

Summary of Robert Dove submission

I take the view, as has the Senate, itself, repeatedly, that the Senate is a continuous body. A quorum of senators (at least 51 under the Constitution) is, at all times, duly elected and seated. Since the Senate has been a continuous body from the outset, its original rules have survived in a straight line to the present. The Senate under Article I Section 5 has the power to write its own rules. The Senate has done so. And, again, the Senate in its Rule V has clearly declared, “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”¹

¹ Rule V, Paragraph 2. U.S. Senate Rules, U.S. Senate Rules Committee Website

Submission by Robert Dove

The United States Senate is a continuing body. Under the Constitution, a majority of the Senate— 51 of the 100 senators—constitutes a quorum.¹ The Constitution also establishes a rotation of Senate terms which ensures that in most normal circumstances only one-third of the Senate seats are at stake in each Congressional election.²

As Congressional Research Service expert Richard Beth, a respected authority on Senate rules, has written, “Even at the beginning of a new Congress, as a result, and even before newly elected Senators are sworn in for new terms of office, a quorum of the Senate remains in being, and the body remains capable of functioning and acting. By this criterion, a Senate, with membership sufficient to do business, has been in continuous existence ever since the body first achieved a quorum on April 6, 1789. That the Senate is a “continuing body” in this sense was explicitly enunciated at least as early as 1841.”³ Beth refers to this as “not a doctrine, but merely a fact.”⁴

Senator Clifford Anderson was a longtime proponent of the idea that the Senate’s rules could be changed by a simple majority vote at the outset of a new Congress. At the beginning of each Congress in 1953, 1957 and 1959, Anderson attempted to do so. “Though these motions were tabled, Anderson gained more support each year.⁵ In 1959, then-Majority Leader Lyndon B. Johnson offered a compromise proposal to amend the filibuster rule—Rule XXII.”⁶

In 1949, ten years earlier, the Senate had applied Rule XXII to the motion to proceed, thus making it possible to close off debate on the motion to proceed to a bill. But, at that time, the Senate had changed the cloture requirement to a two-thirds vote of all senators. Previously, ever since the enactment of Rule XXII in 1917, cloture had required two-thirds of those voting, an easier threshold to attain. Majority Leader Johnson’s 1959 compromise returned the cloture rule to two-thirds present and voting. Cloture would be easier to invoke.

Proponents of the “constitutional option” like to characterize the 1959 compromise as a successful instance of pressure being brought to bear by the near adoption of the idea that rules can be changed by majority vote. However, the Senate in 1959, as a part of this compromise, addressed the question of the Senate as a continuing body by adopting a new rule stating that “the rules of the Senate shall

¹ U.S. Constitution, Article I Section 5 Clause 1 states: “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business...”

² U.S. Constitution, Article I Section 3 states: “Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year...”

³ Beth, Richard S. “Entrenchment of Senate Procedure and the ‘Nuclear Option’ for Change: Possible Proceedings and Their Implications”, Congressional Research Service, March 28, 2005.

⁴ Ibid.

⁵ In 1953, Senator Anderson’s motion was tabled 70-21 and, in 1957, the Senate tabled his motion 55-38.

⁶ Ibid.

continue from one Congress to the next unless they are changed as provided in these rules.”⁷ This is an explicit declaration that the rules of the Senate continue from one Congress to another.

The cloture rule was further amended in 1975 when Senators Walter Mondale (D-MN) and James Pearson (R-KS) also used an attempt to amend the rules by simple majority at the beginning of a Congress to leverage a compromise rules change. Only two sitting senators—Daniel Inouye (D-HI) and Patrick Leahy (D-VT)—were in Congress then. This means that 98 Senators have never voted on the rule.

