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 Ninetieth Congress	January, 1967

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 NINETIETH 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

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INTRODUCTION: FAVORABLE OUTLOOK FOR CHANGE IN SENATE RULE XXII AT OPENING OF 90th CONGRESS

The effort to strengthen the anti-filibuster rule at the opening of the Senate of the 90th Congress on January 10, 1967 will be the seventh such attempt in the past fourteen years. What makes the outlook for a change this year more favorable than at any time in this 14-year period is the fact that both Vice President Humphrey and a majority of the Senate of the 90th Congress favor a change in Rule XXII. For the first time, we have the indispensable combination of a Vice President and a majority of the Senate who favor change. The burden of this brief is that the Vice President and a majority of the Senate of a new Congress have full legal power to work their will into a new Rule XXII and, in view of the need for such a new Rule, have the obligation to act.

(1) Vice President Humphrey. This brief is, of course, being presented to Vice President Humphrey, but it is not written on an empty slate. Vice President Humphrey was one of a small group of Senators who, in January 1953, espoused the principle that the Senate of a new Congress has power to adopt its own rules at the opening of the new Congress, unfettered by the rules of earlier Congresses. Through the entire period that the Vice President remained as a Senator he was one of the most eloquent spokesmen for the proposition that the new Senate could act unfettered by the past. It was he who arranged and had the colloquy with Vice President Nixon in 1957 in which the latter first gave his advisory ruling in favor of the power of the Senate of a new Congress to act by a majority vote. */ It seems unlikely that Vice President Humphrey would not follow the precedent which he himself helped set. And, indeed, on the ABC television program "Issues and Answers" only this past October 16th, the Vice President responded to a question on how he would rule at the opening of the 90th Congress with the statement that "my past actions indicate pretty much my views on the filibuster rule, so you do a little research and you might have some predictions to make." With these factors in mind, this brief is more to remind

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*/ Vice President Nixon's rulings in 1957, and also in 1959 and 1961, are set forth in the Appendix.

Vice President Humphrey of details of history and procedure than to persuade him of the basic proposition contained herein for which he has spoken so eloquently and so often.

(2) A Growing Majority of the Senate Favors a Change in Rule XXII at the Opening of the 90th Congress. We are encouraged to renew the effort to bring about majority rule in the senate on January 10, 1967 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 anti-filibuster 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 seven 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 commital was 50 to 46 with Case of South Dakota paired against the committal and Young of Ohio and Kefauver announced against it).

In January 1963, the times were ripe for victory. A clear majority of the Senators favored changing Rule XXII at the opening of the Senate of the 88th Congress. With this majority behind him, Senator Anderson, the floor leader

of the effort to change Rule XXII, moved to close debate under the Constitution and the Nixon advisory rulings; this move was frustrated when Vice President Johnson put the Anderson motion to close debate to the Senate for debate instead of for a vote (as Vice President Nixon had indicated he would have done). Putting the Anderson motion to close debate to the Senate for debate, of course, had the effect of killing the motion; this forced the supporters of a change in Rule XXII to a cloture motion which was lost 54 to 42 (less than two-thirds).

In 1965, again there was a majority of the Senate for changing the rules at the opening of the 89th Congress, but again the Chair (Senator Hayden*/) was opposed to change. After some debate on the issue, a unanimous consent agreement was reached sending the matter to committee under instructions to report back by March 9, 1965, with "all existing rights" protected. This meant that when the matter came back to the Senate, it would be debated as though it were still the opening of Congress. But when the committee reported on March 9, 1965, the matter was not called up for debate because the impending voting rights bill appeared more important.

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 and to a majority in 1963 and 1965 -- 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 1st. The situation was not too much different in 1963 and 1965. With the decks clear at the opening of Congress, the Senate can determine this

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*/ Vice President Humphrey was, of course, not inaugurated into his present office until January 20, 1965.

