12-30-68

MEMORANDUM

IN SUPPORT OF THE EFFORT TO STRENGTHEN RULE XXII

AT THE OPENING OF THE 91ST CONGRESS

The effort to strengthen the anti-filibuster rule at the opening of the Senate of the 91st Congress on January 3, 1969, will be the eighth such attempt in the past sixteen years. Prior to each of the earlier attempts, a Brief was prepared for the Vice President in support of the proposition that the Senate of the new Congress has the power to enact an anti-filibuster rule of its choosing at the opening of the new Congress by action of the majority unfettered by any restrictive rules of earlier Congresses. There would not appear to be any need for such a Brief at this time since Vice President Humphrey's rulings, statements and opinions at the opening of the 90th Congress in 1967 point the way to the procedure to be followed at the opening of the 91st Congress (see Point IV of the Memorandum for a review of the 1967 experience).

While a Brief to the Vice President would not appear to be necessary under these circumstances, this Memorandum is being prepared and circulated to highlight a number of historical and other matters which may be helpful to those participating in the effort to change Rule XXII at the opening of the 91st Congress. Point I deals in brief outline with the need to change Rule XXII. Point II makes clear that there is no escape from the filibuster once the existing Rule XXII is accepted at the opening of the 91st Congress. Point III summarizes the reasons why the Senate of each new Congress has a constitutional right to adopt rules of proceedings for the Senate of that Congress by majority vote unfettered by any action or rules of the Senate of any preceding Congress. Point IV summarizes the procedure utilized in the 1967 effort to obtain a new Rule XXII, which procedure can act as a model for the 1969 effort.

It should be noted at the outset that this Memorandum will not deal with the comparative merits of cloture by constitutional majority (51 Senators) as against cloture by three-fifths of those present and voting. As is made clear in Point IV outlining what happened in 1967, the Senators supporting each of these proposals to change

Rule XXII were able to work together in support of the basic principle that the majority of the Senate of a new Congress can act at the opening of the new Congress to write a new rule. If and when that principle is established in 1969, one or the other of these two proposals can be adopted by the Senate in accordance with the will of the majority.

About the only additional word of introduction that would seem appropriate at this point is to indicate one very real favorable aspect of the forthcoming effort. The Senators who have long sought a new anti-filibuster rule have always recognized that the effort can and will only be successful if it has strong bi-partisan support. This time the effort is being made shortly after an election in which the standard bearers of both political parties were men who are veterans of past campaigns to change Rule XXII. Thus, President-elect Nixon, when Vice President, gave numerous advisory rulings to the effect that the majority of the Senate of a new Congress can act at the opening to determine the rules governing its operations and that any effort to obstruct this action would be unconstitutional. The Democratic candidate, Vice President Humphrey, who will again be in the Chair on January 3, 1969, has not only taken the same position as President-elect Nixon, but was a leading champion of a new rule providing for cloture by a constitutional majority of the Senate. On this hopeful note we have prepared and are circulating this Memorandum.

I.

RULE XXII OBSTRUCTS THE WORK OF THE SENATE AND WEAKENS ITS STANDING BEFORE THE NATION

The success or failure of the efforts made on the opening day of the 91st Congress to end the filibuster may very well determine the outcome of much important legislation which will be presented to the new Congress. Rule XXII is not only the "gravedigger" of much meaningful legislation, but it is equally the threat under which other vital legislation has been defeated, delayed or compromised to meet the views of the minority. It would not be too much to say that what

is at stake in the fight for a new Rule XXII at the opening of the 91st Congress is nothing more nor less than the dignity of the Senate and its ability to function as a democratic and representative legislative body.

There is no need to belabor the long and sad history of the filibuster in the Senate. For those who care to study the subject, a list of 36 bills (not purporting to be complete) which had been defeated or delayed by the filibuster was inserted as an exhibit during the January, 1961, debate on proposed changes in Rule XXII (107 Cong. Rec. 66). The 36 bills ranged from one end of the issue spectrum to the other; they covered civil rights, proposals for statehood, ship subsidy bills and other matters vital to the national interest. And there is more recent filibuster history during the last two Congresses that is equally damaging to the work of the Senate and its standing before the nation:

(i) A majority of Senators favored the repeal of Section 14(b) of the Taft-Hartley Law. The bill repealing 14(b) passed the House in the 90th Congress; but, when it came to the Senate, repeal was never enacted into law simply because the minority maintained a successful filibuster. On February 8, 1966, 51 Senators supported invoking cloture and 48 opposed cloture. On February 10, 1966, 50 Senators supported invoking cloture and 49 opposed it. Rule XXII thwarted the will of the majority.