The issue of the continuity of the Senate and its rules is older than the cloture rule (adopted in 1917) itself. During the 1891 filibuster of the so-called “Force Bill” introduced by Judiciary Committee Chairman Senator George Hoar (R-MA), Senator Nelson Aldrich (R-RI) proposed a cloture rule “permitting any senator, after a matter has been considered ‘for a reasonable time,’ to demand that debate be closed, after which, only motions to adjourn or recess would be in order.”⁸

Senator Francis Cockrell (D-MO), seeking to embarrass Senator Hoar for his support of the cloture proposal, read into the Congressional Record an article authored by Hoar published just weeks earlier in “The Youth’s Companion.”⁹ He read:

“The men who framed the Constitution had studied thoroughly all former attempts at republican government. History was strewn with the wrecks of unsuccessful democracies. Sometimes usurpation of the executive power, sometimes the fickleness and unbridled license of the people, had brought popular governments to destruction. To guard against these two dangers they placed their chief hope in the Senate.

In the first place, they made it a perpetual body... [T]he Senate is indestructible. The Senate which was organized in 1789 at the inauguration of the Government abides and will continue to abide, one and the same body, until the Republic itself shall be overthrown or until time shall be no more... The Senate,... alone of all the departments of Government, is unchangeable and indestructible by any constitutional process.”¹⁰

In 1917, Senator Thomas Walsh (D-MT) argued that the question of whether the rules of the Senate continued from one Congress to another had never been specifically considered by the Senate.¹¹ Interestingly, Vice President Thomas Marshall, who was presiding at the time, replied:

“I do not want any misconceptions about this matter. One thing particularly is clear, and I think everyone will agree upon it. The Vice President of the United States as the

⁷ Senate Rule V, Paragraph 2.

⁸ Byrd, Robert C. “The Senate 1789-1989: Addresses on the History of the United States Senate”, Vol. 2, 1991, pg. 104.

⁹ “The Youth’s Companion” was a popular religious youth magazine founded in Boston in 1827 which grew in popularity until about the turn of the 20th Century. The article appeared in the November 13, 1890 edition.

¹⁰ Congressional Record, January 22, 1891, pg. S1680.

¹¹ Congressional Record, March 6, 1917, pp. S8-9.

Presiding Officer of this body has absolutely nothing to do with making the rules. It is not any of his business what they are. The question whether there are or are not rules... [is a question] for the Senate and it makes no difference what opinion I express, the Senate will settle it, and will settle it without any regard whatever to what my views are.”¹²

Senator Walsh offered a resolution to adopt the rules of the Senate as they existed with the exception of Rule XXII governing motions and pending questions. Walsh proposed that a committee be appointed to write a cloture rule and that the debate on that rule would be conducted under “general parliamentary law,” including the provision that it would be “in order to move to fix a time when the Senate shall take a vote on the pending question or to move the previous question with a view to closing debate...”¹³

In their treatise on the “constitutional option”, Martin Gold and Dimple Gupta conclude that:

“Although the Senate was not forced to act on Walsh’s constitutional option, there is strong reason to believe that the proposal was the impetus for cloture reform. Looking back on the 1917 rule change, Senator Clinton P. Anderson (D-NM) concluded that Walsh’s proposal carried the day: ‘[Walsh] made a very powerful argument [in favor of adding a cloture rule] ... When he finished, someone surrendered. Senator Walsh won without firing another shot. A cloture rule was brought forth ... and, with the exception of three, every one of [the opposing Senators]... fell into line.’ Senator Paul H. Douglas (D-IL) concurred that the 1917 rules ‘change would not have been made had not Senator Walsh presented his original resolution: “[W]hile there was no formal rule or decision dealing with the Walsh motion, it was not overruled, and the result he was seeking to accomplish was attained, because the objectors had hanging over their heads general parliamentary law, under which the previous question could be moved to shut off debate.””¹⁴

However, it seems pretty clear that the popular uproar against the Senate fueled by President Woodrow Wilson’s criticisms had left little doubt that the Senate would amend its rules and create a cloture provision. This would have happened, I believe, without Senator Walsh’s maneuverings. The debate throughout and the overwhelming 76-3 vote at the end to adopt the rule support this view.

Congressional Quarterly points out that “as a political scientist in 1882, Wilson had celebrated ‘the Senate’s opportunities for open and unrestricted discussion.””¹⁵ But as CQ points out, that after the 1917 bill to arm merchant ships was blocked by filibuster in the Senate, Wilson fumed, “The Senate of the United States is the only legislative body in the world which cannot act when the majority is ready for action. A little group of willful men...have rendered the great government of the United States helpless and contemptible.”¹⁶

¹² Ibid, pg. S9.