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 10, 1967. The success or failure of the efforts that will be made on the opening day of the 90th 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 much meaningful legislation, it is also the threat under which other vital legislation has been defeated, delayed, or compromised to meet the views of the minority.

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.

(2) 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. The history of the filibuster in the United States Senate makes abundantly clear that two-thirds cloture simply cannot be obtained in those areas where cloture is needed and this is true both in relation to civil rights legislation and equally in relation to other legislation.

Thus, a list of 36 bills (not purporting to be complete) which had been defeated or delayed by filibuster in the Senate was inserted as an exhibit during the January, 1961 debate on proposed changes in Rule XXII (107 Cong. Rec. 86).

Twenty-six of these bills had not the remotest connection with civil rights. They covered such diverse proposals as the 1911 bill for statehood for Arizona and New Mexico, which was passed one year later, and two ship subsidy bills, introduced in 1907 and 1922, respectively, which were delayed by filibuster until 1936.

In all of the eleven cases of attempted cloture on a civil rights bill in the Senate prior to 1964, it was never 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). The nine unsuccessful attempts at cloture on civil rights bills up to 1961 are set forth in the January, 1961 debate on cloture (107 Cong. Rec. 87). The latter two unsuccessful attempts at cloture occurred on the literary test bill in 1962 in the 87th Congress.

(3) Rule XXII Has Damaged The National Interest. To use only examples from recent history, the filibuster and threat of filibuster in 1957 and 1960 against the then pending civil rights bills delayed much needed civil rights legislation for years and contributed substantially to the present divisive racial tension in our Nation.

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 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.

The crucial provisions of the 1957 bill supporting the Supreme Court's 1954 desegregation decision, which were deleted under threat of filibuster, were finally enacted in 1964. The federal registrar provisions, which were deleted from the 1960 bill under threat of filibuster, were finally enacted in 1965. These delays of 7 years and 5 years, respectively, in recognizing Negro rights in the fields of desegregation and voting exacerbated racial tensions in this country to their present danger-point.

(4) Three Successful Uses of Cloture From 1962 to 1965 No Clue to Future.

(i) The cloture vote in 1962 on the Communications Satellite Bill has sometimes been cited as proof that the Senate does not need a change in Rule XXII in order to break a filibuster. We disagree. The overwhelming support for that bill from every region of the country made the short-lived filibuster virtually a hopeless venture from the start; there was neither organized nor sectional opposition to the bill. Indeed, the Southern Senators themselves made certain the successful 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 defeated even on a bill so overwhelmingly supported by the Senate. And it might also be noted that, by cooperating to permit cloture on the Communications Satellite Bill, the Southern Senators destroyed the last vestige of the so-called "principled" argument against cloture based on the idea of "free speech in the Senate."

(ii) Opponents of a change in Rule XXII also point to the successful cloture vote on the Civil Rights Act of 1964. But the length of that debate was a national scandal rather than a victory for cloture. The 1964 Civil Rights Bill reached the Senate for consideration on February 26. The debate on the motion to decide whether the Senate should take up the Civil Rights Bill began on March 9. Actual debate on the Bill began on March 26. Cloture was voted on June 10. There were 57 days of formal consideration of the Civil Rights Bill. Actually, however, the real filibuster began on March 9 on the motion to take up the Bill. There were thus 13 additional days of actual debate before the debate began on the Bill on March 26, making a total of 70 days of actual debate on the Bill. Indeed it is unlikely that the filibuster could have gone on much longer than that

even without a cloture vote. The Bill was acceptable to nearly all Senators except those from the South and was passed despite Rule XXII solely because there was no real opposition outside the South. Yet the Senate of the United States made a three-months spectacle of itself on a Bill so overwhelmingly passed.

(iii) The situation on the 1965 Voting Rights Act, where cloture was again successful, was not too dissimilar from the experience of the previous year. While the debate was not nearly as long as the debate on the 1964 law, the unanimity behind the Voting Rights Act was at least as great or greater. The national shame involved in denying Negroes the basic right to vote took much of the starch out of even the Southern opponents of the bill and the battle against the right to vote had no meaningful support from any other source.

