against a majority in the country at large.

December 5, 1958, marked the twenty-fifth anniversary of an event on which the Northern liberals might pause to reflect: the end of national prohibition, which was, perhaps, in President Herbert Hoover's phrase, an experiment "noble in motive" but which was certainly a spectacular and disastrous failure. In 1918, when the state legislatures began to vote on the proposed prohibition amendment, saloons were illegal in approximately ninety per cent of the area of the nation, which contained nearly two-thirds of the population of the country. Temperance societies and the Anti-Saloon League (the most powerful pressure group that ever worked on Congress and state legislatures) insisted that aridity be complete. The "drys" marched to a battle that they won. Then they lost the war.

One concluding observation. Ours is the only major country with a two-party system where the laws that get on the Federal statute books, or that fail to get there, usually have bipartisan support and bipartisan opposition. In academic quarters one sometimes hears laments that American political parties are not "disciplined"; that their leadership is sometimes shadowy or undiscoverable, and that they do not present to the electorate clashing bodies of doctrine. But in a country as vast as the United States, with different sectional interests, a political providence has been good in seeing to it that a party majority does not pass party legislation which is opposed by a powerful and determined party minority; that on policies our parties prefer concessions to Pyrrhic victories. The filibuster is undemocratic if "democracy" means that anywhere, and particularly in a federal system, any majority should be able to do what it wishes on any issue at any time. Do the Northern liberals thus define "democracy"? Federalism was the means of forming the nation and it remains the means of preserving it. Congress, as well as the Supreme Court, is the Federal system's manager, and a Senate filibuster is well worth while if, on occasion, it prevents the Congressional manager from being tyrannical.

2. 'The Public Business Must Go Forward'

SENATOR JACOB K. JAVITS

After full discussion, encompassed within a reasonable period of time, the Senate should not be prevented from voting on vital matters by the specter of "extended" debate—the euphemism for a filibuster. To this end a number of senators, including Mr. Douglas of Illinois, Mr. Case of New Jersey, Mr. Humphrey of Minnesota, and myself, are proposing that Rule XXII, relating to cloture, be amended. Our resolution provides that debate may be limited by a vote of two-thirds of the senators present and voting—instead of a two-thirds majority of the full Senate, as is now provided in the rules—two days after sixteen senators have filed a petition for this purpose. It also provides that fifteen days, exclusive of Sundays and holidays, after the presentation to the Senate of a petition signed by sixteen senators, the Senate may impose cloture by a simple majority vote of the whole number of senators "duly chosen and sworn." As this is possible both on a motion to call up a bill and on the bill itself—and considering normal debate before cloture is even considered—there is an indicated sixty days' debate on any major bill.

Surely the foundations of the Republic will be sounder if a measure that ought to be voted on is eventually voted on, instead of being talked to death. Our proposal does not whittle away at free speech or the right to adequate debate. The resolution is nothing more than a reasonable attempt to provide for orderly and responsible representative government. It is not a gag rule. All it attempts to do is to provide that a small group of determined senators shall no longer have an arbitrary veto power to prevent the Senate from voting on the question before it by the threat of what is in effect unlimited time-consuming talk.

The Constitutional Issue

Of course, Rule XXII itself as it now stands, presents the most formidable obstacle against any attempt to amend it. If a motion is made to amend Rule XXII, then it says that senators may speak as long as they please, and no cloture of any kind is provided for. Under those circumstances, it becomes a fortress within a fortress.

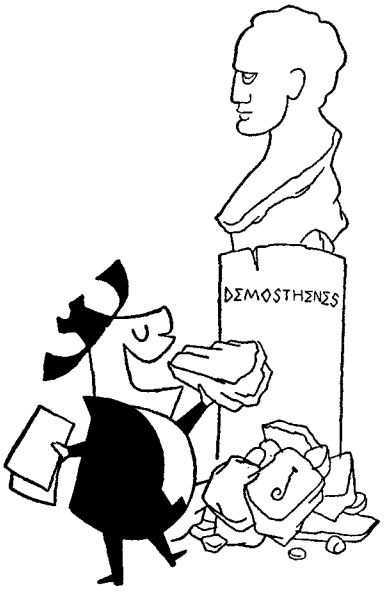
Accordingly, the first vote likely to be faced when the new Congress convenes will be on some phase of a motion to proceed to the consideration of the Senate rules—on the assumption that the prior rules do not, of their own effect, carry over from Senate to Senate. A great deal of legal analysis has been devoted to the question of whether the rules from a prior Congress govern or whether at the outset of a Congress