¹³ Ibid.

¹⁴ Gold, Martin B. and Dimple Gupta. “The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster”, Harvard Journal of Law & Public Policy, Volume 28, Issue 1, 2004.

¹⁵ CQRollCall.com Found at: <http://corporate.cqrollcall.com/wmspage.cfm?parm1=227>.

¹⁶ Ibid.

CQ concludes, “Public outrage finally forced the Senate to accept debate limitations.”¹⁷

However, as many of the 86 senators who voted to adopt a cloture rule made clear, they supported a conservative rule which would not interfere with extended debate in the Senate, and they did not support Senator Walsh’s contention that the rules could be changed by a simple majority at the start of a Congress. As the man who would succeed Woodrow Wilson as president, Senator Warren Harding (R-OH) declared on the floor:

“I am quite content to say that I favor some modified form of cloture rule; but the point I want to make is, that where the sentiment of this body is favorable to a change of the rules, no dilatory tactics can long obtain in opposing that change of the rules... I am not ready to accept the soundness of the Senator [Walsh]’s argument, that this is not a continuing body; and I cannot accept the contention that we must first enter into a state of chaos in order to bring about the reform which the Senator seeks.”¹⁸

The debate about continuity of the Senate is crucial. It is likely that any future effort to change the cloture rule, if controversial, will include a battle over this issue. Senate Rule V requires only a majority vote to amend the Senate rules. This is deceiving, however, because, under Rule XXII, it takes two-thirds of the Senators present and voting to end debate on the rules change. Therefore a supermajority, larger than the normal 60 vote cloture, is required to get to the vote on changing the rules. This makes it unlikely that major changes will occur unless the Senate decides that it was not a continuing body after all.

As I have noted, the Senate rules themselves state: “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”¹⁹ So, without a grand compromise, it will take a very cooperative Vice President, willing to join with the Senate’s majority and ignore the Senate’s rules, and/or precedents to get the Senate to the point where it can or will change the rules in the absence of a two-thirds cloture vote.

A “constitutional option” was threatened by Republicans led by Majority Leader Bill Frist (R-TN) during the 2003-2005 effort to thwart Democratic filibusters of several of President Bush’s judicial nominees. Senator Frist, opening the 109th Congress in the Senate issued the clear threat, “I reserve the right to propose changes to Senate Rule XXII, and do not acquiesce to carrying over all the rules from the last Congress.”²⁰ This statement was based on the belief that he was reserving the right to use the “constitutional option” to rewrite the Senate’s rules by majority vote.

Norman Ornstein, one of the most authoritative scholars on Congress, a proponent of filibuster reform wrote recently:

¹⁷ Ibid.

¹⁸ Congressional Record, March 7, 1917, pg. S16.

¹⁹ U.S. Senate Rule V, Section 2.

²⁰ Congressional Record, January 4, 2005, pg. S14.

“Reform ideas are fine-- but they are academic exercises unless 67 Senators can agree to change their rules, a near impossibility. I have no doubt that Democrats are going to be tempted to contemplate their own version of the “nuclear option” after the 2010 midterm elections, something considered briefly in 1978-79 by the Carter Administration.”²¹

He explains:

“Since its origins, the Senate has been considered a continuing body... Thus, the rules in the body remain in effect—and those rules require two-thirds to invoke cloture for a rules change. Mondale considered taking the chair as President of the Senate and making a parliamentary ruling that the Senate is not a continuing body; rather, like the House, it has to adopt rules at the beginning of each Congress, and that can be done by majority action. That might work—but like the nuclear option, it would be radioactive, with collateral damage that would reverberate for a long time, in a Senate where business is mostly conducted by unanimous consent.”²²

Of course, it’s not clear that so much unanimous consent would be necessary any longer in a new majoritarian Senate. After all, the majority would be free to operate the legislative agenda as it saw fit.

I take the view, as has the Senate, itself, repeatedly, that the Senate is a continuous body. A quorum of senators (at least 51 under the Constitution) is, at all times, duly elected and seated. Since the Senate has been a continuous body from the outset, its original rules have survived in a straight line to the present. The Senate under Article I Section 5 has the power to write its own rules. The Senate has done so. And, again, the Senate in its Rule V has clearly declared, “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”²³

There is nothing in Article I Section V which directly supports the contention that the Constitution empowers the Senate to change its rules in contradiction to its existing rules and the provisions for changing those rules under those rules.