(iv) What these three successful attempts at cloture prove and all that they prove is that when two-thirds of the Senators support legislation it can be enacted. But, as we show in Part V of this brief, the Constitution was never intended to require two-thirds support for legislation.

(5) 1966 Experience Demonstrates Need For a Change in Rule XXII. Just as the experience in the years 1962 to 1965 demonstrates that cloture can be obtained where there is two-thirds support for legislation, so the experience in 1966 demonstrates that a majority cannot obtain cloture and enact legislation where a substantial minority opposes the legislation. 1966 was a year of Senate minority rule.

(i) A majority of Senators favored the repeal of Section 14(b) of the Taft-Hartley Law. The bill repealing 14(b) passed the House; but, when it came to the Senate, repeal was never enacted into law for the plain and simple reason that the minority maintained a successful filibuster. On February 8, 1966, 51 Senators supported invoking cloture and 48 opposed cloture. On February 10, 1966, 50 Senators supported invoking cloture and 49 opposed it. This is a clear case where Rule XXII thwarted the will of the majority.

(ii) The 1966 Civil Rights Bill is another case in point. The House of Representatives passed a strong Civil Rights Bill including much-needed jury reform, increase of Federal authority against racial violence, and prohibition of discrimination in housing. Just as in the House, a majority of the members of

the Senate supported the bill; just as in the case of the repeal of 14(b), the filibuster succeeded in thwarting the will of the majority. On September 14, 1966, 54 Senators supported invoking cloture and 42 opposed it. Counting the pairs, the vote would have been 56 to 43. On September 19, 1966, 52 Senators supported invoking cloture and 41 opposed it. Counting the pairs and public announced positions, the final vote would have been 57-43. Despite this substantial preponderance in favor of the 1966 Civil Rights Bill, the bill went down to defeat.

(iii) Home rule, too, was executed by the Rule XXII guillotine. The Senate had passed a Home Rule Bill in 1965 by the overwhelming vote of 63 to 29. After the bill was stymied in the House, Senator Morse proposed a weaker Home Rule Bill as an amendment to the Higher Education Bill. A filibuster was threatened; cloture was the only method of dealing with the matter as the session was drawing to a close. Despite the full debate on, and the overwhelming support for, the Home Rule Bill in 1965, cloture failed. 41 Senators voted in support of invoking cloture and 37 opposed it. If the pairs and publicly announced positions were counted, the vote would have been 53-40, with 7 abstentions. Despite this overwhelming majority for home rule, the citizens of the District are left without the right to vote.

(6) Rule XXII Is Inequitable. In the last analysis, our case against Rule XXII is not based wholly or even principally upon the fact that it obstructs legislation as it has done innumerable times and as it did in 1966; 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 Point 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 ANTI-FILIBUSTER 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 two 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., fifty-one) 15 days after a petition is filed by 16 Senators.

It has been decided to retain the two-thirds vote for cloture after two 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. */ 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 or some announced threat of filibuster. Thus a week or two 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

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*/ The text is set forth at the opening of Point VI where the proposed parliamentary procedure is outlined.

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 one hundred hours of debate is allowed. If only half of this time is utilized, it would mean at least another week of normal Senate sessions.**/ 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 of 1964 was debated for 13 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.

(v) This proposal obviously permits full, fair, and even prolonged debate. 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.

(3) Three-fifths Cloture Is Not Adequate. The arithmetic on three-fifths cloture leaves no doubt that while it is far better than the present rule, it would not be a satisfactory cloture rule. Assuming that 96 of the 100 Senators voted on cloture (and votes on cloture do run that high and at times even higher), three-fifths of those present and voting

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**/ Our proposed procedure after cloture is voted is far more generous in time than that under which the Communications Satellite Bill and the Civil Rights Bills of 1964 and 1965 were considered after the cloture vote. First, there is a guarantee of 100 hours of debate (fifty for each side). Second, there is a guarantee of a minimum of one 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.

will be 58 Senators, or seven more than a majority of the total Senate. The important thing to note is that these 7 additional votes for cloture are the hardest to obtain for they will have to come from Senators who are at best only mildly in favor of the bill being filibustered and who may feel that it is more important to propitiate some senior member of the filibustering group than to help the majority obtain the cloture it seeks. It is these 7 votes very often that will determine the outcome on cloture.