(ii) The 1966 Civil Rights Bill is another case in point. The House of Representatives passed a strong Civil Rights Bill including much-needed federal and state jury reform, increase of federal authority against racial violence,and prohibition of discrimination in housing. Just as in the House, a majority of the members of the Senate supported the bill; just as in the case of the repeal of 14(b), the filibuster succeeded in thwarting the will of the majority. On September 14, 1966, 54 Senators supported invoking cloture and 42 opposed it. Counting the pairs, the vote would have been 56 to 43. On September 19, 1966, 52 Senators supported invoking cloture and 41 opposed it.

Counting the pairs and publicly-announced positions, the final vote would have been 57-43. Despite this substantial preponderance in favor of the 1963 Civil Rights Bill, the bill died in the 89th Congress.

(iii) Home rule, too, was executed by the Rule XXII guillotine. The Senate had passed a Home Rule Bill in 1965 by the overwhelming vote of 63 to 29. After the bill was stymied in the House, Senator Morse proposed a less controversial Home Rule Bill as an amendment to the Higher Education Bill. A filibuster was threatened; cloture was the only method of dealing with the matter as the session was drawing to a close. Despite the full debate on, and the overwhelming support for, the stronger Home Rule Bill in 1965, cloture failed. Forty-one Senators voted in support of invoking cloture and 37 opposed it. If the pairs and publicly-announced positions were counted, the vote would have been 53-40, with abstentions. Despite this overwhelming majority for home rule, the citizens of the District are left without the right of self-government.

Action blocked by the filibuster is no accurate measure of its pervasively destructive impact. The threat of filibuster is an ever-present force for dilution and compromise, rendering the Senate incapable of the bold and dynamic action which many believe is required to respond to the stresses and strains in our society. Most legislation is enacted in the latter part of each session of Congress; at that point the threat of a filibuster by even a very few Senators can force the removal of vital parts of badly needed legislations. The later in the session the legislation comes to the floor of the Senate, the stronger the threat of filibuster and the greater its debilitating effect upon the legislation.

For the greatest deliberative body in the world to act under the constant threat of filibuster is to render it impotent to mee the needs of the times.

Before it can lead the nation in these critical days, the Senate must put its own house in order. It must show its own sense of urgency if it expects a response commensurate with the urgency of the times. Rule XXII reflects frustration and apathy, not urgency; a change now would demonstrate the Senate's determination to give leadership at this critical moment.

II

THERE IS NO ESCAPE FROM THE FILIBUSTER ONCE THE EXISTING RULE XXII IS ACCEPTED AT THE OPENING OF CONGRESS

(1) No Escape Hatch after Rule XXII Is Accepted. Once the Senate of the 91st Congress, meeting in January 1969, accepts Rule XXII by action or acquiescence and commences to operate under that rule, there is no practical way of amending the rule later on in the session. The only time a new filibuster rule can be adopted is at the opening of the Senate of the new Congress on January 3, 1969. As Point III of this Memorandum demonstrates, at the opening of a new Congress a majority of the Senators present and voting can cut off debate and adopt any filibuster rule for the Senate of the new Congress that the majority desires. But, once the Senate of the 91st Congress has accepted Rule XXII by action or acquiescence and has commenced to operate under it, there is no way out.

(2) Rule XXII Is Self-perpetuating Except at the Opening of a New Congress. Once Rule XXII has been accepted by the new Congress it can be used as a lethal weapon against changing it; there is no way of obtaining the necessary two-thirds to close debate on a resolution for a new Rule XXII once the existing rules are in effect. The new rule will either be obtained at the opening of the Senate of the new Congress or it will not be obtained during the new Congress at all.