The 1953 battle, led by Senate liberals frustrated by repeated filibusters conducted by Southern Democrats against civil rights legislation, sought to reduce the necessary number of votes for cloture from two-thirds of the whole body, which was the case in the wake of the 1949 compromise which

²¹ Ornstein, Norman, “Time to Reassess Filibuster to Keep Senate Functioning”. Roll Call, January 20, 2010, Pg. 6.

²² Ibid.

²³ Rule V, Paragraph 2. U.S. Senate Rules, U.S. Senate Rules Committee Website.

allowed cloture against the motion to proceed. Their strategy was to argue that, under the Constitution, the Senate could vote at the beginning of a session with a simple majority to change its rules. The issue was not resolved and the Senate voted to table a motion by Senator Clinton Anderson (D-NM) to consider a change in the rules.²⁴

Senate Historian Donald Ritchie asked rules expert Martin Gold in his Senate oral history interview about this era of attempted changes in Rule XXII:

RITCHIE: At the beginning of every Congress from the Truman and Eisenhower administrations right on through to Nelson Rockefeller, when he was vice president, they were still hoping to do that. It's interesting that the ideologies and parties have changed, but the talk of the tactics has stayed the same. What really did change things in the past was whenever you had an election that gave one party or the other a large majority, instead of having things as evenly balanced as they are now, or at least that's the way it's seemed to me.

GOLD: Well, that's right. You know, I have looked at a lot of that history and can trace some interesting people. You talk about how people have changed after they got accustomed to the Senate. When Mike Mansfield was elected to the Senate in 1952, and when he arrived in 1953, the first issue before the Senate was reform of the filibuster rule by the so-called constitutional method. There were twenty-one senators who supported that change that year, almost all of whom were Democrats. Mansfield was one of them. He was part of that intrepid group that tried to change the rules by such a means. By the time he got into the leadership and the same efforts were being made by others, he spoke out vigorously against it. Part of that was a change in role from being a freshman member pursuing a particular ideology without regard to Senate traditions to being the majority leader and being the defender of those traditions; also lots of years of experience in the Senate and an evolving sense of what the Senate was supposed to be about. But you are absolutely correct to say that in the years between 1953 and 1975, whenever these efforts were made, and they were almost made biennially, they were done by liberal Democrats, with some support on the Republican side...²⁵

The late Senator Robert Byrd (D-WV), the Senate's leading expert of its rules and their history, at the Senate Rules Committee's May 19, 2010 hearing just a month before his death, declared, "Our Founding Fathers intended the Senate to be a continuing body that allows for open and unlimited debate and the protection of minority rights. Senators have understood this since the Senate first

²⁴ Congressional Quarterly Almanac (1953), p. 313.

²⁵ Martin Gold, Counsel to the Senate Republican Leader, 1979-1982, 2003-2004, Oral History Interviews, Senate Historical Office, Washington, D.C., conducted by Donald A. Ritchie (then Associate Historian and currently Senate Historian).

convened."²⁶

For the “constitutional option” to succeed, it will rely upon Vice President Biden ignoring the Senate rules, and almost certainly the advice of the Senate Parliamentarian, and ruling that a simple majority, under the Constitution, can invoke cloture.

During the 2005 debate on the “nuclear option,” which was based on much the same reasoning, then-Senator Biden rejected the argument in the strongest terms. I quote his statement at some length because it makes the case strongly and correctly, and because Joseph Biden, himself, is likely to be at the center of just such an historic decision-making moment. Then-Senator Biden declared:

“We should make no mistake. This nuclear option is ultimately an example of the arrogance of power. It is a fundamental power grab by the majority party...to eliminate one of the procedural mechanisms designed for the express purpose of guaranteeing individual rights, and they...would undermine the protections of a minority point of view in the heat of majority excess. We have been through these periods before in American history but never, to the best of my knowledge, has any party been so bold as to fundamentally attempt to change the structure of this body.