But more important than the difference between majority and three-fifths cloture is the need to hold the anti-filibuster forces together until it is established that the Senate of a new congress can write its own Rule XXII unfettered by restrictions of earlier congresses. If this principle is established under the procedure set forth in Part VI, then it will be time enough to see which of the possible versions of a new Rule XXII will prevail.

Actually, there are at least three possible solutions once it is established that a majority of the Senate of a new Congress has the power to act. Senator Morse favors a simple majority of those present and voting having the right to close debate. Senator Clark and most of the Senators who have made the effort at the opening of Congress in the past favor a constitutional majority of 51 Senators voting in the affirmative. Senator Anderson, who has led the fight in the Senate for a change in Rule XXII in the past, and Senators Cooper and Morton, who have joined with him, all favor three-fifths of those present and voting. As indicated above, the first two proposals will make it possible to close debate far more readily than the third and indeed it is not certain whether three-fifths could have been obtained to close debate on the three bills filibustered to death in the 89th Congress. Nevertheless, all three are improvements on the present situation and it is important that all Senators favoring any of the three proposals above work together to establish the principle that the new Senate can adopt whatever Rule XXII a majority

desires. Once that principle is established, we will work for the Rule XXII set forth above; if a majority of the Senate does not, however, favor this proposal, we recognize that the three-fifths proposal is a substantial, if not yet adequate, change.

(4) 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.*/

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*/ 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, and is presently being suggested by Senator Morse, 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.

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 90th Congress, meeting in January 1967, 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 10, 1967. 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 Congress that the majority desires. But, once the Senate of the 90th 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 legislation for civil rights or the repeal of 14(b) makes it impossible to obtain two-thirds cloture on a rules change for the purpose of enacting such meaningful and effective 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 Eight 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 eight Congresses.

In the 82nd and 83rd 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 bi-partisan 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 the majority of the Senate can vote its will.

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 Cong. Rec. 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 Cong. Rec 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.

In the 88th Congress, after Vice President Johnson put the Anderson motion to close debate under the Constitution to the Senate for debate instead of for a vote (thus killing the motion) and after the cloture motion under Rule XXII was lost, the subject of changing Rule XXII was never heard from again in that Congress. Everybody knew that Rule XXII had to be changed at the opening of the new Congress or not at all.

In the 89th Congress, a unanimous consent agreement was reached at the opening of Congress sending the matter to committee under instructions to report back by March 9, 1965, with "all existing rights" protected. The Rules Committee did report back on March 9, but the matter was not called up for debate because the impending Voting Rights Bill appeared more important.

Whatever assurances 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.

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 Eighty-Seventh 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 Cong. Rec. 232-241) and will not be repeated here, particularly as this Brief was never seriously challenged or controverted. Indeed, in none of the debates of recent years has anyone made a serious effort to challenge the basic proposition that the Senate of a new Congress has power to act unhindered by rules from the past. 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. Vice President Nixon'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 de 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 desitny 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 90th Congress meeting in 1967 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. 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 10, 1967, to determine whether and how they will limit the use of the filibuster for the Senate of the 90th 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 rule-making 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 rule-making 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 rule-making 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 10, 1967, the right to "determine the rules of its proceedings" unfettered by action or rules of the Senate of any preceding Congress.*/

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*/ Since the Constitution gives the majority of the Senate present on January 10, 1967, the right to "determine the rules of its proceedings," Section 2 of Rule XXXII can not thwart this right. Section 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

(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 (see 1961 Brief, 107 Cong. Rec. 232-241).