(3) Experience in Last Nine Congresses. That there is no escape from the filibuster if Rule XXII is accepted by the new Congress is shown by what happened in the last nine Congresses after opening-of-session efforts failed.

In the 82nd and 83rd Congresses, a change in Rule XXII was favorably reported to the Senate by the Rules Committee, but in both Congresses the threat of a filibuster kept the issue from the floor of the Senate.

In the 84th Congress, nothing whatever happened on Rule XXII.

In the 85th Congress, the Rules Committee on April 30, 1958, reported out Senate Resolution 17 to amend Rule XXII to provide for majority rule after full and fair debate. On July 28, 1958, a bi-partisan group of a dozen Senators took the floor and urged action on Senate Resolution 17, but the Resolution was not called up for action.

In the 86th Congress, both those who supported a substantial change in the filibuster rule and those who supported only a negligible change (from two-thirds of the total Senate to two-thirds of those present and voting) moved for a change in Rule XXII at the opening of the Senate of the 86th

Congress before any other business had been transacted. Those who favored the negligible change from two-thirds of the total Senate to two-thirds of those present and voting won out over those who favored the substantial change. But this cannot obscure the fact that both sides recognized that the time, and the only time, to obtain any change in the filibuster rule is on opening day of the Senate of a new Congress when the majority of the Senate can vote its will.

In the 87th Congress the Majority and Minority Leaders sent the motion for a new Rule XXII to the Rules Committee with a promise that there would be action later in the Senate. The Majority Leader later stated that, "I am not at all certain that there will be a filibuster . . ." (107 Cong. Rec. 521). And the Minority Leader went even further, saying that, if a filibuster against a rules change were to develop, "it would be like falling off a log to get two-thirds of the Senators to vote for cloture" (107 Cong. Rec. 527). Despite these assurances, when the matter was brought up on the floor in September, 1961, the filibuster prevented action on a change in Rule XXII and the matter died as it was bound to do.

In the 88th Congress, after Vice President Johnson put the motion to close debate under the Constitution to the Senate for debate instead of for a vote (thus killing the motion) and after the cloture motion under Rule XXII was lost, the subject of changing Rule XXII was never heard from again in that Congress.

In the 89th Congress, a unanimous consent agreement was reached at the opening of Congress sending the matter to committee under instructions to report back by March 9, 1965, with "all existing rights" protected. The Rules Committee did report back on March 9, but the matter was not called up for debate because the impending Voting Rights Bill appeared more important.

In the 90th Congress, after the effort to change Rule XXII at the opening of Congress failed (see Part IV), the issue was dead for the remainder of the Congress.

Whatever assurances may be given about action after the opening of the Senate of a new Congress, history renders those assurances meaningless. It is the opening of Congress -- or never.

III

THE SENATE IN EACH CONGRESS HAS A CONSTITUTIONAL RIGHT TO ADOPT RULES OF PROCEEDINGS FOR THE SENATE OF THAT CONGRESS BY MAJORITY VOTE UNFETTERED BY ACTION OR RULES OF THE SENATE OF ANY PRECEDING CONGRESS

(1) Brief Filed During January, 1961, Rule XXII Effort Never Answered. On December 30, 1960, a number of Senators favoring majority rule presented to Vice President Nixon a "Brief in Support of Proposition that a Majority of the Members of the Senate of the Eighty-Seventh Congress Has Power to Amend Rules at the Opening of the New Congress Unfettered by Any Restrictive Rules of Earlier Congresses." This Brief was inserted in the Congressional Record on January 5, 1961, by Senator Douglas (107 Cong. Rec. 232-241) and will not be repeated here, particularly as this Brief was never seriously challenged or controverted. Indeed, in none of the debates of recent years has anyone made a serious effort to challenge the basic proposition that the Senate of a new Congress has power to act unhindered by rules from the past. What follows is a summary of the arguments in favor of the right of the Senate of the new Congress to act. (Further details are available in the earlier brief through reference to the cited pages of the Congressional Record.)

