Prohibition.	Jones (Washington).	55	27	68	4986	Yes.
72d, 2d: Jan. 19, 1933.	Banking Act	Robinson	58	30	76	2077	No.
75th, 3d:							
Jan. 27, 1938	Antilynching	Neely	37	51	83	1166	No.
Feb. 16, 1938	do	Wagner	42	46	83	2007	No.
77th, 2d: Nov. 23, 1942.	Antipoll tax	Barkley	37	41	88	9065	No.
78th, 2d: May 15, 1944.	do	do	36	44	90	2550–2551	No.
79th, 2d:							
Feb. 9, 1946	FEPC	do	48	36	92	1219	No.
May 7, 1946	British loan	Ball	41	41	92	4539	No.
May 25, 1946	Labor disputes	Knowland	3	77	92	5714	No.
July 31, 1946	Antipoll tax	Barkley	39	33	92	10512	No.
81st, 2d:							
May 19, 1950	FEPC	Lucas	52	32	96	7300	No.
July 12, 1950	do	do	55	33	96	9982	No.
83d, 2d: July 26, 1954.	Atomic Energy Act	Knowland	44	42	100	11942	No.
86th, 2d: Mar. 10, 1960.	Civil rights	Douglas and Javits.	42	53	106	[2] 4763	No.
87th, 1st: Sept. 19, 1961.	Amend rule 22	Mansfield and Dirksen.	37	43	107	20147	No.
87th, 2d:							
May 9, 1962	Literacy test for voting	do	43	53	108	[2] 7444	No.
May 14, 1962	do	do	42	52	108	[2] 7659	No.
Aug. 14, 1962	Communications Satellite Act.	do	63	27	108	[2] 15409	Yes.
88th, 1st: Feb. 7, 1963	Amend rule 22	Mansfield	54	42	109	1952	No.
88th, 2d: June 10, 1964.	*Civil rights*	*Mansfield and Dirksen*	*71*	*29*			*Yes.*

[1] Many cloture petitions have also been withdrawn or held out of order since 1917.
[2] Daily Congressional Record.

LEGISLATIVE HISTORY OF PARAGRAPHS 2 AND 3 OF THE STANDING RULES OF THE SENATE (CLOTURE RULE)

By John M. Reynolds
Senior Counsel
Office of the Legislative Counsel
United States Senate

(August 9, 1963)

THE MARTIN RESOLUTION

The cloture rule was adopted during a period of national emergency, shortly before war on Germany was declared. In 1915 a shipping bill had been defeated in the Senate as the result of a filibuster, and on March 4, 1917, the 64th Congress adjourned having failed to pass a bill authorizing the arming of merchant vessels. Referring to the defeat of this latter bill President Wilson made the following statement:

"It would not cure the difficulty to call the 65th Congress in extraordinary session.

"The paralysis of the Senate would remain. The purpose and the spirit of action are not lacking now.

"The Congress is more definitely united in thought and purpose at this moment, I venture to say, than it has been within the memory of any man now in its membership. There is not only the most united patriotic purpose, but the objects Members have in view are perfectly clear and definite.

"But the Senate cannot act unless its leaders can obtain unanimous consent. Its majority is powerless, helpless. In the midst of a crisis of extraordinary peril, when only definite and decided action can make the Nation safe or shield it from war itself by the aggression of others, action is impossible.

"RULES SHOULD BE ALTERED

"Although as a matter of fact, the Nation and the representatives of the Nation stand back of the Executive with unprecedented unanimity and spirit, the impression made abroad will, of course, be that it is not so, and that other governments may act as they please without fear that this Government can do anything at all. We cannot explain. The explanation is incredible.

"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.

"The remedy? There is but one remedy. The only remedy is that the rules of the Senate shall be so altered that it can act. The country can be relied upon to draw the moral" (55 Congressional Record 20).

Soon after the Senate met in special session on March 5, 1917, the question of amending the rules of the Senate so that debate could be closed was considered at conferences of the majority and the minority. A joint committee of five Senators from each conference was selected to prepare the necessary resolution which was presented to the Senate on March 8, 1917, by the majority leader, Senator Martin, of Virginia,

who obtained unanimous consent for its immediate consideration. The Martin resolution (S. Res. 5) reads as follows: [1]

"*Resolved*, That the Senate shall, from and after its adoption, enforce the following rule, which is hereby adopted:

" '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 roll, 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?"

" '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.' "

Following some debate on the Martin resolution a rollcall on final passage showed that 76 Senators voted for its adoption, 3 were against, and announcements were made that 12 other Senators who were absent would have voted for its adoption if present (55 Congressional Record 45). Senators Gronna, La Follette, and Sherman voted against the resolution. During the debate Senator La Follette expressed his opposition to the measure as follows: "* * * I shall stand while I am a Member of this body against any cloture that denies free and unlimited debate" (55 Congressional Record 41). Senator Gronna was "surprised to find men who have advocated progressive measures rising today on the floor seeking to take away from the minority the possibility of being heard" (55 Congressional Record 40). Senator Sherman felt that the President had been unfair to the Senate in attributing the defeat of the bill authorizing the arming of merchant vessels to the rules of the Senate when in fact "his own deferred action caused it" (55 Congressional Record 23).

During the consideration of the Martin resolution, Senator Hollis proposed an amendment which would have permitted a simple majority to cut off debate. But upon request of the majority leader the amendment was withdrawn (55 Congressional Record 27). Senator Norris' statement in support of the resolution would seem to reflect the attitude of most of the Senators voting in the affirmative. After observing that he could not have supported the Hollis amendment he stated:

[1] A comparison of the Martin resolution with S. Res. 195, as reported to the Senate on May 16, 1916, from the Committee on Rules by Senator Smith of Georgia, shows that only clarifying changes were made in the text of the earlier resolution which had not been acted upon at the close of the 64th Cong. (53 Congressional Record 8023). An interesting discussion of some of the resolutions offered in the Senate from 1915 to March 1917 providing for some form of cloture appears in 95 Congressional Record 1587, 1588.

"I have always opposed any change of the rule that would give any majority, no matter how large, the right absolutely to close debate and permit no one to be heard further because under that kind of a rule Members of the Senate could absolutely be precluded even from expressing an opinion on any pending measure. But this rule, Mr. President, goes only to a reasonable extent. It requires, in the first place, a two-thirds vote to invoke the rule, and after it is invoked every Senator has a right to speak one hour on the bill and the amendments, which, I take it from the language of the proposed rule, will mean that he can divide that hour as he sees fit—use it all on the bill, all on one amendment, or divide it up according to his own idea and his own judgment. To my mind, that is a reasonable proposition" (55 Congressional Record 27).

THE 1949 AMENDMENT

On February 17, 1949, Senator Hayden, from the Committee on Rules and Administration, reported Senate Resolution 15. The text of the resolution is as follows:

"*Resolved*, That subsection 2 of rule XXII of the Standing Rules of the Senate, relating to cloture, be, and the same is hereby, amended to read as follows:

" 'If at any time, notwithstanding the provisions of rule III or rule VI or any other rule of the Senate, a motion, signed by sixteen 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 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 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 the 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 a two-thirds vote of those voting, 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 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 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.' "

Senate Report 69, accompanying Senate Resolution 15, explains the reasons for and the purposes of the resolution.

"The resolution is identical with Senate Resolution 25 of the 80th Congress, favorably reported to the Senate on April 3, 1947, to make rule XXII, as adopted on March 8, 1917, applicable to any measure, motion, or other matter pending before the Senate, or the unfinished business. This change is primarily necessary in order to overcome the possibility of unlimited debate upon a motion that the Senate proceed to the consideration of a bill or other measure which has not been made the unfinished business of the Senate.

"The resolution further provides that a motion signed by 16 Senators to bring debate to a close may be presented at any time notwithstanding the provisions of rule III or rule VI or any other rule of

the Senate. Rule III of the Standing Rules of the Senate provides that a motion to amend or correct the Journal shall be deemed a privileged question and proceeded with until disposed of, and rule VI provides that all questions and motions arising or made upon the presentation of credentials shall be proceeded with until disposed of.

"The necessity for this change in rule XXII was first demonstrated in November 1922, when a number of motions to amend the Journal were debated for several days, thereby preventing the consideration of an antilynching bill which was finally laid aside.

"Extended discussion of amendments to the Journal was the method usually used during the following 20 years to prevent the consideration of bills about which there were decided differences of opinion. In more recent years, however, the practice has been for several Senators to discuss at length the question of whether a particular bill should become the unfinished business of the Senate. A direct ruling that a petition to bring such discussion to an end may not be presented was made by the President pro tempore (Mr. Vandenberg) on August 2, 1948. The intent of Senate Resolution 15 is to close those two loopholes in rule XXII and to make that rule applicable in all instances.

"The fact that over 5 years elapsed before the first flaw in the cloture provisions of rule XXII was developed and that a much longer time expired before a second serious flaw was discovered is a definite indication that every Senator who voted to amend rule XXII in 1917 did so with a clear understanding that he was voting for an enforcible rule to close debate and not to produce a result, as Mr. Vandenberg stated, 'That, in the final analysis, the Senate has no effective cloture rule at all.' The ruling of the Chair was clearly required by the rules and precedents of the Senate, and that is the reason why this proposed change in the rules is indispensable."

On February 28, 1949, Senator Lucas, the majority leader, moved that the Senate proceed to the consideration of Senate Resolution 15. Debate on the motion to take up this resolution occupied the attention of the Senate during the succeeding days. On March 10, 1949, Mr. Lucas offered a cloture petition under rule XXII of the Standing Rules of the Senate (the Martin resolution) to bring to a close the debate on the motion to take up Senate Resolution 15. A point of order was thereupon made by Senator Russell that rule XXII applied only to "debate upon a pending measure" and not to debate upon a motion to proceed to the consideration of a measure. In support of his point of order Senator Russell cited a number of precedents, including the ruling of Senator Vandenberg which, as has been noted, was referred to in the committee report accompanying Senate Resolution 15. After reviewing at some length the purposes sought to be accomplished by the Senate in adopting the cloture rule in 1917, and after distinguishing the precedents cited by Senator Russell from the pending issue, the Vice President overruled the point of order (95 Congressional Record 2172–2175). Senator Russell thereupon appealed from the decision of the Chair. After some debate a motion by Senator Lucas to lay on the table Mr. Russell's appeal was rejected 41 to 46 (95 Congressional Record 2275).

Following the refusal of the Senate to sustain the ruling of the Vice President, debate resumed on the motion to take up Senate Resolution 15. There were, however, indications that efforts were being made off the floor of the Senate to draft a compromise measure (95 Congres-

sional Record 2354). On March 15, 1949, Mr. Wherry, for himself and 51 other Senators, offered an amendment (in the nature of a substitute) to Senate Resolution 15. The text of the substitute is as follows (95 Congressional Record 2509):

"*Resolved*, That subsection 2 of rule XXII of the Standing Rules of the Senate relating to cloture, be, and the same is hereby, amended to read as follows:

" '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. 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.'

"SEC. 2. Rule XXII of the Standing Rules of the Senate, relating to cloture, be, and the same is hereby, amended by adding at the end thereof the following new 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.' "

The debate which ensued on the substitute proposal pointed up the two important differences between it and Senate Resolution 15 as reported. Senate Resolution 15, as reported, authorized cloture on an affirmative vote of *two-thirds of those voting;* the substitute required *two-thirds of the Senators duly chosen and sworn.* Secondly, the resolution as reported applied to any measure, motion, or other matter pending before the Senate, or the unfinished business. The substitute was applicable to the same, except that cloture would 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.*

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Several amendments were offered to the substitute. Senator Donnell's amendment to make explicit that "matter," as used in the substitute resolution, included a motion to approve the Journal, was defeated 14 to 72 (95 Congressional Record 2719). Senator Morse's amendment to permit cloture by a simple majority and to remove any exception in the case of a motion to proceed to the consideration of a rule change was rejected 7 to 80 (95 Congressional Record 2723). Senator Baldwin's amendment to permit cloture by a two-thirds vote of those present, except a motion, resolution, or proposal to change the rules which would require two-thirds of the Senators duly chosen, was defeated 29 to 57 (95 Congressional Record 2720). And finally, Senator Myers "perfecting" amendment, which would have had the same substantive effect as the Morse amendment, was rejected 17 to 69 (95 Congressional Record 2723).

All amendments having been voted down, the substitute amendment was approved 63 to 23, and Senate Resolution 15, as amended by the substitute, was agreed to on March 17, 1949 (95 Congressional Record 2724).

THE 1959 AMENDMENT

On January 8, 1959, Senate Resolution 5 was introduced by Senator Johnson of Texas. It had some 40 cosponsors and amended rule XXII of the Standing Rules of the Senate in two ways. It reduced the required number of Senators to effect cloture from "two-thirds of the Senators duly chosen and sworn" to "two-thirds of the Senators present and voting" and made the cloture rule, itself, applicable to a motion to consider a change in the Standing Rules of the Senate. The third change made by the resolution amended rule XXXII of the Standing Rules of the Senate to provide that the rules of the Senate continue from one Congress to the next Congress, unless changed in accordance with the Standing Rules of the Senate. The resolution provided:

"*Resolved*, That subsection 2 of Rule XXII of the Standing Rules of the Senate is amended (1) by striking out 'except subsection 3 of rule XXII,', and (2) by striking out 'two-thirds of the Senators duly chosen and sworn' and inserting in lieu thereof 'two-thirds of the Senators present and voting'.

"SEC. 2. Subsection 3 of rule XXII of the Standing Rules of the Senate is amended by striking out 'and of subsection 2 of this rule'.

"SEC. 3. Rule XXXII of the Standing Rules of the Senate is amended by inserting '1.' immediately preceding 'At', and by adding at the end thereof a new paragraph as follows:

" '2. The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.' " [1]

The purpose of the change proposed by Senate Resolution 5 was set out in the notice of the motion to amend the rules pursuant to the provisions of rule XL of the standing rules as follows:

"(1) To modify subsection 2 of rule XXII by reducing the number of votes required for the adoption of a cloture motion;

"(2) To modify subsection 3 of said rule so as to permit a cloture motion to be presented on a motion to proceed to the consideration of any motion, resolution or proposal to change any of the standing rules of the Senate.

"(3) To add a new paragraph to rule XXXII to provide that the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in the rules of the Senate (105 Congressional Record 10)."

On January 9, 1959, Senate Resolution 5 was made the pending business of the Senate.

One substitute and five amendments were considered during the debate on the Johnson resolution. The amendment in the form of a substitute was sponsored by Senator Anderson and 32 other Senators. The effect of the Anderson proposal was to adopt rules for the Senate

[1] The same proposal was introduced in the 85th Cong. as S. Res. 30, and was considered by the Senate Committee on Rules and Administration. That committee reported S. Res. 17 which would have amended rule XXII to permit a constitutional majority of Senators to effect cloture (85th Cong., 2d sess., S. Rept. 1509 (1958)).

de novo at the beginning of each session of the Congress pursuant to section 5 of article 1 of the Constitution. The amendment as modified provided:

"*Resolved*, That, in accordance with article 1, sec. 5 of the Constitution which declares that "each House may determine the Rules of its proceedings" this body procede now to the immediate consideration of the adoption of Rules for the Senate of the 86th Congress.

"SEC. 2. The Standing Rules of the Senate of the 86th Congress shall be the same as the Standing Rules, other than rule XXII, of the Senate of the 85th Congress.

"SEC. 3. Consideration of the form of rule XXII for the Senate of the 86th Congress shall be the next order of business of the Senate" (105 Congressional Record 156)."

The initial debate on both the Johnson resolution and Senator Anderson's substitute was concerned with the advisory opinion of Vice President Nixon made on January 4, 1957 (103 Congressional Record 178), which stated in pertinent part:

"It is the opinion of the Chair that while the rules of the Senate have been continued from one Congress to another, the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress.

"Any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional. It is also the opinion of the Chair that section 3 of rule 22 in practice has such an effect."

Senator Anderson explained the reason for his substitute as follows:

"Mr. President, my interest in the proposal to adopt rules at the beginning of the session is based upon enough experience to know that if we do not act on the rules now, we will never have opportunity to act during this session. * * *

* * * * * * *

"* * * I think it should be pointed out that the situation since has changed considerably, by reason of the ruling by the Vice President that the Senate continues to operate under rules of the previous Congress until they are changed.

"The Vice President says that, in his opinion, the old rules are not applicable as to certain sections, which may be unconstitutional—I hope I am quoting him correctly—but that as to the remainder of the rules, in the absence of some affirmative action, the Senate could properly be regarded as proceeding under them.

"Therefore, I do not see how it can be said that if we take the proposed action there will be a great legislative hiatus, in which nothing can be done because we shall have no rules. * * *" (105 Congressional Record 112, 113).

The Anderson substitute as modified was tabled by a vote of 60 to 36 (105 Congressional Record 207).

The major amendment submitted to Senate Resolution 5 was sponsored by Senator Douglas and 13 other Senators. It provided for cloture to be effected by "a majority of Senators duly chosen and

sworn"—a constitutional majority. The amendment was rejected 28 to 67 (105 Congressional Record 439). An amendment sponsored by Senator Morton and three other Senators would have substituted three-fifths of the Senators present and voting for the two-thirds provision contained in the Johnson proposal. It was rejected 36 to 58 (105 Congressional Record 446).

Two amendments dealt with section 3 of the resolution. They were designed to avoid the application of the cloture rule to a motion to consider changing the standing rules—with the implication that the advisory opinion of the Vice President would be persuasive. Both amendments, one sponsored by Senator Javits and one sponsored by Senator Case of New Jersey, were rejected (105 Congressional Record 452, 453).

An amendment submitted by Senator Case of South Dakota, which would have provided a germaneness test, was modified and as a resolution was referred to the Committee on Rules and Administration (105 Congressional Record 464).

In the debate on the Johnson resolution there were four positions. There were Senators who, like Senator Russell, opposed the resolution because it was a limitation upon free debate in the Senate:

"I am saddened by the thought that the Senate of the United States should now be prepared to adopt what is known as the Johnson resolution, sponsored by the distinguished majority leader and coauthored by 40 other Senators. There is no need on earth to further curtail the right of free speech in the Senate.

"We hear much talk about filibusters, yet no one has pointed out to this body a single highly desirable, advantageous bill that has been defeated by unlimited debate in the Senate.

"We can read the statements of the great men of other years—Senator Reed, Senator La Follette, Senator Norris, Vice President Adlai Stevenson, grandfather of the former Governor of Illinois and twice a Democratic standard bearer, and many others. These giants of the past believed that the widest latitude and freedom of debate in the Senate was the greatest bulwark of liberty in the United States" (105 Congressional Record 465).

There were some Senators who, like Senator Douglas, opposed the resolution because in their opinion it did not make significant changes in the 1949 rule:

"It is perfectly clear from the record of past votes over the years in the Senate that no real change has been made by section one of the bill. It is clear that on measures of importance on which a filibuster would be conducted, virtually the entire membership of the Senate would be present on the floor for the final vote * * *

"Section 3 is a distinct step backward. It gives strong moral authority, and possibly constitutional authority, for continuing this restrictive provision at the beginning of the next Congress, and thus making it more difficult to modify the rules of the Senate.

"Section 2 may be a slight step forward, but not a very great step, because in practice, on the rules change which most interests me, I think a two-thirds requirement will be as effective in preventing a vote from being taken as unanimous consent; and in addition the two-thirds requirement can seldom be met on issues of civil rights" (105 Congressional Record 489).

There were some Senators who, like Senator Case, of New Jersey, supported the resolution although they disapproved of one of its provisions:

"I have considered carefully whether these very small gains would be outweighted by the provisions of section 3, which purports to limit the power of the Senate, at the beginning of each new Congress, to adopt new rules. I have concluded that, under the Constitution, section 3 would not, and could not, have that effect. To that extent, section 3 is a nullity.

"It is highly distasteful to vote for a measure which contains an invalid provision—a provision which I would oppose to the end if it had any binding effect. Yet I have finally concluded that, for me, it is not a sufficient reason to forego such improvement, however slight, as the resolution represents in the respects already mentioned" (105 Congressional Record 491).

There were a large group of Senators who, like its chief sponsor, Senator Johnson, supported the resolution as a constructive change. He explained:

"The resolution does these things—for these reasons:

"First, it provides that cloture shall be possible on the vote of two-thirds of the Senators present and voting.

"Our present rule provides that cloture can be voted only by two-thirds of the full Senate membership. This necessitates the actual presence in the Chamber of 66 Senators casting affirmative votes. In a body of this size, infirmities and disabilities for one or two Members or more are commonplace. The committee duties of the Senate frequently require some Senators to be absent. The nature of our Nation's world position, also, has resulted in more and more Senators being asked to serve the country at important tasks abroad. Each absent Senator, in effect, cancels two votes of those present.

* * * * * * *

"Two-thirds is the division by which we provide for amending the Constitution, for ratifying treaties, and for expelling Members from the Senate. It is an established, traditional division and we are maintaining it by this resolution.

"The second provision of this resolution is, perhaps, the most important—although some have chosen to disregard its presence.

"Our present rule XXII specifically exempts from cloture any motion to proceed to consideration of a change in the rules. This is the only such gap in our rules. Cloture can apply to substantive issues. Cloture can apply to a vote on the rules themselves. No cloture, however, can be applied to this one motion.

"Thus, in present form, this means that debate could conceivably run on with no power to limit it when, in effect, there was no real subject matter before the Senate. This invites obstruction which serves no real purpose. It is intolerable to a majority and unnecessary for a minority, where the minority has a case to present.

"The change now proposed would close this remaining narrow gap and permit the majority to maintain a standard of responsibility on this as on more important motions.

"Finally, the third provision of this resolution would write into the rules a simple statement affirming what seems no longer to be at issue. Namely, that the rules of the Senate shall continue in force, at all times, except as amended by the Senate.

"This preserves, indisputably the character of the Senate as the one continuing body in our policy-making process.

"It precludes the involvement of the Senate in the obstruction that would occur—or could occur—if, at the beginning of each Congress, a minority might attempt to force protracted debate on the adoption of each Senate rule individually" (105 Congressional Record, 493).

On January 12, 1959, the resolution (S. Res. 5) was agreed to by a vote of 72 to 22 (105 Congressional Record 495). As amended, paragraphs 2 and 3 of rule XXII of the Standing Rules of the Senate now provide:

"2. Notwithstanding the provisions of rule III or rule VI or any other rule of the Senate, at any time a motion signed by sixteen 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 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 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 the 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 present and voting, 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 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 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.

"3. The provisions of the last paragraph of rule VIII (prohibiting debate on motions made before 2 o'clock) 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."

