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THE PREVIOUS QUESTION

ITS STANDING AS A PRECEDENT FOR CLOTURE IN THE UNITED STATES SENATE

A DISSERTATION ON THE SO-CALLED "PREVIOUS QUESTION RULE" AS EMPLOYED BY THE SENATE IN ITS EARLY DAYS

PRESENTED BY MR. RUSSELL

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FOREWORD

By great good fortune, there has come to my attention an outstanding and scholarly dissertation by Dr. Joseph Cooper, a professor of political science in the Department of Government at Harvard University entitled "The Previous Question: Its Standing as a Precedent for Cloture in the Senate of the United States."

Dr. George B. Galloway, senior specialist, American Government and Public Administration of the Library of Congress, was gracious enough to permit me to see Dr. Cooper's work.

Dr. Cooper reached the conclusion, after his painstaking study that the previous question rule in the early Senate was not in any sense a restriction on debate nor a mechanism for cloture.

I have never seen Dr. Cooper and had never heard of him or his study of this subject until after he had completed his research and prepared his dissertation. It is most gratifying that his findings support the position that I have taken a number of times on the floor of the Senate when efforts to impose further restrictions on freedom of debate were pending in the Senate. Dr. Cooper's thesis is a notable contribution to the history of the Senate and to an understanding of its rules. I feel it should be made available to all of the Members of the Senate as well as students and others interested in the history of this great parliamentary institution. I have therefore asked unanimous consent that Dr. Cooper's thesis be printed as a Senate document.

RICHARD B. RUSSELL.

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THE PREVIOUS QUESTION: ITS STANDING AS A PRECEDENT FOR CLOTURE IN THE SENATE OF THE UNITED STATES

Many persons interested in Senate procedure are aware that a rule for the previous question existed in that body during its first 17 years.[1] Still, the manner in which this rule was understood and used has been and continues to be a topic of much misunderstanding and disagreement. Thus, as eminent a student of the Senate as Lindsay Rogers seems to believe that the previous question existed as a cloture mechanism in the early Senate, whereas other equally eminent students of the Senate, such as George H. Haynes and Clara (Kerr) Stidham, are convinced that the rule was not so used or understood.[2] In recent years, as a result of the efforts of a group of liberal Senators to impose some form of majority cloture on the Senate, interest has been revived in the nature of the precedent furnished by the original Senate rule for the previous question. The leading antagonists in the controversy have been Senator Richard Russell (D., Ga.) and Senator Paul Douglas (D., Ill.).

Senator Russell has contended that the previous question did not serve as a mechanism for cloture in the early Senate, but merely as a mechanism for postponing or avoiding decision.[3] Senator Douglas has argued that Russell's view is "almost completely wrong." [4] In so arguing Douglas has not only relied on his own investigations; in addition, he has made use of extensive research done for him by Irving Brant. Thus, he has twice introduced into the *Congressional Record* a memorandum on the previous question prepared by Brant.[5] This memorandum contends that in the early Senate a simple majority had the power to close debate through use of the previous question in order to bring a matter to decision and that on occasion this power was actually exercised.

The aim of this paper is to settle the longstanding dispute over the status and significance of the rule for the previous question which

[1] On Apr. 16, 1789, the Senate adopted the following rule as the ninth of a code of 19 rules adopted that day:

"The previous question being moved and seconded the question from the chair shall be: 'Shall the main question be now put?' And if the nays prevail, the main question shall not then be put."

This rule was omitted in the revised rules adopted 17 years later on Mar. 26, 1806. See *Annals Of Congress*, Washington, 1834-1855, 1 Cong. 1, 20-21, and 9 Cong. 1, 202-203.

[2] See Lindsay Rogers, *The American Senate*, New York, 1926, p. 165; George H. Haynes, *The Senate Of The United States*, Boston, 1938, vol. I, p. 393; and Clara (Kerr) Stidham, *The Origin And Development Of The United States Senate*, Ithaca, 1895, p. 59.

Also relevant are Robert Luce, *Legislative Procedure*, Boston, 1922, pp. 275 and 289; Henry Jones Ford, *The Rise And Growth Of American Politics*, New York, 1898, p. 265; and Franklin L. Burdette, *Filibustering In The Senate*, Princeton, 1940, pp. 14, 15, and 219.

[3] See *Congressional Record*, Washington, 1873-1961, 85 Cong. 1, p. 153. See also *Cong. Rec.*, 83 Cong. 1, p. 112, and S. Doc. No. 4, 83 Cong. 1, p. 11.

[4] *Cong. Rec.*, 85 Cong. 1, pp. 6669-6686. See also *Cong. Rec.*, 87 Cong. 1, pp. 231-246 (daily—Jan. 5, 1961).

[5] *Ibid.* For other statements of Brant and Douglas see Proposed Amendments To Rule XXII Of The Standing Rules Of The Senate, *Hearings Before A Special Subcommittee Of The Committee On Rules And Administration*, United States Senate, 85 Cong. 1, Washington, 1957, pp. 170-182 and 31-45.

Senator Joseph S. Clark (D., Pa.) has also been a leading advocate of the view that majority cloture would be a return to original Senate practice. See *Senate Rules Must Be Reformed*, Reprint of Speeches and Proposals of Senator Joseph S. Clark, Washington, 1960, pp. 22-26.

existed in the Senate in the years from 1789 to 1806.[6] In terms of the Haynes-Stidham-Russell line of thought the previous question mechanism in the early Senate provides no valid precedent for the adoption of majority cloture today. In terms of the Rogers-Douglas-Brant line of thought it provides a solid precedent.

I. Proper Usage in Parliamentary Theory, 1789–1806

We may start our inquiry by examining what parliamentary theory in these years conceived to be the proper function of the motion for the previous question. There is very little evidence to support the contention that in the period 1789–1806 the previous question was seen as a mechanism for cloture, as a mechanism for bringing a matter to a vote despite the desire of some members to continue talking or to obstruct decision.[7] This is true for the House as well as for the Senate.[8] On the other hand, convincing evidence exists to support the contention that the previous question was understood as a mechanism for avoiding either undesired discussions or undesired decisions, or both.

The leading advocate of the view that the proper function of the previous question related to the suppression of undesired discussions was Thomas Jefferson. In his famous manual, written near the end of his term as Vice President for the future guidance of the Senate, he defined the proper usage of the previous question as follows:

> The proper occasion for the previous question is when a subject is brought forward of a delicate nature as to high personages, etc., or the discussion of which

[6] The House of Representatives has, of course, had a previous question rule since its inception in 1789. Over the years this rule has undergone many changes and it now serves as a very effective mechanism for cloture in the House. See any recent manual of rules for the House of Representatives, rule XVII and explanatory footnotes. See also Asher C. Hinds, *Hinds' Precedents Of The House Of Representatives*, Washington, 1907, secs. 5443-5446.

[7] There are only two pieces of evidence that can be cited in support of the contention that the previous question was understood as a cloture mechanism in the Senate before 1806. The first is the fact that on the cover of his famous journal William Maclay, a Senator from Pennsylvania in the First Congress (1789–91) records the following as Senate rule 7:

> "In case of debate becoming tedious, four Senators may call for the question; or the same number may at any time move for the previous question, viz., 'Shall the main question now be put?' "

See *The Journal of William Maclay*, New York, 1927, p. 403. It is clear, however, that this rule never became an official rule of the Senate. Instead, it, together with the other rules listed on the cover, probably represent Maclay's proposals for Senate rules. See Stidham, *op. cit.*, p. 38, footnote 2, and p. 60, footnote 2. See also Haynes, *op. cit.*, vol. I, p. 392, footnote 3. Still, from the way this rule is worded it is often assumed that Maclay understood the previous question as a cloture mechanism. This is far from clear. The Senate of the Commonwealth of Pennsylvania in 1790 had two separate rules dealing with the matters contained in rule 7 as listed by Maclay. One permitted four Senators to ask for the question, i.e., a vote, when the debate became tedious and the other permitted four Senators to move the previous question. This suggests that the objects of these procedures were understood as separate and distinct and that Maclay merely lumped them together for purposes of brevity since both kinds of motions required the same number of initiators. See *Journal Of The Senate Of The Commonwealth Of Pennsylvania, 1790–1791*, Philadelphia, 1791, pp. 50–51 (Dec. 29, 1790), rules 13 and 17. It is true, however, that by 1790 the House of Representatives in Pennsylvania only had a rule for the previous question. Note the conclusions drawn with reference to this fact by Lauros G. McConachie. See Lauros G. McConachie, *Congressional Committees*, Boston, 1898, p. 24. Yet see *Journal Of The House Of Representatives Of The Commonwealth Of Pennsylvania, 1790–1791*, Philadelphia, 1791, p. 129 (Jan. 28, 1791).