(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 start at the beginning of each 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.

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majority in 1959 cannot give a minority in 1967 the right to prevent the majority in 1967 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.

*/ Actually, it would be possible to cite another Vice President to the same effect, although not in the same detail, as Vice President Nixon. On the opening day of the new Congress in 1953, Vice President Barkley stated to the Senate that: "The organization of the Senate is an inherent right of the Senate, as it is of any sovereign body, and all that has taken place up to date [election of officers] has been under that inherent right." This inherent right to organize the Senate includes, as Vice President Barkley was making clear, the right of the majority to determine the rules under which the Senate would operate.

For convenience, we present the following analysis of the operations of the United States Senate in tabular form:

ANALYSIS OF THE OPERATIONS OF THE UNITED STATES 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		See Senate Rule XXXII.
3. Debate on bills	X		See Senate Rule XXXII.
4. Voting on bills	X		See Senate Rule XXXII.
5. Election of Officers	X		While the old officers carry over until new ones are elected, the carry-over 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.
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 carry-over 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.

ACTIVITY	SENATE ACTS ANEW IN EACH CONGRESS	SENATE BOUND BY SENATE OF PRECEDING CONGRESS	COMMENT
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 one minute afterwards opens the new session.
11. Rules	?	?	Past practice of Senate on rules is ambiguous. It is best explained as acquiescence in past rules, which can either be repeated at the opening of the new 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 carry-over of rules of the Senate from Congress to Congress.*/ Carry-over 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 acquiescense, 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 acquiescense in Rule XXII will be ruptured when the Resolution proposed herein is offered on January 10, 1967.

(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

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*/ 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, 1961, 1963 and 1965, when Senators sought to change the rules as we are now doing.

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 carry-over) 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 carry-over 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 non-sequitur. It assumes that the carry-over 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 carry-over 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 90th Congress in 1967 is the same as the

Senate of the First Congress in 1789 because two-thirds of its members carried over to the Senate of the Second Congress is to prefer romantic form to rational substance 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 carry-over 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 expressly 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 (Article I, Section 7; Article II, Section 2; Article V; Article I, Section 3; Article I, Section 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.*/

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 Cong. Rec. 33). Yet this fundamental constitutional principle can only be reestablished in the United States Senate through new rules, in whole or in part, at the opening of the Senate of a new Congress. If this route is blocked, 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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*/ 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 Cong. Rec. 18648.

VI.

THE PARLIAMENTARY STEPS TO CHANGE RULE XXII AT THE OPENING OF CONGRESS

(1) Proceedings on January 10, 1967. The Senate of the 90th Congress will convene at 12 o'clock meridian on January 10, 1967. 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, Senator Anderson or one of the other 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. 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 required because Rule XL entitles the Senate to one day's notice in writing of motions to amend or modify a rule.*/ 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:

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*/ 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.

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."

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 or 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 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 Wednesday, January 11th. It is not believed that Majority Leader Mansfield would seek to prejudice the right of theSenators bringing up the resolution to change Rule XXII by attempting to take up other business on January 10th.

Indeed, it is customary for the Senate not to remain in session for any length of time on opening day when 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 11th as still the opening of the new Congress for purposes of the rules, despite the business the Majority Leader proposed to transact on January 10th. 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 11th without hitch.

(2) Proceedings on January 11, 1967 and thereafter. As in past efforts to change Rule XXII at the opening of Congress, 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 (see, for example, the experience in 1961, 107 Cong. Rec. 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 11th.

(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 90th 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 90th Congress.*/

(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 then Majority Leader Johnson's Resolution was in 1959) as a Resolution to change a particular Rule.**/

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*/ 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 90th Congress.

**/ 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, 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.

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), 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 to this question -- the majority of the Senate of the 90th Congress has the power, under the Constitution, to act to determine its rules.