EXHIBIT 2

(For presentation to the Vice President of the United States acting as President of the Senate of the United States and all Members of the Senate)

In the Matter of the Efforts to Change Rule XXII at the Opening of the 88th Congress

January 4, 1963

MEMORANDUM AND BRIEF CONCERNING THE NEED FOR A NEW ANTI-FILIBUSTER RULE PERMITTING A MAJORITY OF THE TOTAL SENATE TO CLOSE DEBATE, AND, SUPPORTING THE PROPOSITION THAT THE SENATE OF THE 88TH CONGRESS HAS POWER TO ENACT SUCH A RULE AT THE OPENING OF THE NEW CONGRESS BY MAJORITY VOTE, UNFETTERED BY ANY RESTRICTIVE RULES OF EARLIER CONGRESSES

(Respectfully submitted by Senators joining in motion to amend rule XXII to permit a majority of the total Senate to close debate)

I. INTRODUCTION

The effort to strengthen the antifilibuster rule at the opening of the Senate of the 88th Congress on January 9, 1963, will be the fifth such attempt in the past decade. We are encouraged to renew the effort to bring about majority rule in the Senate of the United States by the continuously growing support for the principle that the Senate of a new Congress has the right to adopt its own rules unfettered by the rules of earlier Congresses and by the continuously growing recognition of the urgent need to strengthen rule XXII.

In 1953, when the initial effort of recent times was made to adopt new rules at the opening of the Senate of a new Congress, only 21 Senators supported this effort and opposed the successful motion to table the proposal for new rules.

Four years later, in 1957, twice as many Senators opposed the motion to table as in 1953 (38 so voted and Senators Wiley, Neely and Javits announced their position against the motion to table).

In 1959, a minor change was actually made in rule XXII at the opening of the Senate of the 86th Congress. While we sought a far more meaningful change in the rule than that actually adopted, the important thing to note here is that those who opposed the meaningful change, as well as those who supported it, recognized that the appropriate moment for dealing with the antifilibuster rule is at the beginning of a new Congress.

In 1961, the proposal for a change in rule XXII at the opening of the Senate of a new Congress received greater support than at any previous time. After 7 days of discussion, the majority and minority leaders moved to commit the proposals for changing rule XXII to

committee. Despite vigorous arguments concerning the need for action in support of the incoming administration and despite the prestige of their offices, only the barest majority (51 to 49) supported the leaders in sending the proposals to committee (the actual vote for committal was 50 to 46 with Case of South Dakota paired against the committal and Young of Ohio and Kefauver announced against it).

This ever-increasing support for action on rule XXII at the opening of the Senate of a new Congress—rising steadily from 21 in 1953 to 49 in 1961—reflects a growing feeling that rule XXII must be changed and that the only time to do it is at the opening of a new Congress. For then, as we make abundantly clear in this memorandum and brief (see point V), the Senate can determine its rules for the new Congress by majority vote, unfettered by any restrictive rules of earlier Congresses.

Actually, the opening of Congress is the appropriate time to deal with the rules question for an additional reason. There is no legislative business at the opening of Congress with which a lengthy discussion of the rules can interfere. In 1961, for example, after the proposals to change rule XXII had been sent to committee on January 11th, the Senate only met for 81 hours from then until March 1. With the decks clear at the opening of Congress, the Senate can determine this significant rules issue without fear that important legislation will be held up. It can truthfully be said that January is the month to solve this problem and, as we show later (in point IV), it is the only time to solve it.

We turn now to a consideration of why there is need for a rules change (point II), the reasonableness of the rules change we propose (point III), the need to make the change at the opening of the Senate of a new Congress (point IV), the constitutional right to act at that time unfettered by earlier rules (point V), and the parliamentary procedure whereby majority rule can be accomplished (point VI).

II. THE OVERWHELMING SIGNIFICANCE OF THE STRUGGLE FOR MAJORITY RULE IN THE SENATE

(1) *The issues at stake on January 9, 1963.*—The success or failure of the efforts that will be made on the opening day of the 88th Congress, to end the filibuster and bring majority rule to the Senate, may very well determine the outcome of much of the important legislation that will be presented to the new Congress.

For rule XXII is not only the "gravedigger" of meaningful and effective civil-rights legislation, it is also the threat under which other vital legislation has been defeated, delayed, or compromised to meet the views of the minority.[1]

It would not be too much to say that what is at stake in the fight for reasonable majority rule to be made at the opening of the new Congress is nothing more nor less than the dignity of the Senate and its ability to function as a democratic and representative legislative body.

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[1] A list of 36 bills (not purporting to be complete) which were so delayed or defeated by filibusters was inserted as an exhibit (p. 107, Congressional Record, 86th Cong.) during the January 1961 debate on proposed changes in rule XXII; 26 of these bills had not the remotest connection with civil rights: they cover such diverse proposals as the 1911 bill for statehood for Arizona and New Mexico, which was passed only 1 year later, and 2 ship-subsidy bills, introduced in 1907 and 1922, respectively, which were delayed by filibuster until 1936.

(2) *Both party platforms pledge antifilibuster action.*—Both party platforms recognize that the existing two-thirds cloture rule is unworkable and pledge action to change that rule:

The Republican platform pledges as follows:

> 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.

The Democratic platform pledges as follows:

> In order that the will of the American people may be expressed upon all 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.
>
> * * * * * * *
>
> To accomplish these goals will require Executive orders, legal actions brought by the Attorney General, legislation, and *improved congressional procedures to safeguard majority rule.*

(3) *Changing rule XXII is the only way to implement civil rights promises of both parties.*—Both parties have pledged meaningful and effective civil rights legislation in the strongest and most unequivocal terms in history. The enactment of these pledges into law depends upon changing rule XXII for, as we shall see, the history of the Senate makes it abundantly clear that two-thirds cloture is not possible on meaningful and effective civil rights legislation. Any Senator who supports the pledges of his party platform for civil rights legislation with more than lipservice must also support strengthening the antifilibuster rule, for the outcome of the latter struggle will determine whether those civil rights pledges can be kept.

(4) *The impossible hurdle of two-thirds cloture.*—The existing rule XXII permits the closing of debate only after two-thirds of those present and voting have voted affirmatively to close debate. Two-thirds cloture simply cannot be obtained in those areas where cloture is needed. In all of the 11 cases of attempted cloture on a civil rights bill in the Senate, it has *never* been possible to secure a two-thirds vote of those present although, in several cases, a heavy majority wanted to proceed to a vote (e.g., 52–32 and 55–33 on FEPC in 1950).[2]

Up until 1957, the strategy of the anti-civil-rights forces was to use the filibuster or threat of filibuster to prevent any civil rights legislation whatever from going through. In 1957, this strategy was shifted to emasculating civil rights measures under threat of filibuster and thus avoiding the necessity of an actual filibuster. Thus the 1957 and 1960 civil rights bills were watered down by such threats of filibuster and the impossibility of obtaining two-thirds cloture for a stronger civil rights bill. In 1957, the House of Representatives passed part III authorizing the Attorney General to institute suits in Federal courts to enforce constitutional rights; the Senate deleted part III from the bill under the threat of filibuster and thus failed to give congressional support and implementation to the

[2] See p. 107, Congressional Record, 87th Cong., for the 9 unsuccessful attempts at cloture on civil rights bill up to 1961. The latter 2 attempts occurred on the literacy test bill in the 87th Cong.

Supreme Court's 1954 desegregation decision. In 1960, the Senate refused to approve the only really significant step being proposed to enforce voting rights—the appointment of Federal registrars; the rejection of the proposed Federal registrars was the only way to avoid a filibuster. In both instances the two-thirds rule made it impossible to end the filibuster and the price of any bill was dilution to the point of southern acceptability.

Almost 9 years has elapsed since the Supreme Court's school desegregation decision. It is probably not too much to say that the reason that Congress has not enacted legislation supporting and implementing this decision is because such a measure would be relentlessly filibustered and it is not possible to obtain a two-thirds vote to end a filibuster on such a measure. That a majority of Congress favors such action to support the Court, and that majority cloture would bring such action, cannot be doubted. *The two-thirds cloture rule, by handcuffing Congress, invites continued disregard of the Supreme Court's desegregation decisions.*

(5) *The literacy test cloture vote.*—Some opponents of majority rule argue that there is no real benefit in changing rule XXII because it will not be possible to get 51 Senators to vote for cloture. This argument is, in part, predicated upon the fact that it was not possible to obtain a majority for cloture on the administration's literacy test bill last year. But this was due largely to the lack of any real drive for the literacy test bill and to the hopelessness of getting the required two-thirds vote. There is every reason to believe that 51 Senators would back cloture on a bill that the administration, the Senate leadership, and the civil rights organizations were vigorously supporting. It might not be amiss, also, to suggest to the opponents of majority rule that if they are so confident that 51 Senators will not support cloture on a civil rights bill, they have nothing to fear in our proposal and, in the interest of democratic procedures, they should allow civil rights legislation to be debated without the overhanging sword inherent in the unattainable two-thirds cloture.

(6) *The communication satellite bill cloture.*—Strangely enough, while some argue that majority cloture will not do the proponents of civil rights any good, others argue in the exact opposite fashion—that the Senate does not need a change in rule XXII in order to stop a filibuster. Those taking this position point to the cloture vote last year on the communications satellite bill and argue that it demonstrates the workability of the present antifilibuster rule. We disagree. The filibuster is now largely a weapon of sectional interests. The ability to obtain cloture on a bill where no sectional interests are involved is no proof whatever of the ability to obtain cloture where sectional interests violently oppose a bill.

Indeed, it was the southern Senators who made possible the cloture vote on the communications satellite bill. Some southerners and their traditional allies actually voted for cloture; others absented themselves—otherwise cloture would have been badly defeated. By cooperating to permit cloture on the satellite bill, the southern Senators destroyed the last vestige of their so-called principled argument against cloture based on the idea of "free speech in the Senate." But the fact remains that there is still no real chance of obtaining the necessary two-thirds to close debate under the existing rule over the opposition of the southerners and their allies in the Senate.

(7) *Rule XXII is inequitable.*—Our case against rule XXII is not based wholly or even principally upon the fact that it obstructs civil rights and other legislation; it is predicated upon a basic belief that it is inequitable for a minority to prevent the majority from working its will. A majority of the Members of the Senate can vote to go to war; a majority can vote to draft our young men. Majority rule is the letter and spirit of our Constitution (see pt. V (7)). It is both inequitable and undemocratic to retain a rule which allows a relentless minority to thwart the efforts of an elected majority.

III. THE PROPOSED NEW ANTIFILIBUSTER RULE IS A WORKABLE AND REASONABLE COMPROMISE

(1) *The proposed new rule XXII.*—Our proposal for a new rule XXII provides for debate limitation in two ways:

first, by a vote of two-thirds of the Senators present and voting 2 days after the filing of a petition for limitation by 16 Senators; and

second, by a vote of a majority of the Senators elected (i.e., 51) *15 days after a petition is filed* by 16 Senators.

It has been decided to retain the two-thirds vote for cloture after 2 days of debate following the filing of a limitation petition in order that the Senate may be able to deal with a national emergency. It is not contemplated, however, that the two-thirds rule would be used on other legislation. In any event, if the two-thirds limitation is attempted and fails, a new petition would have to be filed for majority cloture and 15 days debate would take place before a vote on that petition for limitation.

(2) *How the proposal for majority rule would work.*[3]—In order that the full meaning of the proposal for majority limitation of debate may be crystal clear, we list the various steps that would be involved:

(i) Since the petition for limitation requires the signatures of 16 Senators, in the absence of an emergency threatening national security, it is clear no petition could be filed before there was some real evidence of a filibuster. Thus 2 to 3 weeks of debate would occur before such a substantial number of Senators would set a limitation procedure in motion.

(ii) After the petition was filed, there would be 15 additional days of debate before the vote on limitation would be taken. This means a minimum of 4–5 weeks of debate up to that time.

(iii) If 51 votes are then cast for limitation, a minimum of an additional 100 hours of debate is allowed. If only half of this time is utilized, it would mean at least another week of normal Senate sessions.[4] This adds up to a minimum of 5–6 weeks in all before a final vote on passage of the bill or motion.

(iv) *And* if extended debate were engaged in on the preliminary motion to bring up a bill (the motion to bring up the civil rights bill

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[3] The text is set forth at the opening of pt. VI, where the proposed parliamentary procedure is outlined.

[4] Our proposed procedure after cloture is voted is far more generous in time than that under which the communications satellite bill was considered after the cloture vote. First, there is a guarantee of 100 hours of debate (50 for each side). Second, there is a guarantee of a minimum of 1 hour per Senator. Third, authority is granted for the Senators seeking cloture to specify in their cloture petition that additional time will be available for debate.

of 1957 was debated for 8 days), the 5–6 weeks of debate before a final vote on that motion could be secured, could be followed by extended debate on the bill itself, necessitating a *second* limitation of debate to reach a vote on final passage of the bill itself. This would add at least another 3 weeks (omitting the waiting period described in (i) above). Thus there would finally have been 8–9 weeks of debate before, by action of a majority of those elected, the Senate eventually reached a vote on the bill.

(3) *The proposed new rule is a workable and reasonable compromise.*—This proposal obviously permits full, fair, and even prolonged debate. It was approved by a majority of the Senate Rules Committee in 1958 (S. Res. 17, 85th Cong.). But this proposal not only permits prolonged debate; it also leaves it ultimately within the power of a majority of the whole Senate to reach the crux of the matter, a vote on passage of the measure thus lengthily considered.

(4) *Three-fifths cloture is not adequate.*—The arithmetic on three-fifths cloture leaves no doubt that while it is better than the present rule, it would not be a satisfactory cloture rule. Assuming that 96 of the 100 Senators vote on cloture (and votes on civil rights issues may well run that high), three-fifths of those present and voting will be 58 Senators, or 7 more than a majority of the total Senate. The important thing to note is that these seven additional votes for cloture are the hardest to obtain for they will have to come from Senators whose constituencies are not particular interested in civil rights issues and may feel that it is more important for their Senator to get favors for their State from the southern committee chairmen than it is to obtain cloture on a civil rights bill. It is these seven votes that may very well determine the outcome on cloture. It is not too much to suggest that the difference between majority and three-fifths cloture may spell the difference between cloture and no cloture and, thus, between civil rights legislation and no civil rights legislation.

(5) *Conclusion.*—A democratic society depends upon the ability at some stage to have the legislature get to a vote. The majority rule proposal we make, which provides for full, fair, and even extended debate, protects the interest of the minority to be heard and the right of the majority to decide.[5]

IV. THERE IS NO ESCAPE FROM THE FILIBUSTER ONCE THE EXISTING RULE XXII IS ACCEPTED AT THE OPENING OF CONGRESS

(1) *No escape hatch after rule XXII is accepted.*—Once the Senate of the 88th Congress, meeting in January 1963, accepts rule XXII by action or acquiescence and commences to operate under that rule, there is no practical way of obtaining majority rule later on in the session. The only time a new filibuster rule can be adopted is at the opening of the Senate of the new Congress on January 9, 1963. As we demonstrate in point V of the memorandum and brief, at the opening of a new Congress a majority of the Senators present and voting can cut off debate and adopt any filibuster rule for the Senate of the new Con-

[5] Before we leave this point, it might be well to note that the rule XXII proposal we are making is a compromise not only in its assurance of extensive debate but also in the number of Senators it requires to close debate. Our proposal is for cloture by a majority of the total Senate (i.e., by 51 Senators). It has often been suggested that cloture should be obtainable by a majority of those present and voting, but we have decided to stand by the more moderate suggestion of a majority of the entire body.

gress that the majority desires. But, once the Senate of the 88th Congress has accepted rule XXII by action or acquiescence and has commenced to operate under it, there is no way out.

(2) *Rule XXII is self-perpetuating except at the opening of a new Congress.*—Once rule XXII has been accepted by the new Congress it can be used as a lethal weapon against changing it; there is no way of obtaining the necessary two-thirds to close debate on a resolution for majority rule once the existing rules are in effect. The suggestion that majority rule can be obtained by bringing a resolution to that effect out of the Rules Committee and passing it on the floor later in the Congress is totally illusory. *The same group that makes it impossible to obtain two-thirds cloture on meaningful and effective civil rights legislation makes it impossible to obtain two-thirds cloture on a rules change for the purpose of enacting such meaningful and effective civil rights legislation.* Majority rule will either be obtained at the opening of the Senate of the new Congress or it will not be obtained during the new Congress at all.

(3) *Experience in last six Congresses.*—That there is no escape from the filibuster if rule XXII is accepted by the new Congress is shown by what happened in the last six Congresses.

In the *82d and 83d Congresses*, a change in rule XXII was favorably reported to the Senate by the Rules Committee, but in both Congresses the threat of a filibuster kept the issue from the floor of the Senate.

In the *84th Congress*, nothing whatever happened on rule XXII.

In the *85th Congress*, the Rules Committee on April 30, 1958, reported out Senate Resolution 17 to amend rule XXII to provide for majority rule after full and fair debate. On July 28, 1958, a bipartisan group of a dozen Senators took the floor and urged action on Senate Resolution 17, but the resolution was not called up for action.

In the *86th Congress*, both those who supported a substantial change in the filibuster rule and those who supported only a negligible change (from two-thirds of the total Senate to two-thirds of those present and voting) moved for a change in rule XXII at the opening of the Senate of the 86th Congress before any other business had been transacted. Those who favored the negligible change from two-thirds of the total Senate to two-thirds of those present and voting won out over those who favored the substantial change. But this cannot obscure the fact that both sides recognized that the time, and the only time, to obtain any change in the filibuster rule is on opening day of the Senate of a new Congress when there are no existing rules to bind the majority of the Senate of a new Congress.

In the *87th Congress* the majority and minority leaders sent our motion for a new rule XXII to the Rules Committee with a promise that there would be action later in the Senate. The majority leader later stated that "I am not at all certain that there will be a filibuster * * *" (107 Congressional Record 521). And the minority leader went even further, saying that, if a filibuster against a rules change were to develop, "it would be like falling off a log to get two-thirds of the Senators to vote for cloture" (107 Congressional Record 527). Despite these assurances, when the matter was brought up on the floor in September 1961, the filibuster prevented action on a change in rule XXII and the matter died as it was bound to do. Whatever assur-

ances may be given about action after the opening of the Senate of a new Congress, history renders those assurances meaningless. It is the opening of Congress—or never.

V. THE SENATE IN EACH CONGRESS HAS A CONSTITUTIONAL RIGHT TO ADOPT RULES OF PROCEEDINGS FOR THE SENATE OF THAT CONGRESS BY MAJORITY VOTE UNFETTERED BY ACTION OR RULES OF THE SENATE OF ANY PRECEDING CONGRESS

(1) *Brief filed during January 1961, rule XXII effort never answered.*—On December 30, 1960, a number of Senators favoring majority rule presented to Vice President Nixon a "Brief in Support of Proposition That a Majority of the Members of the Senate of the 87th Congress Has Power To Amend Rules at the Opening of the New Congress Unfettered by Any Restrictive Rules of Earlier Congresses." This brief was inserted in the Congressional Record on January 5, 1961, by Senator Douglas (107 Congressional Record, 232–241) and will not be repeated here, particularly as this brief was never seriously challenged or controverted. What follows is a summary of the arguments in favor of the right of the Senate of the new Congress to act, and further details are available in the earlier brief through reference to the cited pages of the Congressional Record.

(2) *The basic constitutional issue.*—The Vice President's advisory rulings in 1957, 1959, and 1961, which are set forth in the appendix, reflect a very real understanding of the basic constitutional principle here involved—that the Members of the Senate of each new Congress have undiluted power to determine the manner in which they will operate during that Congress and have no power whatever to determine the manner in which the Senate of future Congresses will operate. This basic constitutional principle is rooted both in article I, section 5, of the Constitution and in the historic democratic principle that the present shall determine its own destiny unhampered by the dead hand of the past.

The Senate of the First Congress meeting in 1789 promptly adopted rules (see "Debates and Proceedings in the Congress of the United States," vol. I, pp. 15–21). Just as the Senators of the First Congress meeting in 1789 had undiluted power to determine the rules under which they would operate, so the Senators of the 88th Congress meeting in 1963 have undiluted power to determine the rules under which they will operate. No rules of the Senate of an earlier Congress can obstruct this right to adopt rules to govern the transaction of business. And no Senator or group of Senators can obstruct this right by seeking to prevent action on the rules through undertaking a filibuster. The filibuster is not a constitutional or a God-given right. It is up to the majority of the Senators convening on January 9, 1963, to determine whether they will expressly limit the use of the filibuster for the Senate of the 88th Congress.

(3) *Article I, section 5 of the Constitution of the United States is determinative.*—That section declares that "each House may determine the rules of its proceedings." Both the language and context make clear that "each House" means not only the separate branches of the Congress—that is, the House and the Senate—but also the separate branches of each succeeding Congress. No reason has been or can be

adduced to interpret this constitutional provision as a grant of rulemaking authority to the Members of the House and the Senate meeting for the first time in 1789 and a withholding of this same authority from the Members of the House and the Senate of later Congresses. Both language and logic lead to the conclusion that the constitutional authority to make rules is granted to *each* House of *each* Congress.

Article I, section 5, as we have just seen, is an identical grant of rulemaking authority to each House of Congress. It is not disputed that the House of Representatives of each new Congress has the power to, and does, adopt new rules at the opening of each Congress. The identical constitutional provision cannot reasonably be given a different interpretation as applied to the Senate, a coordinate branch of the Congress of the United States, Article I, section 1. The two bodies must act as a team in *the Congress*, and, if the Senate is so inhibited by old rules that it cannot express the will of its majority on legislation, the will of Congress is thwarted and the rulemaking authority of the House becomes meaningless. Every principle of constitutional construction supports the interpretation of article I, section 5, which gives the majority of the Senate present on January 9, 1963, the right to "determine the rules of its proceedings" unfettered by action or rules of the Senate of any preceding Congress.[6]

(4) *The four closest Senate precedents support the right of the majority to act.*—In 1841 the Senate dismissed a printer whom the Senate of an earlier Congress sought to foist upon it. In 1876 the Senate abrogated the joint rules of the Senate and House which had been carried over from Congress to Congress by acquiescence for 87 years. In 1917 Senator Tom Walsh, of Montana, challenged the binding effect of the rules of the earlier Senate upon the new body and accomplished his purpose of obtaining the cloture rule he sought before acquiescing in the old rules. In 1957, 1959, and 1961 Vice President Nixon gave repeated advisory rulings that a majority of the Senate of a new Congress can act to adopt its own rules without the obstruction of actions and rules of the Senate of an earlier Congress and that a motion to cut off debate would be in order against a filibuster attempt to prevent a determination of the rules to govern the Senate of the new Congress. Thus, in the four closest precedents, the Senate, while some of its Members talked "continuous body" and others talked in a contrary vein, each time supported the right of the Senate to adopt new rules unfettered by past actions.

(5) *The Senate of each new Congress makes a fresh start on all activities.*—In every major activity the Senate recognizes a constitutional right of the Senate of each new Congress to determine both legislative and executive business anew. All consideration of bills, resolutions, treaties, and nominations starts at the beginning of each

[6] Since the Constitution gives the majority of the Senate present on Jan. 9, 1963, the right to "determine the rules of its proceedings," sec. 2 of rule XXXII cannot thwart this right. Sec. 2 of rule XXXII provides that "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." This section may be valid with respect to rules that do not obstruct the will of the majority of the Senate of the new Congress, but, as Vice President Nixon repeatedly made clear, it is unconstitutional as applied to rule XXII. See appendix. Simply put, a majority in 1959 cannot give a minority in 1963 the right to prevent the majority in 1963 from exercising its democratic will. It might also be well to note that there is doubt whether there actually was a majority for this provision in 1959; it was added as part of a "compromise package" and no vote was ever taken on this provision separately. At any rate, neither this provision nor any other rule can override the Constitution of the United States.

