SENATE CLOTURE

Let it be supposed that the business officially before the Senate at a given time is a bill dealing with some important but prosaic subject. A bill to amend the National Banking Act may serve as an illustration. A bank president deeply interested in the measure takes his seat in the gallery to listen to the debate and to await the vote.

The senator who happens to have the floor is commenting at length on some recent act or utterance of the President or of a cabinet officer and is criticizing them in harsh or even in violent terms. The visitor waits a reasonable time for the speaker to refer to banking or to make some application of his remarks to the question before the Senate. He waits in vain. The senator is not discussing the banking bill and has no idea of doing so. Why is he not called to order? He is not out of order. There is no rule of relevancy in the Senate. Unless by consent a special regulation has been made applicable to the pending question, any senator may speak on any subject he pleases and as long as he wants. "Why not amend the rules?" the visitor inquires. He is told that the Senate has always hesitated to adopt a rule empowering the presiding officer to decide whether or not the remarks of a senator are relevant to the issue. On an appeal to the Senate from a decision that the remarks are irrelevant, a bare majority might, it is said, sustain a gag ruling in the crisis of an important debate. The visitor is perhaps also reminded by a senator who has accompanied him into the gallery that the Senate is, among other things, a forum in which senators may ventilate their views at pleasure and on any subject; that while forbidden by senate rule to refer offensively to any state of the Union or to impute unworthy motives or conduct to one another, there is no such rule restraining them when they criticize or attack other officers of Government or even the President himself; and that, in the opinion of many, this liberty of speech is in the nature of a safety-valve and may even be at times a substitute for revolution. "Had there been a Senate in Russia," the visitor may be told, "the fires that smouldered long and

burst forth all at once and with such terrible effect might have spent themselves harmlessly one by one and at intervals."

The visitor who is interested in the banking bill is possibly not convinced by this historical speculation. He is apt to inquire what is the probable motive which actuates the speaking senator to launch his attack upon the President and cabinet at this particular time. If the answer is that the senator has no special hostility to the banking bill, or is actually in favor of its passage, the only reasonable explanation of his course is that he is speaking either from sincere conviction or for partisan political effect. If, on the other hand, there is reason to believe that he is vehemently opposed to the pending bill and fears that a majority will vote in its favor, there is some ground for inferring that the speaker is engaged in a filibuster against the measure; *i. e.,* is using the right of debate, not to clarify the issue or to enforce his own views, but to postpone as long as he can the opportunity of the majority to enact the measure. It is, of course, a well-known fact that filibusters have been organized and carried on at various times both by individual senators and by political parties and often with deadly effect. Especially when every second year the life of a Congress must end on March 4th, it is possible for a well-organized group so to maneuver during the closing days of the session as to make a vote altogether impossible.

"Is there no rule," the persistent visitor asks, "by which a majority of the Senate can force a measure to a vote when they honestly believe that the delay in reaching a vote is due to the existence of a filibuster rather than to a bona fide desire for further discussion?" His attention is called to Senate Rule *XXII,* which is as follows:

> If at any time a motion, signed by sixteen Senators, to bring to a close the debate upon any pending measure is presented to the Senate, the presiding officer shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the Secretary call the roll, and, upon the ascertainment that a quorum is present, the presiding officer shall, without debate, submit to the Senate by an aye-and-nay vote the question:

"Is it the sense of the Senate that the debate shall be brought to a close?"

And if that question shall be decided in the affirmative by a two-thirds vote of those voting, then said measure shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the pending measure, the amendments thereto, and motions affecting the same, and it shall be the duty of the presiding officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be in order after the vote to bring the debate to a close, unless the same has been presented and read prior to that time. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the presiding officer, shall be decided without debate.[1]

This rule, it will be observed, provides a method by which two-thirds of the Senate can terminate debate and secure a vote. This is cloture. It is then explained to the visitor that it is to substitute a 51 per cent. cloture for a 66 per cent. cloture that Vice-President Dawes has launched a campaign. "Will his campaign be successful?" the visitor inquires. His senatorial friend is not sure. The change is not popular in the Senate but it is very popular at home. Why the distinction? Because most senators think that they better than their constituents understand how the Senate should be run; while practically all constituents are sure that their own view of the subject is the correct one. If popular opinion is definitely and persistently in favor of majority cloture, of course, in the end the action of the Senate will be responsive to it.