the Senate is subject only to general parliamentary rules. The importance of this matter lies in the fact that if general parliamentary rules control, then it is possible to close debate by moving "the previous question," which needs only the affirmative votes of a simple majority of those present and voting. In this connection, it is important to consider the advisory ruling of the Vice-President two years ago. That ruling was, in part, as follows:

"The Constitution also provided that 'each House may determine the rules of its proceedings.' This Constitutional right is lodged in the membership of the Senate, and it may be exercised by a majority of the Senate at any time. When the membership of the Senate changes, as it does upon the election of each Congress, it is the Chair's opinion that there can be no question that the majority of the new existing membership of the Senate, under the Constitution, have the power to determine the rules under which the Senate will proceed.

"Any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying the majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional."

As the Vice-President pointed out, his ruling is only advisory. Only the



Senate itself may determine such questions of constitutionality. Nevertheless, the rationale of the Vice-President's opinion should have a considerable persuasive effect on that determination.

In accordance with the Constitution, each House determines its own rules of procedure; and, in this context, action by each House means a majority of each House. A practical delegation of that power to one or to thirty-three of its members is beyond the power of the Senate. The Senate's responsibilities are derived from the Constitution; and, short of amending that document, there is no way to qualify this power.

The Supreme Court has held that a House of Congress "may not by its rules ignore constitutional restraints" —*U.S.* v. *Ballin.*

To illustrate, let us assume that Congress were to pass a statute which, by its terms, provided that it could not be amended except by unanimous consent of both Houses. Surely no one would thereafter contend that that law might not be amended by a simple majority vote. In other words, Congress cannot impose on itself or on future Congresses a limitation that is not imposed by the Constitution. The proposition that one Congress does not have the right to bind another is almost hornbook law.

I recognize that the problem cannot be solved on the basis of constitutional authority alone; it must be worked out within both the parliamentary law and the traditions of the Senate. I am convinced that this can be done, but I think it is important to set at rest any possible question of the Senate's power to change its own rules.

The basic issue underlying the problem of cloture is whether the Senate—resting, as it does, on the premise of majority rule—is to function at all; or whether the Congressional power is to be nullified by the unparliamentary device of the filibuster.

Underwood and Hamilton

Much of the discussion on this subject has invoked the traditions of the Senate. Careful research on the development of the United States government from its initial period under the Articles of Confederation through the Constitutional Convention of 1787 show that the power which now stems from Rule XXII was not even contemplated at that time. On the contrary, from the expressed views of Madison, Hamilton, and others, a method of parliamentary procedure premised on Rule

XXII would have been violently opposed had it been suggested, because the premise of Rule XXII violates fundamental parliamentary law. It is at odds with early Senate procedures and with British parliamentary practice, and, almost without exception, it is directly contrary to all our State legislative rules of procedure.

In the early Senate, simple majority cloture was used; and the parliamentary device of "the previous question" was available to close debate under Senate rules and in Jefferson's Senate Manual. Even after 1806, when reference to "the previous question" was dropped from the standing rules, the presiding officer's power to rule on questions of relevancy and order could have prevented abuse. The conjunction of the lack of cloture and the lack of enforcement of a rule of relevancy made possible, after 1872, the modern veto-type filibuster. Its fullest development and its most flagrant abuses have occurred following the Civil War, in opposition to the enactment of civil-rights legislation. Most have occurred in the last thirty-five years.

Although opponents of any changes in the rules prefer to phrase the issue in terms of free speech, what is primarily involved is the unrestrained power of obstruction.