The second piece of evidence that might be cited to support the contention that the previous question was understood as a cloture mechanism in the Senate during the years from 1789 to 1806 is Jefferson's statement that use of the previous question had been extended to accomplish ends beyond the mere suppression of delicate discussions. Thomas Jefferson, *A Manual Of Parliamentary Practice*, Washington, 1820, sec. XXXIV. In this regard see Luther Stearns Cushing, *Elements Of The Law And Practice Of Legislative Assemblies In The United States Of America*, 1866, par. 1420 and related footnote 4. However, in all probability what Jefferson had in mind here was use of the previous question on propositions that were not delicate, simply, for the purpose of suppressing an undesired decision. This is indicated by his discussion of why it would be preferable to permit the main question to be amended when the motion for the previous question was being debated. It is also indicated by the fact that Jefferson at no point states that on a certain date the previous question was used for cloture in the Senate, whereas it is unlikely that he would have allowed such an important and revolutionary precedent to go by unnoted.

[8] For conceptions of the function of the previous question in the House see Hinds' Precedents, *op. cit.*, sec. 5445 and De Alva S. Alexander, *History And Procedure Of The House Of Representatives*, Boston, 1916, p. 181. See also *Annals*, 1 Cong. 1, 324 (May 11, 1789); 2 Cong. 2, 846–851; 3 Cong. 1, 595–596; 3 Cong. 2, 960; 3 Cong. 2, 998–1000; 5 Cong. 2, 650–652; 5 Cong. 2, 1067; 7 Cong. 1, 439–441; 7 Cong. 1, 1045; 9 Cong. 1, 1091–1092; and 10 Cong. 1, 1183–1184. It should be noted that in the last instance mentioned Randolph's argument assumes that the previous question is a mechanism for avoiding decisions, not discussions.

may call forth observations, which might be of injurious consequences. Then the previous question is proposed: and, in the modern usage, the discussion of the main question is suspended, and the debate confined to the previous question * * *[9]

In terms of his approach, then, Jefferson regarded as an abuse any use of the previous question simply for the purpose of suppressing a subject which was undesired but not delicate, and he advised that the procedure be "restricted within as narrow limits as possible." [10]

Despite Jefferson's prestige as an interpreter of parliamentary law for the period with which we are concerned, his view of the proper usage of the previous question cannot be said to have been the sole or even the dominant one then in existence. A second strongly supported conception understood the purpose of the previous question in a manner that conflicted with Jefferson's view; that is, as a device for avoiding or suppressing undesired decisions.

The classic statement of this view was made in a lengthy and scholarly speech delivered on the floor of the House of Representatives on January 19, 1816, by William Gaston. In this speech Gaston, a Federalist member from North Carolina, argued that on the basis of precedents established both in England and America the function of the previous question was to provide a mechanism for allowing a parliamentary body to decide whether it wanted to face a particular decision. In the course of his speech he took special pains to emphasize his differences with Jefferson:

> I believe, sir, that some confusion has been thrown on the subject of the previous question (a confusion, from which even the luminous mind of the compiler of our Manual, Mr. Jefferson, was not thoroughly free) by supposing it designed to suppress unpleasant discussions, instead of unpleasant decisions. * * * [11]

Gaston's speech, to be sure, was made 5 years after the previous question had been turned into a cloture mechanism in the House and it was made as a protest against this development.[12] It is valuable, nonetheless, as an indication of the state of parliamentary theory in the years from 1789 to 1806 and its standing as evidence of this nature is supported both by the arguments made in the speech itself and by less elaborate statements made on the floor of the House in the years before 1806.[13]

That the previous question was understood as a mechanism for avoiding undesired decisions in the early Senate as well as the early House is indicated by an excerpt from the diary of John Quincy Adams.[13a] The excerpt comes from the period in which Adams served in the Senate and it contains his account of Vice President Burr's

[9] Jefferson's Manual, *op. cit.*, sec. XXXIV.
[10] *Ibid.*
[11] *Annals*, 14 Cong. 1, p. 707.
[12] See references cited in footnote 6 above.
[13] See references cited in footnote 8 above.
[13a] The fact that a considerable amount of secrecy characterized the early sessions of the Senate also makes less reasonable the supposition that in this body the previous question was understood solely as a mechanism whose proper usage was confined to the suppression of delicate discussions. Until 1794 the Senate held all its sessions behind closed doors. In that year a resolution was passed which opened the doors for the consideration of legislative business, though simultaneously a new rule was passed which permitted any member to move to close the doors whenever he thought necessary. However, the Senate did provide for the regular publication of its legislative journal from the very first year of its operation. The proceedings of the Senate when acting in its executive capacity continued to be held in secret far beyond the year 1806. Moreover, in the years before 1806 and beyond the Senate appears to have published only portions of its executive journal and to have done so on very few occasions. For material on secrecy in the Senate see Stidham, *op. cit.*, pp. 39–40, 98–102, and 170–171; Haynes, *op. cit.*, vol. II, pp. 665–670 and 779–782; George P. Furber, *Precedents Relating To The Privileges Of The Senate Of The United States*, Washington, 1893 (S. Doc. No. 68, 52 Cong. 2, vol. VII of misc. doc. vols.); Dorman B. Eaton, *Secret Sessions Of The Senate*, New York, 1886; and Joseph P. Harris, *The Advice And Consent Of The Senate*, Berkeley, 1953, p. 249. See also Jefferson's Manual, *op. cit.*, sec. XLIX, and *Rules Of The United States Senate*, Dec. 7, 1801, Houghton Library Document, Harvard University, Call No. AC8UN33C.801r.

farewell speech to the Senate. In this speech, delivered on March 2, 1805, Burr by implication seems to understand the function of the previous question as relating primarily to the suppression of undesired decisions.

He [Burr] mentioned one or two of the rules which appeared to him to need a revisal, and recommended the abolition of that respecting the *previous question*, which he said had in the four years been only once taken, and that upon an amendment. This was proof that it could not be necessary, and all its purposes were certainly much better answered by the question of indefinite postponement * * *.[14]

We should note in closing our discussion of proper usage that in Burr's case, as in a number of others, his words do not rule out the possibility that he understood the previous question as a mechanism for avoiding undesired discussions as well as undesired decisions. Indeed, despite the exclusive character of the positions maintained by Jefferson and Gaston their basic views could be held concurrently and in the years immediately preceding 1789 they were, as a matter of general agreement, so held in the Continental Congress. The previous question rule adopted by that body in 1784 read as follows:

The previous question (which is always to be understood in this sense, that the main question be not now put) shall only be admitted when in the judgment of two Members, at least, the subject moved is in its nature, or from the circumstances of time and place, improper to be debated or decided, and shall therefore preclude all amendments and further debates on the subject until it is decided.[15]

Thus, a third alternative existed in parliamentary theory in the early decades of government under the Constitution with reference to the previous question—that of seeing it as a mechanism for avoiding both undesired discussions and undesired decisions. The extent to which Jefferson's, Gaston's, or a combination of their positions dominated congressional conceptions of the proper function of th previous question is not clear.[16] The lack of rigidity in parliamentary theory was an advantage rather than a disadvantage and the average member, in the years before 1806 as now, was not apt to be overly concerned with the state of theory or its conflicts unless some crucial practical issue was also involved. However, practice in these years reveals that in both the House and the Senate the previous question was used mainly for the purpose of avoiding or suppressing undesired decisions, rather than undesired discussions.[17] Still, practice also reveals that the de-

[14] Charles Francis Adams (ed.), *Memoirs Of John Quincy Adams*, Philadelphia, 1874, vol. I, p. 365. That Burr saw the previous question primarily as a mechanism for avoiding or suppressing undesired decisions can be inferred from the fact that he said "all its purposes were certainly much better answered by the question of indefinite postponement." This claim can be seen to be most correct if one regards the previous question as a mechanism for suppressing undesired decisions rather than undesired discussions. The consequence that indefinite postponement entailed that the previous question did not necessarily entail was total suppression of a matter for the remainder of the session. Such a consequence is better suited for suppressing decisions than for suppressing discussions since in all probability opposition to a substantive question will remain permanent whereas questions that are too delicate to be discussed at one moment may well lose their delicacy with the passage of time.