(2) The Basic Constitutional Issue. Then Vice President Nixon's advisory rulings in 1957, 1959 and 1961 (collected at 113 Cong. Rec. 917-918) reflect a very real understanding of the basic constitutional principle here involved -- that the members of the Senate of each new Congress have undiluted power to determine the manner in which they will operate during that Congress and have no power whatever to determine the manner in which the Senate of future Congresses will operate. This basic constitutional principle is rooted both in Article I, Section 5 of the Constitution and in the historic democratic principle that the present shall determine its own destiny unhampered by the dead hand of the past.

The Senate of the First Congress meeting in 1789 promptly adopted rules (see Debates and Proceedings in the Congress of the United States, Vol. 1, pp. 15-21). Just as the Senators of the First Congress meeting in 1789 had undiluted power to determine the rules under which they would operate, so the Senators of the 91st Congress meeting in 1969 have undiluted power to determine the rules under which they will operate. No rules of the Senate of an earlier Congress protecting filibusters can obstruct this right to adopt rules to govern the transaction of business. And no Senator or

group of Senators can obstruct this right by seeking to prevent action on the rules through undertaking a filibuster. The filibuster is not a constitutional or a God-given right. It is up to the majority of the Senators convening on January 3, 1969, to determine whether and how they will limit the use of the filibuster for the Senate of the 91st Congress.

(3) Article I, Section 5 of the Constitution of the United States is Determinative. That section declares that "each House may determine the rules of its proceedings." Both the language and context make clear that "each House" means not only the separate branches of the Congress -- that is, the House and the Senate -- but also the separate branches of each succeeding Congress. No reason has been or can be adduced to interpret this constitutional provision as a grant of rule-making authority to the members of the House and the Senate meeting for the first time in 1789 and a withholding of this same authority from the members of the House and the Senate of later Congresses. Both language and logic lead to the conclusion that the constitutional authority to make rules is granted to each House of each Congress.

Article I, Section 5, as we have just seen, is an identical grant of rule-making authority to each House of Congress. It is not disputed that the House of Representatives of each new Congress has the power to, and does, adopt new rules at the opening of each Congress. The identical constitutional provision cannot reasonably be given a different interpretation as applied to the Senate, a coordinate branch of the "Congress of the United States." Article I, Section 1. The two bodies must act as a team in the Congress, and, if the Senate is so inhibited by old rules that it cannot express the will of its majority on legislation, the will of Congress is thwarted and the rule-making authority of the House becomes meaningless. Every principle of constitutional construction supports the interpretation of Article I, Section 5, which gives the majority of the Senate present on January 3, 1969, the right to "determine the rules of its proceedings" unfettered by action or rules of the Senate of any preceding Congress.*/

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*/ Since the Constitution gives the majority of the Senate present on January 3, 1969, the right to "determine the rules of its proceedings," Section 2 of Rule XXXII cannot thwart this right. Section 2 of Rule XXXII provides that "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." This Section may be valid with respect to rules that do not obstruct the will of the majority in the Senate of the new Congress, but as then Vice President Nixon repeatedly made clear, it is unconstitutional as applied to Rule XXII. Simply put, a majority in 1959 cannot

(4) The Four Closest Senate Precedents Support the Right of the Majority to Act. In 1841 the Senate dismissed a printer whom the Senate of an earlier Congress sought to foist upon it. In 1876 the Senate abrogated the joint rules of the Senate and House which had been carried over from Congress to Congress by acquiescence for 87 years. In 1917 Senator Tom Walsh of Montana challenged the binding effect of the rules of the earlier Senate upon the new body and accomplished his purpose of obtaining the cloture rule he sought before acquiescing in the old rules. In 1957, 1959 and 1961 then Vice President Nixon gave repeated advisory rulings that a majority of the Senate of a new Congress can act to adopt its own rules without the obstruction of actions and rules of the Senate of an earlier Congress and that a motion to cut off debate would be in order against a filibuster attempt to prevent a determination of the rules to govern the Senate of the new Congress.*/ Thus, in the four closest precedents, the Senate, while some of its members talked "continuous body" and others talked in a contrary vein, each time supported the right of the Senate to adopt new rules unfettered by past actions (see 1961 Brief, 107 Cong. Rec. 232-241).

