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The Constitutional Option to Reform Senate Rules

The unprecedented use, and abuse, of the filibuster, secret holds, and other procedural rules has prevented the Senate from doing its work. Senate rules are designed to allow for substantive debate and to protect the views of the minority – as our Founders intended. Instead, they have been abused to cause unnecessary delay and to prevent the Senate from ever beginning to debate critical legislation. Protecting the views of the minority makes sense, but not at the expense of the will of the majority.

Several proposals were introduced at the beginning of this Congress that are designed to help make the body more functional while maintaining its uniquely deliberative nature. These proposals all have merit, but the current rules require two-thirds of senators present to vote to end debate on a rules change; something that is highly unlikely in the current environment. However, there is one way to avoid the two-thirds requirement – the Constitutional Option.

The Constitutional Option is a procedural mechanism that allows a simple majority to end debate on rules changes at the beginning of a new Congress. It has been used numerous times since the cloture provision was adopted in 1917; the last being in 1975 when it was the catalyst for amending the filibuster rule to its current form.

- Article I, Section 5 of the Constitution states, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." When the Framers required a supermajority in the Constitution, they explicitly stated so, as they did for expelling a member. On all other matters, such as determining the chamber's rules, a majority requirement is implied.

- A longstanding constitutional principle, upheld in the Supreme Court, holds that one legislature cannot bind its successors. For example, if the Senate passed a bill with a requirement that it takes 75 votes to repeal it in the future, that would violate this principle and be unconstitutional. Similarly, the Senate of one Congress cannot adopt procedural rules that a majority of the Senate in the future cannot amend or repeal. Vice Presidents of both parties, sitting as President of the Senate, have made advisory rulings that at the beginning of a Congress the Senate is not bound by the rules of its predecessors and has the constitutional right to adopt its rules of procedure by a simple majority vote.

- Therefore, the Senate of the 113th Congress is not bound by the provision in Rule XXII that requires two-thirds of senators to end a filibuster on a rules change. The next Senate can limit debate and reform the rules by a simple majority.

- Each time the filibuster rule has been amended over the years, a bipartisan group of senators used the Constitutional Option to compel the Senate to act.

At the start of the 113th Congress, the Senate should debate reforms and amend its rules by majority vote, as provided for under Article I, Section 5 of the Constitution.

The Constitutional Option: Frequently Asked Questions

1) What is the Constitutional Option?

The Constitutional Option (CO) is a procedural mechanism that allows a simple majority to end debate on rules changes at the beginning of a new Congress. It has been used numerous times since the cloture provision was first adopted in 1917; the last being in 1975 when the filibuster rule was changed to its current form.

The CO is rooted in two fundamental principles: 1) the Constitution explicitly states the few instances where a supermajority is required. Article I, Section 5, which states that "each House may determine the Rules of its Proceedings," does not require a supermajority, and 2) that a longstanding constitutional principle, upheld by the Supreme Court, states that each legislature must have the same powers as its successors – that is, the Senate of a past Congress cannot pass laws or adopt rules that a majority of a future Senate cannot repeal or amend.

The CO is not premised on the belief that the filibuster itself is unconstitutional. It is only the provision in Rule XXII requiring a supermajority to change the rules that is unconstitutional because it prevents a majority of the Senate in a future Congress from amending the filibuster, or any other rule.

2) How is the "Constitutional Option" different from the "Nuclear Option"?

The so-called "Nuclear Option" was a partisan plan by Senate Republicans during the Bush Administration to have the filibuster of judicial nominees declared unconstitutional by Vice President Cheney, sitting as presiding officer. It would have been done in the middle of a Congress and there was no precedent for using this procedure to amend the rules.

Conversely, the CO has a long bipartisan history dating back to the inception of the cloture rule in 1917. It is also used at the beginning of a Congress, based on the longstanding principle that a Senate of one Congress may not unconstitutionally bind a subsequent Senate.

3) How does the Constitutional Option work?

This depends on a variety of factors, the most important being: 1) how many senators support the CO; 2) does the Majority Leader support it; and 3) does the Vice President support it.

The initial procedure is for a supporter of the CO to go to the Senate Floor on the first day of a new Congress and call on the Senate to adopt its rules for that Congress and to end debate with a simple majority vote. Looking back at its use over several decades, this has usually been done by making a motion or by introducing a resolution that had specific rules reforms. At that point, how the CO played out on the Senate floor depends heavily on the factors listed above. In the best case scenario, at least 50 senators support reform and it has the backing of the Majority Leader and Vice President. In this case, the reformers can either use the CO to amend the rules with a majority (and the Vice President can break a tie), or the threat of the CO will provide enough incentive for two-thirds of senators to support rules changes and invoke cloture under the existing Rule XXII.

4) What is entrenchment of the Senate Rules?