When the late Senator Oscar W. Underwood of Alabama staged a filbuster during the 1922 debate on the Dyer anti-lynching bill, he unmasked for all time the real reason for the tremendous opposition that any rules change always faces when he said:

"We are not disguising what is being done on this side of the Chamber. It must be apparent, not only to the Senate but to the country, that an effort is being made to prevent the consideration of a certain bill, and I want to be perfectly candid about it. It is known throughout the country generally as a force bill. . . .

"I do not say that captiously. I think all men here know that under the rules of the Senate when fifteen or twenty or twenty-five men say that you cannot pass a certain bill, it cannot be passed.

"I want to say right now to the Senate that if the majority party insists on this procedure they are not going to pass the bill, and they are not going to do any other business.

"You know you cannot pass it. Then let us go along and attend to the business of the country."

Alexander Hamilton, himself a staunch conservative, stated his views on this subject in Number 22 of *The Federalist:*

"The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings."

I DO NOT BELIEVE that today's Rule XXII serves the purpose of deliberation within the Senate or of education of the public generally. I do not —and I know of no responsible person who does—question the desirability of those two objectives. What I question is in effect a delegation of the power and responsibility of the majority to a determined minority, which has been, and can be again, an arbitrary block to action, contrary to the judgment of the majority of the senators and to the will of the people they represent.

The Berliners Make Their Choice

GEORGE BAILEY

BERLIN

LATE LAST SUMMER, during his annual vacation on the shores of the Black Sea, Walter Ulbricht, First Secretary of the S.E.D., or Socialist Unity (i.e., Communist) Party of East Germany, put his situation to Nikita Khrushchev in forceful terms: "If the Soviet Union can't get the Allies out of Berlin, I can't hold East Germany." Ulbricht was not exaggerating. Since the founding of the "German Democratic Republic" it had proved impossible to stabilize this artificial state. Now, both politically and economically, matters had at last reached a critical stage.

Politically, the S.E.D. had been bedeviled by an unending series of internal crises, purges, and defections. The eight-man Politburo (with an additional four voteless "candidates") and the nine-man Secretariat of the Central Committee have always been in a state of flux. The only constants in these top echelons have been Ulbricht, President of the Republic Wilhelm Pieck, now eighty-two and decrepit, and Prime Minister Otto Grotewohl, a turncoat Socialist who has just suffered a severe stroke and may be on his deathbed. The chief reason for this chaos is a basic division of allegiance even among many of the top Communist functionaries. Ulbricht himself revealed the essence of the situation late in 1957 in preparing the way for the purge of Karl Schirdewan, his deputy and "crown prince" of the party; Fred Oelssner, the Politburo member in charge of consumer-goods production; and Ernst Wollweber, central committeeman and chief of state security. "There are comrades," said Ulbricht then, "who regard the peasants' and workers' state as a temporary phenomenon and are of the opinion that we should remain in the present stage of development because, if we were to go further, the reunification of Germany would be hindered."

Germany is divided, and too many German Communists are more German than Communist. The yearning of East German Communists for reunification at almost any price has sometimes amounted to what can only be called subconscious sabotage. To combat this, Ulbricht has been forced to turn the ideological screws even tighter. The result has been an added impetus to *Republikflucht,* "flight from the Republic," which is the East German term for the unceasing flow of refugees from East to West Germany.

Drang nach Westen

Since 1945 more than 3,400,000 East Germans have fled to the West. This is roughly twenty per cent of the present East German population. (Included among them were more than twenty-two thousand officers and men of the People's Police and People's Army—the equivalent of seven regiments.) This depletion has already drastically affected the basic structure of the East German population. In a speech in July of last year, Grotewohl was unusually frank on this score:

"It is a fact," he said, "that the German Democratic Republic numbered nineteen million people in 1945, while today it numbers only 17,300,000." (According to the figures published by the Federal Ministry for All-German Affairs, the population of the East Zone is now just under seventeen million.) Grotewohl added that this loss had seriously affected the birth rate, which continues to decrease. "In 1951 we had 16.9 births for every thousand inhabitants. In 1952 it was 16.7, a year later 16.4, and in 1957 only 15.6." As a result, the proportion of old people has risen sharply. "At present," Grotewohl went on, "two men must work in order to support a third who is retired." He confessed that "the continuing flight from the Republic is problem No. 1, a prob-