Congress without reference to or continuation of what has taken place in the past; new officers and committee members are elected in the Senate of each new Congress; when the Senate finally adjourns, the slate is wiped clean; the proceedings begin again in the next Congress.

For convenience, we present the following analysis of the operations of the U.S. Senate in tabular form:

Analysis of the operations of the U.S. Senate

Activity	Senate acts anew in each Congress	Senate bound by Senate of preceding Congress	Comment
1. Introduction of bills	X		See Senate rule XXXII.
2. Committee consideration of bills.	X		Do.
3. Debate on bills	X		Do.
4. Voting on bills	X		Do.
5. Election of officers	X		While the old officers carry over until new ones are elected, the carryover does not prove rules carryover. It is a mere convenience. Even in the House, the Clerk carries over until the new one is elected. Obviously this does not prove that House rules carry over; they do not.
6. Consideration of validity of senatorial elections.	X		Although credentials of a Senator-elect are often presented to the Senate prior to the beginning of his term, the validity of the credentials can only be considered by the Senate to which he was elected and not before.
7. Consideration of treaties	X		See Senate rule XXXVII(2).
8. Submission and consideration of nominations.	X		See Senate rule XXXVIII(6).
9. Election of committee members.	X		See rule XXV. While old committees carry over until new ones are elected, the carryover does not prove rules carry over. It is a mere convenience. Even in the House, the Clerk carries over until the new one is elected. Obviously this does not prove that House rules carry over; they do not.
10. Adjournment	X		Adjourns sine die. When Congress ends at noon of a particular day, and a special session of the Senate of the new Congress is called, the Senate adjourns at noon, and 1 minute afterward opens the new session.
11. Rules	(?)	(?)	Past practice of Senate on rules is ambiguous. It can be explained as acquiescence in past rules, which can either be repeated at the opening of the Senate of any new Congress by beginning to operate under them or which can be refused by the adoption of new rules in whole or in part.

The thing that stands out in the above analysis is that everything starts afresh with the possible exception of the rules. And these, too, it is submitted, start afresh in whole or in part the moment a majority of the Senators at the opening of the Senate of a new Congress so will it and so vote. All that has happened over the past years is that there has been acquiescence in the carryover of rules of the Senate from Congress to Congress.[7] Carryover of the rules based on acquiescence is certainly no precedent for arguing that the earlier rules bind the Senate of the new Congress in the absence of such acquiescence. Absent acquiescence, the Senate of the new Congress has power to adopt its rules at the opening of the new Congress unfettered by any restrictive rules of earlier Congresses. The acquiescence of rule XXII

[7] Except, of course, in 1917, when Senators Walsh and Owen refused to acquiesce until the Senate adopted the cloture rule they sought, and in 1953, 1957, 1959, and 1961, when Senators sought to change the rules as we are now doing.

will be ruptured when the resolution proposed herein is offered on January 9, 1963.

(6) *Continuous body talk is irrelevant.*—As we have seen in (4) and (5), above, the Senate has *not* in the past *acted* as a continuous body. It did not act as a continuous body in 1841 when it dismissed the printer chosen by the Senate of the earlier Congress, it did not act as a continuous body in 1876 when it adopted new joint rules, and it did not act as a continuous body in 1917 when it yielded to the contrary arguments of Senator Walsh and adopted the cloture rule he demanded.

It does not today act as a continuous body; it wipes the slate clean on bills, resolutions, treaties, and nominations at the beginning of each new Congress.

No one would deny that many Senators have *talked* in terms of a continuous body and that textbook writers have accepted this talk in their academic works. But the talk has been largely by those who tried—unsuccessfully—to use the phrase to prevent Senate action departing from that of the Senate of an earlier Congress and who have failed in their efforts.

Actually, parliamentary bodies generally have both continuous and discontinuous aspects. The House of Representatives has continuous aspects and yet no one refers to it as a continuous body and no one disputes its right to adopt new rules at the beginning of each Congress. By the same token, the Senate has both continuous and discontinuous aspects; its limited continuous aspects (e.g., two-thirds carryover) do not support the proposition that the Senate of an earlier Congress can prevent the Senate of a new Congress from acting upon rules as the majority may determine at the opening of the new Congress.

The argument for the carryover of the rules seems to come down to this: Because two-thirds of the Senators carry over, the Senate is a continuous body; because the Senate is a continuous body, the rules carry over. Striking the words "continuous body" out of this formula, the argument comes down to this: Since two-thirds of the Senators carry over, the rules carry over. But this is a patent nonsequitur. It assumes that the carryover of two-thirds of the Senate always carries over a majority in favor of the rules. The infusion of one-third newly elected Senators—both by their numbers and their power of persuasion—may very well change the majority view on rules and it is this majority view that is determinative under our constitutional democracy, not who carries over. That the new one-third may change the majority on any matter is well illustrated by the shifting of the Senate from party to party over the years. The argument that the two-thirds carryover prevents the new majority from acting on the rules disenfranchises not only the newly elected one-third, but the new majority who are prevented from exercising their powers and duties to make the rules for their own work and laws for the people. To say that the Senate of the 88th Congress in 1963 is the same as the Senate of the 1st Congress in 1789 because two-thirds of its Members carried over to the Senate of the 2d Congress is to prefer romantic form to rational substances and dubious academic theory to practical reality.

Some Senators genuinely believe the Senate is a "continuous body." Others genuinely believe that it is not, that it acts as a "discontinuous body." Both have the right to their opinions. But when a descriptive

term resulting from nothing more than the carryover of two-thirds of the Senators is used as a reason for preventing the majority of the body from determining the Senate's actions, an adjective is being confused with a reason and an effect with a cause. The parliamentary deadfall dug by the Senate of a dead Congress, harmless enough as an abstraction, should not be permitted to stultify and destroy the power of the Senate and of the entire Congress in the present.

(7) *Majority rule is the letter and spirit of our Constitution.*—The Supreme Court has aptly described the principle of majority rule as one "sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions" (*N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 331).

The pervasive need for majority rule was recognized at the Constitutional Convention. Alexander Hamilton, writing in the Federalist, No. XXII, strongly emphasized this need as follows:

> To give a minority a negative upon a majority (which is always the case where more than a majority is requisite to a decision) is, in its tendency, to subject the sense of the greater number to that of the lesser * * *. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to national proceedings.

The authors of the Constitution prescribed majority rule as the rule for congressional action by expressingly enumerating all the instances in which more than a majority vote was to be required. These special cases were limited to five. There are two-thirds requirements in connection with (1) the power of Congress to override the veto; (2) senatorial ratification of treaties; (3) the initiation by Congress of proposals to amend the Constitution; (4) the impeachment power; and (5) the expulsion of Members of Congress. In these rare instances, where it was felt necessary to make exceptions to majority rule, the Constitution expressly said so (art. I, sec. 7; art. II, sec. 2; art. V; art. I, sec. 3; art. I, sec. 5). This detailed specification of the two-thirds requirement in connection with particular powers demonstrates that, when Congress was to operate by other than majority rule, it was so instructed by definite language in the Constitution.[8]

Majority rule is the constitutional measure for legislative action. As Senator Thomas, of Colorado, pointed out in debating the cloture rule of 1917, "majority rule is an essential principle in American Government" (55 Congressional Record 33). Yet this fundamental constitutional principle can only be reestablished in the U.S. Senate through new rules, in whole or in part, at the opening of the Senate of a new Congress. If this route is blocked by a ruling of the Vice President or otherwise, there will be no way to carry out this basic principle of the Constitution and to implement the Supreme Court's statement that a House of Congress "may not by its rules ignore constitutional restraints * * *" (*United States* v. *Ballin*, 144 U.S. 1, 5). We turn now to the parliamentary steps to obtain majority rule at the opening of Congress.

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[8] It should be noted here that the argument under this subsection (7), as distinguished from the other arguments made in support of the proposition that the Senate of a new Congress has unfettered authority to deal with its rules, would be equally valid if raised at a later stage in the Congress. (See 107 Congressional Record 18648.)

VI. THE PARLIAMENTARY STEPS TO CHANGE RULE XXII AT THE OPENING OF CONGRESS

(1) *Proceedings on January 9, 1963.*—The Senate of the 88th Congress will convene at 12 o'clock meridian on January 9, 1963. Immediately after the opening prayer, there will be formalities of presenting credentials, administering the oath to new Members and the election of officers. At the close of the formalities, one of the Senators who supports a change in rule XXII to three-fifths of those present and voting will seek recognition and, upon receiving recognition, will send his three-fifths cloture resolution to the Chair and ask that it be read. Since Majority Leader Mansfield has announced his support for the opening day effort to obtain a three-fifths cloture rule, he may offer the resolution himself; even if he does not do so, he will certainly facilitate recognition of a Senator desiring to offer this resolution. After the clerk reads the three fifths cloture resolution, the Senator who had sent that resolution to the desk will request unanimous consent for the immediate consideration of the resolution. Unanimous consent for immediate consideration of the resolution is requested because rule XL entitles the Senate to 1 day's notice in writing of motions to amend or modify a rule.[9] If unanimous consent is forthcoming, the resolution is on the floor of the Senate for debate. If, as seems almost certain, one or more Senators refuse unanimous consent, the Senator who had sent the resolution to the desk will send to the desk a notice of motion under rule XL to amend rule XXII to provide for three-fifths cloture.

After the three-fifths cloture resolution has been offered, one of the Senators seeking to change rule XXII to provide for majority rule will seek recognition and, upon receiving recognition, will address the Chair substantially as follows:

Mr. President, on behalf of the following Senators [listing them] and myself and in accordance with article I, section 5, of the Constitution of the United States and the advisory rulings of the Chair at the opening of the 85th, 86th, and 87th Congresses, I send to the desk a resolution and I ask that the clerk read it.

The resolution sent to the desk will be as follows:

RESOLUTION

Resolved, that rule XXII of the Standing Rules of the Senate is amended by adding a new section 3 as follows:

"3. If at any time, notwithstanding the provision of rule III or rule VI or any other rule of the Senate, a motion, signed by sixteen 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 pursuant to this section, the Presiding Officer shall at once state the motion to the Senate, and one hour after the Senate meets on the fifteenth calendar day thereafter (exclusive of Sundays, legal holidays, and nonsession days) 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 further debate, submit to the Senate by a yea-and-nay vote the 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 a majority vote of the Senators duly chosen and sworn, then said measure, motion, or

[9] Since rule XL does not restrict the power of a majority of the Senate to act expeditiously on new rules, the group seeking to change rule XXII acquiesces in this rule and is operating under it.

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, debate upon the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto, and motions with respect thereto, shall be limited in all to not more than 100 hours, of which 50 hours will be controlled by the majority leader, and 50 hours will be controlled by the minority leader. The majority and minority leaders will divide equally the time allocated among those Senators favoring and those Senators opposing the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto, and the motions affecting the same; provided, however, that any Senator so requesting shall be allocated a minimum total of one hour. It shall be the duty of the Presiding Officer to keep the time. The above provisions for time in this paragraph are minimum guarantees and the motion to bring the debate to a close may specify additional time for debate. 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."

Resolved, further That section 3 of the Standing Rules of the Senate be redesignated as section. 4.

After the clerk reads the resolution, the Senator who had sent the resolution to the desk will request unanimous consent for the immediate consideration of the resolution. If unanimous consent is denied, as seems almost certain, the Senator who sent the resolution to the desk will address the Chair as follows:

Mr. President, I therefore send to the desk a notice of motion to amend certain rules of the Senate and ask that it be read.

The notice of motion would read as follows:

NOTICE OF MOTION TO AMEND CERTAIN SENATE RULES

"In accordance with the provisions of Rule XL of the Standing Rules of the Senate, I hereby give notice in writing that I shall hereafter move to amend Rule XXII of the Standing Rules of the Senate in the following particulars, namely:

Rule XXII of the Standing Rules of the Senate is amended by adding a new section 3 as follows:

"3. If at any time, notwithstanding the provisions of rule III or rule VI or any other rule of the Senate, a motion, signed by sixteen 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 pursuant to this section, the Presiding Officer shall at once state the motion to the Senate, and one hour after the Senate meets on the fifteenth calendar day thereafter (exclusive of Sundays, legal holidays, and nonsession days) 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 further debate, submit to the Senate by a yea and nay vote the 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 a majority vote 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, debate upon the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto, and motions with respect thereto, shall be limited in all to not more than 100 hours, of which 50 hours will be controlled by the majority leader, and 50 hours will be controlled by the minority leader. The majority and minority leaders will divide equally the time allocated among those Senators favoring and those Senators opposing the measure, motion, or other matter pending

before the Senate, or the unfinished business, the amendments thereto, and the motions affecting the same; *Provided, however*, That any Senator so requesting shall be allocated a minimum total of one hour. It shall be the duty of the Presiding Officer to keep the time. The above provisions for time in this paragraph are minimum guarantees and the motion to bring the debate to a close may specify additional time for debate. 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."

Section 3. Redesignate section 3 of the Standing Rules of the Senate as section 4.

The purpose of the proposed amendment is to provide for bringing debate to a close by a majority of the Senators duly chosen and sworn after full and fair discussion.

After the resolutions have been offered, the Senate would presumably adjourn until Thursday, January 10. It is not believed that Majority Leader Mansfield, who favors the proposal for three-fifths cloture, would seek to prejudice the right of the Senators bringing up the resolution to change rule XXII by attempting to take up other business on January 9. Indeed, it is customary for the Senate not to remain in session for any length of time on opening day when the new Senators who have just been sworn in have congratulatory and other festivities to attend. If, by some remote chance, an effort were made to go to other business, it would be incumbent on the Senators supporting either of the proposed rules changes to object to the transaction of any such business or to make certain, by obtaining the necessary consents or parliamentary rulings, that the transaction of such business would not waive the rights of the majority to adopt rules at the opening of the Senate of the new Congress. In other words, it would be necessary to make sure that the Vice President would be prepared to treat January 10 as still the opening of the new Congress for purposes of the rules, despite the business the majority leader proposed to transact on January 9. As already indicated, however, it is not believed that this problem is likely to arise; rather, it is assumed that debate on the resolution will commence on January 10 without hitch.

(2) *Proceedings on January 10, 1963.*—As in 1959 and 1961, the Vice President would lay the resolution before the Senate during the morning hour. At the conclusion of the morning hour, the resolution would be placed on the calendar. At that time the sponsor of the resolution for three-fifths cloture would move that the Senate proceed to the consideration of the resolution. Debate on the motion that the Senate proceed to the consideration of the resolution would follow and presumably the motion would be agreed to just as it was in 1961 (107 Congressional Record 231). As soon as the three-fifths resolution becomes the pending business of the Senate, the Senators who have given notice of their proposal for majority rule would offer their proposal as a substitute for the three-fifths cloture resolution. Debate would then go forward on the majority rule and three-fifths proposals. During the course of the debate on the motion to proceed to consideration and on the resolutions themselves, it would be incumbent on the Senators supporting either of the rules changes to object to the transaction of any other business except by unanimous consent or under a ruling from the Chair that such business would not prejudice the rights

of the majority to adopt rules at the opening of the Senate of the new Congress. Presumably the debate would continue from day to day after January 10.

(3) *Motion for majority cloture to be voted first.*—It is generally agreed both by those supporting majority rule and those supporting three-fifths cloture that the proposal for majority rule should be voted upon first. Because of this, it is important that the three-fifths proposal be offered first and that the majority rule proposal be offered as a substitute for it. This would automatically bring majority cloture up for the first vote.

(4) *Tactics of the opposition.*—What tactics the opposition to a change in rule XXII will adopt are, of course, not known to us at this time. The opponents have at least the following alternatives:

(i) They can move to table the resolution to change the rules. If a majority votes to table, such action would, as Vice President Nixon made clear in 1957, constitute approval of rule XXII as a part of the rules of the Senate of the 88th Congress.

(ii) They can move to commit the resolution to committee as was done in 1961. This would also constitute approval of rule XXII as a part of the rules of the Senate of the 88th Congress.[10]

(iii) They can seek to defeat a motion to take up the resolution to change rule XXII or seek to defeat the resolution itself. If a majority so votes, this would likewise constitute approval of rule XXII.

(iv) They can make a point of order against the consideration of the resolution to change rule XXII. The point of order would *not*, clearly *not*, be well taken. Whether or not the proposed resolution is considered under the Constitution or under the existing rules, in either event it is clearly in order. If rules do not carry over from Congress to Congress except by acquiescence, the proposed resolution is in order as an expression of such acquiescence in the existing rules other than rule XXII plus a new rule XXII. If the rules do carry over, the resolution is in order (as Majority Leader Johnson's resolution was in 1959) as a resolution to change a particular rule.[11]

If the opponents of a change in rule XXII do not have the votes to table (as in (i) above), to send to committee (as in (ii) above), or to defeat the proposed resolution (as in (iii) above), those who are most strenuously opposed to majority rule will undoubtedly seek to filibuster either the motion to take up the rules change or the rules change itself or both. It is then and only then that the real constitutional issue arises: Whether a majority of the Senators of the newly convening body can cut off debate in order to carry out their constitutional function of determining rules or whether they must stand powerless before the minority shielded by the rules of an earlier Senate? As we have conclusively demonstrated in point V, there can be only one answer

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[10] The only other motions that appear possible besides the tabling and committal motions would be ones either to postpone indefinitely or to postpone to a day certain. Unless an agreement were made that the matter would be considered at the later time as though it were the opening of Congress, such motions, if adopted, would likewise mean the fastening of rule XXII upon the Senate of the 88th Cong.

[11] Nor would a point of order lie on the ground that the resolutions to change rule XXII must go to the Rules Committee. In the first place, as was done in 1957 on the civil rights bill, a majority of the Senate has the right under existing rules to determine whether a bill or resolution should go to committee or go directly to the calendar. Furthermore, as fully demonstrated in point V above, if any rule of the Senate did require a rules change to go to committee and thus prevent the majority from working its will at the opening of Congress, the rule itself would be invalid as an effort by an earlier Congress to prevent the new majority from working its will.

to this question—the majority of the Senate of the 88th Congress has the power, under the Constitution, to act to determine is rules.

(5) *Motion to close debate.*—As just indicated, if the opponents of a change in rule XXII do not have the votes to table the resolution, to commit it to committee or to defeat it, they will undoubtedly filibuster. After reasonably lengthy debate, the time will come for the proponents of a new rule XXII to make their move to end the filibuster. The first step would be a request to the filibusterers to agree to a vote at some specified time in the future. If this request is refused, the next step would be to announce that a motion to close debate will be made on the following day as soon as recognition can be obtained. At that time one of the supporters of a new rule XXII (either a three-fifths or majority supporter) would rise and address the Chair substantially as follows:

Mr. President, it is now clear that a majority of the Members of this body desires to change rule XXII. It is also clear that there has been a full and fair and even prolonged discussion of this matter. Further discussion will not enlighten the Senate nor the Nation, but will simply be an effort to keep this body from acting. Therefore, under the Constitution and especially under article I, section 5 thereof, and under the advisory rulings of the Vice President at the opening of the last three Congresses, I move that the Senate without further debate now vote upon the question whether the body wishes to terminate debate and to vote without further debate upon the pending resolution and all amendments thereto concerning rule XXII. [12]

It would seem likely that Senator Russell or one of his colleagues would raise a point of order contending that the proposed motion is out of order on the ground, as they would claim, that rule XXII carries over and is the only method for closing debate. The matter would then be squarely before the Vice President on the right of the Senate of a new Congress to adopt its rules by a majority vote and without the fetters of rule XXII laid down by an earlier Congress.

The Vice President would have three choices:

(i) The Vice President could, and we submit *should*, rule that the motion is in order (as Vice President Nixon repeatedly made clear he would have ruled). In this event there would undoubtedly be an appeal from the ruling of the Chair and this appeal is debatable. However, the Senators favoring a change in rule XXII could move to table the appeal and, if the tabling motion succeeded, this would have the effect of upholding the Vice President's ruling. Immediately upon the tabling of the appeal, the Vice President would put the motion to terminate debate, and, if this motion carried, the Vice President would put the majority rule proposal to the Senate. If that carried, it would be the end of the matter; if it failed, the Vice President would then put the three-fifths motion to the Senate. Whatever happened, that would be the end of the matter.[13]

(ii) The Vice President could, with or without giving an advisory ruling, place before the Senate the constitutional question whether the motion to terminate debate was in order. During the debate on rule

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[12] This form of motion is preferred to a motion for the previous question (as used in the House) to avoid the raging academic controversy on the history of the previous question motion from 1789 to 1806. We are convinced, however, that the previous question motion could be utilized as an alternative.

[13] If the opponents of a change in rule XXII filibuster the motion to proceed to consideration of the rules change rather than allowing that motion to be voted upon as they did in 1961, the motion to terminate debate which we set forth above would have to be made initially as an effort to terminate debate upon the motion to proceed to consideration of the change in rule XXII. While this might require two motions to terminate debate rather than one, it would not change the basic procedure in any way.

XXII in the 87th Congress, the Vice President indicated that this was the course he would follow in dealing with any question involving an interpretation of the Constitution (107 Congressional Record 18648, Sept. 16, 1961). Senator Keating in a series of parliamentary inquiries sought confirmation of the view that a majority of Senators had the power under the Constitution to determine the rules of proceedings in the Senate. In declining comment on one of the questions posed during this colloquy, the Vice President stated:

> The Chair has no authority to interpret the Constitution. *Constitutional questions must be submitted to the Senate for determination under the uniform precedents of the Senate* (ibid).

This same view is set forth in the Manual on Senate Procedure prepared by the Senate Parliamentarian. In the words of the Manual (at p. 20):

> It is not within the province of the Presiding Officer to rule a bill or an amendment out of order on the ground that it is unconstitutional; the Presiding Officer has no authority or power to pass on the constitutionality of a measure or amendment; that is a mater for the Senate itself to decide.

If the Vice President should follow this course, any point of order against the motion to terminate debate under article I, section 5 of the Constitution, would be put to the Senate for decision. If a majority of the Senators rejected the point of order and voted that the motion to terminate debate was in order, then the motion to terminate would be put and from there on the procedure would be identical with that in (i) above.

(iii) The Vice President could, contrary to Vice President Nixon's several advisory rulings and contrary to his own expressed belief that constitutional questions should be put to the Senate as indicated in (ii) above, hold the motion to terminate debate out of order. If he did this, we could appeal the ruling, but the matter would be subject to further filibuster. It is not believed, however, that the Vice President would deal this blow to the hopes of a majority of the Senate in view of his statement in September 1961 quoted in (ii) above and in view of his deep concern that the Senate be permitted to work its will.

(6) *Procedure like 1961 not 1953, 1957, or 1959.*—It is immediately recognizable that the proposed procedure for January 9, 1963, is like the 1961 procedure and is different from the procedure adopted by the proponents of majority rule at the opening of other recent Congresses.

In 1953 and 1957, the motion utilized on opening day was as follows:

> In accordance with article I, section 5 of the Constitution which declares that * * * "each House may determine the rules of its proceedings" * * * I now move that this body take up for immediate consideration the adoption of rules for the Senate of the 83d [or 85th] Congress.