(5) The Senate of Each New Congress Makes a Fresh Start on All Activities. In every major activity the Senate recognizes a constitutional right of the Senate of each new Congress to determine both legislative and executive business anew. All consideration of bills, resolutions, treaties and nominations start at the beginning of each Congress without reference to or continuation of what has taken place in the past; new officers and committee members are elected in the Senate of each new Congress; when the Senate finally adjourns, the slate is wiped clean and proceedings begin again in the next Congress.

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give a minority in 1969 the right to prevent the majority in 1969 from exercising its democratic will. It might also be well to note that there is doubt whether there actually was a majority for this provision in 1959; it was added as part of a "compromise package" and no vote was ever taken on this provision separately. At any rate, neither this provision nor any other rule can override the Constitution of the United States.

*/ Actually, it would be possible to cite another Vice President to the same effect, although not in the same detail, as Vice President Nixon. On the opening day of the new Congress in 1953, Vice President Barkley stated to the Senate that: "The organization of the Senate is an inherent right of the Senate, as it is of any sovereign body, and all that has taken place up to date (election of officers) has been under that inherent right." This inherent right to organize the Senate includes, as Vice President Barkley was making clear, the right of the majority to determine the rules under which the Senate would operate.

Everything starts afresh with the possible exception of the rules. And these, too, it is submitted, start afresh in whole or in part the moment a majority of the Senators at the opening of the Senate of a new Congress so wills it and so votes. All that has happened over the past years is that there has been acquiescence in the carry-over of rules of the Senate from Congress to Congress.*/ Carry-over of the rules based on acquiescence is certainly no precedent for arguing that the earlier rules bind the Senate of the new Congress in the absence of such acquiescence. Absent acquiescence, the Senate of the new Congress has power to adopt its rules at the opening of the new Congress unfettered by any restrictive rules of earlier Congresses. The acquiescence in Rule XXII will be ruptured when the resolutions to change the rule are offered on January 3, 1969.

(6) Continuous Body Talk is Irrelevant. As we have seen in (4) and (5) above, the Senate has not in the past acted as a continuous body.

It did not act as a continuous body in 1841 when it dismissed the printer chosen by the Senate of the earlier Congress; it did not act as a continuous body in 1876 when it adopted new joint rules; and it did not act as a continuous body in 1917 when it yielded to the contrary arguments of Senator Walsh and adopted the cloture rule he demanded.

It does not today act as a continuous body; it wipes the slate clean on bills, resolutions, treaties and nominations at the beginning of each new Congress.

No one would deny that many Senators have talked in terms of a continuous body and that some textbook writers have accepted this talk in their academic works. But the talk has been largely by those who tried -- unsuccessfully -- to use the phrase to prevent Senate action departing from that of the Senate of an earlier Congress and who have failed in their efforts.

Actually, parliamentary bodies generally have both continuous and discontinuous aspects. The House of Representatives has continuous aspects and yet no one refers to it as a continuous body and no one disputes its right to adopt new rules at the beginning of each Congress. By the same token, the Senate has both continuous and discontinuous aspects; its limited continuous aspects (e.g., two-thirds carry-over) do not support the proposition that the Senate of an earlier Congress can prevent the Senate of a new Congress from acting upon rules as the majority may determine at the opening of the new Congress.

*/ Except, of course, in 1917, when Senators Walsh and Owen refused to acquiesce until the Senate adopted the cloture rule they sought, and in 1953, 1957, 1959, 1961, 1963, 1965 and 1967, when Senators sought to change the rules as we are now doing.

The argument for the carry-over of the rules seems to come down to this: Because two-thirds of the Senators carry over, the Senate is a continuous body; because the Senate is a continuous body, the rules carry over. Striking the words "continuous body" out of this formula, the argument comes down to this: Since two-thirds of the Senators carry over, the rules carry over. But this is a patent non-sequitur. It assumes that the carry-over of two-thirds of the Senate always carries over a majority in favor of the rules. The infusion of one-third newly elected Senators -- both by their numbers and their power of persuasion -- may very well change the majority view on rules and it is this majority view that is determinative under our constitutional democracy, not who carries over. That the new one-third may change the majority on any matter is well illustrated by the shifting of the Senate from Party to Party over the years. The argument that the two-thirds carry-over prevents the new majority from acting on the rules disenfranchises not only the newly elected one-third, but the new majority who are prevented from exercising their powers and duties to make the rules for their own work and laws for the people. To say that the Senate of the 91st Congress in 1969 is the same as the Senate of the First Congress in 1789 because two-thirds of its members carried over to the Senate of the Second Congress is to prefer romantic form to rational substance and dubious academic theory to practical reality.