While the visitor interested in the prompt passage of the banking bill is praying that even more strength be given to the Vice-President's right arm, it will be well to review the arguments advanced on either side of the proposal which he is advocating.

[1] For an account of the conditions which led to the adoption of this rule, see THE FORUM for October, 1925, at p. 578, where appears an extract from a speech on the subject by the Vice President.

The Senate, under the Constitution, has several important duties to discharge. It occasionally sits as a court of impeachment. It must advise and consent to the appointment by the President of various sorts of public officers. It must perform a like function in respect to the ratification of treaties negotiated by the Executive. It must share with the House of Representatives responsibility for all the legislation of Congress.

The filibuster may be resorted to in order to prevent confirmation of a presidential appointment, in order to block the ratification of a treaty or in order to defeat a legislative measure.

My observation is that, in the case of nominations, the danger is apparent rather than real. Sooner or later a vote is certain to be reached. The intervening debate uniformly helps to clear the air. If it were to become evident that obstruction was being attempted Rule *XXII* might be successfully invoked as it stands. There are always some minority senators who are reluctant to embarrass the President in the matter of appointments. Such action sets a precedent for which they themselves might suffer when political fortunes have changed.

In the case of a treaty, ratification requires the concurrence of two-thirds of the senators present. If two-thirds are actually eager to vote for ratification, Rule *XXII* as it stands will effectually serve their purpose. If a 51 per cent. cloture rule were in effect, I can think of only one situation in which a vote could be forced more effectively than under Rule *XXII*. That is the situation in which some senators propose to vote for ratification in case a vote is reached but are sufficiently in doubt about the merits of the treaty to prefer that no vote be taken at all. My judgment is that a bare majority ought not to have it in their power to accomplish ratification by forcing these reluctant senators to vote. Unless the treaty can command the convinced support of the constitutional majority it had better lapse.

During the special session of March of 1925 the question arose whether or not the Senate would advise and consent to the ratification of the Treaty with Cuba concerning title to the Isle of Pines. I had been put in charge of the measure on the floor by the Chairman of the Committee on Foreign Relations. After

a debate upon the merits it became evident that a minority filibuster was being developed. It was equally evident, however, that two-thirds of the Senate were ready to vote in favor of ratification. Accordingly we prepared a form of motion for cloture under Rule *XXII* and had it signed by the requisite number of senators. In the belief that we were sure of the votes needed for ratification, we held the motion in reserve for use in case the filibuster could not otherwise be suppressed. In point of fact, it gradually flickered and went out so that the motion was never actually presented. But the incident shows that cloture is available when the case for ratification is clear. And my own judgment is that, if the case is not clear, ratification by majority cloture would be undesirable. As applicable to treaties, therefore, as well as to executive nominations, I should not be in favor of changing the present rule.

The legislative field is the true battle ground.

The Vice-President thus puts the case in favor of majority cloture in connection with legislation:

> "In the last five Congresses the Senate bills and resolutions passed by the Senate, with ninety-six members, exceeded by 182 the House bills and resolutions passed by the House, with 435 members. The exact figures are 3113 for the Senate and 2931 for the House.
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> "But more significant even than this, as evidence of the inevitable exactions of selfish human nature when given a chance, is the fact that the Senate passed *these 3113 bills and resolutions out of a total of 29,332 introduced, while the House passed its smaller number of 2931 out of a total of 82,632 introduced.*
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> "During the last five Congresses, therefore, the Senate passed ten and one-half per cent. of the bills and resolutions introduced in the Senate while the House of Representatives passed only three and one-half per cent. of the bills and resolutions introduced in the House. In other words, of bills and resolutions introduced, the Senate, without effective cloture, passed in proportion three times as many as did the House of Representatives, with cloture.
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> "There have been vague claims made by the opponents of reform in the Senate rules, that the absence of effective cloture tended to prevent multiplicity of laws. *My conten-*

tion is that the figures I have given establish the fact that the absence of effective cloture tends to increase the number of laws.