In 1959, the same motion was offered as a substitute for Majority Leader Johnson's motion to amend the rules.

The Senators joining in the effort to change the rules on January 9, 1963, have two alternative courses open to them:

(i) They could have proceeded with the motion to take up rules as they did in 1953 and 1957 and as they sought to do in 1959.

(ii) Or they could proceed, as they did in 1961 and are now doing, under the Constitution, Vice President Nixon's advisory rulings in 1957, 1959, and 1961, and the existing rules (to the extent they do not thwart the will of the majority).

The motion to take up rules utilized in 1953, 1957, and 1959 proceeds on the assumption that the rules of the Senate do *not* carry over from Congress to Congress except by acquiescence of a majority of the Senate of the new Congress. The briefs submitted in support of the motion to take up the rules at the opening of those Congresses made out an overhelming case for this proposition.

We have, however, decided on the second alternative of proceeding under the Constitution, Vice President Nixon's rulings and the existing rules, for four reasons:

(i) Some Senators have indicated concern at operating under general parliamentary procedures even during the period of the adoption of rules, and the procedure now being followed avoids this problem, for the rules are assumed to carry over except to the extent that they thwart the ability of the majority to determine the rules at the opening of the Senate of the new Congress.

(ii) Vice President Nixon repeatedly expressed his opinion at the opening of the 85th, 86th, and 87th Congresses that the rules do carry over from Senate to Senate except that earlier rules, insofar as they restrict the power of the Senate of a new Congress to change its rules, are not binding on the Senate at the opening of a new Congress.

(iii) Majority Leader Johnson's 1959 action in bringing up a rules change on opening day of the new Congress is a recent precedent for immediate consideration under the rules of such rules changes as are desired by a majority of the Members of the Senate.

(iv) This procedure worked smoothly in 1961 and was thwarted only by a motion to send to committee, adopted by the barest majority. If that majority is now on our side, the procedure we are utilizing will be effective.

We desire to make it extremely clear that, by proceeding as we are doing under both the Constitution and the existing rules, we do not waive and we cannot be considered as waiving the constitutional power of the Senate of the new Congress to adopt their own rules by majority vote unfettered by any restrictive rules of the past. We are proceeding under the Constitution and under Vice President Nixon's repeated advisory rulings that the rules, although they do carry over from Congress to Congress, cannot restrict what a majority of the Senate of the new Congress wants to do at the opening of a new Congress in the way of determining what rules are to govern the body for the next 2 years.

Appendix

Vice President Nixon's Rulings

In 1957, during the debate on the rules at the opening of the Senate of the 85th Congress, Vice President Nixon gave an advisory ruling as follows (103 Congressional Record 178):

> It is the opinion of the Chair that while the rules of the Senate have been continued from one Congress to another, the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress.
>
> Any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying the majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional. It is also the opinion of the Chair that section 3 of rule 22 in practice has such an effect.

The Chair emphasizes that this is only his own opinion because, under Senate precedents, a question of constitutionality can only be decided by the Senate itself, and not by the Chair.

At the beginning of a session, in a newly elected Congress, the Senate can indicate its will in regard to its rules in one of three ways:

First. It can proceed to conduct its business under the Senate rules which were in effect in the previous Congress and thereby indicate by acquiescence that those rules continue in effect. This has been the practice in the past.

Second. It can vote negatively when a motion is made to adopt new rules and by such action indicate approval of the previous rules.

Third. It can vote affirmatively to proceed with the adoption of new rules.

Turning to the parliamentary situation in which the Senate now finds itself, if the motion to table should prevail, a majority of the Senate by such action 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 this Congress unless subsequently changed under those rules.

If, on the other hand, the motion to lay on the table shall fail, the Senate can proceed with the adoption of rules under whatever procedures the majority of the Senate approves.

In summary, until the Senate at the initiation of a new Congress expresses its will otherwise, the rules in effect in the previous Congress in the opinion of the Chair remain in effect, with the exception that the Senate should not be bound by any provision in those previous rules which denies the membership of the Senate to exercise its constitutional right to make its own rules.

In 1959, during the debate on the rules at the opening of the Senate of the 86th Congress, Vice President Nixon gave advisory rulings as follows:

Under the advisory opinion the Chair rendered at the beginning of the last Congress, it is the opinion of the Chair that until the Senate indicates otherwise by its majority vote the Senate is proceeding under the rules adopted previously by the Senate, but, as the Chair also indicated in that opinion, it is the view of the Chair that a majority of the Senate has a constitutional right at the beginning of each new Congress to determine what rules it desires to follow (105 Congressional Record 6).

The resolution submitted by the Senator from Texas will be considered under the rules of the Senate which have been adopted previously by the Senate. But as the Chair stated earlier today, and as he expressed himself more fully in an advisory opinion at the beginning of the last Congress, in the opinion of the Chair the rules previously adopted by the Senate and currently in effect are not, insofar as they restrict the power of the Senate to change its rules, binding on the Senate at this time.

The Chair expressed that opinion in the last Congress, but it is only an opinion. The question of constitutionality lies within the power of the Senate itself to decide. The Constitution gives to the Senate the power to make its rules. That means that the Members of the Senate have the right to determine the rules under which the Senate will operate. This right, in the opinion of the Chair, is one which can be exercised by and is lodged in a majority of the Members of the Senate. This right, in the opinion of the Chair, in order to be operative also implies the constitutional right that *the majority has the power to cut off debate in order to exercise the right of changing or determining the rules* (105 Congressional Record 8–9).

* * * * * * *

If, for example, during the course of the debate on the motion of the Senator from Texas, which deals with changing the rules, a Senator believes that action should be taken and debate closed, such Senator at that time could, in the opinion of the Chair, *raise the constitutional question by moving to cut off debate.* The Chair would indicate his opinion that *such a motion was in order* but would submit the question to the Senate for its decision (105 Congressional Record 9).

* * * * * * *

In the opinion of the Chair, as he has expressed it both yesterday and at the beginning of the first session of the last Congress, 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 of rule XXII 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.

On the other hand, in the opinion of the Chair, the requirement that any proposal to amend or adopt rules lie over for a day, under rule XL, would not have such an inhibiting effect. Consequently, the Chair believes that rule XL is one which can properly apply in connection with consideration of the rules by the Senate at this point (105 Congressional Record 96).

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It is the opinion of the Chair that at the beginning of a new Congress a majority of the Senate has the constitutional right to work its will with regard to the rules by which it desires to be governed, and that that right cannot be restricted by the membership of the Senate in one Congress imposing its will on the membership of the Senate in another Congress (105 Congressional Record 101).

* * * * * * *

The key problem around which this discussion has revolved is with regard to the question of *whether the Senate can move to bring a question of change of the rules to a vote*, as the Senator from Wyoming is aware. It is the opinion of the Chair that insofar as that problem is concerned, *at the beginning of a new Congress the Senate can proceed to adopt new rules or to amend old rules without being inhibited by any previous rule* which might restrict or deny the constitutional right or power of a majority of the membership of the Senate to determine its rules (105 Congressional Record 102).

* * * * * * *

A constitutional question would be presented if the time should come during the course of the debate when action on changing the rules should seem unlikely because of extended debate. At that point any Member of the Senate, in the opinion of the Chair, would have the *right to move to cut off debate*. Such a motion would be questioned by raising a point of order. At that point the Chair would submit the question to the Senate on the ground that a constitutional question had been raised because of the Chair's opinion that the Senate, at the commencement of a new Congress, has the power to make its rules. That power, in the Chair's opinion, cannot be restricted even by action of the Senate itself, which would be the case where the membership of the Senate in one Congress has attempted to curtail the constitutional right of the membership of the Senate in another Congress to adopt its rules (105 Congressional Record 103).

In 1961, during the debate on the rules at the opening of the Senate of the 87th Congress, Vice President Nixon gave advisory rulings as follows (107 Congressional Record 9–13):

The Chair has indicated his opinion that at the beginning of each new Congress a majority of the Members of the Senate have the constitutional right to determine the rules under which the Senate will be guided. Once that decision is made, or once the Senate proceeds to conduct business under rules adopted in previous Congresses, those rules will then be in effect.

* * * * * * *

The ruling of the Chair is that any rule adopted in a previous Senate which would inhibit the right of a majority of the Members of the Senate in a new Congress to adopt its rules is not applicable. And, as the Chair has made his ruling previously, the Chair would hold that in this instance the filing of the motion under rule XL, as the Senator has indicated he would desire to proceed, is proper; but that any section of the rules, other than rule XL, which would inhibit the right of a majority of the Members of the Senate to determine its rules, would not be applicable.

* * * * * * *

* * * The Chair stated that at the beginning of a new Congress a majority of the Members of the Senate can, either by positive action or by waiver of the right to take such action, proceed to adopt its rules; but if the Senate proceeds, without objection, under rules previously adopted, to the conduct of business, it is the Chair's opinion that then the rules adopted in previous Congresses will apply to the Congress in which this Senate is sitting.

On the other hand, if at the beginning of a Congress, before other business is transacted, a majority of the Members of the Senate desire to change the rules under which the Senate has been operating, it is the opinion of the Chair that the majority rule will apply.

* * * * * * *

* * * As the Chair pointed out in his advisory opinion during a previous session of the Senate, any provision of the rules adopted by the Members of the Senate in one Congress cannot, in his opinion, inhibit the constitutional right of a majority of the Members of the Senate in any new Congress to adopt their rules by majority vote.

As the Senator from Georgia has properly pointed out, only a majority vote is required to change the rules, if the Senate reaches the point of voting.

What the Chair held as, in his opinion, unconstitutional was the attempt of the Senate in a previous Congress to inhibit the right of the Senate in a practical sense to get to the point where it could adopt rules by majority vote.

* * * * * * *

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

* * * * * * *

The Chair expressed his opinion that the provisions of rule XXXII which would inhibit the right of a majority of the Members of the Senate at the beginning of a new Congress to change its rules by majority vote would be unconstitutional.

* * * * * * *

It is the opinion of the Chair that so long as no substantive business is undertaken by the Senate the opening of the new Congress still is in effect, so that the Senate would be able to adopt its rules under the majority procedure which the Chair has described.

EXHIBIT 3

87TH CONGRESS
2d Session

SENATE

DOCUMENT
No. 104

THE PREVIOUS QUESTION

ITS STANDING AS A PRECEDENT FOR CLOTURE IN THE UNITED STATES SENATE

A DISSERTATION ON THE SO-CALLED "PREVIOUS QUESTION RULE" AS EMPLOYED BY THE SENATE IN ITS EARLY DAYS

PRESENTED BY MR. RUSSELL

JULY 9, 1962.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1962

FOREWORD

By great good fortune, there has come to my attention an outstanding and scholarly dissertation by Dr. Joseph Cooper, a professor of political science in the Department of Government at Harvard University entitled "The Previous Question: Its Standing as a Precedent for Cloture in the Senate of the United States."

Dr. George B. Galloway, senior specialist, American Government and Public Administration of the Library of Congress, was gracious enough to permit me to see Dr. Cooper's work.

Dr. Cooper reached the conclusion, after his painstaking study that the previous question rule in the early Senate was not in any sense a restriction on debate nor a mechanism for cloture.

I have never seen Dr. Cooper and had never heard of him or his study of this subject until after he had completed his research and prepared his dissertation. It is most gratifying that his findings support the position that I have taken a number of times on the floor of the Senate when efforts to impose further restrictions on freedom of debate were pending in the Senate. Dr. Cooper's thesis is a notable contribution to the history of the Senate and to an understanding of its rules. I feel it should be made available to all of the Members of the Senate as well as students and others interested in the history of this great parliamentary institution. I have therefore asked unanimous consent that Dr. Cooper's thesis be printed as a Senate document.

RICHARD B. RUSSELL.

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CONTENTS

THE PREVIOUS QUESTION: ITS STANDING AS A PRECEDENT FOR CLOTURE IN THE SENATE OF THE UNITED STATES

Many persons interested in Senate procedure are aware that a rule for the previous question existed in that body during its first 17 years.[1] Still, the manner in which this rule was understood and used has been and continues to be a topic of much misunderstanding and disagreement. Thus, as eminent a student of the Senate as Lindsay Rogers seems to believe that the previous question existed as a cloture mechanism in the early Senate, whereas other equally eminent students of the Senate, such as George H. Haynes and Clara (Kerr) Stidham, are convinced that the rule was not so used or understood.[2] In recent years, as a result of the efforts of a group of liberal Senators to impose some form of majority cloture on the Senate, interest has been revived in the nature of the precedent furnished by the original Senate rule for the previous question. The leading antagonists in the controversy have been Senator Richard Russell (D., Ga.) and Senator Paul Douglas (D., Ill.).

Senator Russell has contended that the previous question did not serve as a mechanism for cloture in the early Senate, but merely as a mechanism for postponing or avoiding decision.[3] Senator Douglas has argued that Russell's view is "almost completely wrong." [4] In so arguing Douglas has not only relied on his own investigations; in addition, he has made use of extensive research done for him by Irving Brant. Thus, he has twice introduced into the *Congressional Record* a memorandum on the previous question prepared by Brant.[5] This memorandum contends that in the early Senate a simple majority had the power to close debate through use of the previous question in order to bring a matter to decision and that on occasion this power was actually exercised.

The aim of this paper is to settle the longstanding dispute over the status and significance of the rule for the previous question which

[1] On Apr. 16, 1789, the Senate adopted the following rule as the ninth of a code of 19 rules adopted that day:

"The previous question being moved and seconded the question from the chair shall be: 'Shall the main question be now put?' And if the nays prevail, the main question shall not then be put."

This rule was omitted in the revised rules adopted 17 years later on Mar. 26, 1806. See *Annals Of Congress*, Washington, 1834-1855, 1 Cong. 1, 20-21, and 9 Cong. 1, 202-203.

[2] See Lindsay Rogers, *The American Senate*, New York, 1926, p. 165; George H. Haynes, *The Senate Of The United States*, Boston, 1938, vol. I, p. 393; and Clara (Kerr) Stidham, *The Origin And Development Of The United States Senate*, Ithaca, 1895, p. 59.

Also relevant are Robert Luce, *Legislative Procedure*, Boston, 1922, pp. 275 and 289; Henry Jones Ford, *The Rise And Growth Of American Politics*, New York, 1898, p. 265; and Franklin L. Burdette, *Filibustering In The Senate*, Princeton, 1940, pp. 14, 15, and 219.

[3] See *Congressional Record*, Washington, 1873-1961, 85 Cong. 1, p. 153. See also *Cong. Rec.*, 83 Cong. 1, p. 112, and S. Doc. No. 4, 83 Cong. 1, p. 11.

[4] *Cong. Rec.*, 85 Cong. 1, pp. 6669-6686. See also *Cong. Rec.*, 87 Cong. 1, pp. 231-246 (daily—Jan. 5, 1961).

[5] *Ibid.* For other statements of Brant and Douglas see Proposed Amendments To Rule XXII Of The Standing Rules Of The Senate, *Hearings Before A Special Subcommittee Of The Committee On Rules And Administration*, United States Senate, 85 Cong. 1, Washington, 1957, pp. 170-182 and 31-45.

Senator Joseph S. Clark (D., Pa.) has also been a leading advocate of the view that majority cloture would be a return to original Senate practice. See *Senate Rules Must Be Reformed*, Reprint of Speeches and Proposals of Senator Joseph S. Clark, Washington, 1960, pp. 22-26.

existed in the Senate in the years from 1789 to 1806.[6] In terms of the Haynes-Stidham-Russell line of thought the previous question mechanism in the early Senate provides no valid precedent for the adoption of majority cloture today. In terms of the Rogers-Douglas-Brant line of thought it provides a solid precedent.

I. Proper Usage in Parliamentary Theory, 1789–1806

We may start our inquiry by examining what parliamentary theory in these years conceived to be the proper function of the motion for the previous question. There is very little evidence to support the contention that in the period 1789–1806 the previous question was seen as a mechanism for cloture, as a mechanism for bringing a matter to a vote despite the desire of some members to continue talking or to obstruct decision.[7] This is true for the House as well as for the Senate.[8] On the other hand, convincing evidence exists to support the contention that the previous question was understood as a mechanism for avoiding either undesired discussions or undesired decisions, or both.

The leading advocate of the view that the proper function of the previous question related to the suppression of undesired discussions was Thomas Jefferson. In his famous manual, written near the end of his term as Vice President for the future guidance of the Senate, he defined the proper usage of the previous question as follows:

The proper occasion for the previous question is when a subject is brought forward of a delicate nature as to high personages, etc., or the discussion of which

[6] The House of Representatives has, of course, had a previous question rule since its inception in 1789. Over the years this rule has undergone many changes and it now serves as a very effective mechanism for cloture in the House. See any recent manual of rules for the House of Representatives, rule XVII and explanatory footnotes. See also Asher C. Hinds, *Hinds' Precedents Of The House Of Representatives*, Washington, 1907, secs. 5443–5446.

[7] There are only two pieces of evidence that can be cited in support of the contention that the previous question was understood as a cloture mechanism in the Senate before 1806. The first is the fact that on the cover of his famous journal William Maclay, a Senator from Pennsylvania in the First Congress (1789–91) records the following as Senate rule 7:

"In case of debate becoming tedious, four Senators may call for the question; or the same number may at any time move for the previous question, viz., 'Shall the main question now be put?' "

See *The Journal of William Maclay*, New York, 1927, p. 403. It is clear, however, that this rule never became an official rule of the Senate. Instead, it, together with the other rules listed on the cover, probably represent Maclay's proposals for Senate rules. See Stidham, *op. cit.*, p. 38, footnote 2, and p. 60, footnote 2. See also Haynes, *op. cit.*, vol. I, p. 392, footnote 3. Still, from the way this rule is worded it is often assumed that Maclay understood the previous question as a cloture mechanism. This is far from clear. The Senate of the Commonwealth of Pennsylvania in 1790 had two separate rules dealing with the matters contained in rule 7 as listed by Maclay. One permitted four Senators to ask for the question, i.e., a vote, when the debate became tedious and the other permitted four Senators to move the previous question. This suggests that the objects of these procedures were understood as separate and distinct and that Maclay merely lumped them together for purposes of brevity since both kinds of motions required the same number of initiators. See *Journal Of The Senate Of The Commonwealth Of Pennsylvania, 1790–1791*, Philadelphia, 1791, pp. 50–51 (Dec. 29, 1790), rules 13 and 17. It is true, however, that by 1790 the House of Representatives in Pennsylvania only had a rule for the previous question. Note the conclusions drawn with reference to this fact by Lauros G. McConachie. See Lauros G. McConachie, *Congressional Committees*, Boston, 1898, p. 24. Yet see *Journal Of The House Of Representatives Of The Commonwealth Of Pennsylvania, 1790–1791*, Philadelphia, 1791, p. 129 (Jan. 28, 1791).

The second piece of evidence that might be cited to support the contention that the previous question was understood as a cloture mechanism in the Senate during the years from 1789 to 1806 is Jefferson's statement that use of the previous question had been extended to accomplish ends beyond the mere suppression of delicate discussions. Thomas Jefferson, *A Manual Of Parliamentary Practice*, Washington, 1820, sec. XXXIV. In this regard see Luther Stearns Cushing, *Elements Of The Law And Practice Of Legislative Assemblies In The United States Of America*, 1866, par. 1420 and related footnote 4. However, in all probability what Jefferson had in mind here was use of the previous question on propositions that were not delicate, simply, for the purpose of suppressing an undesired decision. This is indicated by his discussion of why it would be preferable to permit the main question to be amended when the motion for the previous question was being debated. It is also indicated by the fact that Jefferson at no point states that on a certain date the previous question was used for cloture in the Senate, whereas it is unlikely that he would have allowed such an important and revolutionary precedent to go by unnoted.

[8] For conceptions of the function of the previous question in the House see Hinds' Precedents, *op. cit.*, sec. 5445 and De Alva S. Alexander, *History And Procedure Of The House Of Representatives*, Boston, 1916, p. 181. See also *Annals*, 1 Cong. 1, 324 (May 11, 1789); 2 Cong. 2, 846–851; 3 Cong. 1, 595–596; 3 Cong. 2, 960; 3 Cong. 2, 998–1000; 5 Cong. 2, 650–652; 5 Cong. 2, 1067; 7 Cong. 1, 439–441; 7 Cong. 1, 1045; 9 Cong. 1, 1091–1092; and 10 Cong. 1, 1183–1184. It should be noted that in the last instance mentioned Randolph's argument assumes that the previous question is a mechanism for avoiding decisions, not discussions.

may call forth observations, which might be of injurious consequences. Then the previous question is proposed: and, in the modern usage, the discussion of the main question is suspended, and the debate confined to the previous question * * *[9]

In terms of his approach, then, Jefferson regarded as an abuse any use of the previous question simply for the purpose of suppressing a subject which was undesired but not delicate, and he advised that the procedure be "restricted within as narrow limits as possible." [10]

Despite Jefferson's prestige as an interpreter of parliamentary law for the period with which we are concerned, his view of the proper usage of the previous question cannot be said to have been the sole or even the dominant one then in existence. A second strongly supported conception understood the purpose of the previous question in a manner that conflicted with Jefferson's view; that is, as a device for avoiding or suppressing undesired decisions.

The classic statement of this view was made in a lengthy and scholarly speech delivered on the floor of the House of Representatives on January 19, 1816, by William Gaston. In this speech Gaston, a Federalist member from North Carolina, argued that on the basis of precedents established both in England and America the function of the previous question was to provide a mechanism for allowing a parliamentary body to decide whether it wanted to face a particular decision. In the course of his speech he took special pains to emphasize his differences with Jefferson:

> I believe, sir, that some confusion has been thrown on the subject of the previous question (a confusion, from which even the luminous mind of the compiler of our Manual, Mr. Jefferson, was not thoroughly free) by supposing it designed to suppress unpleasant discussions, instead of unpleasant decisions. * * *[11]

Gaston's speech, to be sure, was made 5 years after the previous question had been turned into a cloture mechanism in the House and it was made as a protest against this development.[12] It is valuable, nonetheless, as an indication of the state of parliamentary theory in the years from 1789 to 1806 and its standing as evidence of this nature is supported both by the arguments made in the speech itself and by less elaborate statements made on the floor of the House in the years before 1806.[13]

That the previous question was understood as a mechanism for avoiding undesired decisions in the early Senate as well as the early House is indicated by an excerpt from the diary of John Quincy Adams.[13a] The excerpt comes from the period in which Adams served in the Senate and it contains his account of Vice President Burr's

[9] Jefferson's Manual, *op. cit.*, sec. XXXIV.
[10] *Ibid.*
[11] *Annals*, 14 Cong. 1, p. 707.
[12] See references cited in footnote 6 above.
[13] See references cited in footnote 8 above.
[13a] The fact that a considerable amount of secrecy characterized the early sessions of the Senate also makes less reasonable the supposition that in this body the previous question was understood solely as a mechanism whose proper usage was confined to the suppression of delicate discussions. Until 1794 the Senate held all its sessions behind closed doors. In that year a resolution was passed which opened the doors for the consideration of legislative business, though simultaneously a new rule was passed which permitted any member to move to close the doors whenever he thought necessary. However, the Senate did provide for the regular publication of its legislative journal from the very first year of its operation. The proceedings of the Senate when acting in its executive capacity continued to be held in secret far beyond the year 1806. Moreover, in the years before 1806 and beyond the Senate appears to have published only portions of its executive journal and to have done so on very few occasions. For material on secrecy in the Senate see Stidham, *op. cit.*, pp. 39–40, 98–102, and 170–171; Haynes, *op. cit.*, vol. II, pp. 665–670 and 779–782; George P. Furber, *Precedents Relating To The Privileges Of The Senate Of The United States*, Washington, 1893 (S. Doc. No. 68, 52 Cong. 2, vol. VII of misc. doc. vols.); Dorman B. Eaton, *Secret Sessions Of The Senate*, New York, 1886; and Joseph P. Harris, *The Advice And Consent Of The Senate*, Berkeley, 1953, p. 249. See also Jefferson's Manual, *op. cit.*, sec. XLIX, and *Rules Of The United States Senate*, Dec. 7, 1801, Houghton Library Document, Harvard University, Call No. AC8UN33C.801r.

farewell speech to the Senate. In this speech, delivered on March 2, 1805, Burr by implication seems to understand the function of the previous question as relating primarily to the suppression of undesired decisions.