It is interesting to note that Jefferson distinguished temporary suppression of a discussion from permanent suppression, assigning the former end to the previous question and the latter end to indefinite postponement. See Jefferson's Manual, *op. cit.*, sec. XXXIII. However, we should also note that we cannot be certain that indefinite postponement was as effective a means of suppressing discussion as the previous question. Under the previous question mechanism discussion of the merits of the main question was absolutely forbidden. Whether this was also true when indefinite postponement was moved is not clear. Jefferson at no point states that the merits of the main question could not be discussed when indefinite postponement was moved, though this may be implicit in his statements regarding indefinite postponement.

[15] Hinds' Precedents, *op. cit.*, sec. 5445.

[16] See Cushing's Manual, *op. cit.*, pars. 1401 and 1421.

[17] For a discussion of all instances of the use or attempted use of the previous question in the Senate which this author has been able to discover see pt. III of this paper. For instances of the use or attempted use of the previous question in the House from 1789 to 1806 see *Annals*, 1 Cong. 1, 324 (May 11, 1789); 1 Cong. 1, 758-759 (Aug. 18, 1789); 1 Cong. 3, 1960 (Feb. 8, 1791); 2 Cong. 1, 597; 2 Cong. 2, 823; 2 Cong. 2, 846-851. 3 Cong. 1, 595-596; 3 Cong. 1, 686; 3 Cong. 2, 960; 3 Cong. 2, 998-1000; 5 Cong. 2, 650-652; 5 Cong. 2, 1067; 6 Cong. 1, 508; 6 Cong. 2, 1042; 7 Cong. 1, 419; 7 Cong. 1, 439-441; 7 Cong. 1, 1045; and 9 Cong. 1, 1091-1092. See also *Journal Of The House of Representatives Of The United States*, Washington, 1826, vol. III, p. 253.

gree to which these purposes can be distinguished varies widely from instance to instance and that often any distinction between them must be a matter of degree and emphasis, rather than a matter of precise differentiation.

II. Proper Operation in Parliamentary Theory, 1789–1806

In line with the prevailing conception of the previous question as a device for avoiding undesired discussions and/or decisions, the mechanism itself was clearly designed to serve such ends, rather than the ends of cloture. This can be seen if we examine parliamentary theory in the years from 1789 to 1806 with reference to three key facets of the rule's operation: the possibility of debate before determination of the motion, the course of procedure after determination of the motion, and the nature of the limitations on the scope of the motion.

Once moved and seconded the motion for the previous question, as in the case of any other motion, could be subject to extensive debate.[18] In both the Senate and the House the rules governing limitation of debate before 1806 were exceedingly lax.[19] Whether debate on the motion for the previous question could have been halted in the House or the Senate before the generous conditions set forth in the rules of these bodies had been satisfied is a matter of conjecture. Senator Douglas and Irving Brant argue that such a result was possible in the Senate and, at least in part, their argument can also be applied to the House. Their contention is that whenever debate became obstructive or repetitious it could have been ended by the presiding officer, and they seem to believe that this officer could have acted either on his own initiative or in response to a point of order raised from the floor.[20] They base their argument on the possibility in the early Senate of founding antifilibuster rulings on a general principle of parliamentary law, which Jefferson in his manual affirmed as follows: "No one is to speak impertinently or beside the question, superfluously or tediously." [21] Thus, Douglas and Brant maintain that in the period from 1789 to 1806 the motion for the previous question was not one that could be debated indefinitely "without let or hindrance," and they emphasize the fact that until 1828 the presiding officer in the Senate

[18] In the House of Representatives five members were required to second a motion for the previous question and no member was permitted to speak more than once without leave. The original previous question rule adopted by the House read as follows:

> "The previous question shall be in this form: "Shall the main question be now put?" It shall only be admitted when demanded by five members; and until it is decided, shall preclude all amendment and further debate of the main question. On a previous question no Member shall speak more than once without leave."

See Hinds' Precedents, *op. cit.*, sec. 5445.

[19] The main limitation on debate in the House prohibited any member from speaking more than twice on the same question without leave of the House or more than once until every member who wanted to speak had spoken. However, as we have already noted in footnote 18, on the motion for the previous question Members were limited to speaking once unless leave was granted to speak again. See *Annals*, 1 Cong. 1, 99 and 100 (Apr. 7, 1789). In the Senate the main limitation on debate prohibited any member from speaking more than twice in any one debate on the same day without permission of the Senate. See *Annals*, 1 Cong. 1, 20 (Apr. 16, 1789). Even this rule, however, was often not enforced. See Stidham, *op. cit.*, p. 59 and Memoirs Of John Quincy Adams, *op. cit.*, vol. I, p. 321.

[20] From the manner in which Brant and Douglas argue their case it is not entirely clear whether they maintain that the presiding officer could have stopped tedious or superfluous debate on his own initiative. I have interpreted them as maintaining this because their argument seems to suggest it, b cause such an interpretation strengthens their case, and because practice in the early Senate in other areas, e.g., relevancy, may furnish a basis for maintaining such a position. In 1826, however, Vice President Calhoun refused to intervene on his own initiative in matters where the "latitude or freedom of debate" was involved. See *Cong. Rec.*, 87 Cong. 1, pp. 232, 237, 238, 243, 245, and 246 (daily—Jan. 5, 1961). See also Burdette, *op. cit.*, pp. 16–19 and 220. In addition, see Haynes, *op. cit.*, vol. I, p. 389 and Furber's Precedents, *op. cit.*, p. 11 .

[21] See *Cong. Rec.*, 85 Cong. 1, pp. 6669–6686 or *Cong. Rec.*, 87 Cong. 1, pp. 231–246 (daily—Jan. 5, 1961). See also Jefferson's Manual, *op. cit.*, sec. XVII.

was permitted to decide all questions of order without debate or appeal.[21a]

However, it is far from clear that the men who served in Congress in the period which concerns us saw themselves as having the powers that Douglas and Brant think they had. On the occasions where records reveal that debate in the Senate actually became "tedious" and "superfluous," there is no evidence to suggest that the presiding officer ever intervened or that a point of order was ever raised.[22] The situation is similar with respect to the House and it is also worth noting that when the House in December of 1805 decided that stricter control of debate on the motion for the previous question was necessary, it felt forced to amend its rules so as to abolish debate on the motion entirely.[23]

Nor can we be certain that if a presiding officer had intervened or a point of order had been raised, the result would have been as Douglas and Brant suggest. Freedom of debate was a principle which this period valued very highly. Thus, one cannot confidently predict that the House or the Senate would have sustained the intervention of its presiding officer. To be sure, if the presiding officer in the Senate had intervened to stop debate, his decision could not have been reversed by appeal to the floor, as could have been done in the House. But this does not mean that the Senate could not and would not have acted to reverse his ruling. This result could easily have been accomplished, if the Senate desired, simply by voting to amend or add to the rules. Similarly, if a point of order had been raised, one cannot confidently predict that the reaction of the presiding officer in either house would have been to uphold it. Given the fact that the rules of both the House and Senate directly concerned themselves with the conditions for limiting debate, any presiding officer would have been quite hesitant to impose by fiat restrictions that went so far beyond what the rules themselves prescribed.[24]

[21a] *Cong. Rec.*, 87 Cong. 1, pp. 232 and 245-246 (daily—Jan. 5, 1961). However, the Senate rules did provide that the presiding officer could submit a question of order to the Senate if he had doubt in his own mind as to what ruling was proper. See Jefferson's Manual, op. cit., sec. XVII.