...Quite frankly, it is the ultimate act of unfairness to alter the unique responsibility of the Senate and to do so by breaking the very rules of the Senate.

... Put simply, the nuclear option would transform the Senate from the so-called cooling saucer our Founding Fathers talked about to cool the passions of the day to a pure majoritarian body like a Parliament. We have heard a lot in recent weeks about the rights of the majority and obstructionism. But the Senate is not meant to be a place of pure majoritarianism.

Is majority rule what you really want? Do my Republican colleagues really want majority rule in this Senate? Let me remind you, 44 of us Democrats represent 161 million people. One hundred sixty-one million Americans voted for these 44 Democrats. Do you know how many Americans voted for the 55 of you? One hundred thirty-one million. If this were about pure majorities, my party represents more people in America than the Republican Party does. But that is not what it is about. Wyoming, the home State of the Vice President, the President of this body, gets one Senator for every 246,000 citizens; California, gets one Senator for 17 million Americans. More Americans voted for Vice President Gore than they did Governor Bush. By majoritarian logic, Vice President Gore won the election.

²⁶ Senator Robert Byrd, opening statement, Hearing on “Examining the Filibuster: The Filibuster Today and Its Consequences”, Senate Committee on Rules and Administration, May 19, 2010.

... At its core, the filibuster is not about stopping a nominee or a bill, it is about compromise and moderation... It does not mean I get my way. It means you may have to compromise. You may have to see my side of the argument. That is what it is about, engendering compromise and moderation.

...Moderates are important only if you need to get 60 votes to satisfy cloture. They are much less important if you need only 50 votes. I understand the frustration of our Republican colleagues... Whenever you are in the majority, it is frustrating to see the other side block a bill or a nominee you support. I have walked in your shoes, and I get it.”²⁷

At this point in his statement, then-Senator Biden of 2005, could be addressing himself directly to Vice President Biden of 2011:

“...If there is one thing I have learned in my years here, once you change the rules and surrender the Senate's institutional power, you never get it back. And we are about to break the rules to change the rules.

I do not want to hear about 'fair play' from my friends. Under our rules, you are required to get 2/3 of the votes to change the rules. Watch what happens when the majority leader stands up and says to the Vice President--if we go forward with this--he calls the question. One of us, I expect our leader, on the Democratic side will stand up and say: Parliamentary inquiry, Mr. President. Is this parliamentarily appropriate? In every other case since I have been here, for 32 years, the Presiding Officer leans down to the Parliamentarian and says: What is the rule, Mr. Parliamentarian? The Parliamentarian turns and tells them.

Hold your breath, Parliamentarian. He is not going to look to you because he knows what you would say. He would say: This is not parliamentarily appropriate. You cannot change the Senate rules by a pure majority vote.

So if any of you think I am exaggerating, watch on television, watch when this happens, and watch the Vice President ignore--he is not required to look to an unelected officer, but that has been the practice for 218 years. He will not look down and say: What is the ruling? He will make the ruling, which is a lie, a lie about the rule.

... The nuclear option abandons America's sense of fair play. It is the one thing this country stands for: Not tilting the playing field on the side of those who control and own the field.

²⁷ Congressional Record, May 23, 2005, pp. S5735-S5737.

I say to my friends on the Republican side: You may own the field right now, but you won't own it forever. I pray God when the Democrats take back control, we don't make the kind of naked power grab you are doing. But I am afraid you will teach my new colleagues the wrong lessons.

We are the only in the Senate as temporary custodians of the Senate. The Senate will go on. Mark my words; history will judge this Republican majority harshly, if it makes this catastrophic move.”²⁸

I could give Vice President Biden and the current Democratic majority in the Senate no more eloquent warning than to modify then-Senator Biden's words. History will judge this Democratic majority harshly, if it makes this catastrophic move.

There are two instances which some proponents of eliminating the filibuster claim as precedent. The first occurred in 1969 when Sen. Frank Church (D-ID) offered a cloture motion on his proposal to change Rule XXII which at the time required a 2/3 vote to a proposed 3/5 requirement. He asserted that under the Constitution cloture on his proposal would only require a simple majority.