The CO is a method for overcoming "entrenchment" of the Senate rules. Specifically, Rule XXII requires a two-thirds vote of all Senators present and voting to end debate on a rules change. Rule V contains language stating that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." Together, these two provisions prevent a current Senate from choosing its own rules by majority vote – it is said that they are "entrenched" against change. Why? Because if the rules are carried over and in effect at the beginning of each new Congress, any rule changes can be filibustered by a one-third minority.

5) Is the "entrenchment" of the Senate's rules unconstitutional?

There is overwhelming agreement among authorities that the current entrenchment of the Senate Rules is unconstitutional. Common law principles, Supreme Court precedent, the opinions of leading conservative and liberal scholars, and respected senators of both parties all agree that the entrenchment of the Senate's rules is unconstitutional.

- William Blackstone, the Eighteenth Century legal scholar, wrote in his Commentaries that "[a]cts of parliament derogatory from the power of subsequent parliaments bind not. . . Because the [subsequent] legislature being in truth the sovereign power, is always equal [to its predecessors]."[1]

- In *Newton v. Commissioners*, the U.S. Supreme Court held that "[e]very succeeding legislature possesses 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 or less."[2]

- In 1957, when the CO 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."[3]

- **Senator Robert Byrd** (D-WV) argued on the Senate Floor: "There is no higher law, insofar as our Government is concerned, than the Constitution. The Senate rules are subordinate to the Constitution of the United States. The Constitution in Article I, Section 5, says that each House shall determine the rules of its proceedings. Now we are at the beginning of Congress. **This Congress is not obliged to be bound by the dead hand of the past.** The first Senate, which met in 1789, approved 19 rules by a majority vote. Those rules have been changed from time to time . . . . [T]he Members of the Senate who met in 1789 . . . did not for one moment think, or believe, or pretend, that all succeeding Senates would be bound by that Senate."[4]

- **Senator Orrin Hatch** (R-UT): "The compelling conclusion is that, before the Senate readopts Rule 22 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**."[5]

- **Senator John Cornyn** (R-TX): "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**

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[1] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE COMMON LAW 90 (St. George Tucker ed. 1803).

[2] 100 U.S. 548, 559 (1879).

[3] *Congressional Record*, vol. 103, Jan. 3, 1957, p. 11.

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

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

amend by majority vote. Such power, after all, would violate the general common law principle that one parliament cannot bind another."[6]

- Law Professor **Steven Calabresi** (Northwestern University School of Law, former law clerk for Justice Antonin Scalia, and co-founder of the Federalist Society): "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."[7]

- Law Professor **Erwin Chemerinsky** (Dean of the University of California, Irvine School of Law): The "conjunction of Rule V and XXII does exactly what the [Supreme Court] say[s] that the Constitution forbids: it allows one session of the Senate to bind later sessions to its procedure for approving legislation." "American democracy is premised upon government by the people, as expressed through representatives. Popular sovereignty is frustrated when one session of the legislature can prevent or limit action by future sessions." "[E]ntrenchment frustrates the legislative accountability that is essential for a properly functioning democratic government." [8]

6) What is the main argument defending entrenchment of the Senate's rules?

Those opposing rules reform often cite the "continuing body" theory to argue that because members of the Senate stand for election in staggered six-year terms, with only a third standing for election every two years, there is never a new Senate, just one legislative body which continues on indefinitely. However, there are strong arguments against the continuing body theory as a rationale for entrenchment of the Senate rules.

In 2005 **Senator Orrin Hatch** wrote:

> The Senate has been called a 'continuing body.' Yet Rule V's language reflecting this observation was included in Senate rules only in 1959. The more important, and much older, sense in which the Senate is a continuing body is its ongoing constitutional authority to determine its rules. Rulings by vice presidents of both parties, sitting as the President of the Senate, confirm that each Senate may make that decision for itself, either implicitly by acquiescence or explicitly by amendment. Both conservative and liberal legal scholars . . . agree that a simple majority can change Senate rules at the beginning of a new Congress.[9]

University of Houston Law Professor Aaron-Andrew Bruhl recently noted that:

> "The striking feature of the [Continuing Body theory] is the way it uses a seemingly bland structural fact about the Senate—that only a minority of its members stand for election every two years—to generate the powerful conclusion that the Senate's rules can violate what are often regarded as foundational principles of majority rule and non-entrenchment."[10]

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

[7] Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Committee on the Judiciary, 108th Cong. 309 (2003) (S. HRG. 108–227).

[8] Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 248-50 (1997).

[9] Senator Orrin G. Hatch, *Crisis Mode: A Fair and Constitutional Option to Beat the Filibuster Game*, NAT'L. REV., Jan. 12, 2005, *available at* http://old.nationalreview.com/comment/hatch200501120729.asp.

[10] Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401, 1406-07 (2010).