[22] See Maclay's Journal, *op. cit.*, p. 63 (June 4, 1789); p. 133 (Aug. 26, 1789); pp. 155-159 (Sept. 22-24, 1789); p. 181 (Jan. 25, 1790); and p. 305 (July 1, 1790). On two and possibly three of these occasions there was not only tedious debate, but also a deliberate attempt to obstruct decision by prolonging debate. See also Everett S. Brown (ed.), *William Plumer's Memorandum Of Proceedings In The United States Senate, New York*, 1923, pp. 72-73 (Dec. 2, 1803); pp. 133-134 (Feb. 1, 1804); and p. 483 (Apr. 12, 1806).

It is true that both in the early Senate and the early House members were called to order for not being germane or relevant in debate. Indeed, the House adopted a rule of relevancy as early as 1811. But action preventing members from speaking "beside the question" is distinguishable from action preventing members from speaking "tediously" or "superfluously." See *Annals*, 11 Cong. 1, 1462-1463; Hinds' Precedents, *op. cit.*, secs. 4979 and 5042; Burdette, *op. cit.*, pp. 16-19 and 220; and Haynes, *op. cit.*, vol. I, pp. 423-425.

[23] *Annals*, 9 Cong. 1, 284, 286, and 287. This action, however, should not in any way be taken to mean that at this time the House understood the previous question as a cloture mechanism and was trying to make it a more efficient instrument for such purposes. On the contrary, from the first the House limited debate on the motion for the previous question more strictly than the Senate because of the special problems which its greater size created. See *Annals*, 10 Cong. 1, 1183-1184.

[24] Senator Douglas notes that from 1797 to 1801 Thomas Jefferson himself presided over the Senate and he asks would Jefferson have failed to uphold a point of order based on a principle which he affirmed in his manual. *Cong. Rec.*, 87 Cong. 1, p. 238 (daily—Jan. 5, 1961). Two points may be advanced in reply First, Jefferson deliberately listed in his manual precedents and principles that were directly contravened by the rules and practice of the Senate. In short, he must not have expected that every pronouncement he made would necessarily be a governing one for the Senate. Second, if the previous question had been moved for the purpose of cloture and the point of order suggested by Douglas raised to stop debate on the motion, it is quite possible that Jefferson either would have referred the point of order to the floor for decision, as he had discretion to do, or would himself have acted to nullify it. If he referred the point of order to the floor for decision, given the Senate's distaste for cloture, there is a good chance that it would have been defeated. If he decided to settle the point himself, it is conceivable that he might have ruled against it. For in such a case the point of order would have been used in support of an end which Jefferson would have thought grossly distorted the proper purpose of the previous question. In the least Jefferson might have held that the motion for the previous question was out of order, thus negating the significance of the point of order even if he upheld it. See below, footnotes 25 and 38.

Douglas also states that the fact that the presiding officer might have refused to stop debate on the basis of Jefferson's maxim does not mean that his power to do so did not exist. *Ibid.* This is a very questionable argument for, if the presiding officer had refused, it would have been because of the way he interpreted his power, and this is the very point in issue. All in all, both Douglas and Brant err in making such an absolute

Lastly, the least that can be said is that even if Douglas and Brant are correct in maintaining that it was possible to limit debate on the motion for the previous question, this facet of the rule's operation does not demonstrate that the previous question was designed as a cloture rule. On the contrary, the fact that debate on the motion could not be prevented until it became obstructive or repetitious made the previous question a very inefficient mechanism for cloture. It meant that a lengthy debate on the merits of the main question could be followed by a lengthy debate on the very propriety of putting the question.[25]

Equally, if not more important, as an indication of the purposes for which the previous question was designed is the manner in which the House and Senate understood the motion to operate after a decision had been rendered on it. With regard to negative determinations of the previous question, the view that appears to have been dominant in the period from 1789 to 1806 was that a negative decision postponed at least for a day, but did not permanently suppress, the proposition on which the previous question had been moved. In the House this view seems to have prevailed during the whole period from 1789 to 1806, though it is possible to place a contrary interpretation on the evidence which exists for the first few years of the House's existence.[26] As for the Senate, less evidence is available, but it is probable that its view was similar to that of the House. This conclusion can be based on Jefferson's statement that temporary rather than permanent suppression was the consequence of a negative result and the fact that on one occasion the Senate seems to have acted in accord with the temporary suspension view.[27] However, it should also be noted that in a number of instances in which the previous question was used in both

authority out of Jefferson. Even in the early decades of the 19th century the Senate did not regard Jefferson's pronouncements on proper parliamentary procedure as being so sacred that they could not be added to, altered, contravened, or even forgotten. Hence, one cannot positively claim that a certain power existed in the early Senate simply on the basis of a single sentence in Jefferson when no evidence exists to show that the power was ever exercised.

[25] The rules of the House precluded debate or amendment of the main question when the motion for the previous question was under discussion. Thus, debate on the motion for the previous question had to confine itself to the propriety or desirability of putting the main question at that time. See footnote 18 above. The rules of the Senate did not explicitly mention this point. See footnote 1 above. Still, the general understanding of the times seems to have been that the merits of the main question could not be discussed when the motion for the previous question was being debated. Jefferson affirmed this principle in his manual. However, Jefferson also believed that it was permissible to move to amend the main question and to discuss the amendment in the interim between the moving and the deciding of the previous question. It is worth noting, especially for the benefit of Brant and Douglas who place so much credence in Jefferson, that had this view been accepted, it would have been very difficult, if not impossible, to use the previous question as a cloture mechanism. See Jefferson's Manual, *op. cit.*, sec. XXXIV.

[26] For evidence bearing on procedure in the earliest days of the House see *Annals*, 1 Cong. 1, 758–759 (Aug. 18, 1789); 2 Cong. 1, 472; 2 Cong. 1, 594–597; and 2 Cong. 2, 846–851. See also Hinds' Precedents, *op. cit.*, sec. 5446. For additional evidence bearing on the whole period see *Annals*, 3 Cong. 1, 595–596; 3 Cong. 2, 998–1000; 7 Cong. 1, 419 and 461–462; 7 Cong. 1, 439–441 and 458–461; and 9 Cong. 1, 284. Beginning in 1302 rulings of the Speakers affirmed and enforced the temporary suppression view. See *Annals*, 7 Cong. 1, 1043–1047 and 12 Cong. 1, 1080–1082. In addition, see Joel B. Sutherland, *Congressional Manual*, Philadelphia, 1841, pp. 45, 104, and 113.

[27] See Jefferson's Manual, *op. cit.*, sec. XXXIV. The occasion referred to is Aug. 18, 1789. See pt. III of this paper and related footnote 51 below. Here the substance of a resolution suppressed the preceding day was allowed to be moved again.

In the Continental Congress the previous question by rule was put in its negative rather than affirmative form—"Shall the main question be not now put?" Thus, in contrast to the House and Senate where the rules provided for the affirmative form of the previous question, a negative determination of the previous question was achieved when the yeas prevailed. In the Continental Congress the effect of such a determination was generally to permanently suppress the main question. See *Journals Of The American Congress From 1774–1788*, Washington, 1823, vol. III, Aug. 8, 1778, Aug 15, 1778, Aug. 20, 1778, Sept. 8, 1778, Nov. 2, 1778, Nov. 19, 1778, Dec. 18, 1778, Feb. 19, 1779, June 8, 1779, June 10, 1779, Nov. 25, 1779, Nov. 27, 1779, Dec. 4, 1779, Oct. 16–17, 1781, Feb. 19, 1782, and Feb. 23, 1782; vol. IV, June 27, 1782, Dec. 12, 1782, Sept. 10, 1783, May 5, 1784, May 26, 1784, June 1, 1784, June 3, 1784, Oct. 13, 1785, and Aug. 14, 1786. On two other occasions, though there were more yeas than nays, there apparently were not enough yeas for the question to pass so that the motion was understood and treated as if it had been lost. *Ibid.*, Mar. 15, 1784, and June 2, 1784. On Sept. 1, 1786, the following resolution was adopted:

> "That when a question is set aside by the previous question, it shall not be in order afterwards formally or substantially to move the same, unless there shall be the same, or as many states represented in Congress."

the House and Senate, the circumstances were such that permanent suppression was or would have been the unavoidable consequence of a negative result.[27a]

