

THE “NEW CONGRESS” OPTION
AND THE “CONSTITUTIONAL”
OPTION:

AMENDING THE SENATE’S RULES
TO ALLOW VOTES ON
NOMINATIONS

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JAY ALAN SEKULOW, *Chief Counsel*
COLBY M. MAY, *Senior Counsel*
JAMES M. HENDERSON, SR., *Senior Counsel*
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Two essentially identical options for changing the cloture rule and terminating a filibuster by a simple majority vote exist.

One option takes into account a longstanding view that, although the Senate views itself as a continuing body, it is peculiarly anti-constitutional to bind the Senate of a newly elected Congress to a set of procedural rules adopted by a previous Congress, and that as a consequence, at least at the commencement of each new Congress of the United States, the Senate should, by simple majority vote, be afforded the opportunity to determine for itself the Rules of its proceedings. This option is the “new Congress” option.

The second option proceeds from the same constitutional principle, that is, that each House possesses the power to make its own rules for proceedings. Although it has been described as a “nuclear” option, because of its powerful ramifications for a startlingly swift change amidst debate over a nomination. Because the power to make rules for its proceedings is deposited in the Senate, by the Constitution, this is the “constitutional” option.

THE “NEW CONGRESS” OPTION

The following approach is suggested from the cloture amendment efforts covering a period from the late 1940s through the mid-1970s:¹

1. At the commencement of the new Congress, a Senator, most likely the Majority Leader, obtains recognition of the Senate President.
2. Upon recognition, the Senator offers a motion to adopt rules of procedure for the new session of Congress.
3. At that point, another cooperating Senator inquires of the Senate President on two points of order: whether the proposed motion is in order (putting in dispute whether the adoption of new Rules was permissible); and, under what rules the Senate was at that time proceeding.

1. For a detailed discussion of the history of the cloture rule amendment process, see RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES at 1221-24 (101st Cong., 2d Session); see also BINDER AND SMITH, POLITICS OR PRINCIPLE: FILIBUSTERING IN THE UNITED STATES SENATE at 173-82 (Brookings Institution Press 1997). For an oral history of the maneuvers in the Senate in 1957 to amend the Rules, see “Floyd M. Riddick, Senate Parliamentarian,” Oral History Interviews, Senate Historical Office, Washington, D.C. (oral history of the late 1950s effort by Vice President Nixon to liberalize the rule on invoking cloture) (also available on the Internet at http://www.senate.gov/artandhistory/history/oral_history/Floyd_M_Riddick.htm). For a larger discussion of the filibuster, see generally Harris, Deadlock or Decision: The U.S. Senate and the Rise of National Politics (Oxford Univ. Press 1993); Fisk and Chemerinsky, The Filibuster, 49 STAN. L. REV. 181 (1997).

4. In response, the Senate President rules² first that the Senate is, at that time, proceeding under normal rules of parliamentary procedure because no Rules had yet been adopted by the current Senate for its proceedings.³

5. And, the Senate President rules that the motion to adopt rules is in order under standard rules of parliamentary procedure, and is subject to simple majority vote.

6. Senators objecting to these rulings may appeal them, making those rulings subject to approval or disapproval by simple majority votes of the Senate.

7. Once the rulings are affirmed, or if not appealed, the Senate may proceed to consideration of the motion to adopt Rules for its proceedings.

THE “CONSTITUTIONAL” OPTION

In the details, this option is quite similar to the first alternative. Here, however, the tactic does not focus on the apparent right of the newly constituted Senate to adopt Rules for its proceedings free from the constraints imposed under Rules held over from prior Congresses. So, rather than being limited in time to the opening day of a new Congress, this option may be given effect at any point in time when a nomination’s consideration on the floor of the Senate has become hostage to extended debate.

Under the “constitutional” option, the issue would be presented at the time when a cloture motion is the current business of the Senate. In considering the motion, the steps set out above would be followed, omitting the question of what rules governed the proceedings of the Senate generally, and focusing instead on the applicability of Rule XXII and its supermajority requirements to the debate. Upon the ruling of the Chair that Rule XXII does not apply, and upon an appeal of the ruling to the Senate, a simple majority would have the power to affirm the ruling of the Chair.⁴

2. The views of the Senate President, presiding as Chair, can be expressed either as opinions, which are not binding or appealable, or as rulings, which are binding on the proceedings and are subject to appeal. Appeal of rulings of the Chair lie to the parliamentary body, and may be affirmed or overturned by simple majority vote.

3. The entire process is mapped out in detail in advance, or at least it can be and should be. See "Floyd M. Riddick, Senate Parliamentarian," Oral History Interviews, *supra* note 1 (describing forty hours of cooperative labor between Vice President Nixon and Riddick prior to the 1957 incident).

4. That appeal, itself, could be a question subject to debate (and hence to further filibuster), until a motion to invoke cloture becomes the business before the Senate.