Some Senators genuinely believe the Senate is a "continuous body." Others genuinely believe that it is not, that it acts as a "discontinuous body." Both have the right to their opinions. But when a descriptive term resulting from nothing more than the carry-over of two-thirds of the Senators is used as a reason for preventing the majority of the body from determining the Senate's actions, an adjective is being confused with a reason and an effect with a cause. The parliamentary deadfall dug by the Senate of a dead Congress, harmless enough as an abstraction, should not be permitted to stultify and destroy the power of the Senate and of the entire Congress in the present. We turn now to a review of the procedure followed in 1967 in an effort to establish the right of a new Congress to determine its own rules.

IV

THE PROCEDURE FOR A NEW RULE XXII UTILIZED AT THE OPENING OF THE 90TH CONGRESS IN JANUARY, 1967

The Senate of the 90th Congress met for the first time on Tuesday, January 10, 1967, swore in its newly-elected members, performed a few housekeeping chores of organization, heard the President's State of the Union Message, and adjourned until the following day. The only reference to the Rule XXII question on opening day occurred when Majority Leader Mansfield asked unanimous consent for a recess until receipt of the resolution for the joint session to hear the President's Message. At that point, Senators Kuchel and Clark intervened to safeguard the rights of those seeking to change Rule XXII, and the following colloquy took place (113 Cong. Rec. 8-9):

> "Mr. KUCHEL. I know my able friend knows that some of us are interested in the proposal to change the rules, a subject which will be discussed after we reassemble.
>
> "Mr. MANSFIELD. May I say that that can be done today or tomorrow. No Senator will lose any privilege; it makes no difference whether it takes place today or later.
>
> "Mr. CLARK. Mr. President, reserving the right to object, I wish to propound a parliamentary inquiry.
>
> "Mr. MANSFIELD. If the Senator objects, I shall have to make a motion.
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> "Mr. CLARK. I should like to ask the Vice President and Parliamentarian whether the ruling would be in accord with what the majority leader has just said, namely, that an opportunity to make any such motion to change rule XXII would not be vitiated or nullified in any way and that no rights would be lost.
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> "The VICE PRESIDENT. The Chair will say that no rights of any Senator would be in any way infringed by the request of the majority leader. The right of each Senator to make such motion as he might desire to make, whenever that time comes, would be preserved. In other words, the situation to which the Senator from Pennsylvania refers, the right of a Senator to make such a motion with regard to the rules, would be preserved.
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> "Mr. CLARK. I thank the Senator. I have no objection."

On Wednesday, January 11th, Senator McGovern was recognized at once to offer his resolution (S. Res. 6), to amend Rule XXII by changing the requirement for the termination of debate from two-thirds of those present and voting to three-fifths of those present and voting (113 Cong. Rec. 180). After the reading of Senator McGovern's resolution, he asked unanimous consent that the Senate proceed to the

immediate consideration of the resolution. When Senator Ervin objected, Senator McGovern immediately gave notice in writing under Senate Rule XL that he would move to amend Rule XXII and his Rule XL notice set forth the three-fifths resolution for which he had just failed to get unanimous consent for immediate consideration. The resolution and the notice under Rule XL appear at 113 Cong. Rec. 180. Thereafter, Senator Morton, the co-sponsor of the McGovern three-fifths resolution, spoke briefly in support of that resolution. At this point, Senator Kuchel, in behalf of himself and fifteen others, offered the resolution (S. Res. 7) to close debate by a constitutional majority of the Senate (51 Senators). This resolution provided for twenty days debate before cloture could be invoked and 100 hours debate on the bill itself after cloture was voted. When Senator Kuchel's request for unanimous consent for immediate consideration of his resolution was objected to, he filed a notice of motion under Rule XL. Both his resolution and the notice of motion are set forth at 113 Cong. Rec. 181.