The fact that a negative determination of the previous question suppressed the main question supports our contention that the previous question was originally designed for avoiding undesired discussions and/or decisions, rather than as an instrument for cloture. That the previous question could not be employed without risking at least the temporary loss of the main question ill adapted it for use as a cloture mechanism. It is not surprising that one of the longrun consequences of the House's post-1806 decision to use the previous question for cloture was the elimination of this feature.[28] On the other hand, suppression was a key and quite functional feature of the previous question, viewed as a mechanism for avoiding undesired discussions and/or decisions. Indeed, in the period from 1789 to 1806 suppression served as a defining feature of the mechanism. Men who intended to vote against the motion would remark that they supported the previous question and on one occasion the motion was recorded as carried when a majority of nays prevailed.[29]

With regard to affirmative determinations of the previous question, the evidence which exists again does not lend itself to simple, sweeping judgments of the state of parliamentary theory in either the House or the Senate. The House in the years from 1789 to 1806 on a number of occasions allowed proceedings on the main question to continue after an affirmative decision of the previous question.[30] Finally, in 1807 a dispute arose over whether such proceedings could legitimately be continued. The Speaker ruled that they could not, that approval of the motion for the previous question resulted in an end to debate and an immediate vote. This was Jefferson's opinion as well. But despite the fact that Jefferson's pronouncements on general parliamentary procedure were as valid for the House as for the Senate, the House overruled the Speaker and voted instead to sustain the legitimacy of continuing proceedings after an affirmative decision of the previous

[27a] For examples in the Senate see pt. III of this paper and related footnotes 56, 65, and 69 below. For examples in the House see *Annals*, 1 Cong. 1, 324 (May 11, 1789); 5 Cong. 2, 650–651; and 6 Cong. 1, 508–509. It is also true that in a number of instances in which the previous question was used, the likely and practical result of a negative decision was or would have been permanent suppression, though theoretically it would still have been possible to bring the question up again. For examples in the House see *Annals*, 3 Cong. 1, 686; 3 Cong. 2, 960–966; 5 Cong. 2, 1067; and 9 Cong. 1, 1090–1092. For an example in the Senate see pt. III of this paper and related footnote 57.

[28] Hinds' Precedents, *op. cit.*, sec. 5446.

[29] See *Annals*, 3 Cong. 2, 999; 5 Cong. 2, 651; and 5 Cong. 2, 1067. See also *Annals*, 5 Cong. 2, 652, and compare with *Journal of The House of Representatives*, vol. III, p. 92. In addition, see Luce, *op. cit.*, p. 270. We may note that it is this kind of thinking and approach which explains the negative form of the previous question rule in the Continental Congress. See Hinds' Precedents, *op. cit.*, sec. 5445 and Cushing's Manual, *op. cit.*, par. 1422. The fact that the House and Senate changed the form of the previous question from negative to positive should not be taken to mean that use of the previous question as a cloture mechanism was understood or intended. See Alexander *op. cit.*, p. 187 and Samuel W. McCall, *The Business Of Congress*, New York, 1911, pp. 93–94.

[30] See *Annals*, 1 Cong. 3, 1960; 3 Cong. 1, 595–603; and 3 Cong. 2, 1000–1002. See also *Journal Of The House Of Representatives*, vol. III, pp. 253–254. In addition, see *Annals*, 12 Cong. 1, 578–579 and 14 Cong. 1, 710–711. It is also true that on a number of occasions in the House a vote on the main question immediately followed an affirmative decision of the previous question. But there may have been no desire to prolong debate on these occasions. See *Annals*, 2 Cong. 2, 823; 2 Cong. 2, 850–851; 3 Cong. 1, 686; 3 Cong. 2, 966; and 9 Cong. 1, 1092.

Senator Douglas claims that, according to American parliamentary practice, "adoption of the motion for the previous question closed debate instantly and completely, regardless of the motive for invoking it and brought the question to an immediate vote." *Cong. Rec.*, 87 Cong. 1, p. 232 (daily—Jan. 5, 1961). In terms of the evidence cited here we may note that in the House before 1806 the opposite was the case nearly 50 percent of the time.

question.[31] It is not clear whether this decision should be explained by assuming that it reflected the House's long-term understanding of proper procedure or by assuming that it merely reflected the House's pragmatic desire to escape the consequences of the 1805 rules change which abolished debate on the motion for the previous question.[32]

As for the Senate, again less evidence is available, but the Senate appears to have accepted the view that the proper result of an affirmative decision was an end to debate and an immediate vote on the main question. This is what seems to have occurred in the three instances in which the previous question was determined affirmatively in the Senate.[33] Nonetheless, it should be noted that the issue never came to a test in the Senate and we cannot be certain what the result would have been if it had.[34]

Yet, even if we concede that the Senate understood the result of an affirmative decision as Jefferson did, what must be emphasized once more is that this facet of the rule's operation does not mean that the previous question was designed as a cloture mechanism. Jefferson did not regard it as such, but rather saw an immediate vote upon an affirmative decision as an integral part of a mechanism designed to suppress delicate questions. To be sure, it was this facet of the rule's operation, combined with the abolition of debate on the motion for the previous question, which helped make it possible for the House to turn the rule into a cloture mechanism. This occurred in 1811 when the House, fearful that filibustering tactics were going to result in the loss of a crucial bill, reversed its previous precedents and decided that henceforth an affirmative decision would close all debate on the

[31] See Jefferson's Manual, *op. cit.*, sec. XXXIV and *Annals*, 10 Cong. 1, 1182-1184. The vote against the Speaker was 103-14. The precedent was reaffirmed directly in 1808 and indirectly in 1810. See *Annals*, 10 Cong. 2, 630-632 and Hinds' Precedents, *op. cit.*, sec. 5445.

In the Continental Congress, where the previous question by rule was put in negative form, a victory by the nays rather than the yeas constituted an affirmative determination of the previous question. For such a result amounted to a decision that, "No, the previous question should not be put" with the negatives canceling out. Before 1780 a victory for the negative seems always to have resulted in an immediate vote on the main question. Indeed, on Oct. 16, 1778, the Continental Congress insisted on such a result and refused to allow an intervening motion. See *Journals Of The American Congress*, vol. III, Oct. 16, 1778, Feb. 26, 1779, Apr. 20, 1779, May 24, 1779, June 10, 1779, Aug. 21, 1779, and Aug. 25, 1779. However, after 1780 intervening motions were allowed. See *Journals Of The American Congress*, vol. IV, May 31, 1784, and Aug. 31-Sept. 1, 1786. See also *ibid.*, Mar. 15, 1784, Apr. 14, 1784, June 2, 1784, and July 25, 1788. It is interesting to note that when the Continental Congress revised its previous question rule in 1784 the wording of the new rule was much less definite than the old one had been with regard to what was to occur if the nays prevailed. See Hinds' Precedents, *op. cit.*, sec. 5445, and Cushing's Manual, *op. cit.*, par. 1422, or *Journals Of The American Congress*, vols. II and IV, May 26, 1778 and July 8, 1784.

[32] De Alva S. Alexander believes that this decision came as a reaction against the 1805 rules change. Samuel W. McCall feels that the decision, in truth, went against the meaning of the words of the rule and Asher Hinds seems to agree. See Alexander, *op. cit.*, p. 185; McCall, *op. cit.*, p. 94; and Hinds' Precedents, *op. cit.*, sec. 5445. However, see also Gaston's interpretation of the meaning of the words of the rule. *Annals*, 14 Cong. 1, 709.

[33] See *Annals*, 3 Cong. 1, 94 and 5 Cong. 2, 538. See also *Journal Of The Executive Proceedings Of The Senate Of The United States*, Washington, 1828, vol. I, p. 318. In addition, see pt. III of the text of this paper and related footnote 58 below. It should be noted, however, that the records of the Senate for these years are so sparse in their description of debate that we cannot know with absolute certainty whether or not debate was allowed to continue on these occasions.