> He [Burr] mentioned one or two of the rules which appeared to him to need a revisal, 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 could not be necessary, and all its purposes were certainly much better answered by the question of indefinite postponement * * *.[14]

We should note in closing our discussion of proper usage that in Burr's case, as in a number of others, his words do not rule out the possibility that he understood the previous question as a mechanism for avoiding undesired discussions as well as undesired decisions. Indeed, despite the exclusive character of the positions maintained by Jefferson and Gaston their basic views could be held concurrently and in the years immediately preceding 1789 they were, as a matter of general agreement, so held in the Continental Congress. The previous question rule adopted by that body in 1784 read as follows:

> The previous question (which is always to be understood in this sense, that the main question be not now put) shall only be admitted when in the judgment of two Members, at least, the subject moved is in its nature, or from the circumstances of time and place, improper to be debated or decided, and shall therefore preclude all amendments and further debates on the subject until it is decided.[15]

Thus, a third alternative existed in parliamentary theory in the early decades of government under the Constitution with reference to the previous question—that of seeing it as a mechanism for avoiding both undesired discussions and undesired decisions. The extent to which Jefferson's, Gaston's, or a combination of their positions dominated congressional conceptions of the proper function of the previous question is not clear.[16] The lack of rigidity in parliamentary theory was an advantage rather than a disadvantage and the average member, in the years before 1806 as now, was not apt to be overly concerned with the state of theory or its conflicts unless some crucial practical issue was also involved. However, practice in these years reveals that in both the House and the Senate the previous question was used mainly for the purpose of avoiding or suppressing undesired decisions, rather than undesired discussions.[17] Still, practice also reveals that the de-

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[14] Charles Francis Adams (ed.), *Memoirs Of John Quincy Adams*, Philadelphia, 1874, vol. I, p. 365. That Burr saw the previous question primarily as a mechanism for avoiding or suppressing undesired decisions can be inferred from the fact that he said "all its purposes were certainly much better answered by the question of indefinite postponement." This claim can be seen to be most correct if one regards the previous question as a mechanism for suppressing undesired decisions rather than undesired discussions. The consequence that indefinite postponement entailed that the previous question did not necessarily entail was total suppression of a matter for the remainder of the session. Such a consequence is better suited for suppressing decisions than for suppressing discussions since in all probability opposition to a substantive question will remain permanent whereas questions that are too delicate to be discussed at one moment may well lose their delicacy with the passage of time.

It is interesting to note that Jefferson distinguished temporary suppression of a discussion from permanent suppression, assigning the former end to the previous question and the latter end to indefinite postponement. See Jefferson's Manual, *op. cit.*, sec. XXXIII. However, we should also note that we cannot be certain that indefinite postponement was as effective a means of suppressing discussion as the previous question. Under the previous question mechanism discussion of the merits of the main question was absolutely forbidden. Whether this was also true when indefinite postponement was moved is not clear. Jefferson at no point states that the merits of the main question could not be discussed when indefinite postponement was moved, though this may be implicit in his statements regarding indefinite postponement.

[15] Hinds' Precedents, *op. cit.*, sec. 5445.

[16] See Cushing's Manual, *op. cit.*, pars. 1404 and 1421.

[17] For a discussion of all instances of the use or attempted use of the previous question in the Senate which this author has been able to discover see pt. III of this paper. For instances of the use or attempted use of the previous question in the House from 1789 to 1806 see *Annals*, 1 Cong. 1, 324 (May 14, 1789); 1 Cong. 1, 758–759 (Aug. 18, 1789); 1 Cong. 3, 1960 (Feb. 8, 1791); 2 Cong. 1, 597; 2 Cong. 2, 823; 2 Cong. 2, 846–851. 3 Cong. 1, 595–596; 3 Cong. 1, 686; 3 Cong. 2, 960; 3 Cong. 2, 998–1000; 5 Cong. 2, 650–652; 5 Cong. 2, 1067; 6 Cong. 1, 508; 6 Cong. 2, 1042; 7 Cong. 1, 419; 7 Cong. 1, 439–441; 7 Cong. 1, 1045; and 9 Cong. 1, 1091–1092. See also *Journal Of The House of Representatives Of The United States*, Washington, 1826, vol. III, p. 253.

gree to which these purposes can be distinguished varies widely from instance to instance and that often any distinction between them must be a matter of degree and emphasis, rather than a matter of precise differentiation.

II. Proper Operation in Parliamentary Theory, 1789–1806

In line with the prevailing conception of the previous question as a device for avoiding undesired discussions and/or decisions, the mechanism itself was clearly designed to serve such ends, rather than the ends of cloture. This can be seen if we examine parliamentary theory in the years from 1789 to 1806 with reference to three key facets of the rule's operation: the possibility of debate before determination of the motion, the course of procedure after determination of the motion, and the nature of the limitations on the scope of the motion.

Once moved and seconded the motion for the previous question, as in the case of any other motion, could be subject to extensive debate.[18] In both the Senate and the House the rules governing limitation of debate before 1806 were exceedingly lax.[19] Whether debate on the motion for the previous question could have been halted in the House or the Senate before the generous conditions set forth in the rules of these bodies had been satisfied is a matter of conjecture. Senator Douglas and Irving Brant argue that such a result was possible in the Senate and, at least in part, their argument can also be applied to the House. Their contention is that whenever debate became obstructive or repetitious it could have been ended by the presiding officer, and they seem to believe that this officer could have acted either on his own initiative or in response to a point of order raised from the floor.[20] They base their argument on the possibility in the early Senate of founding antifilibuster rulings on a general principle of parliamentary law, which Jefferson in his manual affirmed as follows: "No one is to speak impertinently or beside the question, superfluously or tediously." [21] Thus, Douglas and Brant maintain that in the period from 1789 to 1806 the motion for the previous question was not one that could be debated indefinitely "without let or hindrance," and they emphasize the fact that until 1828 the presiding officer in the Senate

[18] In the House of Representatives five members were required to second a motion for the previous question and no member was permitted to speak more than once without leave. The original previous question rule adopted by the House read as follows:

> "The previous question shall be in this form: "Shall the main question be now put?" It shall only be admitted when demanded by five members; and until it is decided, shall preclude all amendment and further debate of the main question. On a previous question no Member shall speak more than once without leave."

See Hinds' Precedents, *op. cit.*, sec. 5445.

[19] The main limitation on debate in the House prohibited any member from speaking more than twice on the same question without leave of the House or more than once until every member who wanted to speak had spoken. However, as we have already noted in footnote 18, on the motion for the previous question Members were limited to speaking once unless leave was granted to speak again. See *Annals*, 1 Cong. 1, 99 and 100 (Apr. 7, 1789). In the Senate the main limitation on debate prohibited any member from speaking more than twice in any one debate on the same day without permission of the Senate. See *Annals*, 1 Cong. 1, 20 (Apr. 16, 1789). Even this rule, however, was often not enforced. See Stidham, *op. cit.*, p. 59 and Memoirs Of John Quincy Adams, *op. cit.*, vol. I, p. 324.

[20] From the manner in which Brant and Douglas argue their case it is not entirely clear whether they maintain that the presiding officer could have stopped tedious or superfluous debate on his own initiative. I have interpreted them as maintaining this because their argument seems to suggest it, b cause such an interpretation strengthens their case, and because practice in the early Senate in other areas, e.g., relevancy, may furnish a basis for maintaining such a position. In 1826, however, Vice President Calhoun refused to intervene on his own initiative in matters where the "latitude or freedom of debate" was involved. See *Cong. Rec.*, 87 Cong. 1, pp. 232, 237, 238, 243, 245, and 246 (daily—Jan. 5, 1961). See also Burdette, *op. cit.*, pp. 16–19 and 220. In addition, see Haynes, *op. cit.*, vol. I, p. 389 and Furber's Precedents, *op. cit.*, p. 11[illegible].

[21] See *Cong. Rec.*, 85 Cong. 1, pp. 6669–6686 or *Cong. Rec.*, 87 Cong. 1, pp. 231–246 (daily—Jan. 5, 1961). See also Jefferson's Manual, *op. cit.*, sec. XVII.

was permitted to decide all questions of order without debate or appeal.[21a]

However, it is far from clear that the men who served in Congress in the period which concerns us saw themselves as having the powers that Douglas and Brant think they had. On the occasions where records reveal that debate in the Senate actually became "tedious" and "superfluous," there is no evidence to suggest that the presiding officer ever intervened or that a point of order was ever raised.[22] The situation is similar with respect to the House and it is also worth noting that when the House in December of 1805 decided that stricter control of debate on the motion for the previous question was necessary, it felt forced to amend its rules so as to abolish debate on the motion entirely.[23]

Nor can we be certain that if a presiding officer had intervened or a point of order had been raised, the result would have been as Douglas and Brant suggest. Freedom of debate was a principle which this period valued very highly. Thus, one cannot confidently predict that the House or the Senate would have sustained the intervention of its presiding officer. To be sure, if the presiding officer in the Senate had intervened to stop debate, his decision could not have been reversed by appeal to the floor, as could have been done in the House. But this does not mean that the Senate could not and would not have acted to reverse his ruling. This result could easily have been accomplished, if the Senate desired, simply by voting to amend or add to the rules. Similarly, if a point of order had been raised, one cannot confidently predict that the reaction of the presiding officer in either house would have been to uphold it. Given the fact that the rules of both the House and Senate directly concerned themselves with the conditions for limiting debate, any presiding officer would have been quite hesitant to impose by fiat restrictions that went so far beyond what the rules themselves prescribed.[24]

[21a] *Cong. Rec.*, 87 Cong. 1, pp. 232 and 245–246 (daily—Jan. 5, 1961). However, the Senate rules did provide that the presiding officer could sub mit a question of order to the Senate if he had doubt in his own mind as to what ruling was proper. See Jefferson's Manual, op. cit., sec. XVII.

[22] See Maclay's Journal, *op. cit.*, p. 63 (June 4, 1789); p. 133 (Aug. 26, 1789); pp. 155–159 (Sept. 22–24, 1789); p. 181 (Jan. 25, 1790); and p. 305 (July 1, 1790). On two and possibly three of these occasions there was not only tedious debate, but also a deliberate attempt to obstruct decision by prolonging debate. See also Everett S. Brown (ed.), *William Plumer's Memorandum Of Proceedings In The United States Senate, New York*, 1923, pp. 72–73 (Dec. 2, 1803); pp. 133–134 (Feb. 1, 1804); and p. 483 (Apr. 12, 1806).

It is true that both in the early Senate and the early House members were called to order for not being germane or relevant in debate. Indeed, the House adopted a rule of relevancy as early as 1811. But action preventing members from speaking "beside the question" is distinguishable from action preventing members from speaking "tediously" or "superfluously." See *Annals*, 11 Cong. 1, 1462–1463; Hinds' Precedents. *op. cit.*, secs. 4979 and 5042; Burdette, *op. cit.*, pp. 16–19 and 220; and Haynes, *op. cit.*, vol. I, pp. 423–425.

[23] *Annals*, 9 Cong. 1, 284, 286, and 287. This action, however, should not in any way be taken to mean that at this time the House understood the previous question as a cloture mechanism and was trying to make it a more efficient instrument for such purposes. On the contrary, from the first the House limited debate on the motion for the previous question more strictly than the Senate because of the special problems which its greater size created. See *Annals*, 10 Cong. 1, 1183–1184.

[24] Senator Douglas notes that from 1797 to 1801 Thomas Jefferson himself presided over the Senate and he asks would Jefferson have failed to uphold a point of order based on a principle which he affirmed in his manual. *Cong. Rec.*, 87 Cong. 1, p. 238 (daily—Jan. 5, 1961). Two points may be advanced in reply First, Jefferson deliberately listed in his manual precedents and principles that were directly contravened by the rules and practice of the Senate. In short, he must not have expected that every pronouncement he made would necessarily be a governing one for the Senate. Second, if the previous question had been moved for the purpose of cloture and the point of order suggested by Douglas raised to stop debate on the motion, it is quite possible that Jefferson either would have referred the point of order to the floor for decision, as he had discretion to do, or would himself have acted to nullify it. If he referred the point of order to the floor for decision, given the Senate's distaste for cloture, there is a good chance that it would have been defeated. If he decided to settle the point himself, it is conceivable that he might have ruled against it. For in such a case the point of order would have been used in support of an end which Jefferson would have thought grossly distorted the proper purpose of the previous question. In the least Jefferson might have held that the motion for the previous question was out of order, thus negating the significance of the point of order even if he upheld it. See below, footnotes 25 and 38.

Douglas also states that the fact that the presiding officer might have refused to stop debate on the basis of Jefferson's maxim does not mean that his power to do so did not exist. *Ibid.* This is a very questionable argument for, if the presiding officer had refused, it would have been because of the way he interpreted his power, and this is the very point in issue. All in all, both Douglas and Brant err in making such an absolute

Lastly, the least that can be said is that even if Douglas and Brant are correct in maintaining that it was possible to limit debate on the motion for the previous question, this facet of the rule's operation does not demonstrate that the previous question was designed as a cloture rule. On the contrary, the fact that debate on the motion could not be prevented until it became obstructive or repetitious made the previous question a very inefficient mechanism for cloture. It meant that a lengthy debate on the merits of the main question could be followed by a lengthy debate on the very propriety of putting the question.[25]

Equally, if not more important, as an indication of the purposes for which the previous question was designed is the manner in which the House and Senate understood the motion to operate after a decision had been rendered on it. With regard to negative determinations of the previous question, the view that appears to have been dominant in the period from 1789 to 1806 was that a negative decision postponed at least for a day, but did not permanently suppress, the proposition on which the previous question had been moved. In the House this view seems to have prevailed during the whole period from 1789 to 1806, though it is possible to place a contrary interpretation on the evidence which exists for the first few years of the House's existence.[26] As for the Senate, less evidence is available, but it is probable that its view was similar to that of the House. This conclusion can be based on Jefferson's statement that temporary rather than permanent suppression was the consequence of a negative result and the fact that on one occasion the Senate seems to have acted in accord with the temporary suspension view.[27] However, it should also be noted that in a number of instances in which the previous question was used in both

authority out of Jefferson. Even in the early decades of the 19th century the Senate did not regard Jefferson's pronouncements on proper parliamentary procedure as being so sacred that they could not be added to, altered, contravened, or even forgotten. Hence, one cannot positively claim that a certain power existed in the early Senate simply on the basis of a single sentence in Jefferson when no evidence exists to show that the power was ever exercised.

[25] The rules of the House precluded debate or amendment of the main question when the motion for the previous question was under discussion. Thus, debate on the motion for the previous question had to confine itself to the propriety or desirability of putting the main question at that time. See footnote 18 above. The rules of the Senate did not explicitly mention this point. See footnote 1 above. Still, the general understanding of the times seems to have been that the merits of the main question could not be discussed when the motion for the previous question was being debated. Jefferson affirmed this principle in his manual. However, Jefferson also believed that it was permissible to move to amend the main question and to discuss the amendment in the interim between the moving and the deciding of the previous question. It is worth noting, especially for the benefit of Brant and Douglas who place so much credence in Jefferson, that had this view been accepted, it would have been very difficult, if not impossible, to use the previous question as a cloture mechanism. See Jefferson's Manual, *op. cit.*, sec. XXXIV.

[26] For evidence bearing on procedure in the earliest days of the House see *Annals*, 1 Cong. 1, 758–759 (Aug. 18, 1789); 2 Cong. 1, 472; 2 Cong. 1, 594–597; and 2 Cong. 2, 846–851. See also Hinds' Precedents, *op. cit.*, sec. 5446. For additional evidence bearing on the whole period see *Annals*, 3 Cong. 1, 595–596; 3 Cong. 2, 998–1000; 7 Cong. 1, 419 and 461–462; 7 Cong. 1, 439–441 and 458–461; and 9 Cong. 1, 284. Beginning in 1802 rulings of the Speakers affirmed and enforced the temporary suppression view. See *Annals*, 7 Cong. 1, 1043–1047 and 12 Cong. 1, 1080–1082. In addition, see Joel B. Sutherland, *Congressional Manual*, Philadelphia, 1841, pp. 45, 104, and 113.

[27] See Jefferson's Manual, *op. cit.*, sec. XXXIV. The occasion referred to is Aug. 18, 1789. See pt. III of this paper and related footnote 51 below. Here the substance of a resolution suppressed the preceding day was allowed to be moved again.

In the Continental Congress the previous question by rule was put in its negative rather than affirmative form—"Shall the main question be not now put?" Thus, in contrast to the House and Senate where the rules provided for the affirmative form of the previous question, a negative determination of the previous question was achieved when the yeas prevailed. In the Continental Congress the effect of such a determination was generally to permanently suppress the main question. See *Journals Of The American Congress From 1774–1788*, Washington, 1823, vol. III, Aug. 8, 1778, Aug 15, 1778, Aug. 20, 1778, Sept. 8, 1778, Nov. 2, 1778, Nov. 19, 1778, Dec. 18, 1778, Feb. 19, 1779, June 8, 1779, June 10, 1779, Nov. 25, 1779, Nov. 27, 1779, Dec. 4, 1779, Oct. 16–17, 1781, Feb. 19, 1782, and Feb. 23, 1782; vol. IV, June 27, 1782, Dec. 12, 1782, Sept. 10, 1783, May 5, 1784, May 26, 1784, June 1, 1784, June 3, 1784, Oct. 13, 1785, and Aug. 14, 1786. On two other occasions, though there were more yeas than nays, there apparently were not enough yeas for the question to pass so that the motion was understood and treated as if it had been lost. *Ibid.*, Mar. 15, 1784, and June 2, 1784. On Sept. 1, 1786, the following resolution was adopted:

> "That when a question is set aside by the previous question, it shall not be in order afterwards formally or substantially to move the same, unless there shall be the same, or as many states represented in Congress."

the House and Senate, the circumstances were such that permanent suppression was or would have been the unavoidable consequence of a negative result.[27a]

The fact that a negative determination of the previous question suppressed the main question supports our contention that the previous question was originally designed for avoiding undesired discussions and/or decisions, rather than as an instrument for cloture. That the previous question could not be employed without risking at least the temporary loss of the main question ill adapted it for use as a cloture mechanism. It is not surprising that one of the longrun consequences of the House's post-1806 decision to use the previous question for cloture was the elimination of this feature.[28] On the other hand, suppression was a key and quite functional feature of the previous question, viewed as a mechanism for avoiding undesired discussions and/or decisions. Indeed, in the period from 1789 to 1806 suppression served as a defining feature of the mechanism. Men who intended to vote against the motion would remark that they supported the previous question and on one occasion the motion was recorded as carried when a majority of nays prevailed.[29]

With regard to affirmative determinations of the previous question, the evidence which exists again does not lend itself to simple, sweeping judgments of the state of parliamentary theory in either the House or the Senate. The House in the years from 1789 to 1806 on a number of occasions allowed proceedings on the main question to continue after an affirmative decision of the previous question.[30] Finally, in 1807 a dispute arose over whether such proceedings could legitimately be continued. The Speaker ruled that they could not, that approval of the motion for the previous question resulted in an end to debate and an immediate vote. This was Jefferson's opinion as well. But despite the fact that Jefferson's pronouncements on general parliamentary procedure were as valid for the House as for the Senate, the House overruled the Speaker and voted instead to sustain the legitimacy of continuing proceedings after an affirmative decision of the previous

[27a] For examples in the Senate see pt. III of this paper and related footnotes 56, 65, and 69 below. For examples in the House see *Annals*, 1 Cong. 1, 324 (May 11, 1789); 5 Cong. 2, 650–651; and 6 Cong. 1, 508–509. It is also true that in a number of instances in which the previous question was used, the likely and practical result of a negative decision was or would have been permanent suppression, though theoretically it would still have been possible to bring the question up again. For examples in the House see *Annals*, 3 Cong. 1, 686; 3 Cong. 2, 960–966; 5 Cong. 2, 1067; and 9 Cong. 1, 1090–1092. For an example in the Senate see pt. III of this paper and related footnote 57.

[28] Hinds' Precedents, *op. cit.*, sec. 5446.

[29] See *Annals*, 3 Cong. 2, 999; 5 Cong. 2, 651; and 5 Cong. 2, 1067. See also *Annals*, 5 Cong. 2, 652, and compare with *Journal of The House of Representatives*, vol. III, p. 92. In addition, see Luce, *op. cit.*, p. 270. We may note that it is this kind of thinking and approach which explains the negative form of the previous question rule in the Continental Congress. See Hinds' Precedents, *op. cit.*, sec. 5445 and Cushing's Manual, *op. cit.*, par. 1422. The fact that the House and Senate changed the form of the previous question from negative to positive should not be taken to mean that use of the previous question as a cloture mechanism was understood or intended. See Alexander, *op. cit.*, p. 187 and Samuel W. McCall, *The Business Of Congress*, New York, 1911, pp. 93–94.

[30] See *Annals*, 1 Cong. 3, 1960; 3 Cong. 1, 595–603; and 3 Cong. 2, 1000–1002. See also *Journal Of The House Of Representatives*, vol. III, pp. 253–254. In addition, see *Annals*, 12 Cong. 1, 578–579 and 14 Cong. 1, 710–711. It is also true that on a number of occasions in the House a vote on the main question immediately followed an affirmative decision of the previous question. But there may have been no desire to prolong debate on these occasions. See *Annals*, 2 Cong. 2, 823; 2 Cong. 2, 850–851; 3 Cong. 1, 686; 3 Cong. 2, 966; and 9 Cong. 1, 1092.