The purpose of submitting the three-fifths resolution ahead of the constitutional majority resolution was to permit the supporters of each to work together on the initial basic issue -- the right of the Senate of the new Congress to adopt its own rules by majority vote -- without jeopardizing the position of either group on the ultimate Rule XXII to be adopted. If the basic issue of the right of the Senate of a new Congress to act had been established and the Senate had then proceeded to vote on the two resolutions, by moving to substitute the constitutional majority resolution for the pending three-fifths resolution, those who supported the former would have been able to register their votes for constitutional majority and, if defeated, to have voted for three-fifths without weakening their position. The same procedure can be utilized this time.

With respect to the substance of the resolutions for three-fifths and constitutional majority submitted in 1967, there would appear to be no reason for any change in the body of either resolution. However, it would seem advisable for the Senator offering each of the resolutions to add to his introductory statement a reference to Vice President Humphrey's action in 1967. In other words, instead of simply proceeding under Article I, Section 5 of the Constitution and the advisory opinions

of then Vice President Nixon, it would be well to proceed under both of those and the rulings of Vice President Humphrey in 1967 as well.

After Senators McGovern and Kuchel had offered their resolutions on Wednesday, January 11th, a short colloquy thereon ensued; following some speeches on other subjects and the introduction of bills, the Majority Leader obtained unanimous consent for adjournment until the following day so as to meet the requirements of Rule XIV, Paragraph 6, that resolutions must lie over for a day.

On Thursday, January 12, the presiding officer laid S. Res. 6 (the McGovern-Morton three-fifths resolution) before the Senate (113 Cong. Rec. 383). Shortly thereafter, the hour of 2 o'clock having arrived, the Vice President announced that the resolution "now goes to the calendar" (113 Cong. Rec. 385). As soon as Senator Russell completed the speech he was in the process of making, Senator McGovern was recognized to "move that the Senate proceed to the consideration of Senate Resolution 6." Following Senator McGovern's motion, debate ensued, other matters were discussed, and the Senate recessed until Monday, January 16.

On Monday, January 16, and Tuesday, January 17, the McGovern three-fifths resolution continued as the pending business.

On Wednesday, January 18, the issue was joined. At the conclusion of the morning business, Senator McGovern was recognized. He asked "unanimous consent that all debate on the pending motion to proceed to the consideration of Senate Resolution 6 come to a close within 2 hours, the time to be equally divided between" the Majority Leader and himself (113 Cong. Rec. 908). Senator Dirksen objected. Thereupon, Senator McGovern, after an explanatory introduction, moved to close debate under the Constitution in the following terms:

> Mr. President, under article I, section 5, of the Constitution, which provides that a majority of each House shall constitute a quorum to do business, and each House may determine the rules of its proceedings, I move that debate upon the pending motion to proceed to the consideration of S. Res. 6 be brought to a close in the following manner:
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> "The Chair shall immediately put the motion to the Senate for a yea-and-nay vote and, upon adoption thereof by a majority of those present and voting, with a quorum present, there shall be two hours of debate upon the motion to proceed to the consideration of S. Res. 6 divided equally between the proponents and the opponents thereof and immediately thereafter the Chair shall put to the Senate, without further debate, the question on the adoption of the pending motion to proceed to the consideration of S. Res. 6" (113 Cong. Rec. 918).

Senator Dirksen made a point of order that debate could only be closed by a two-thirds vote (113 Cong. Rec. 918), and the Vice President submitted the point of order to the Senate on the ground that it raised a constitutional issue: "the Chair submits to the Senate the question: Shall the point of order made by the Senator from Illinois be sustained? That question is debatable" (113 Cong. Rec. 919). Thereupon, in answer to a series of parliamentary inquiries concerning the effect of a successful motion to table the point of order, the Vice President made clear his position that, if the tabling motion carried, the point of order would be deemed overruled and he would put the McGovern motion to close debate to an immediate vote. The Vice President said,