"As a result of the consuming of time which the Senate has for constructive legislation by efforts of the minority, through frivolous and unlimited oratory, to obstruct the responsible majority, it becomes necessary that there be occasional outbursts of speed by the Senate in passing bills on the calendar and jamming through appropriation bills. These outbursts of speed are a dangerous reaction from the cumulative inaction preceding them. Individual Senators have bills on the calendar in which they are interested, as well as items in appropriation bills. The forces of normal action are held in check by some obstruction until the reaction comes with a rush that does not make for due or wise consideration. To pass bills in less time than it takes to read them, especially in the case of appropriation bills carrying hundreds of millions of dollars, after spending days on a revenue bill or a tariff bill, demonstrates the necessity of so amending the rules of the Senate as to bring about a proper application of time to the consideration of *all* its business." [2]

Over against these considerations Senator Norris of Nebraska marshals his contention that the filibuster is formidable only in those short sessions of the Senate which under the Constitution expire on the fourth of March. He favors a constitutional amendment providing that Congressmen and Senators elected in November shall take their seats in January instead of allowing, as at present, Congressmen and Senators defeated in November to function until the fourth of March. "If," says Senator Norris, "this proposed amendment were agreed to, then after we have had an election and a Congress convened in January, it would be the Congress that had been elected in the November election, a Congress fresh from the people, a Congress representing the ideas of the citizenship as expressed at the ballot box. No limitation of a session would exist, and no filibuster would even be attempted." [3]

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[2] THE FORUM for October, 1925, pp. 479, 480.

[3] THE FORUM, pp. 485, 486.

Senator Moses, of New Hampshire, the President *pro tem* of the Senate, has advanced his reasons for thinking that the alleged evil of the filibuster is really not an evil at all.[4] He holds that if there is an evil the remedy proposed by Senator Norris is the proper one to apply.

When the arguments pro and con are reviewed, it appears to me that the facts cited by the Vice-President give rise to a presumption in favor of reform. If this presumption is rebutted by Senator Norris and by Senator Moses it is only by invoking a constitutional amendment not yet adopted and, if ultimately adopted, necessarily inoperative for a long time to come. When these able senators point to Rule *XXII* as sufficiently effective for legislative purposes, they are tacitly assuming that the Constitution of the United States intends that legislation can be enacted only with the concurrence of two-thirds of the Senate. An assumption which in this respect assimilates the enactment of laws to the ratification of treaties is without foundation in fact. If Rule *XXII* is the proper measure of majority power, it must be conceded that the Senate, by permitting unregulated debate and by requiring a 66 per cent. majority to terminate it, has in effect so amended the Constitution as to enable a 34 per cent. minority to do to a legislative measure what they may do to a treaty. It seems to me that this is an unjustifiable use of the rule-making power and I am therefore in favor of amendment to correct the abuse but operative in the field of legislation only.

Meanwhile the visiting bank president is still sitting in the gallery and the speaking senator is still discussing everything except the pending measure. "What are the chances," asks the perplexed visitor, "that this much-needed reform will prevail?" His companion thinks it depends upon the amount of pressure exerted by constituents upon their senators. There is likely to be strong opposition to change on the part of those southern men who fear the enactment of an anti-lynching bill or some measure deemed by them unconstitutional. They regard the filibuster as their first line of defence and will be slow to outlaw

[4] *"The Senate and its Rules,"* THE SATURDAY EVENING POST, June 27, 1925.

it. It is understood that the Vice-President favors an exception to the new rule, applicable to cases in which the question of constitutionality is raised. It will be difficult, however, to draft the exception in such a way as not to defeat the reform. A question of constitutionality can be injected into almost every legislative discussion. Who is to decide whether the case is within the new rule or within the suggested exception? It would seem wiser to make the reform applicable to all legislative measures and to press for its adoption notwithstanding sectional opposition.

When at the end of the day the Senate recessed until the following morning the visiting bank president remained seated for a few minutes and speculated upon the course which the debate was likely to take on the morrow.

"At length he rose and twitched his mantle blue:
"Tomorrow to fresh woods and pastures new."

George Wharton Pepper.

Philadelphia, Pa.