Senator Douglas claims that, according to American parliamentary practice, "adoption of the motion for the previous question closed debate instantly and completely, regardless of the motive for invoking it and brought the question to an immediate vote." *Cong. Rec.*, 87 Cong. 1, p. 232 (daily—Jan. 5, 1961). In terms of the evidence cited here we may note that in the House before 1806 the opposite was the case nearly 50 percent of the time.

question.[31] It is not clear whether this decision should be explained by assuming that it reflected the House's long-term understanding of proper procedure or by assuming that it merely reflected the House's pragmatic desire to escape the consequences of the 1805 rules change which abolished debate on the motion for the previous question.[32]

As for the Senate, again less evidence is available, but the Senate appears to have accepted the view that the proper result of an affirmative decision was an end to debate and an immediate vote on the main question. This is what seems to have occurred in the three instances in which the previous question was determined affirmatively in the Senate.[33] Nonetheless, it should be noted that the issue never came to a test in the Senate and we cannot be certain what the result would have been if it had.[34]

Yet, even if we concede that the Senate understood the result of an affirmative decision as Jefferson did, what must be emphasized once more is that this facet of the rule's operation does not mean that the previous question was designed as a cloture mechanism. Jefferson did not regard it as such, but rather saw an immediate vote upon an affirmative decision as an integral part of a mechanism designed to suppress delicate questions. To be sure, it was this facet of the rule's operation, combined with the abolition of debate on the motion for the previous question, which helped make it possible for the House to turn the rule into a cloture mechanism. This occurred in 1811 when the House, fearful that filibustering tactics were going to result in the loss of a crucial bill, reversed its previous precedents and decided that henceforth an affirmative decision would close all debate on the

[31] See Jefferson's Manual, *op. cit.*, sec. XXXIV and *Annals*, 10 Cong. 1, 1182-1184. The vote against the Speaker was 103-14. The precedent was reaffirmed directly in 1808 and indirectly in 1810. See *Annals*, 10 Cong. 2, 630-632 and Hinds' Precedents, *op. cit.*, sec. 5445.

In the Continental Congress, where the previous question by rule was put in negative form, a victory by the nays rather than the yeas constituted an affirmative determination of the previous question. For such a result amounted to a decision that, "No, the previous question should not be put" with the negatives canceling out. Before 1780 a victory for the negative seems always to have resulted in an immediate vote on the main question. Indeed, on Oct. 16, 1778, the Continental Congress insisted on such a result and refused to allow an intervening motion. See *Journals Of The American Congress*, vol. III, Oct. 16, 1778, Feb. 26, 1779, Apr. 20, 1779, May 24, 1779, June 10, 1779, Aug. 21, 1779, and Aug. 25, 1779. However, after 1780 intervening motions were allowed. See *Journals Of The American Congress*, vol. IV, May 31, 1784, and Aug. 31-Sept. 1, 1786. See also *ibid.*, Mar. 15, 1784, Apr. 14, 1784, June 2, 1784, and July 25, 1788. It is interesting to note that when the Continental Congress revised its previous question rule in 1784 the wording of the new rule was much less definite than the old one had been with regard to what was to occur if the nays prevailed. See Hinds' Precedents, *op. cit.*, sec. 5445, and Cushing's Manual, *op. cit.*, par. 1422, or *Journals Of The American Congress*, vols. II and IV, May 26, 1778 and July 8, 1784.

[32] De Alva S. Alexander believes that this decision came as a reaction against the 1805 rules change. Samuel W. McCall feels that the decision, in truth, went against the meaning of the words of the rule and Asher Hinds seems to agree. See Alexander, *op. cit.*, p. 185; McCall, *op. cit.*, p. 94; and Hinds' Precedents, *op. cit.*, sec. 5445. However, see also Gaston's interpretation of the meaning of the words of the rule. *Annals*, 14 Cong. 1, 709.

[33] See *Annals*, 3 Cong. 1, 94 and 5 Cong. 2, 538. See also *Journal Of The Executive Proceedings Of The Senate Of The United States*, Washington, 1828, vol. I, p. 318. In addition, see pt. III of the text of this paper and related footnote 58 below. It should be noted, however, that the records of the Senate for these years are so sparse in their description of debate that we cannot know with absolute certainty whether or not debate was allowed to continue on these occasions.

[34] This is especially true, assuming for the moment that debate on the motion for the previous question could actually have been limited, if the test involved the use of the previous question as a cloture mechanism. Even if we grant that the Senate did understand the result of an affirmative decision as an end to debate and an immediate vote, one cannot simply postulate that because the Senate understood the previous question to entail certain consequences when viewed as a mechanism for suppressing undesired decisions, it necessarily would have understood it to involve the same consequences if an attempt was made to transform the device into a cloture mechanism. Given the distaste the early Senate had for cloture, it is quite likely that the majority of Senators, no matter what their policy persuasions, would have regarded transformation of the previous question into a cloture mechanism as improper and would have modified their understanding of the proper operation of the rule accordingly. Nor would they have been helpless in the face of past precedents. The presiding officer could have been asked to rule in their favor or merely to submit the issue to the floor, as he had discretion to do. If the cooperation of the presiding officer could not have been secured, the rules themselves could have been amended. It is worth noting that the House only became convinced that it was necessary to allow the previous question to be used for cloture after a series of trials with obstructionists, the last of which threatened a very crucial bill. See footnote 35 below. It may well be argued that it would have taken at least as severe a set of experiences as the House underwent before the Senate would have allowed cloture to be imposed on its minorities through the forced closing of debate after affirmative decisions of the previous question.

main question finally and completely.[35] Nonetheless, despite the fact that the previous question was available for use as a cloture mechanism from 1811 on, the House did not make frequent use of it for several decades.[36] One of the reasons for this was that the rule, not having been designed as a cloture rule, continued to retain or was interpreted to have features which made it both ineffective and unwieldy when used for the purpose of cloture.[37] Indeed, it took the House another 50 years of intermittent tinkering to eliminate most of these debilitating features.[38]

In part, the previous question continued to be handicapped as a cloture mechanism because a negative determination of the motion suppressed the main question at least for a day. In part, however, its efficacy was also impaired by a factor we have not yet discussed, though we began by identifying it as one of the key facets of the rule's operation—the nature of the limitations on the scope of the motion.

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[35] This event occurred on Feb. 27, 1811. See *Annals*, 11 Cong. 3, 1091–1094. See also *Annals* 14 Cong. 1, 698–699 and Alexander, *op. cit.*, pp. 185–188. It should be noted that on this occasion the previous question was applied to amendments as well as to the principal question at the third reading stage, i.e., the question on the passage of the bill. Thus, the main question involved in the motion for the previous question was at times a subsidiary question rather than the principal question. See footnotes 44 and 49a below.

The filibustering tactics employed on Feb. 27, 1811, were nothing new. In the years immediately preceding 1811 the House was subjected to obstructive tactics that sorely tried its great distaste for cloture. As late as 1810 the House, despite its difficulties with obstructionists, evinced its opposition to cloture by rejecting a proposal which sought to turn the previous question into a cloture mechanism. See Hinds' Precedents, *op. cit.*, sec. 5445 and *Annals*, 11 Cong. 2, 1207–1215. However, on this occasion the importance of the bill, the nearness of the end of the session, and the series of abuses the House had sustained combined to exhaust even its great capacity for patience. See references cited in footnotes 37 and 38 below.

Irving Brant claims that the House in turning the previous question into a cloture mechanism "was actually following the precedent set in the Senate." *Cong. Rec.*, 87 Cong. 1, p. 245 (daily—Jan. 5, 1961). However, even aside from the question of whether such a precedent did in fact exist which is considered in pt. III of this paper, it is worth noting that the men who favored turning the previous question into a cloture mechanism in the House were totally unaware of any such precedent. See *Annals*, 11 Cong. 2, 1153–1157 and 1207–1215; 12 Cong. 1, 567–581; and 14 Cong. 1, 696–718.

[36] Scholars now generally accept the proposition that the previous question was used only four times in the 20 years that followed 1811. This estimate is based on a statement of Calhoun's made in 1841. See Alexander, *op. cit.*, pp. 188–190 and Luce, *op. cit.*, p. 272. This proposition, however, is not correct. An inspection of the indexes to the Journals from the Twelfth through the Seventeenth Congresses (1811–23) indicates that in this 12-year period alone the previous question was used at least 30 times. Nonetheless, it is still true that such usage cannot be seen as frequent usage. In contrast, during the first session of the Twenty-Eighth Congress (1843–1844) the previous question was used over 150 times. This increase in frequency can be related, at least in part, to the fact that the efficacy of the previous question as a cloture mechanism had been improved by a rules change adopted in 1840. See Hinds' Precedents, *op. cit.*, sec. 5446.

[37] Distaste for cloture *per se* was probably an even more important factor underlying the infrequency of the House s reliance on the previous question in the years that followed 1811. See Thomas H. Benton, *Thirty Years' View*, New York, 1856, vol. II, pp. 256–257. Thus, the increase in the size and business of the House and its greater acceptance of the desirability of cloture are of utmost significance in explaining the increase that occurred in the use of the previous question. These factors not only stimulated the House to use the previous question more frequently; in addition, they stimulated it to transform the device into an efficient cloture mechanism which had the reciprocal effect of allowing it to be used more frequently. See Alexander, *op. cit.*, app. F for figures on the size of the House and the indexes of the relevant Journals for figures on the number of bills introduced.

[38] Hinds' Precedents, *op. cit.*, secs. 5443, 5445, and 5446. In addition, see Luce, *op. cit.*, pp. 272–274. It is worth noting that Jefferson himself advised the House of Representatives against use of the previous question as a cloture mechanism. On Jan. 5, 1810, as a result of the filibustering tactics that had lately been employed in the House, a resolution was introduced which among other things proposed to amend the rules so as to cut off debate immediately after an affirmative decision of the previous question. This resolution was destined to fail. However, on Jan. 17, 1810, writing in reply to a letter addressed to him a week earlier by John W. Eppes, a leader in the House and also his son-in-law, Jefferson remarked that he observed that the House was trying to remedy the protraction of debate by sitting up all night or by use of the previous question. He further remarked that reliance on the previous question was a mistake since it would not only inconvenience the House but also furnish the minority with a weapon they could turn on the majority

Whether Jefferson actually knew of the substance of the proposed rules change is unclear. It can be argued that the resolution contained provisions which would have met his objections. But the least that can be said is that Jefferson did not recommend changing the practice of the House which at that time allowed debate to continue after an affirmative decision of the previous question, even though this practice was contrary to the principles of his manual. What Jefferson did recommend to Eppes was a straight cloture rule which he had devised and which could have been used to force a vote at a certain time each day. In closing, it is also worth noting that Jefferson apparently did not feel that reliance could be put on points of order raised on the basis of the general parliamentary principle which ruled out "tedious" or "superfluous" debate, even though he himself affirmed this principle in his manual. See Paul L. Ford (ed.), *The Writings Of Thomas Jefferson*, New York, 1898, vol. IX, pp. 267–268 (Thomas Jefferson to John W. Eppes—Jan. 17, 1810); *Annals*, 11 Cong. 2, 1153–1157 and 1207–1215; James Schouler, *History Of The United States of America*, Washington, 1882, vol. II, p. 293; and Richard Hildreth, *History Of The United States of America*, New York, 1856, vol. III, p. 197.

For one thing, the previous question could not be moved in committee of the whole, a form of proceeding which both the early House and early Senate valued highly as a locus for completely free debate.[39] Thus, when the House beginning in 1841 finally decided to limit debate in committee of the whole, it was forced to develop methods other than the previous question for accomplishing this result.[40] However, the early Senate relied to a large extent, not on the regular committee of the whole, but on a special form of it called quasi-committee of the whole, i.e., the Senate as if in committee of the whole; and apparently it was possible to move the previous question when the Senate operated under this form of proceeding.[41]

More important as a limitation on the scope of the previous question was its relation to secondary or subsidiary questions. At first, at least in the House, the previous question was treated as a mechanism that could be moved on subsidiary or secondary questions, e.g., motions to amend, motions to postpone, etc., as well as a mechanism that could be moved on original or principal questions, e.g., that the bill be engrossed and read a third time, that the bill or resolution pass, etc.[42] Thus, though this fact is often misunderstood, in the early House the main question contemplated by the motion for the previous question was sometimes a subsidiary question rather than the principal or original question. Whether the Senate permitted the previous question to be applied to secondary or subsidiary questions before 1800 is not clear.[42a] However, in that year Thomas Jefferson, as presiding officer of the Senate, ruled that the previous question could not be moved on a subsidiary question and his manual when it appeared reaffirmed this position.[43] The House followed suit in 1807, though as late as 1802 a ruling of the Speaker, concerned with the effect of a negative determination of the previous question, took

[39] See Jefferson's Manual, *op. cit.*, secs. XII and XXX; Hinds, *op. cit.*, sec. 4705; and Haynes, *op. cit.*, vol. I, pp. 317-320. Originally, every member could speak as often as he wished in committee of the whole and debate could only be ended by voting to rise and return to the floor. See also Paul L. Ford (ed.), *The Writings Of Thomas Jefferson*, New York, 1896, vol. VII, p. 224 (Thomas Jefferson to James Madison—Mar. 29, 1798).

[40] Alexander, *op. cit.*, p. 267 and Hinds' Precedents, *op. cit.*, sec. 5221.

[41] Jefferson believed that the previous question could be moved when the body was in quasi-committee and in later years the House adopted this interpretation. See Jefferson's Manual, *op. cit.*, sec. XXX and Hinds' Precedents, *op. cit.*, sec. 4923. Jefferson's words in this instance derive added weight from the fact that the quasi-committee procedure was unknown in Parliament so that when he interprets it he apparently relies on what indeed was the practice of the Senate. Moreover, in two instances the previous question may actually have been moved when the Senate was in quasi-committee of the whole. See Jefferson's Manual, *op. cit.*, secs. XXIV-XXXI; *Journal Of The Senate Of The United States Of America*, Washington, 1820, vol. I, pp. 60 and 66; and Maclay's Journal, *op. cit.*, pp. 136-138.

[42] For examples in the House see *Annals*, 2 Cong. 1, 594-597; 6 Cong. 1, 508-509; and 7 Cong. 1, 1043-1045. In the Continental Congress the previous question was not confined to principal questions. At one point in its history (Jan. 7, 1779) this body did express itself as regarding the use of the previous question on amendments as improper. But use of the previous question on amendments as well as on other subsidiary questions continued. See *Journals Of The American Congress*, vol. III, Aug. 8, 1778, Sept. 8, 1778, Dec. 18, 1778, Jan. 7, 1779, and Nov. 27, 1779; vol. IV, Mar. 15, 1784, Apr. 14, 1784, May 5, 1784, May 26, 1784, May 31, 1784, June 1, 1784, June 2, 1784, and June 3, 1784.

[42a] See footnotes 54 and 69 below. The early Senate did permit the previous question to be applied to resolutions, even when moved in a context in which another question existed as the original or principal question. The reasons why this was so are not clear. See footnotes 51, 56, and 65 below.

[43] *Annals*, 6 Cong. 1, 42-43 and Jefferson's Manual, *op. cit.*, sec. XXXIII. Jefferson recognized the existence of six different kinds of subsidiary questions: the motion for the previous question, the motion to postpone indefinitely, the motion to adjourn a question to a definite day, the motion to lie on the table, the motion to commit, and the motion to amend. He also noted that the Senate used the motion to postpone to a day within the session for the motion to adjourn a question to a definite day and the motion to postpone to a day beyond the session for indefinite postponement. The motion to lie on the table was not recognized in the rules of the Senate, but apparently it was nonetheless used.

In general, Jefferson stated that subsidiary questions could not be moved on other subsidiary questions. However, he did make exceptions for an amendment to a motion to postpone, an amendment to a motion to commit, and an amendment to an amendment. For a definition of the nature of a subsidiary question see Cushing's Manual, *op. cit.*, par. 1443.

no cognizance of the fact that the previous question had been moved on a subsidiary question and allowed such usage to go by unchallenged [44]

The decision of the House to confine the previous question to principal questions created great difficulties for it once it began to use the device as a cloture mechanism. Neither the rules of the House or the Senate clearly gave the previous question precedence over other subsidiary questions, such as the motions to postpone, commit, or amend. Thomas Jefferson's opinion was that subsidiary questions moved before the previous question should be decided prior to a vote on the previous question.[45] However, such an approach became entirely unacceptable once it was desired to employ the previous question as a cloture mechanism. If subsidiary questions moved before the previous question took precedence over it and if the previous question could only be applied to the original or principal question, then obstructionists could move subsidiary questions before the previous question and prolong the discussion of these questions for great lengths of time. It was probably no accident that the House amended its rules to give the previous question precedence over other subsidiary questions less than a year after it first used the previous question for cloture.[46]

Nonetheless, this change did not transform the previous question into an efficient cloture mechanism. Beginning with the Twelfth Congress (1811–13), rulings of the Speakers strictly enforced and further developed the doctrine that the previous question applied only to the original or principal question.[47] This caused the House great inconvenience.[48] It meant that if the previous question was approved, it cut off all pending subsidiary questions and brought the House directly to a vote on the original or principal question. Thus, a vote

[44] *Annals*, 10 Cong. 1, 1048–1049 and 7 Cong. 1, 1043–1045. The use of the previous question on amendments on the historic night of Feb. 27, 1811, was seen as an aberration, not a precedent. See *Annals*, 11 Cong. 3, 1091–1094 and 14 Cong. 1, 714. See also *Annals*, 11 Cong. 3, 1106–1107. However, in one area the House did continue to allow the previous question to be confined to subsidiary questions, i.e., with regard to Senate amendments to bills returned to the House for concurrence. See, for example, *Journal Of The House of Representatives Of The United States*, Washington, 1819, 16 Cong. 1, pp. 275–277 (Mar. 2, 1820) and *Journal Of The House of Representatives Of The United States*, Washington, 1821, 17 Cong. 1, pp. 581–582 (May 6, 1822). This was true despite the implications of a ruling made in 1812 by Henry Clay. See Hinds' Precedents, *op. cit.*, sec. 5446.

[45] Jefferson's Manual, *op. cit.*, sec. XXXIII.

[46] This event took place on Dec. 23, 1811. See Hinds' Precedents, *op. cit.*, sec. 5301 and *Journal Of The House of Representatives*, vol. VIII, appendix, p. 528.

It should be noted that the importance of precedence relates not only to the matter of whether subsidiary questions moved before the previous question could be considered before it, but also to the matter of whether subsidiary questions moved after the previous question could be considered before it. This latter feature of the privilege contained in precedence could be an even more serious impediment to the use of the previous question for cloture than the fact that the previous question might have to wait its turn according to the order in which subsidiary questions were moved. Before 1811 the House seems in practice to have given the previous question precedence over other subsidiary questions, if it was moved prior to them. It was, however, not given precedence over the motion to adjourn. See *Annals*, 3 Cong. 1, 596; 7 Cong. 1, 440; and 9 Cong. 1, 288. Still, the situation was an ambiguous one. If a conflict had ever arisen, much would have depended on the inclination of the presiding officer. See John M, Barclay, *Rules And Orders Of The House Of Representatives*, Washington, 1867, footnote to rule 42 on p. 166. When the House did revise its rules in 1811, the previous question was given precedence over all subsidiary questions except the motion to table. In addition, the motion to adjourn was given precedence over the previous question. On one occasion, however, the presiding officer refused to give the motion to table precedence over the previous question. See *Annals*, 13 Cong. 3, 994–995. See also Sutherland's Manual, *op. cit.*, p. 46.

The Senate did not clearly define the precedence of subsidiary questions in its rules until after 1806. Indeed, it may not have done so until 9 years after the House did, i.e., not until 1820. Thus, the rules of the Senate were vague and ambiguous on this point during the whole period in which the previous question existed as part of its procedure. Though a conflict situation involving the previous question never seems to have arisen, we do have some evidence that the Senate did not feel bound to give the previous question precedence over subsidiary questions moved after it. On one occasion in 1792 a motion to postpone was put to a vote before the previous question, even though the previous question had been moved before that motion. See *Annals*, 1 Cong. 1, 20–21 (Apr. 16, 1789) and 9 Cong. 1, 201. See also *Senate Executive Journal*, vol. I, pp. 96–98.

[47] See Hinds' Precedents, *op. cit.*, sec. 5446. See also *Annals*, 12 Cong. 1, 1352–1353; 12 Cong. 2, 1028 13 Cong. 1, 398; 13 Cong. 3, 900–901; 13 Cong. 3, 994–995; 13 Cong. 3, 1010–1011; 13 Cong. 3, 1270–1271; and 14 Cong. 1, 714–715. Occasions on which the previous question was used in succeeding Congresses can be found in the indexes to the relevant Journals.

[48] Hinds' Precedents, *op. cit.*, secs. 5443 and 5446.

might have to be taken on a form of the question undesired by the majority, e.g., that the bill without the amendments reported pass to a third reading instead of that the bill with the amendments reported be recommitted with instructions. Thus also, when a subsidiary question was moved early in debate the House might either have to endure a lengthy discussion on the motion or employ the previous question, which would force a vote on the principal question before it had been adequately considered. Ultimately, of course, the House did reshape the previous question mechanism so that it could efficiently be applied to the subsidiary questions involved in an issue. However, this reshaping occurred piecemeal over a number of years in response to the difficulties we have described and it was in a sense dependent on them.

We may conclude, then, that in the period from 1789 to 1806 the previous question mechanism was designed to operate in a manner that was suited only to its utilization as an instrument for avoiding undesired discussions and/or decisions. In the Senate and in the House until December of 1805 debate on the motion was permitted. In both bodies a negative determination of the previous question postponed or permanently suppressed the main question and in the House, at least, debate and amendment were permitted after an affirmative decision. In the eyes of those who saw the previous question as a means of avoiding undesired decisions this could easily be justified by assuming that the vote on the previous question only determined whether the body wanted to face the issue. Finally, the nature of the limits on the scope of the motion greatly handicapped its efficacy as a cloture mechanism. It is true that in the beginning the House and possibly the Senate allowed the previous question to be applied to subsidiary questions. It is also true that, once both bodies accepted the proposition that the device could not be so applied, this restriction could and in the Senate actually did handicap those who wanted to use the previous question as a mechanism for avoiding certain decisions. Still, as the experience of the House after 1811 demonstrates, the nature of the handicap was one that was much less a limit on the negative objective of suppressing a whole question than on the positive objective of forcing a whole question to a vote. In short, we may conclude that in both the early House and early Senate not only was the purpose of the previous question conceived of as relating to the prevention of undesired discussions and/or decisions; in addition, the device itself was clearly designed operationally to serve such ends rather than the ends of cloture. In later years the previous question was turned into an efficient cloture mechanism in the House. But this required considerable tinkering, and what is more, tinkering that resulted ultimately in a basic transformation of the operational nature of the mechanism.[48a]

III. The Previous Question in Practice in the Senate, 1789–1806

The conclusions we have reached thus far are significant; but they are not conclusive. The purposes for which the previous question was actually used in the period from 1789 to 1806 must also be examined since the possibility of a discrepancy between theory and

[48a] *Ibid.*, sec. 5446.

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practice cannot be disregarded. As far as the House of Representatives is concerned, it is clear from the evidence and acknowledged by all that the previous question was not employed as a cloture mechanism in the years before 1806. However, with regard to the Senate, Senator Douglas and Irving Brant claim that the previous question was in fact used for cloture during the 17 years in which it existed as part of the procedure of the upper house. If this is true, Brant and Douglas can well argue that on the basis of this experience a precedent exists for the imposition of majority cloture in the Senate today, though the strength of the precedent would still depend on how isolated or irregular such usage was.