Vice President Humphrey ruled that at the beginning of a Congress a simple majority could invoke cloture and if the Senate did vote to invoke cloture with less than a 2/3 votes but more than a majority, he would rule that cloture was invoked. The Senate voted 51-47 to invoke cloture. The Vice President's ruling was appealed, and the Senate voted not to sustain the opinion. This does not create a precedent since the Vice President's judgment was not sustained by the Senate and cloture was not invoked.

The second occasion was in 1975. Senators James Pearson (R-KS) and Walter Mondale (D-MN) attempted to use the Constitutional option. Pearson offered a motion providing for majority cloture on a change in the rules to reduce the supermajority required for cloture to 3/5 vote. The motion included the proposition that cloture on his proposal could be invoked by a simple majority. Majority Leader Mike Mansfield (D-MT) raised a point of order against the motion. Vice President Rockefeller ruled that if the Senate were to reject the Mansfield appeal, it would be the judgment of the Senate that the Pearson motion was constitutional and he would enforce cloture by a simple majority under the Constitutional option. The Senate tabled the point of order, but Senator James Allen (D-AL) was able to divide the question because the Pearson motion had two parts. Rockefeller allowed the division and ruled that the first part was debatable, nullifying the Pearson-Mondale victory in effect. Mondale offered another motion for an immediate simple majority cloture vote and again Mansfield raised a point of order which was tabled by the Senate.

Senator Robert Byrd (D-WV), backed by Senator Mansfield and the Republican leadership, offered a compromise 3/5 cloture (duly elected and sworn, rather than present and voting as in the Mondale proposal and retaining 2/3 for rules changes). The compromise was adopted and the Senate reconsidered and adopted the Mansfield point of order.

²⁸ Ibid.

Some view this action as reversing the precedent. Some believe that it did not reverse the initial point of order and that the precedent stands. In my view, the Senate, as it always has in its more than 200 year history, through this point of order, backed away from the consequences of majority cloture on rules changes, and did what the Senate does well, arrived at a viable and stable compromise.

Senator Byrd, in his excellent history of the Senate, points out that “By this action, as the Rules Committee’s published history stated, the Senate ‘erased the precedent of majority cloture established two weeks before, and reaffirmed the continuous nature of the Senate rules.’”

The argument over a precedent may be a side bar because, in reality, the Vice President or presiding officer can do whatever a majority will permit as long as he and the Senate’s majority are willing to ignore the Senate rules. (Rule XXII requires a 2/3 majority in order to end debate on a rules change and Rule V states, “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”)

In 1967, Senator Sam Ervin (D-NC), who had served as a Justice on the North Carolina Supreme Court and who later became famous for his Chairmanship of the Senate Watergate Committee, pointed out:

“If a majority can act as proposed... at the beginning of the session, it can so act on any day of the session... [The only rule the Senate could have under this theory would be that the majority of Senators present on any given occasion could do anything they wish to do at any time regardless of what the rules of the Senate might be. If the Constitution does not permit the Senate to adopt rules which can bind a majority of the Senate at the beginning of the session, it does not permit the Senate to adopt rules which can bind a majority at any time in the session. This conclusion is inescapable because the provisions of the Constitution applicable to the Senate are exactly the same on every day of the session, however long it may last.”²⁹

The question of majorities binding future majorities, and legislatures binding future legislatures is central to the “constitutional option” argument. This is particularly true because the Senate acted in 1959 to adopt Senate Rule V which states, “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.” The question arises whether that rule binds future Senates.

There are many circumstances in which the Congress “binds” future Congresses in much the same way. These provisions like Rule V, however, do not truly bind the future bodies because the Congress is able, under the rules, to change or reverse the actions.

²⁹ Congressional Record, January 18, 1967, pp. S925-S926.

Examples include laws which Congress has passed which impose expedited procedures on the Congress like the War Powers Act of 1973, the Trade Act of 1974, the Defense Base Closure and Realignment Act of 1990, and the Congressional Accountability Act of 1995.

These expedited procedures affect activities of both houses of Congress, their committees, and the role of Senators in shaping public policy through debate and amendments.