[34] This is especially true, assuming for the moment that debate on the motion for the previous question could actually have been limited, if the test involved the use of the previous question as a cloture mechanism. Even if we grant that the Senate did understand the result of an affirmative decision as an end to debate and an immediate vote, one cannot simply postulate that because the Senate understood the previous question to entail certain consequences when viewed as a mechanism for suppressing undesired decisions, it necessarily would have understood it to involve the same consequences if an attempt was made to transform the device into a cloture mechanism. Given the distaste the early Senate had for cloture, it is quite likely that the majority of Senators, no matter what their policy persuasions, would have regarded transformation of the previous question into a cloture mechanism as improper and would have modified their understanding of the proper operation of the rule accordingly. Nor would they have been helpless in the face of past precedents. The presiding officer could have been asked to rule in their favor or merely to submit the issue to the floor, as he had discretion to do. If the cooperation of the presiding officer could not have been secured, the rules themselves could have been amended. It is worth noting that the House only became convinced that it was necessary to allow the previous question to be used for cloture after a series of trials with obstructionists, the last of which threatened a very crucial bill. See footnote 35 below. It may well be argued that it would have taken at least as severe a set of experiences as the House underwent before the Senate would have allowed cloture to be imposed on its minorities through the forced closing of debate after affirmative decisions of the previous question.

main question finally and completely.[35] Nonetheless, despite the fact that the previous question was available for use as a cloture mechanism from 1811 on, the House did not make frequent use of it for several decades.[36] One of the reasons for this was that the rule, not having been designed as a cloture rule, continued to retain or was interpreted to have features which made it both ineffective and unwieldy when used for the purpose of cloture.[37] Indeed, it took the House another 50 years of intermittent tinkering to eliminate most of these debilitating features.[38]

In part, the previous question continued to be handicapped as a cloture mechanism because a negative determination of the motion suppressed the main question at least for a day. In part, however, its efficacy was also impaired by a factor we have not yet discussed, though we began by identifying it as one of the key facets of the rule's operation—the nature of the limitations on the scope of the motion.

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[35] This event occurred on Feb. 27, 1811. See *Annals*, 11 Cong. 3, 1091-1094. See also *Annals* 14 Cong. 1, 698-699 and Alexander, *op. cit.*, pp. 185-188. It should be noted that on this occasion the previous question was applied to amendments as well as to the principal question at the third reading stage, i.e., the question on the passage of the bill. Thus, the main question involved in the motion for the previous question was at times a subsidiary question rather than the principal question. See footnotes 44 and 49a below.

The filibustering tactics employed on Feb. 27, 1811, were nothing new. In the years immediately preceding 1811 the House was subjected to obstructive tactics that sorely tried its great distaste for cloture. As late as 1810 the House, despite its difficulties with obstructionists, evinced its opposition to cloture by rejecting a proposal which sought to turn the previous question into a cloture mechanism. See Hinds' Precedents, *op. cit.*, sec. 5445 and *Annals*, 11 Cong. 2, 1207-1215. However, on this occasion the importance of the bill, the nearness of the end of the session, and the series of abuses the House had sustained combined to exhaust even its great capacity for patience. See references cited in footnotes 37 and 38 below.

Irving Brant claims that the House in turning the previous question into a cloture mechanism "was actually following the precedent set in the Senate." *Cong. Rec.*, 87 Cong. 1, p. 245 (daily—Jan. 5, 1961). However, even aside from the question of whether such a precedent did in fact exist which is considered in pt. III of this paper, it is worth noting that the men who favored turning the previous question into a cloture mechanism in the House were totally unaware of any such precedent. See *Annals*, 11 Cong. 2, 1153-1157 and 1207-1215; 12 Cong. 1, 567-581; and 14 Cong. 1, 696-718.

[36] Scholars now generally accept the proposition that the previous question was used only four times in the 20 years that followed 1811. This estimate is based on a statement of Calhoun's made in 1841. See Alexander, *op. cit.*, pp. 188-190 and Luce, *op. cit.*, p. 272. This proposition, however, is not correct. An inspection of the indexes to the Journals from the Twelfth through the Seventeenth Congresses (1811-23) indicates that in this 12-year period alone the previous question was used at least 30 times. Nonetheless, it is still true that such usage cannot be seen as frequent usage. In contrast, during the first session of the Twenty-Eighth Congress (1843-1844) the previous question was used over 150 times. This increase in frequency can be related, at least in part, to the fact that the efficacy of the previous question as a cloture mechanism had been improved by a rules change adopted in 1840. See Hinds' Precedents, *op. cit.*, sec. 5446.

[37] Distaste for cloture *per se* was probably an even more important factor underlying the infrequency of the House's reliance on the previous question in the years that followed 1811. See Thomas H. Benton, *Thirty Years' View*, New York, 1856, vol. II, pp. 256-257. Thus, the increase in the size and business of the House and its greater acceptance of the desirability of cloture are of utmost significance in explaining the increase that occurred in the use of the previous question. These factors not only stimulated the House to use the previous question more frequently; in addition, they stimulated it to transform the device into an efficient cloture mechanism which had the reciprocal effect of allowing it to be used more frequently. See Alexander, *op. cit.*, app. F for figures on the size of the House and the indexes of the relevant Journals for figures on the number of bills introduced.

[38] Hinds' Precedents, *op. cit.*, secs. 5443, 5445, and 5446. In addition, see Luce, *op. cit.*, pp. 272-274. It is worth noting that Jefferson himself advised the House of Representatives against use of the previous question as a cloture mechanism. On Jan. 5, 1810, as a result of the filibustering tactics that had lately been employed in the House, a resolution was introduced which among other things proposed to amend the rules so as to cut off debate immediately after an affirmative decision of the previous question. This resolution was destined to fail. However, on Jan. 17, 1810, writing in reply to a letter addressed to him a week earlier by John W. Eppes, a leader in the House and also his son-in-law, Jefferson remarked that he observed that the House was trying to remedy the protraction of debate by sitting up all night or by use of the previous question. He further remarked that reliance on the previous question was a mistake since it would not only inconvenience the House but also furnish the minority with a weapon they could turn on the majority.

Whether Jefferson actually knew of the substance of the proposed rules change is unclear. It can be argued that the resolution contained provisions which would have met his objections. But the least that can be said is that Jefferson did not recommend changing the practice of the House which at that time allowed debate to continue after an affirmative decision of the previous question, even though this practice was contrary to the principles of his manual. What Jefferson did recommend to Eppes was a straight cloture rule which he had devised and which could have been used to force a vote at a certain time each day. In closing, it is also worth noting that Jefferson apparently did not feel that reliance could be put on points of order raised on the basis of the general parliamentary principle which ruled out "tedious" or "superfluous" debate, even though he himself affirmed this principle in his manual. See Paul L. Ford (ed.), *The Writings Of Thomas Jefferson*, New York, 1898, vol. IX, pp. 267-268 (Thomas Jefferson to John W. Eppes—Jan. 17, 1810); *Annals*, 11 Cong. 2, 1153-1157 and 1207-1215; James Schouler, *History Of The United States of America*, Washington, 1882, vol. II, p. 293; and Richard Hildreth, *History Of The United States of America*, New York, 1856, vol. III, p. 197.

For one thing, the previous question could not be moved in committee of the whole, a form of proceeding which both the early House and early Senate valued highly as a locus for completely free debate.[39] Thus, when the House beginning in 1841 finally decided to limit debate in committee of the whole, it was forced to develop methods other than the previous question for accomplishing this result.[40] However, the early Senate relied to a large extent, not on the regular committee of the whole, but on a special form of it called quasi-committee of the whole, i.e., the Senate as if in committee of the whole; and apparently it was possible to move the previous question when the Senate operated under this form of proceeding.[41]

More important as a limitation on the scope of the previous question was its relation to secondary or subsidiary questions. At first, at least in the House, the previous question was treated as a mechanism that could be moved on subsidiary or secondary questions, e.g., motions to amend, motions to postpone, etc., as well as a mechanism that could be moved on original or principal questions, e.g., that the bill be engrossed and read a third time, that the bill or resolution pass, etc.[42] Thus, though this fact is often misunderstood, in the early House the main question contemplated by the motion for the previous question was sometimes a subsidiary question rather than the principal or original question. Whether the Senate permitted the previous question to be applied to secondary or subsidiary questions before 1800 is not clear.[42a] However, in that year Thomas Jefferson, as presiding officer of the Senate, ruled that the previous question could not be moved on a subsidiary question and his manual when it appeared reaffirmed this position.[43] The House followed suit in 1807, though as late as 1802 a ruling of the Speaker, concerned with the effect of a negative determination of the previous question, took

[39] See Jefferson's Manual, *op. cit.*, secs. XII and XXX; Hinds, *op. cit.*, sec. 4705; and Haynes, *op. cit.*, vol. I, pp. 317-320. Originally, every member could speak as often as he wished in committee of the whole and debate could only be ended by voting to rise and return to the floor. See also Paul L. Ford (ed.), *The Writings Of Thomas Jefferson*, New York, 1896, vol. VII, p. 224 (Thomas Jefferson to James Madison—Mar. 29, 1798).