Yet there is still another reason for examining the actual instances in which the previous question was used in the Senate. Interestingly enough, the actual use of the previous question as a cloture mechanism is crucial to Brant and Douglas' claim that the Senate had the "power" to use the previous question for cloture whenever it desired. This is something of a paradox since Brant and Douglas imply that the Senate's power in this regard existed whether or not the Senate ever actually exercised it. However, this view cannot be accepted. The reasons why it cannot have already been touched on in various parts of this paper, but for purposes of exposition it is necessary to bring them together here. First, the possibility that the Senate could have limited debate on the motion for the previous question through rulings which prohibited tedious or superfluous debate is subject to doubt. Nothing exists to support this contention except a sentence in Jefferson's manual.[49] Second, the early Senate never gave the previous question a position of precedence over other subsidiary questions in its rules. Third, it is clear that the Senate did not allow the previous question to be applied to subsidiary questions in the latter part of the period from 1789 to 1806 and it may well be the case that this prohibition existed in the earlier part of the period as well.[49a] Fourth, we cannot even be certain that in the Senate the inevitable, irreversible result of an affirmative determination of the previous question was an immediate vote.[50] Given these difficulties, the only way in which

[49] See footnotes 22, 24, and 25 above. It is worth noting that if obstructive debate could have been stopped through rulings based on the general parliamentary principle which prohibited tedious or superfluous debate, there would have been much less need to use the previous question as a cloture mechanism than Brant and Douglas recognize. Assuming that the previous question could have been used for cloture, it only would have been required in situations where an absolute prohibition of discussion on the merits of a question was desired or where the possibility of moving obstructive subsidiary questions, e.g., amendments, was unlimited.

[49a] See footnotes 54 and 69 below. If it is true that in its earliest years the Senate allowed the previous question to be applied to subsidiary questions, then for these years the significance of the fact that the previous question was not given precedence in the Senate rules is limited. See footnote 46 above. Assuming that the Senate would not have greatly restricted the kinds of subsidiary questions the previous question could be applied to and assuming that the Senate would not have further expanded the possibility of moving subsidiary questions on other subsidiary questions, the previous question would have furnished an efficient instrument for handling pending subsidiary questions which stood in the way of a vote on the original or principal question. Moreover, if necessary, the mechanism also could have been applied to secure a vote on the principal question itself.

It is worth noting that the first time the previous question was used for cloture in the House the rules of the House had not yet been amended to give the previous question precedence over other subsidiary questions. One of the reasons the House was nonetheless able to use the previous question for cloture was that on this occasion the House permitted it to be applied to subsidiary questions. However, it should be remembered that this was not the only reason, nor would it have been sufficient if it had been. Also important was the fact that debate on the motion for the previous question was prohibited, the fact that past precedents were reversed so that debate was not allowed to continue after the motion had been decided, and the fact that the understanding of the House seems to have been that other subsidiary questions could not be used to obstruct the application of the previous question to the questions on which it was moved. See *Annals*, 11 Cong. 3, 1091–1094.

The House, of course, retreated almost immediately from the position that the previous question could be applied to subsidiary questions. That it was allowed on this occasion was regarded as an aberration. See footnote 44 above. Instead, the House gave the previous question precedence in its rules. This combined with the prohibition of debate both before and after the vote on the previous question meant that the mechanism could be used for cloture, though only at the cost of removing all pending subsidiary questions.

[50] See footnote 34 above.

Brant and Douglas' contention that the Senate had the "power" to use the previous question for cloture can be substantiated is by evidence of its actual exercise, i.e., by evidence that the difficulties we have mentioned could be overcome. Moreover, if such evidence cannot be furnished, we may push our argument even further than we have up to this point. For, then, we may strongly suspect that, in the face of the obstacles which existed, the Senate could not have used the previous question for cloture unless it first modified its rules and practices in the same way the House did starting in 1805.

This author has been able to find ten instances of the use or attempted use of the previous question in the Senate during the years from 1789 to 1806. They are as follows.

(*A*) *August 17 and 18, 1789* [50a]

On August 17, 1789, a committee report on a House bill concerned with providing expenses for negotiating a treaty with the Creek Indians was taken up for consideration. The bill as referred from the House made no mention of measures to be taken to protect the people of Georgia in the event efforts for a treaty failed. After the resolution embodied in the committee report and a second resolution originating on the floor were moved and defeated, a third resolution was moved which proposed to authorize the President to protect the citizens of Georgia and to draw on the Treasury for defraying the expenses incurred. At this point in the proceedings the previous question was moved. A majority of nays prevailed and the Senate adjourned. The next day the bill was again brought up for consideration. After a number of motions pertaining to particular clauses in the bill were proposed and, save one, defeated, a resolution was moved making it the duty of Congress to provide for expenses incurred by the President in defense of the citizens of Georgia. At this point the previous question was again moved. It was defeated and the bill, with the solitary amendment previously adopted, was then put to a vote and approved.[51]

[50a] See *Annals*, 1 Cong. 1, 62–63 and 1 Cong. 3, appendix, 2161. See also *Senate Journal*, vol. I, pp. 60–61 and *Cong. Rec.*, 87 Cong. 1, pp. 233 and 244 (daily—Jan. 5, 1961). Brant and Douglas, as well as all the other secondary sources which treat the previous question, are aware at most of only five instances of its use or attempted use in the Senate. This author has been able to find an additional five. It is quite possible that an exhaustive page-by-page search of the records of the Senate and the letters of contemporary figures would yield additional examples.

[51] In the second instance, i.e., Aug. 18, 1789, it is clear that the resolution moved immediately before the previous question was not the original or principal question. It is also clear that in this instance the previous question was moved on the resolution since the negative determination of the previous question did not prevent the Senate from passing immediately to a vote on the original or principal question—Shall the bill with the amendment pass?

In the first instance, i.e., Aug. 17, 1789, we cannot be certain that the resolution moved immediately before the previous question was not in fact the principal question at that point in the proceedings. It depends on whether a hiatus was possible between the defeat of the report and the resumption of the second reading stage. See Jefferson's Manual, *op. cit.*, sec. XXIX and *Senate Journal*, vol. I, pp. 59–60. If the resolution did exist as the principal question, there can be no doubt that the previous question was moved on it. However, even if the resolution did not exist as the principal question, it is still probable that the previous question was moved on the resolution rather than on what would have then been the principal question—Shall the bill pass to a third reading? Assuming that the resolution did not exist as the principal question, the fact that the Senate seems to have adjourned immediately after voting down the previous question does not necessarily mean that the previous question was moved on the principal question. To assert this is to presume that since the Senate adjourned, it must have been forced to adjourn because the whole bill had been suppressed. Yet adjournment could have come as a separate, voluntary act. Given the manner in which the previous question was used on the following day, it is more likely that even if the resolution did not exist as the principal question, the previous question was nonetheless applied to it rather than to the question on the bill. Senator Douglas seems to misunderstand this point. See *Cong. Rec.*, 87 Cong. 1, p. 233 (daily—Jan. 5, 1961).

That the Senate on Aug. 18, 1789, and possibly also on Aug. 17, 1789, allowed the previous question to be applied to a question that did not exist as the original or principal question raises the issue of whether the Senate initially permitted the previous question to be applied to subsidary questions. As far as the evidence furnished by these two instances is concerned, determination of the issue depends on whether the Senate regarded resolutions, moved in a context in which another question existed as the original or principal question, as subsidiary questions. Unfortunately, the answer to this question is not clear.

On the one hand, it can be maintained that the Senate distinguished resolutions, which stated a principle within a context in which another question existed as the original or principal question, from motions which

Brant and Douglas concede that in these two instances the previous question was moved for the purpose of avoiding or suppressing an undesired decision. Brant notes that this maneuver enabled "the economy bloc * * * to avoid an indefinite grant of spending power to the President and yet escape the odium of a vote against the defense of the frontier."[52]

(B) August 28, 1789 [53]

On August 28, 1789, during the discussion of a bill fixing the pay of Senators and Representatives William Maclay offered an amendment which sought to reduce the pay of Senators from six to five dollars per day. Maclay records in his Journal that his proposed amendment evoked a "storm of abuse" and that Izard, a Senator from South Carolina, "moved for the previous question." He further notes that Izard "was replied to that this would not smother the motion" and that when it was learned that "abuse and insult would not do, then followed entreaty." Maclay, however, remained undaunted. He knew that his amendment would be defeated; his object was simply to get a record vote on the amendment in the minutes. In this he was successful. The amendment was put to a vote and defeated, but the yeas and nays were recorded. The motion for the previous question was either not seconded or withdrawn since there is no mention of it in the *Senate Journal.*

In this instance, as in the last two, it is clear that use of the previous question was attempted for the purpose of avoiding or suppressing an undesired decision. However, the reasons why the motion for the previous question was not persisted in are not clear. The critical factor to be resolved is whether the motion was killed voluntarily because it was undesired or forcibly because power was lacking to insist on it.[54]

(C) January 12 and 16, 1792 [55]

On January 12, 1792, consideration of the nomination of William Short to be Minister resident at The Hague was resumed. After a committee had reported certain information concerning Short's fitness to be appointed a resolution was moved which stated that no Minister should at that time be sent to The Hague. The previous question was then moved in its negative form, i.e., "That the main

amended, postponed, or committed the original or principal question. See Jefferson's Manual, *op. cit.*, secs. XX and XXI. Thus, it can be maintained that a resolution, such as was moved on Aug. 18, 1789, was not technically regarded as a subsidiary question but rather as a kind of principal question. On the other hand, it can be argued that the Senate allowed the previous question to be applied to resolutions which did not exist as the original or principal question because it, as well as the House, initially permitted the previous question to be applied to subsidiary questions. In support of this contention the fact that resolutions were referred to by the Senate as "motions" can be cited. See *Senate Executive Journal*, vol. I, pp. 96–98. See also Senate rule VIII, *Annals*, 1 Cong. 1, 20–21 (Apr. 16, 1789). For additional evidence bearing on the status of resolutions see footnotes 54 and 65 below.

[52] *Cong. Rec.*, 87 Cong. 1, p. 244 (daily—Jan. 5, 1961).

[53] See Maclay's Journal, *op. cit.*, p. 138 and *Senate Journal*, vol. I, pp. 66–67. The Senate rules provided for a record vote at the request of one-fifth of the members present. *Annals*, 1 Cong. 1, 21 (Apr. 16 1789).

[54] Resolution of this issue hinges on whether the Senate at this time permitted the previous question to be applied to a question that was technically regarded as an amendment or subsidiary question. One can argue that the Senate, as well as the House, initially permitted the previous question to be applied to questions that were technically regarded as amendments or subsidiary questions no matter what stand one takes on the issue of the status of resolutions. In contrast, one cannot argue that the previous question was not applied in this instance because power was lacking to do so unless one also argues that the Senate distinguished resolutions from motions. This is true because unless the manner in which the previous question was used on Aug. 18, 1789, can be distinguished, it would indicate that the mechanism could have been used 10 days later in this instance as well.

It is worth noting that, though Izard was informed that the previous question would not "smother" Maclay's motion, these words do not necessarily imply that the previous question could not have been used. They can be interpreted as signifying only that Maclay's motion, even if suppressed, could have been raised again when the bill came up for its third reading. See footnote 69 below.

[55] See *Senate Executive Journal*, vol. I, pp. 96–98 and *Cong. Rec.*, 87 Cong. 1, pp. 234–235 and 244 (daily—Jan. 5, 1961).

question be not now put," despite the fact that the rules provided only for the positive form of the mechanism. At this point, however, the Senate decided that "the nomination last mentioned, and the subsequent motion thereon, be postponed to Monday next." On that day, January 16, 1792, the Senate resumed its consideration of the nomination and the resolution moved on the nomination. The previous question was put in negative form and carried with the help of a tie-breaking vote by the Vice President. This removed the resolution which would have prohibited sending a resident Minister to The Hague. The Senate then proceeded to the Short nomination and approved it.[56]

Here again Brant and Douglas concede that the previous question was not used for the purpose of cloture, i.e., for the purpose of closing debate in order to force a vote. Instead, they recognize that it was used to avoid or suppress an undesired decision and they also argue that it was used to suppress a discussion of certain conditions at The Hague which might have jeopardized Short's appointment.

(*D*) *May 6, 1794* [57]

On May 6, 1794, James Monroe, then a Senator from Virginia, asked the permission of the Senate to bring in a bill "providing, under certain limitations, for the suspension of the fourth article of the Treaty of Peace between the United States and Great Britain." The previous question in its normal, affirmative form was moved on Monroe's motion and it was approved by a vote of 12 to 7. The main question was then put and permission to bring in the bill was denied by a vote of 14 to 2. Monroe and John Taylor, his fellow Senator from Virginia, were the only Senators in favor.

Once more we may conclude that the previous question was moved in an attempt to avoid or suppress an undesired decision. This can be deduced from the fact that neither the proponents nor the opponents of Monroe's motion had any reason to attempt to obstruct decision by prolonging debate. This certainly was not in Monroe and Taylor's interest; they wanted a decision on the motion, preferably an affirmative one. As for the opponents, their numbers were such that they had no need to obstruct decision. The only Senators, then, who had a motive for moving the previous question were those seven Senators who voted against the previous question. For these men the previous question offered a means of suppressing a decision they wished to avoid.

Unfortunately, the *Annals* do not record the name of the Senator who moved the previous question. Nonetheless, convincing evidence exists to support our deduction that the previous question was, moved by a Senator who voted nay on that motion. John C. Hamilton's account indicates that such a Senator, James Jackson of Georgia, was the man who moved the previous question. He reports that Jackson made the following announcement to the Senate:

> I deem the proposition ill-timed * * * I wish for peace, and am opposed to every harsh measure under the present circumstances. I will move the previous question; * * *.[58]

[56] This case presents another instance in which the previous question was applied and confined to a resolution that did not exist as the original or principal question. That the resolution did not exist as the original or principal question can be inferred, among other things, from the fact that it was referred to as a "subsequent motion." That the previous question was applied and confined to the resolution can be inferred from the fact that its defeat did not suppress the question on the nomination but only the resolution itself.

[57] See *Annals*, 3 Cong. 1, 94 and Henry H. Simms, *Life of John Taylor*, Richmond, 1932, p. 61.

[58] John C. Hamilton, *History Of The Republic Of The United States Of America*, New York, 1860, vol. V, p. 570. Hamilton was the son of Alexander Hamilton.

Debate continued after this statement, presumably because Jackson held back on his motion to allow the other Senators to have their say. Undoubtedly, the reasons why Jackson considered Monroe's motion as "ill-timed" related to the fact that only a few weeks before John Jay had been appointed special envoy to Great Britain and was at that very moment making preparations to depart on his historic mission.[59]

(E) April 9, 1798 [60]

On April 9, 1798, after the Senate had gone into closed session James Lloyd, a staunch Federalist Senator from Maryland, moved that the instructions to the envoys to the French Republic be printed for the use of the Senate. Six days previous on the 3d the President had submitted to Congress the instructions to and the dispatches from these envoys. Four days previous on the 5th the Senate had agreed to publish the dispatches for the use of the Senate. These papers were the famous ones in which Talleyrand's agents were identified as X, Y, and Z and the whole affair was seen by the Federalists as a great vindication and triumph for their party.

Lloyd first moved his motion on the 5th when the Senate agreed to publish 500 copies of the dispatches, but it was postponed on that day. When he moved it again on April 9, 1798, John Hunter, a Senator from South Carolina, moved the previous question.[61] The motion for the previous question was approved by a vote of 15 to 11, with Hunter voting nay. The main question, i.e., that the instructions be printed, was also approved by a vote of 16 to 11, Hunter again voting nay.

In this instance, once again, it is clear that the previous question was not used as a mechanism for cloture. Rather, it was brought forward as a means of avoiding or suppressing an undesired decision. This is attested to by the fact that the Senate was in closed session when the previous question was moved and by the fact that Hunter, the mover of the previous question, voted nay both on his own motion and on the main question. It is also supported by the fact that 10 of the 11 Senators who voted nay on the motion for the previous question also voted nay on the main question.[62]

(F) February 26, 1799 [63]

On February 18, 1799, President Adams proposed to the Senate that William Vans Murray be appointed minister plenipotentiary to the French Republic for the purpose of making another attempt to settle our differences with France by negotiation. This proposal caused dismay and consternation in the ranks of the Federalists. For

[59] Hildreth, *op. cit.*, vol. IV, pp. 488-490.

[60] *Annals*, 5 Cong. 2, 535-538 and Schouler, *op. cit.*, vol. I, pp. 396-398.

[61] Hunter was a Republican but apparently such a moderate one that the Federalists had hopes of capturing him. See "South Carolina Federalist Correspondence," *American Historical Review*, vol. XIV, No. 4, pp. 783 and 789 (July 1909). Moreover, there is some evidence to indicate that by April 1798, the Federalists had, at least to some extent, succeeded in their objective. See Charles R. King (ed.), *The Life And Correspondence Of Rufus King*, New York, 1895, vol. II, p. 311.

[62] The reasons why Hunter and his supporters desired to apply the previous question in this instance are not clear. Given the party status of Hunter and the mixed nature of his support, sheer political expediency does not seem to be an adequate explanation. Instead, the desire for the previous question may have been motivated by opposition to the publication of confidential communications and/or hopes for continued negotiations. See *Annals*, 5 Cong. 2, 535-538 and 1375-1380; Correspondence Of Rufus King, *op. cit.*, vol. II, pp. 310-313; and Writings Of Thomas Jefferson, *op. cit.*, vol. VII, pp. 224-246 (letters to James Madison, James Monroe, Edmund Pendleton, and Peter Carr in the period from Mar. 29, 1798, to Apr. 26, 1798).

[63] *Senate Executive Journal*, vol. I, pp. 313-319. See also Schouler, *op. cit.*, vol. I, pp. 441-444; Hildreth, *op. cit.*, vol. V, pp. 284-291; and *Cong. Rec.*, 87 Cong. 1, pp. 235 and 244-245 (daily—Jan. 5, 1961).

one thing, Adams acted suddenly on the basis of confidential communications he had received from abroad without informing anyone in the Cabinet or the Senate as to his intentions. For another thing, a strong pro-war faction existed among the Federalist members of Congress and the party as a whole had been engaged in driving a number of war preparedness measures through Congress. Moreover, ever since the X.Y.Z. affair the Federalists had been using the presumed wickedness and hostility of France as a weapon for humiliating and destroying the strength of the Jeffersonian Republicans. Lastly, a number of prominent Federalists distrusted Murray and thought him too weak.

The nomination of Murray was referred to a committee headed by Theodore Sedgwick, a Federalist Senator from Massachusetts. Meanwhile, pressure was brought to bear on Adams and he was threatened with a party revolt if he did not agree to modify his request for the appointment of Murray. The result was that on February 25, 1799, Adams sent a second message to the Senate asking that a commission, composed of Murray, Patrick Henry, and Oliver Ellsworth, be appointed in lieu of his original request.[64] The next day, February 26, 1799, a resolution was moved which proposed that the President's original message of the 18th be superseded by his message of the 25th. The previous question was moved and it passed in the affirmative. The effect of this decision was to bring about a vote on the resolution and it also was approved. The Senate then proceeded to consider the nominations of Murray, Henry, and Ellsworth to office and all three were approved on the following day.[65]

Brant and Douglas contend that this is clearly an instance in which the previous question was moved for the purpose of cloture. Unfortunately, the *Executive Journal* does not record the name of the Senator who moved the previous question or the names of the Senators who voted for and against the motion.[66] However, the evidence that is

[64] Sedgwick and his committee asked for and were granted a meeting with President Adams. Whether he agreed to substitute a commission for his original proposal at this meeting or later when he learned that the Federalists in the Senate had caucused and decided to reject the nomination of Murray is a matter that varies from account to account. See John C. Hamilton, *The Works Of Alexander Hamilton*, New York, 1851, vol. VI, pp. 396-400 (letters of Sedgwick and Pickering to Hamilton and of Hamilton to Sedgwick in the period from Feb. 19, 1799, to Feb. 25, 1799); Charles F. Adams, *The Life And Works Of John Adams*, Boston, 1856, vol. I, pp. 547-549; George Gibbs, *The Administrations Of Washington And John Adams*, New York, 1846, vol. II, pp. 203-205; and *Correspondence Of The Late President Adams Originally Published In The Boston Patriot*, Boston, 1809, letters IV-V, pp. 20-26.

[65] This seems to be another instance in which the previous question was applied to a resolution which did not exist as the original or principal question. The original or principal question on this occasion appears to have been the nomination of Murray. The committee to whom this subject had been referred was discharged on Feb. 25, 1799, when Adams' second message nominating a commission of three men was received. See *Senate Executive Journal*, vol. I, p. 317.

If the resolution involved in this instance did not exist as the original or principal question, events on this occasion can be interpreted to contain significant evidence bearing on the status of resolutions in the Senate. Less than a year later on Feb. 5, 1800, the Senate refused to permit the previous question to be applied to a motion that directly sought to amend an original or principal question. See discussion of this instance in text and footnote 69. These facts might lead one to conclude that at least in 1799 the Senate did distinguish between resolutions and motions with the result that resolutions were not seen as subsidiary questions, even when moved in a context in which another question existed as the original or principal question.

However, it is quite probable that the resolution moved on Feb. 26, 1799, had a distinct parliamentary status that in and of itself explains why the previous question could have been moved on it. That is to say, this resolution may well have been seen as an incidental question. According to Jefferson and Cushing, an incidental question is a question which arises out of another question; but, unlike a subsidiary question, its decision does not necessarily dispose of that question, e.g., a question of order. Moreover, whereas an incidental question is not equivalent to an original or principal question, once it is brought up it supersedes the question on the floor and becomes open to subsidiary motions. See Jefferson's Manual, *op. cit.*, secs. XXXIII and XXXVII and Cushing's Manual, *op. cit.*, par. S. 1443, 1456, and 1476 (footnote).

Thus, the use of the previous question on Feb. 26, 1799, can be explained by noting that the Senate probably saw the resolution as an incidental question. If this was the case, a comparison of events on Feb. 26, 1799, and Feb. 5, 1800, does not in any way indicate that the Senate distinguished between resolutions and motions.

[66] An examination of unprinted material in the National Archives undertaken for this writer by the staff of the General Records Division also failed to reveal the name of the Senator who moved the previous question or the names of the Senators who voted for and against the motion.

available strongly suggests that Brant and Douglas' conclusions are incorrect.

Brant and Douglas have no evidence on which to base their argument except the presumption that since the previous question was affirmatively decided and since an immediate vote seems to have followed, the previous question must have been used for cloture. However, as we have seen in the instances of May 6, 1794, and April 9, 1798, an affirmative decision of the previous question does not necessarily mean that the previous question was moved for the purpose of cloture. It may only mean that the men who desired the previous question for the purpose of avoiding or suppressing a decision could not command a majority. What occurs in such instances is not the forced closing of debate for the purpose of bringing a matter to a vote, but the closing of debate as a feature of a mechanism employed for the purpose of allowing a parliamentary body to decide whether it desires to face a particular matter. Indeed, as the behavior of Senator Jackson on May 6, 1794, suggests, such closing can well be postponed until a point is reached where it is generally agreed that the time for decision has arrived.