> "If the motion to table fails, the point of order remains the pending question and is debatable.
>
> "If the motion to table carries, then, of course, the point of order is not valid, and it is the understanding of the Chair, and he will so advise the Senate, that the motion of the Senator from South Dakota would be valid and the Chair would be instructed to place that motion before the Senate for an immediate vote" (113 Cong. Rec. 919).*

After considerable debate, in which the Vice President interspersed rulings and opinions, Senator McGovern moved to table the Dirksen point of order (113 Cong. Rec. 939). On a yea-and-nay vote, there were 37 for tabling and 61 against, with Senators Hartke and McCarthy absent but announced as voting for tabling (113 Cong. Rec. 940). Immediately thereafter, the vote was taken on the Dirksen point of order and it was sustained 59-37. The Senate promptly adjourned.

On Thursday, January 19th, Senator McGovern renewed his motion that the Senate proceed to the consideration of Senate Resolution 6 and Senator Mansfield and others filed a cloture petition under existing Rule XXII (113 Cong. Rec. 1011). The cloture vote was taken on Tuesday, January 24th -- 53 supporting cloture and 46 opposed (113 Cong. Rec. 1336). Thus ended the 1967 effort to change Rule XXII.

This review of the 1967 procedure shows it to have been wholly adequate and thus available as a model for the 1969 effort. If 51 Senators rather than 39 had supported the 1967 effort, the proponents

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*Later in the discussion the Vice President restated this same position: "The Chair stated that he would feel obligated if the motion to table the point of order was carried, to place for immediate vote the motion of the Senator from South Dakota" (113 Cong. Rec. 925).

of a new Rule XXII would have prevailed. The mechanics were not at fault and there would seem to be no reason to change them now unless the Vice President himself desires that there be such a change. Actually, the 1967 procedure was in part devised by the Vice President in order to give the Senate a chance to act without the Vice President having to make a direct constitutional ruling. Unless the Vice President would prefer a different route this time, there would seem to be no need for any change in the 1967 procedure.

One additional point about the 1967 procedure should, however, be noted before closing. It was Senator Dirksen's point of order against the McGovern motion to close debate that made it possible for the Vice President to announce that he would put the McGovern motion to the Senate for an immediate vote if the Dirksen point of order was tabled. A moment's consideration should, therefore, be given to the situation that would arise if neither Senator Dirksen nor any other opponent of the effort to change Rule XXII made a point of order against the motion to close debate. If that were to happen, the Vice President could not rely on the tabling of the point of order as the basis for putting the motion to close debate to the Senate for an immediate vote.

If no point of order were made against the motion to close debate, the Vice President would be in somewhat of a dilemma because of his own repeatedly-expressed desire in 1967 not to make a constitutional ruling but rather to allow constitutional questions to be settled by the membership of the Senate. The dilemma lies in the fact that both of the most likely courses of action upon the motion to close debate would be, in effect, constitutional rulings. Thus, if the Vice President put the motion to close debate to the Senate for an immediate vote, this would be a constitutional ruling in accordance with the views expressed in Point III of this Memorandum -- that the majority of the Senate of a new Congress does have power to close debate. If, on the other hand, the Vice President were to put the motion to close debate to the Senate for debate, he would be killing the motion and thus making a constitutional ruling against the power of the majority to act. Actually, the case against this latter course can be simply put -- you do not debate a motion to end debate. This is for the obvious reason that debating the motion renders it meaningless. It is just like the fact that you do not

debate a motion to adjourn because you defeat the motion by debating it. Because putting the motion to close debate to the Senate for debate is tantamount to saying that there is no way to get to a vote on a motion to end debate under the Constitution, we are confident that the Vice President, consistent with his public statements from 1953 to 1965 that the Senate of a new Congress does have power to act by majority vote, would put the motion to close debate to the Senate for a vote.

Of course, the Vice President could do one other thing. He could put to the Senate <u>for a vote</u> the question whether the Senate desired him to treat the motion to close debate as debatable or non-debatable. This, however, would be little different than putting the motion to close debate to the Senate for an immediate vote. Either accomplishes the same result -- the former in two votes, the latter in one -- it gives the majority a chance to act. More likely than any of this, however, a point of order will be raised against the motion to close debate and it can be assumed that the 1967 procedure will be followed this time unless the Vice President himself determines to adopt a different course.

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