December 12, 2012

Dear Members of the Senate:

The current debate over whether to alter the 113th Senate's rules raises serious questions of policy and political judgment. We take no position on the wisdom of any proposed change. Some, however, have sought to elevate the debate to constitutional dimensions by suggesting that it is institutionally improper for a new Senate to alter the Senate's rules by majority vote because the internal procedures adopted by prior Senates have required a two-third majority to allow a vote on a motion to alter the rules.

With respect, such a concern confuses the power to change the Senate's rules during a session, with the unquestioned constitutional power of each incoming Senate to fix its own rules unencumbered by the decisions of past Senates. The standing two-thirds requirement for altering the Senate's rules is a sensible effort at preventing changes to the rules in the midst of a game. It cannot, however, prevent the Senate, at the beginning of a new game, from adopting rules deemed necessary to permit the just, efficient and orderly operation of the 113th Senate. Thus, bound up in the current debate over filibuster reform is a related, but distinctly separate, question: What are the limits of each new Senate's authority to determine its own rules of procedure?

The undersigned—scholars in the fields of constitutional law and Senate procedure and history—submit this letter to clarify the constitutional framework that governs the Senate's rulemaking authority. We agree with the overwhelming consensus of the academic community that no pre-existing internal procedural rule can limit the constitutional authority of each new Senate to determine by majority vote its own rules of procedure.

The Standing Rules Cannot, Constitutionally, Prevent a Majority of a Newly Convened Senate From Voting to Reform its Rules of Proceedings.

Article I, Section 5, Clause 2 of the Constitution authorizes each chamber of Congress to "determine the Rules of its Proceedings." This power is a foundational aspect of Congress' legislative authority. With limited exceptions, the Constitution itself does not set forth the specific mechanics of how each chamber shall go about the business of making "all Laws which shall be necessary and proper." Article I, Section 8, Clause 18. Thus, the Rulemaking Clause is necessary in enabling each house to carry out its constitutional lawmaking duties. For this reason, the Supreme Court has long recognized that since Congress' rulemaking authority is key to its legislative powers, the executive and judicial branches cannot interfere on the grounds that "some other way would be better, more accurate, or even more just."[1]

Of course, while the Constitution affords Congress broad discretion to set its own internal rules, the Senate cannot pass rules that ignore constitutional restraints on that power. One such restraint is the constitutional principle that one lawmaking body cannot

[1] *United States v. Ballin*, 144 U.S. 1, 5 (1892).

bind future lawmakers. As the Supreme Court has long held: "[N]o one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body."[2] This prohibition against so-called "entrenching provisions" that bind newly elected representatives to past policy choices, is a hallmark of our democracy.

In tension with the constitutional ban on legislative entrenchment, the modern rules of the Senate purport to place an exceptionally high bar on each new Senate's authority to change its Standing Rules of procedure. Under Rule XXII, as amended in 1959, when a rules change is being considered, 67 senators must agree to halt debate. And, under Senate Rule V, this supermajority barrier to voting on a rules change, along with all other rules, shall "continue from one Congress to the next Congress unless they are changed as provided in these rules." If such an entrenching provision was made legally binding at the start of a new Congress, it would deprive each new Senate of the ability to change its rules by a majority vote. We are confident, however, that the Constitution prohibits a transitory body of Senators meeting in 1959 from eviscerating the ability of subsequent freely-elected Senates to adopt procedural rules deemed necessary by the elected majority for the just and efficient functioning of the body.[3]

The Framers believed deeply in a democracy steeped in majority rule. The overwhelming consensus of the Revolutionary period called for legislative and executive elections to be determined by majority vote. The Supreme Court simply assumed that its decisions would be by majority vote, even when the Court invalidated legislation as unconstitutional. Similarly, the Founders intended that each house of the national legislature would proceed by majority rule, including the enactment of rules pertaining to the procedures of each house. Both the history and text of the Constitution confirm this design. Notably, Alexander Hamilton urged support for ratifying the Constitution because it would eliminate the numerous supermajority requirements that had dogged the federal government under the Articles of Confederation. Such requirements, he wrote, "destroy the energy of government, and…substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt [faction for] the regular deliberations and decisions of a respectable majority."[4]

Reflecting Hamilton's concerns, the Framers included only five discrete and explicit exceptions to majority rule in the Senate: overriding vetoes, expelling members, convicting on impeachments, proposing constitutional amendments, and ratifying treaties. The weightiness of the issues for which the Constitution specifies a supermajority requirement underscores the degree to which the Framers intended majority rule to govern the normal order of business. Notably, among the sections of the

[2] *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. 416, 431 (1853).
[3] Indeed, the prospect of any one Senate issuing rules that permanently bind all future Senates would lead to absurd and untenable results. Imagine if the first Senate had adopted permanent rules of proceeding when it first met in 1789—when it represented only 11 states. According to those who would deny each new Senate the right to change the rules by a majority vote, that first set of rules would still bind a Senate of 100 members from 50 states sitting two hundred and twenty-four years later.
[4] THE FEDERALIST NO. 22, 120 (Barnes & Noble, ed., 2006).