[40] Alexander, *op. cit.*, p. 267 and Hinds' Precedents, *op. cit.*, sec. 5221.

[41] Jefferson believed that the previous question could be moved when the body was in quasi-committee and in later years the House adopted this interpretation. See Jefferson's Manual, *op. cit.*, sec. XXX and Hinds' Precedents, *op. cit.*, sec. 4923. Jefferson's words in this instance derive added weight from the fact that the quasi-committee procedure was unknown in Parliament so that when he interprets it he apparently relies on what indeed was the practice of the Senate. Moreover, in two instances the previous question may actually have been moved when the Senate was in quasi-committee of the whole. See Jefferson's Manual, *op. cit.*, secs. XXIV-XXXI; *Journal Of The Senate Of The United States Of America*, Washington, 1820, vol. I, pp. 60 and 66; and Maclay's Journal, *op. cit.*, pp. 136-138.

[42] For examples in the House see *Annals*, 2 Cong. 1, 594-597; 6 Cong. 1, 508-509; and 7 Cong. 1, 1043-1045. In the Continental Congress the previous question was not confined to principal questions. At one point in its history (Jan. 7, 1779) this body did express itself as regarding the use of the previous question on amendments as improper. But use of the previous question on amendments as well as on other subsidiary questions continued. See *Journals Of The American Congress*, vol. III, Aug. 8, 1778, Sept. 8, 1778, Dec. 18, 1778, Jan. 7, 1779, and Nov. 27, 1779; vol. IV, Mar. 15, 1784, Apr. 14, 1784, May 5, 1784, May 26, 1784, May 31, 1784, June 1, 1784, June 2, 1784, and June 3, 1784.

[42a] See footnotes 54 and 69 below. The early Senate did permit the previous question to be applied to resolutions, even when moved in a context in which another question existed as the original or principal question. The reasons why this was so are not clear. See footnotes 51, 56, and 65 below.

[43] *Annals*, 6 Cong. 1, 42-43 and Jefferson's Manual, *op. cit.*, sec. XXXIII. Jefferson recognized the existence of six different kinds of subsidiary questions: the motion for the previous question, the motion to postpone indefinitely, the motion to adjourn a question to a definite day, the motion to lie on the table, the motion to commit, and the motion to amend. He also noted that the Senate used the motion to postpone to a day within the session for the motion to adjourn a question to a definite day and the motion to postpone to a day beyond the session for indefinite postponement. The motion to lie on the table was not recognized in the rules of the Senate, but apparently it was nonetheless used.

In general, Jefferson stated that subsidiary questions could not be moved on other subsidiary questions. However, he did make exceptions for an amendment to a motion to postpone, an amendment to a motion to commit, and an amendment to an amendment. For a definition of the nature of a subsidiary question see Cushing's Manual, *op. cit.*, par. 1443.

no cognizance of the fact that the previous question had been moved on a subsidiary question and allowed such usage to go by unchallenged [44]

The decision of the House to confine the previous question to principal questions created great difficulties for it once it began to use the device as a cloture mechanism. Neither the rules of the House or the Senate clearly gave the previous question precedence over other subsidiary questions, such as the motions to postpone, commit, or amend. Thomas Jefferson's opinion was that subsidiary questions moved before the previous question should be decided prior to a vote on the previous question.[45] However, such an approach became entirely unacceptable once it was desired to employ the previous question as a cloture mechanism. If subsidiary questions moved before the previous question took precedence over it and if the previous question could only be applied to the original or principal question, then obstructionists could move subsidiary questions before the previous question and prolong the discussion of these questions for great lengths of time. It was probably no accident that the House amended its rules to give the previous question precedence over other subsidiary questions less than a year after it first used the previous question for cloture.[46]

Nonetheless, this change did not transform the previous question into an efficient cloture mechanism. Beginning with the Twelfth Congress (1811–13), rulings of the Speakers strictly enforced and further developed the doctrine that the previous question applied only to the original or principal question.[47] This caused the House great inconvenience.[48] It meant that if the previous question was approved, it cut off all pending subsidiary questions and brought the House directly to a vote on the original or principal question. Thus, a vote

[44] *Annals*, 10 Cong. 1, 1048–1049 and 7 Cong. 1, 1043–1045. The use of the previous question on amendments on the historic night of Feb. 27, 1811, was seen as an aberration, not a precedent. See *Annals*, 11 Cong. 3, 1091–1094 and 14 Cong. 1, 714. See also *Annals*, 11 Cong. 3, 1106–1107. However, in one area the House did continue to allow the previous question to be confined to subsidiary questions, i.e., with regard to Senate amendments to bills returned to the House for concurrence. See, for example, *Journal Of The House of Representatives Of The United States*, Washington, 1819, 16 Cong. 1, pp. 275–277 (Mar. 2, 1820) and *Journal Of The House of Representatives Of The United States*, Washington, 1821, 17 Cong. 1, pp. 581–582 (May 6, 1822). This was true despite the implications of a ruling made in 1812 by Henry Clay. See Hinds' Precedents, *op. cit.*, sec. 5446.

[45] Jefferson's Manual, *op. cit.*, sec. XXXIII.

[46] This event took place on Dec. 23, 1811. See Hinds' Precedents, *op. cit.*, sec. 5301 and *Journal Of The House of Representatives*, vol. VIII, appendix, p. 528.

It should be noted that the importance of precedence relates not only to the matter of whether subsidiary questions moved before the previous question could be considered before it, but also to the matter of whether subsidiary questions moved after the previous question could be considered before it. This latter feature of the privilege contained in precedence could be an even more serious impediment to the use of the previous question for cloture than the fact that the previous question might have to wait its turn according to the order in which subsidiary questions were moved. Before 1811 the House seems in practice to have given the previous question precedence over other subsidiary questions, if it was moved prior to them. It was, however, not given precedence over the motion to adjourn. See *Annals*, 3 Cong. 1, 596; 7 Cong. 1, 440; and 9 Cong. 1, 288. Still, the situation was an ambiguous one. If a conflict had ever arisen, much would have depended on the inclination of the presiding officer. See John M. Barclay, *Rules And Orders Of The House Of Representatives*, Washington, 1867, footnote to rule 42 on p. 166. When the House did revise its rules in 1811, the previous question was given precedence over all subsidiary questions except the motion to table. In addition, the motion to adjourn was given precedence over the previous question. On one occasion, however, the presiding officer refused to give the motion to table precedence over the previous question. See *Annals*, 13 Cong. 3, 994–995. See also Sutherland's Manual, *op. cit.*, p. 46.

The Senate did not clearly define the precedence of subsidiary questions in its rules until after 1806. Indeed, it may not have done so until 9 years after the House did, i.e., not until 1820. Thus, the rules of the Senate were vague and ambiguous on this point during the whole period in which the previous question existed as part of its procedure. Though a conflict situation involving the previous question never seems to have arisen, we do have some evidence that the Senate did not feel bound to give the previous question precedence over subsidiary questions moved after it. On one occasion in 1792 a motion to postpone was put to a vote before the previous question, even though the previous question had been moved before that motion. See *Annals*, 1 Cong. 1, 20–21 (Apr. 16, 1789) and 9 Cong. 1, 201. See also *Senate Executive Journal*, vol. I, pp. 96–98.

[47] See Hinds' Precedents, *op. cit.*, sec. 5446. See also *Annals*, 12 Cong. 1, 1352–1353; 12 Cong. 2, 1028 13 Cong. 1, 398; 13 Cong. 3, 900–901; 13 Cong. 3, 994–995; 13 Cong. 3, 1010–1011; 13 Cong. 3, 1270–1271; and 14 Cong. 1, 714–715. Occasions on which the previous question was used in succeeding Congresses can be found in the indexes to the relevant Journals.