In addition, the Budget Act of 1974 creates the reconciliation process, and the budget process has been amended to create such past laws as Gramm-Rudman, and more recently PAYGO. In addition, the Senate has imposed the Byrd Rule on itself to limit amendments under reconciliation. These have binding characteristics on the Congress which can only be waived by supermajority votes. Actually, Rule XXII is less binding since it applies only to debate and the rules themselves can be amended by a simple majority vote.

Also, I would argue that in the Constitution, the Founders bound all future Congresses, Constitutional Conventions, and potentially huge majorities of the American people, when they wrote in Article V “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”

Finally, James Madison in a letter to Thomas Jefferson written on February 4, 1790, refers to three categories: (1) constitutions; (2) *laws irrevocable at the will of the legislature*; and (3) laws involving no such irrevocable quality. Clearly, he saw the second as a legitimate category of laws.³⁰

Madison writes:

“On what principle does the voice of the majority bind the minority? It does not result I conceive from the law of nature, but from compact founded on conveniency. A greater proportion might be required by the fundamental constitution of a Society, if it were judged eligible. Prior then to the establishment of this principle, *unanimity* was necessary; and strict Theory at all times presupposes the assent of every member to the establishment of the rule itself. If this assent can not be given tacitly, or be not implied where no positive evidence forbids, persons born in Society would not on attaining ripe age be bound by acts of the Majority; and either a *unanimous* repetition of every law would be necessary on the accession of new members, or an express assent must be obtained from these to the rule by which the voice of the Majority is made the voice of the whole.”³¹

The Senate, exercised its right, under the Constitution, to establish a rule (Rule V) which sets out the procedures for future Senates to amend their rules. This is far less binding than “laws irrevocable at the will of the legislature” since Senate rules are revocable.

³⁰ *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1826*, ed. by James Morton Smith, W. W. Norton (1995). Found at http://www.constitution.org/jm/17900204_tj.htm.

³¹ *Ibid.*

Senator Mansfield, during the 1967 debate, even though he strongly supported changing Rule XXII from the two-thirds requirement to the three-fifths rule warned:

“...[T]he urgency or even wisdom of adopting the three-fifths resolution does not justify a path of destruction of the Senate as an institution and its vital importance to our scheme of government. And this, in my opinion, is what the present motion³² would do. The proponents would disregard the rules which have governed the Senate over the years simply by stating the rules do not exist...

This biennial dispute for a change in the rules has brought to issue the question of the Senate as a continuing body. The concept is really symbolic of the notion of the Senate in our scheme of government... What should be considered is whether the motion at hand- the motion for simple majority cloture- would destroy the character of the Senate as a parliamentary body... If a simple majority votes to sustain the availability...this motion at this time, it necessarily means that henceforth on any issue, at any time, and during any future session of any Congress a simple majority, with a cooperative presiding officer, can accomplish any end they desire without regard to the existing rules of process and without consideration or regard to the viewpoint of any minority position...

The issue of limiting debate in this body is one of such monumental importance that it reaches, in my opinion, to the very essence of the Senate as an institution.”³³

³² A motion by Senator McGovern which would have invoked cloture by a majority vote.

³³ Congressional Record, January 18, 1967, pp. S921-S922.

Biography

Robert Dove, is Parliamentarian Emeritus of the United States Senate, served for over 30 years as a Parliamentary expert in the United States Senate, including 13 years serving as the Senate's Chief Parliamentarian. Since his retirement in May 2001, he has been named Congressional Professor at George Washington University, and joined the faculty of the Georgetown University Law Center as a senior policy Fellow and Adjunct Professor. Dr. Dove is the author of articles and chapters on congressional procedure including sections of the Encyclopedia of Congress, and "Enactment of a Law: Procedural Steps in the Legislative Process." He has acted as parliamentary consultant to numerous foreign government entities such as the Russian Duma, the Yemen Parliament, the Kuwait Parliament, the Bulgarian Legislature, and the Polish Legislature.

Employment History

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Certifications

Dr. Dove was certified as a Professional Parliamentarian by the American Institute of Parliamentarians in 1987.

Selected Publications

published PUBLIC MANAGER Summer 1992 "Leaders and Policymaking"

LAW & TECHNOLOGY V. 17 N. 4 1984 "The Computerization of the Office of Senate Parliamentarian"