Constitution that impose no supermajority requirements, is Article 1, Section 5, Clause 2 authorizing each chamber of Congress to "determine the Rules of its Proceedings."

Thus, we are confident that unless each new Senate can, at some point, alter its rules by a majority vote, Rules V and XXII would operate unconstitutionally to entrench the decisions of past Senates concerning supermajority requirements, thereby depriving the freely-elected representatives of the people of the ability to adopt procedural rules deemed necessary for the just and efficient operation of the Senate as a representative body.

Senate Precedent and Tradition Support Rule Change By Majority Vote on the First Day.

Consistent with its role as a partially-continuing body only one-third of which is newly-elected, the Senate, unlike the House, does not automatically reset its entire rulebook at the start of each new Congress.[5] Nevertheless, since the first set of Senate rules was adopted in 1789, there have been several general revisions to the Standing Rules, along with far more numerous piecemeal changes. In altering its rules over time, the Senate has consistently recognized its authority to change its procedural rules by a majority vote on the first day of a new Congress.

When a newly-elected Congress convenes, the newly-constituted Senate, like the newly-elected House, can invoke its constitutional rulemaking authority to make changes to the Standing Rules. At that time, a majority of the new Senate can choose to reject or amend an existing rule. Vice-Presidents, in their capacities as Presidents of the Senate, have repeatedly issued advisory opinions asserting the chamber's power under the Constitution to modify its rules by a majority vote at the beginning of each Congress. In 1957, Vice-President Richard Nixon wrote:

> 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 the 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.[6]

[5] Some have suggested that there are no "new" senates because the Senate's overlapping term structure makes it one continuous Senate for all time—thereby justifying permanent entrenchment of these provisions. Of course, as discussed above, the Senate itself has never accepted this view. Moreover, there is no textual or historical support for a theory that the Senate lacks the same continuous constitutional rulemaking authority as the House. *See generally*, Aaron–Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 Iowa L. R. 1401 (2010). To the contrary, Article I expressly grants each chamber the same power to establish its rules.

[6] 103 Cong. Rec. 178 (1957).

Vice-President Nixon reasserted his constitutional interpretation in 1959. Vice-Presidents Hubert Humphrey in 1967 and Nelson Rockefeller in 1975 echoed this interpretation.[7] And, though he issued no advisory opinion, Vice-President Dick Cheney signaled his agreement in 2005.[8]

In both 1959 and 1975, the Vice-President's advisory opinions effectively enabled rules reform. In 1959, the Senate changed the cloture threshold from two-thirds of all Senators to two-thirds of all Senators present.[9] In 1975, the chamber further reduced the threshold to three-fifths of all Senators.[10] In both instances, the minority relented and supported the modifications only when it became apparent that a simple majority could enact reform. Indeed, in 1975, the Senate formally invoked its constitutional authority to pass a rule change by majority vote to lower the cloture threshold. But, in deference to the wishes of the Senate minority, the Senate later enacted the reform by a two-thirds majority, rather than following the parliamentary ruling of the Vice-President that had authorized the rules change by a majority vote.[11]

Despite the numerous precedents confirming a new Senate's authority to change its rules by majority vote, some warn that disregarding the convention of supermajority approval will upend the Senate's unique role as the more deliberative chamber, particularly sensitive to the rights of the minority. Such an objection misunderstands the appropriate role of the two-thirds rule, and the source of the Senate's unique status.

The two-thirds rule is constitutional to the extent that it ensures Senate procedures will not be manipulated during a legislative session to the detriment of the minority. As we have demonstrated, however, it would be unconstitutional to use the two-thirds rule to impose the procedural judgments of a past Senate on a newly-elected body. Moreover, it is the Constitution, not the Standing Rules that distinguishes the structure and representative nature of the Senate from that of the House. The length and staggered nature of Senate terms creates a membership that is more stable than that of the House. An individual must be older to run for the Senate than the House, ensuring a body with more senior and experienced members. And each state, no matter its size or population, has equal representation—two senators—in the upper chamber. These distinctive characteristics, not internal procedures, are the mechanisms that James Madison imagined would insulate democracy from the "fickleness and passion" of a majority that would seek to "oppress the minority."[12]

As the 1959 and 1975 precedents confirm, changing a rule by a majority vote on the first day of a new Senate is consistent with the Senate's tradition of judiciously revising its Rules when necessary for maintaining the path to deliberative and functional

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[7] *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 209-13 (1997).
[8] David D. Kirkpatrick, *Cheney Backs End of Filibustering*, N.Y. TIMES, Apr. 23, 2005, at A1.
[9] S. Rep. No. 112-31, *Senate Cloture Rule: Limitation of Debate in the Congress of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate*, at 24-25 (2011).
[10] *Id.* at 29-31.
[11] *See* Fisk & Chemerinsky, *supra* note 7, at 212-13.
[12] JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION, 242 (E.H. Scott, ed., 1893).

lawmaking. While Senates throughout history have invoked this authority sparingly, there is no question of the right to do so. Any determination to the contrary would be unconstitutional.

We hope this brief explication of the well-established, and constitutionally authorized, standards for rules change in the Senate will be helpful to your deliberations over proposals for rules reform at the start of the 113th Congress.

Sincerely,

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