(5) Motion to Close Debate -- Point of Order Raised Against It. As just indicated, if the opponents of a change in Rule XXII do not have the vote 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 desire 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 or 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 Nixon, 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." */

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

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*/ This form of motion is probably to be 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.

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.*/

(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 XXII in the 87th Congress, Vice President Johnson indicated that this was the course he would follow in dealing with any question involving an interpretation of the Constitution (107 Cong. Rec. 19847, 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 practices 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 page 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 matter for the Senate itself to decide."

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*/ 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, for example, 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.

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, of course, contrary to Vice President Nixon's several advisory rulings and to his own views expressed over a number of years, sustain the point of order against the motion to terminate debate. If he did this, we could appeal the ruling, but the matter would be subject to further filibuster and there would be no way out of the dilemma. But the Senators joining in this effort to obtain majority rule in the Senate do not consider this a realistic possibility.

(6) Motion to Close Debate -- No Point of Order Raised Against It. It was assumed in the discussion under (5) immediately above, that the motion to close debate under the Constitution and the Nixon advisory rulings would be met by a point of order and the Vice President's ruling would thus come in deciding the validity of that point of order. But it is also possible that the opponents of a change in Rule XXII would simply sit tight in the hope that Vice President Humphrey would put the motion to close debate to the Senate for debate (as Vice President Johnson did in 1963) rather than for a vote (as Vice President Nixon indicated he would do in 1957, 1959 and 1961). We are confident that Vice President Humphrey would put the motion to close debate to the Senate for a vote rather than killing the motion by putting it to the Senate for debate.

Our case to the Vice President on this point can be simply put: You do not debate a motion to end debate. This is for the obvious reason that debating the motion renders it meaningless. It is just like the fact that you do not debate a motion to adjourn because you defeat the motion by debating it. So, if the Vice President were to say that there is no way to get to a vote on a motion to end debate under the Constitution, he would be saying:

(i) You can debate a motion to end debate;

(ii) You can kill a motion to end debate with debate;

(iii) The Senate cannot act except under Rule XXII;

(iv) The Senate does not have the power of the Senate of the 1st Congress to adopt rules by majority will.

The Senators seeking rules change are confident that the Vice President will be willing to help the Senate to perform its Constitutional obligations. His statements from 1953 to date make clear his belief that the Senate of a new Congress does have the power to act by majority will. We rest our case in the firm belief that the Vice President will put the motion to close debate to the Senate for a vote not for certain death by further debate.

(7) Procedure Like 1961, 1963 and 1965 not 1953, 1957 or 1959. It is immediately recognizable that the proposed procedure for January 10, 1967, is like the 1961, 1963 and 1965 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 Eighty-third (or Eighty-fifth) 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 10, 1967, 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, 1963, and 1965 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 overwhelming 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) Then 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, 1963, and 1965. It was thwarted in 1961 only by a motion to send to committee adopted by the barest majority and in 1963 by Vice President Johnson's putting the motion to close debate to the Senate for debate. If the Vice President and a majority are now on our side, as we believe them to be, 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 two years. With a majority of the Senators supporting a change in Rule XXII at the opening of the 90th Congress and with a Vice President who has long favored such action, 1967 is the year of decision.

Respectfully Submitted by Senators
Joining in Motion to Amend Rule
XXII to Permit a Majority of the
Total Senate to Close Debate

APPENDIX

VICE PRESIDENT NIXON'S RULINGS

In 1957, during the debate on the rules at the opening of the Senate of the Eighty-fifth Congress, Vice President Nixon gave an advisory ruling as follows (103 Cong. Rec. 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 Eighty-sixth 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 Cong. Rec. 6).
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>
> "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 Cong. Rec. 8-9).
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> "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 Cong. Rec. 9).
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> "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 Cong. Rec. 96).

* * * * *

"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 Cong. Rec. 101).

* * * * *

"The key problem around which this discussion has resolved 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 Cong. Rec. 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" (Cong. Rec. 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 Cong. Rec. 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 the 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 constitutitional 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."

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"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."

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