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Conservatives Support the Constitutional Option

In 1957, when the Constitutional Option was attempted on the first day of Congress, **Vice President Nixon** issued the following opinion while presiding in the Senate:

> [W]hile 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 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.

In 2005, **Senator Orrin Hatch** (R-UT) wrote:

> "The compelling conclusion is that, before the Senate readopts Rule XXII by acquiescence, a simple majority can invoke cloture and adopt a rules change. This is the basis for Vice President Nixon's advisory opinion in 1957; as he outlined, the Senate's right to determine its procedural rules derives from the Constitution itself and, therefore, 'cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress.' … So it is clear that the Senate, at the beginning of a new Congress, can invoke cloture and amend its rules by simple majority."[1]

In 2003, **Senator John Cornyn** (R-TX) wrote:

> "Just as one Congress cannot enact a law that a subsequent Congress could not amend by majority vote, one Senate cannot enact a rule that a subsequent Senate could not amend by majority vote. Such power, after all, would violate the general common law principle that one parliament cannot bind another."[2]

Senator Cornyn also held a hearing in 2003 when he was Chairman of the Subcommittee on the Constitution, Civil Rights and Property Rights of the Judiciary Committee (S. HRG. 108–227). Some of the nation's leading conservative constitutional scholars testified or submitted testimony at that hearing, and all of it supports the principle that a previous Senate cannot enact a rule that prevents a majority in a future Senate from acting. Below is a sample of those quotes:

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[1] Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803.

[2] Senator John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181 (2003).

Steven Calabresi, a professor of law at Northwestern University School of Law, former law clerk for Justice Antonin Scalia, and co-founder of the Federalist Society testified that:

> "The Senate can always change its rules by majority vote. To the extent that Senate Rule XXII purports to require a two-thirds majority for rules changes, Rule XXII is unconstitutional. It is an ancient principle of Anglo–American constitutional law that one legislature cannot bind a succeeding legislature. This principle goes back to the great William Blackstone, who said in his commentary, 'Acts of Parliament derogatory from the power of subsequent Parliaments bind not.'"

Douglas Kmiec, then Dean of the Columbus School of Law at Catholic University, testified about the unconstitutional entrenchment of supermajority rules and stated:

> "We currently have in play a process where carryover rules, rules that have not been adopted by the present Senate, are requiring a supermajority to, in effect, approve and confirm a judicial nominee. As you know, to close debate, it requires 60 votes; in order to amend the rules, it requires 67. These are carryover provisions that have not been adopted by this body and by virtue of that, they pose the most serious of constitutional questions because, as I quote, Senator, the Supreme Court has long held the following: 'Every legislature possess the same jurisdiction and power as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less.'"

Dr. John Eastman, a professor of Constitutional Law at Chapman University School of Law, said at the hearing that "the use of supermajority requirements to bar the change in the rules inherited from a prior session of Congress would itself be unconstitutional."

Testimony submitted to the Committee for this hearing also supports this principle. **Professor John C. McGinnis** of Northwestern University and **Professor Michael Rappaport** of the University of San Diego School of Law stated in their written testimony that:

> "[T]he Constitution does not permit entrenchment of the filibuster rule against change by a majority of the Senate. Although the filibuster rule itself is a time-honored senatorial practice that is constitutional, all entrenchment of the filibuster rule, or of any other legislative rule or law, that would prevent its repeal by more than a majority of a legislative chamber, is unconstitutional. Therefore, an attempt to prevent a majority of the Senate from changing the filibuster rule, through a filibuster of that proposed change in the Senate rules, would be unconstitutional."

Finally, renowned constitutional law scholar **Ronald Rotunda** stated in written testimony:

> "The present Senate rules that create the filibuster also purport not to allow the Senate to change the filibuster by a simple majority. However, these rules should not bind the present Senate any more than a statute that says it cannot be repealed until 60% or 67% of the Senate vote to repeal the Statute. … I do not see how an earlier Senate can bind a present Senate on this issue."