Thus, in order to determine how the previous question was used in this instance we must consider the motives that seem to have prompted it. If the previous question was used for cloture, the Federalists would have been the ones to move it. However, there is no reason to believe that the Federalists were motivated to act in this manner. The Jeffersonians do not appear to have staged a filibuster on the resolution. In truth, this would have played into the hands of the war Federalists by giving them an excuse to refuse any kind of peace mission while throwing all blame on the Jeffersonians. Nor is there any reason to believe that the Federalists moved the previous question because they feared the consequences of a discussion on the resolution. The anti-Adams Federalists well realized that it was essential to unite on the commission idea as the only possible compromise under the circumstances and the problem of defection or embarrassment through debate was a slight one, if it existed at all.[67]

In contrast, there are a number of reasons for believing that the Jeffersonians moved the previous question in an attempt to suppress the resolution. First, the Jeffersonians feared that the commission alternative might just be a subterfuge for torpedoing the negotiations.[68] They much preferred the appointment of Murray alone.

[67] See John A. Carroll and Mary W. Ashworth, *George Washington*, New York, 1957, vol. VII, p. 572; Henry Cabot Lodge, *Life and Letters Of George Cabot*, Boston, 1877, pp. 223 and 235; and John T. Morse, Jr., *John Adams*, Boston, 1889, pp. 302–303. See also references cited in footnote 64 above. Senator Humphrey Marshall of Kentucky seems to be the only Federalist who may have refused to go along with the commission compromise. See footnote 68 below. It should also be remembered that the Senate was in closed session on this occasion.

[68] Writings of Thomas Jefferson, *op. cit.*, vol. VII, p. 372 (letter to Bishop James Madison—Feb. 27, 1799). Additional evidence bearing on the identity and motive of the Senator who moved the previous question is contained in the record of the vote on the nominations of Murray, Ellsworth, and Henry. No dissenting vote was cast on the question to agree to the nomination of Murray. This supports the view that the Jeffersonian Republicans favored him and the view that the war Federalists were willing to swallow him in the interests of party harmony. Six dissenting votes were cast on the question to agree to the nomination of Ellsworth. Five of these votes were cast by Jeffersonian Republicans. Three dissenting votes were cast on the question to agree to the nomination of Henry. All three of these votes were cast by Jeffersonian Republicans who had also voted against Ellsworth. Given these facts, it is quite likely that the mover of the previous question was one of the three Jeffersonian Republicans who felt so strongly about the issue that he voted against the nominations of both Ellsworth and Henry. These three Republican Senators, Bloodworth, Langdon, and Pinckney, also voted against referring Adams' original nomination of Murray to a committee, the purpose of this maneuver being to gain time for the Federalist leaders to bring pressure to bear on Adams.

A single Federalist Senator, Humphrey Marshall of Kentucky, voted against the nomination of Ellsworth. Marshall also was the only Federalist who voted against referring Adams' original nomination of Murray to a committee. Thus, it is possible that Marshall was the Senator who moved the previous

Second, tactically much was to be gained by confining the choice to simply approving or disapproving Murray. If he was approved, the Jeffersonians would have gotten exactly the kind of peace mission they desired; if he was disapproved, a party split in the ranks of the Federalists was likely and, what is more, the Federalists would stand before the public as a group of truculent warmongers.

Now it is true that the very reasons that would have led the Jeffersonians to attempt the previous question also helped to insure the defeat of the maneuver by solidifying the Federalists. Nonetheless, the Jeffersonians, not knowing exactly how united the Federalists were, could very well have thought the previous question worth a try. We may conclude, then, that in all probability this case is no different than the others we have considered. Despite the interpretations placed on it by Brant and Douglas, it seems to be simply another instance in which the previous question was attempted for the purpose of suppressing an undesired decision.

(*G*) *February 5, 1800* [69]

On February 5, 1800, a bill for the relief of John Vaughn was brought up for its third reading. A motion was made to amend the preamble of the bill. On this motion the previous question was moved, but ruled out of order on the grounds that the mechanism could not be applied to an amendment. A motion was next made to postpone the question on the final passage of the bill until the coming Monday. This motion was defeated. Having disposed of the attempt to postpone, the majority then proceeded to vote down the amendment and approve the bill.

The purpose for which the previous question was used in this instance seems in no way to depart from the usual pattern. In this case the opponents of the amendment appear to have attempted to suppress it by applying the previous question. They failed in this but still succeeded in defeating the amendment in a direct vote.

(*H*) *March 10, 1804* [70]

The impeachment trial of Judge John Pickering of the New Hampshire district court commenced on March 2, 1804. The Representatives selected by the House to manage the impeachment completed their case against Pickering on March 8, 1804. Two days later Samuel White, a Federalist Senator from Delaware, rose and offered a resolution which stated that the Senate was not at that time prepared to make a final decision on the Pickering impeachment.[71] The

question. He might have done so either because he remained an intransigent war Federalist or because on this occasion he happened to agree with the Jeffersonians. Nonetheless, Marshall is a much less likely candidate than any one of the three Jeffersonians who voted against both Ellsworth and Henry. Indeed, Marshall's votes in favor of Henry and Murray may indicate that he voted against Ellsworth on personal grounds rather than because he rejected the commission compromise accepted by all the other Federalists. Moreover, even if Marshall, a Federalist, did move the previous question in this instance, his purpose would not have been cloture. Given his votes against reference to a committee and against Ellsworth, his purpose would have been similar to that we have postulated for the Jeffersonians, i.e., to suppress the resolution to supersede and confine the issue to the simple acceptance or rejection of Murray. See *Senate Executive Journal*, vol. I, pp. 315, 318, and 319.

[69] *Annals*, 6 Cong. 1, 42–43. The fact that an attempt was made on this occasion to apply the previous question to an amendment may indicate that prior to 1800 the Senate, as well as the House, understood such usage as proper. On the other hand, it may only mean that the position of the Senate in its earliest days had been forgotten so that the point had to be settled again.

[70] For account of events on this day see *Annals*, 8 Cong. 1, 362–363; Memoirs Of John Quincy Adams, *op. cit.*, vol. I, pp. 302–303; and Everett S. Brown (ed.), *William Plumer's Memorandum Of Proceedings In The United States Senate*, New York, 1923, pp. 173–176. See also Haynes, *op. cit.*, vol. II, p. 850 and Henry Adams, *History Of The United States During The First Administration Of Thomas Jefferson*, New York, 1889, vol. II, pp. 153–159.

[71] Whether this resolution existed as a principal or incidental question is not entirely clear. However, it is clear that it did not exist as a subsidiary question. This can be inferred from the fact that it was open to subsidiary motions other than the previous question, e.g., the motion to amend. See *Annals*, 8 Cong. 1, 363.

resolution also stated a number of reasons in support of its contention: that Pickering had not been able to appear but could be brought to Washington at a later date, that Pickering had not been represented by counsel, and that evidence indicating that Pickering was insane had been introduced.

The Jeffersonian leadership in the Senate received this resolution with hostility. Their first reaction was to try to suppress it by having it declared out of order, but this maneuver failed.[72] That the Jeffersonians would have preferred not to face the resolution directly is quite understandable since it advanced potent legal grounds for inducing the Senate to refuse to convict Pickering, e.g., that the trial had not been impartial and that Pickering as an insane man could not legally be held responsible for his acts. However, the hostility of the Jeffersonians was based on more than the fact that the resolution endangered the success of the Pickering impeachment. By implication it also threatened the success of the upcoming impeachment of the hated Judge Chase. To lose the Pickering impeachment on the grounds stated in the White resolution would create a precedent which denied the Senate broad, quasi-political discretion in impeachment and limited it to the determination of whether "high crimes and misdemeanors" in a quasi-criminal sense had actually been committed.

Unfortunately, the three accounts we have of Senate proceedings on March 10, 1804, differ significantly.[73] One area of important difference concerns the exact order of events on this day. Both the *Annals* and the diary of William Plumer report that the previous question was moved by Senator Jackson, Republican of Georgia, after Senator Nicholas, Republican of Virginia, urged that the White resolution not be recorded, if defeated. Both these accounts report that Jackson's motion was followed by a statement of Senator White and by an amendment offered by Senator Anderson, Republican of Tennessee, which proposed to strike out of the resolution all material relating to Pickering's insanity and lack of counsel. In addition, both of these accounts report that after the moving of the Anderson amendment the Senate proceeded to vote down the White resolution. Despite these similarities an important difference does distinguish these two accounts. In the Plumer account Nicholas' statement, Jackson's motion, White's statement, and Anderson's motion are all made when the Senate is in closed session. In the *Annals* they are all made before the Senate is reported to have gone into closed session. We should also note that neither the *Annals* nor Plumer supply any further information regarding the previous question aside from the fact that it was moved. The *Annals* are similarly obscure with respect to the fate of Anderson's amendment, but Plumer records that this motion failed to secure a second which would explain why it was never brought to a vote.

Further complications are introduced when we add the report of events given in the diary of John Quincy Adams. Adams and Plumer were both members of the Senate at this time. In the Adams account no mention is made of the previous question or of White's statement.

[72] *Annals*, 8 Cong. 1, 363. For accounts of events from the beginning of the trial on Mar. 2, 1804, up through Mar. 9, 1804, see *Annals*, 8 Cong. 1, 326–362; Memoirs of John Quincy Adams, *op. cit.*, vol. I, pp. 297–302; and Plumer Memorandum, *op. cit.*, pp. 147–174.

[73] Once again an examination of unprinted material in the National Archives, conducted for this writer by the staff of the General Records Division, failed to reveal any information not already contained in the *Annals*.

Anderson's amendment is reported to have been moved when the Senate was in open session. Nicholas' remarks are reported as occurring later when the Senate was in closed session. In addition, in contrast to Plumer, Anderson's amendment is reported to have secured a second but to have been withdrawn when the Senate was in closed session.

A second important area of difference concerns the nature of the rules governing the Senate during the Pickering impeachment.[74] According to Adams, the rules restricted debate to closed session and required all decisions to be taken in open session by a yea and nay vote. Thus, he reports that when the Senate was in closed session on the White resolution the Jeffersonians were very impatient to return to open session so as to end debate and bring the resolution to a vote. Adams further explains that the reason Anderson withdrew his amendment was to end debate on it in order that the time the Senate was in closed session need not be prolonged.

The *Annals* and Plumer's diary do not directly contradict Adams' interpretation of the rules. Indeed, on the whole, the record of events in these accounts does not depart from Adams' rendition of what the rules required. However, on occasion they do present examples of action which suggest either that the Senate did not necessarily follow its own rules or that Adams' interpretation is not entirely correct. In the Plumer account of events on March 5, 1804, the Senate is reported to have voted on two motions when it was still in closed session. In the *Annals'* account of events on March 10, 1804, and Plumer's account of events on March 9, 1804, the Senate is reported to have entered into debate when it was in open session.

Senator Douglas and Irving Brant claim that the events of March 10, 1804, represent an instance in which the purpose and effect of moving the previous question was cloture.[75] They argue, on the basis of the Plumer account, that the Senate was in closed session when the previous question was moved.[76] They argue, on the basis of the Adams account, that the rules restricted debate to closed session and decisions to open session and that the Jeffersonians were impatient

[74] On March 2, 1804, the Senate passed the following resolution:

"Resolved, * * * All motions made by the parties or their counsel shall be addressed to the President of the Senate, and, if he shall require it, shall be committed to writing, and read at the Secretary's table; and, after the parties shall be heard upon such motion, the Senate shall retire to the adjoining committee room for consideration, if one-third of the members present shall require it; but all decisions shall be had in open court, by ayes and noes, and without debate, which shall be entered on the records."

On March 5, 1804, the Senate passed another resolution which stated, "That on the motion made and seconded, the Court shall retire to the adjoining committee room, if one-third of the Senators present shall require it." See *Annals*, 8 Cong. 1, 327 and 333.

The first resolution can be interpreted as restricting all debate to closed session and requiring all decisions to be made in open session. The significance of the second resolution would then be that it gave the Senate the privilege of going into closed session by a one-third vote on motions made by its own members as well as on motions made by the parties to the impeachment.

On the other hand, the first resolution can be interpreted as applying only to motions made by the parties to the impeachment. The significance of the second resolution would then be that it gave the Senate the option of going into closed session by a one-third vote on motions made by its own members. In terms of this interpretation the Senate could debate and decide motions made by its own members in open or closed session, but it had the option of going into closed session if it desired by a one-third vote.

As is pointed out in the text, John Quincy Adams saw the first interpretation as the governing one. See Memoirs Of John Quincy Adams, *op. cit.*, vol. I, pp. 302–303. However, as is also indicated in the text, the claims of the first interpretation are impaired by the existence of a number of instances in which the Senate can be seen to have acted contrary to it. For a view which differs from that of Adams and supports the other possible interpretation, see Stidham, *op. cit.*, pp. 170–171.

[75] See *Cong. Rec.*, 87 Cong. 1, pp. 235–238 and 245–246 (daily—Jan. 5, 1961).

[76] Irving Brant argues that the *Annals* give a mistaken impression in suggesting that the previous question was moved in open session. His point is that the *Annals* indicate that debate took place immediately before the previous question was moved, but that the rules prohibited debate in open session. See *Cong. Rec.*, 87 Cong. 1, p. 245 (daily—Jan. 5, 1961). However, it is possible to interpret the rules to mean that debate was possible in open session, if the motion involved was moved by a member of the Senate. See footnote 74 above. Moreover, one can argue that the *Annals* would not have recorded any debate which took place in closed session. The fact that debate was recorded, then, would indicate that the Senate was in open session. See *Annals*, 8 Cong. 1, 326–367 and Stidham, *op. cit.*, pp. 170–171.

to end debate on the White resolution and bring it to a vote. Thus, they conclude that the previous question was moved to force an end to debate and a vote on the White resolution and that it actually had this effect since according to the rules decisions had to be taken in open session. The fact that neither Adams, Plumer, nor the *Annals* indicate that the motion for the previous question was actually put to a vote in open session does not disturb them. They point out that once the Senate had returned to open session debate was prohibited, with the result that the previous questio achieved its purpose of forcing a vote on the White resolution without having to be brought to a vote itself.

The validity of Brant and Douglas' interpretation of the order of events and the nature of the rules on March 10, 1804, cannot be determined conclusively one way or the other. Nonetheless, even if we accept the propositions they advance in these regards, we can still reject their conclusion that in this instance the purpose and effect of the previous question was cloture. First, merely moving the previous question would not and could not have ended debate and forced the Senate to return to open session. As long as the previous question was not voted on and determined affirmatively, the only way debate could be cut off and a vote on the White resolution forced would have been by passing a motion to open the doors. It is true that, if the motion for the previous question received a second, it would have cut off debate on the main question, i.e., on the White resolution. But debate could have and undoubtedly would have continued on the motion for the previous question itself. The Federalists would have objected strenuously to any Republican maneuver designed to avoid the necessity of directly facing the embarrassing issues contained in the White resolution. Given the fact that the previous question was moved after the White resolution had already been subject to discussion, we may conclude, in contrast to Brant and Douglas, that instead of serving to end debate the motion for the previous question threatened to prolong it.

Second, both the *Annals* and Plumer record that Anderson's amendment was moved after the previous question while the Senate was still in closed session. This indicates that the previous question either failed to secure a second or was withdrawn soon after it was moved. Otherwise, an amendment of the main question would not have been in order. Thus, Brant and Douglas cannot argue that the Senate returned to open session to vote on the motion for the previous question since the motion itself seems to have been killed while the Senate was still in closed session. The fact that Adams does not even mention the previous question in his account supports our contention that the previous question was killed before it could play a significant role in the events of the day. Given the care with which Adams documents each and every Jeffersonian move to avoid facing or discussing the White resolution, it is highly unlikely that he would have failed to mention the previous question if it had been used as Brant and Douglas suggest.

If we may dismiss the claims of Brant and Douglas, can we also assert that the events of March 10, 1804, merely furnish another illustration of the use of the previous question for the purpose of

suppressing an undesired discussion and/or decision? The answer is "Yes." We may note that on March 5, 1804, Jackson spoke and voted against allowing evidence bearing on Pickering's sanity to be introduced. We may note that on March 10, 1804, when the Senate returned to open session, he voted against the White resolution which listed insanity as a ground for not voting to convict Pickering. We may also note that Jackson moved the previous question immediately after Nicholas urged that the resolution not be recorded, if defeated. It is probable, therefore, that Jackson moved the previous question for the purpose of suppressing the White resolution rather than for the purpose of forcing a vote on it. If cloture were his aim and such an aim only would have been feasible if debate was in fact prohibited in open session, either that end could have been achieved more easily by simply moving to return to open session, or alternatively, if the Senate was already in open session, there would have been no reason not to press the previous question to its ultimate conclusion.

Why, then, would the previous question have been refused a second or withdrawn? The answer is that under the circumstances which existed the best way to get rid of the White resolution and clear the way for a vote on the impeachment was to face the resolution directly. The timing and the substance of Nicholas' words indicate that the Senate was just about ready to proceed to a vote on the White resolution. To introduce the previous question at such a point would be to complicate and prolong the proceedings. This is true whether or not the Senate could have actually voted on the previous question in closed session. In either event debate on the motion would still have been possible. It is also true whether the previous question was moved in open or closed session. Both the *Annals* and Plumer indicate that debate took place immediately before and after the previous question was moved. This means that, if the previous question was moved in open session, debate was possible in open as well as closed session.[77]

Thus, the reasons Adams suggests for the killing of Anderson's amendment probably apply to the previous question as well. The Jeffersonians desired to get rid of the White resolution and push on to a vote on the impeachment as fast as possible. They knew they had the votes to defeat the resolution. Moreover, though they might have preferred to suppress or amend the resolution, they also knew that they could not really save themselves from embarrassment by adopting either alternative. That Pickering had not appeared, that he had not been represented by counsel, and that evidence had been introduced indicating that he was insane were part of the record of the trial. Hence, it is not surprising that the Republicans elected to face the White resolution without delay. This was the course that promised the swiftest and surest attainment of their basic objective—the conviction of Pickering.[78]

[77] See footnotes 74 and 76 above.

[78] Adams is reported by the *Annals* and Plumer, but not by his own diary, to have argued that amendments to the White resolution were out of order because "a gentleman had a right to a vote upon any specific proposition he might please to submit." Whether this was actually required by the rules is conjectural. If it was, it offers an alternative explanation of why the previous question was killed. Yet Adams in his own diary notes that the Senate permitted amendments on the White resolution. Moreover, his only recorded objection was that these motions constituted "debate" and therefore should not have been allowed when the Senate was in open session. See *Annals*, 8 Cong. 1, 363; Memoirs of John Quincy Adams, *op. cit.*, vol. I, p. 302; and Plumer Memorandum, *op. cit.*, p. 174.

(I) December 24, 1804.[79]

On December 24, 1804, the Senate resumed consideration of a set of rules proposed to govern the Senate during the Chase impeachment. These rules had been recommended by a select committee whose chairman was William Giles, a Virginia Republican who led the anti-Chase forces in the Senate. Four days earlier, when the Senate was involved in a discussion of these rules, Stephen Bradley, an independent Republican from Vermont, had moved an amendment to one of the rules proposed by the Giles committee. Bradley, however, was ill on the 24th and was not present in the chamber. John Quincy Adams reports in his diary that he therefore moved that the whole subject be postponed until Bradley could attend. This bid for postponement of consideration was defeated. Adams relates that "Giles then offered to postpone or put the previous question upon Mr. Bradley's amendment; but this the Vice-President declared to be not in order." [80] Following Burr's ruling, the Senate proceeded to vote down the amendment and before the day was ended it agreed to adopt all or most of the rules recommended by the Giles committee, including the rule on which Bradley's amendment had been moved.[81]

This case presents another instance in which the previous question was attempted to suppress an undesired decision. Giles' intention was obviously to remove the amendment either through postponement or through the previous question as a preliminary to voting to adopt the rule. The practical effect of this would have been to kill the amendment, even though technically neither postponement nor the previous question would have permanently suppressed the amendment.[82]

IV. Conclusion

We may conclude that the Haynes-Stidham-Russell position is the correct one. The fact that a previous question mechanism existed and was used in the early Senate furnishes no precedent for the imposition of majority cloture in the Senate today. As we have shown in part I, the previous question was not understood functionally as a cloture mechanism. As we have shown in part II, it was not designed to operate as a cloture mechanism. As we have shown in part III, it was not in practice used as a cloture mechanism. Indeed, it is even improbable that the Senate could have used the previous question for cloture, given the obstacles which existed and the lack of any evidence to show that these obstacles could in fact be overcome.

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[79] See Memoirs Of John Quincy Adams, *op. cit.*, vol. I, pp. 318-326; *Annals*, 8 Cong. 2, 89-92; Plumer Memorandum, *op. cit.*, pp. 228-233; and Henry Adams, *op. cit.*, vol. II, pp. 218-228.

[80] Memoirs Of John Quincy Adams, *op. cit.*, vol. I, p. 324. The grounds of the ruling undoubtedly were that subsidiary questions could not be moved on another subsidiary question. This ruling, made by Burr, reaffirmed Jefferson's ruling of Feb. 5, 1800. See footnote 69 above. It is interesting to note that Giles had just entered the Senate that session. Previous to his entrance into the Senate, he had for over a decade been a leading Republican member of the House and the House, as late as 1802, permitted the previous question to be applied to subsidiary questions. See footnote 44 above.

[81] That the rule on which Bradley's amendment had been moved, as well as all or most of the other rules proposed by the Giles committee, were adopted on this occasion can be inferred by comparing Adams' report of the discussion on Dec. 24 and 31, 1804, with the list of rules recorded in the *Annals*. See Memoirs Of John Quincy Adams, *op. cit.*, vol. I, pp. 324-326 and *Annals*, 8 Cong. 2, 89-92.

[82] This point is based on the fact that the Senate rules did not require resolutions which applied only to the Senate to undergo three readings. See Jefferson's Manual, *op. cit.*, secs. XXI and XXII and *Annals*, 9 Cong. 1, 201.

EXHIBIT 4

OPINION EXPRESSED BY VICE PRESIDENT LYNDON B. JOHNSON ON JANUARY 28, 1963, ON A MOTION TO SUBMIT THE PREVIOUS QUESTION

This motion raises explicitly a constitutional question. There have been 36 previous occupants of the chair, and the Parliamentarian informs me that all of the decisions have been uniform, that the Presiding Officer does not have the authority to rule on a constitutional matter. The Chair is in full agreement with those precedents, because the President cannot make a decision for 100 Senators, unless he has previously been granted the authority to make that decision.

Our Constitution leaves the rulemaking authority in the Senate itself, not in its Presiding Officer. Therefore, it would be improper for the Vice President to arrogate this authority to himself.

The proposition that has been placed before us is that under the Constitution the Senate has the right to decide the very issue contained in the motion itself.

The Chair acts under the direction of the Senate. In this instance there is no direction from the Senate until the question of constitutionality has been decided. Therefore, the Chair now submits this issue to the Senate for its decision, and will carry out the directives of the Senate as expressed by a majority vote of the Senate.

Article I, section 5, of the Constitution states: Each House may determine the rules of its proceedings.

This the Senate can do by a majority vote. Therefore, the Chair submits the 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?

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