[48] Hinds' Precedents, *op. cit.*, secs. 5445 and 5446.

might have to be taken on a form of the question undesired by the majority, e.g., that the bill without the amendments reported pass to a third reading instead of that the bill with the amendments reported be recommitted with instructions. Thus also, when a subsidiary question was moved early in debate the House might either have to endure a lengthy discussion on the motion or employ the previous question, which would force a vote on the principal question before it had been adequately considered. Ultimately, of course, the House did reshape the previous question mechanism so that it could efficiently be applied to the subsidiary questions involved in an issue. However, this reshaping occurred piecemeal over a number of years in response to the difficulties we have described and it was in a sense dependent on them.

We may conclude, then, that in the period from 1789 to 1806 the previous question mechanism was designed to operate in a manner that was suited only to its utilization as an instrument for avoiding undesired discussions and/or decisions. In the Senate and in the House until December of 1805 debate on the motion was permitted. In both bodies a negative determination of the previous question postponed or permanently suppressed the main question and in the House, at least, debate and amendment were permitted after an affirmative decision. In the eyes of those who saw the previous question as a means of avoiding undesired decisions this could easily be justified by assuming that the vote on the previous question only determined whether the body wanted to face the issue. Finally, the nature of the limits on the scope of the motion greatly handicapped its efficacy as a cloture mechanism. It is true that in the beginning the House and possibly the Senate allowed the previous question to be applied to subsidiary questions. It is also true that, once both bodies accepted the proposition that the device could not be so applied, this restriction could and in the Senate actually did handicap those who wanted to use the previous question as a mechanism for avoiding certain decisions. Still, as the experience of the House after 1811 demonstrates, the nature of the handicap was one that was much less a limit on the negative objective of suppressing a whole question than on the positive objective of forcing a whole question to a vote. In short, we may conclude that in both the early House and early Senate not only was the purpose of the previous question conceived of as relating to the prevention of undesired discussions and/or decisions; in addition, the device itself was clearly designed operationally to serve such ends rather than the ends of cloture. In later years the previous question was turned into an efficient cloture mechanism in the House. But this required considerable tinkering, and what is more, tinkering that resulted ultimately in a basic transformation of the operational nature of the mechanism.[48a]

III. The Previous Question in Practice in the Senate, 1789–1806

The conclusions we have reached thus far are significant; but they are not conclusive. The purposes for which the previous question was actually used in the period from 1789 to 1806 must also be examined since the possibility of a discrepancy between theory and

[48a] *Ibid.*, sec. 6446.

practice cannot be disregarded. As far as the House of Representatives is concerned, it is clear from the evidence and acknowledged by all that the previous question was not employed as a cloture mechanism in the years before 1806. However, with regard to the Senate, Senator Douglas and Irving Brant claim that the previous question was in fact used for cloture during the 17 years in which it existed as part of the procedure of the upper house. If this is true, Brant and Douglas can well argue that on the basis of this experience a precedent exists for the imposition of majority cloture in the Senate today, though the strength of the precedent would still depend on how isolated or irregular such usage was.

Yet there is still another reason for examining the actual instances in which the previous question was used in the Senate. Interestingly enough, the actual use of the previous question as a cloture mechanism is crucial to Brant and Douglas' claim that the Senate had the "power" to use the previous question for cloture whenever it desired. This is something of a paradox since Brant and Douglas imply that the Senate's power in this regard existed whether or not the Senate ever actually exercised it. However, this view cannot be accepted. The reasons why it cannot have already been touched on in various parts of this paper, but for purposes of exposition it is necessary to bring them together here. First, the possibility that the Senate could have limited debate on the motion for the previous question through rulings which prohibited tedious or superfluous debate is subject to doubt. Nothing exists to support this contention except a sentence in Jefferson's manual.[49] Second, the early Senate never gave the previous question a position of precedence over other subsidiary questions in its rules. Third, it is clear that the Senate did not allow the previous question to be applied to subsidiary questions in the latter part of the period from 1789 to 1806 and it may well be the case that this prohibition existed in the earlier part of the period as well.[49a] Fourth, we cannot even be certain that in the Senate the inevitable, irreversible result of an affirmative determination of the previous question was an immediate vote.[50] Given these difficulties, the only way in which

[49] See footnotes 22, 24, and 25 above. It is worth noting that if obstructive debate could have been stopped through rulings based on the general parliamentary principle which prohibited tedious or superfluous debate, there would have been much less need to use the previous question as a cloture mechanism than Brant and Douglas recognize. Assuming that the previous question could have been used for cloture, it only would have been required in situations where an absolute prohibition of discussion on the merits of a question was desired or where the possibility of moving obstructive subsidiary questions, e.g., amendments, was unlimited.

[49a] See footnotes 54 and 69 below. If it is true that in its earliest years the Senate allowed the previous question to be applied to subsidiary questions, then for these years the significance of the fact that the previous question was not given precedence in the Senate rules is limited. See footnote 46 above. Assuming that the Senate would not have greatly restricted the kinds of subsidiary questions the previous question could be applied to and assuming that the Senate would not have further expanded the possibility of moving subsidiary questions on other subsidiary questions, the previous question would have furnished an efficient instrument for handling pending subsidiary questions which stood in the way of a vote on the original or principal question. Moreover, if necessary, the mechanism also could have been applied to secure a vote on the principal question itself.

It is worth noting that the first time the previous question was used for cloture in the House the rules of the House had not yet been amended to give the previous question precedence over other subsidiary questions. One of the reasons the House was nonetheless able to use the previous question for cloture was that on this occasion the House permitted it to be applied to subsidiary questions. However, it should be remembered that this was not the only reason, nor would it have been sufficient if it had been. Also important was the fact that debate on the motion for the previous question was prohibited, the fact that past precedents were reversed so that debate was not allowed to continue after the motion had been decided, and the fact that the understanding of the House seems to have been that other subsidiary questions could not be used to obstruct the application of the previous question to the questions on which it was moved. See *Annals*, 11 Cong. 3, 1091-1094.

The House, of course, retreated almost immediately from the position that the previous question could be applied to subsidiary questions. That it was allowed on this occasion was regarded as an aberration. See footnote 44 above. Instead, the House gave the previous question precedence in its rules. This combined with the prohibition of debate both before and after the vote on the previous question meant that the mechanism could be used for cloture, though only at the cost of removing all pending subsidiary questions.

[50] See footnote 34 above.

Brant and Douglas' contention that the Senate had the "power" to use the previous question for cloture can be substantiated is by evidence of its actual exercise, i.e., by evidence that the difficulties we have mentioned could be overcome. Moreover, if such evidence cannot be furnished, we may push our argument even further than we have up to this point. For, then, we may strongly suspect that, in the face of the obstacles which existed, the Senate could not have used the previous question for cloture unless it first modified its rules and practices in the same way the House did starting in 1805.

This author has been able to find ten instances of the use or attempted use of the previous question in the Senate during the years from 1789 to 1806. They are as follows.

(A) August 17 and 18, 1789 [50a]

On August 17, 1789, a committee report on a House bill concerned with providing expenses for negotiating a treaty with the Creek Indians was taken up for consideration. The bill as referred from the House made no mention of measures to be taken to protect the people of Georgia in the event efforts for a treaty failed. After the resolution embodied in the committee report and a second resolution originating on the floor were moved and defeated, a third resolution was moved which proposed to authorize the President to protect the citizens of Georgia and to draw on the Treasury for defraying the expenses incurred. At this point in the proceedings the previous question was moved. A majority of nays prevailed and the Senate adjourned. The next day the bill was again brought up for consideration. After a number of motions pertaining to particular clauses in the bill were proposed and, save one, defeated, a resolution was moved making it the duty of Congress to provide for expenses incurred by the President in defense of the citizens of Georgia. At this point the previous question was again moved. It was defeated and the bill, with the solitary amendment previously adopted, was then put to a vote and approved.[51]

[50a] See *Annals*, 1 Cong. 1, 62-63 and 1 Cong. 3, appendix, 2161. See also *Senate Journal*, vol. I, pp. 60-61 and *Cong. Rec.*, 87 Cong. 1, pp. 233 and 244 (daily—Jan. 5, 1961). Brant and Douglas, as well as all the other secondary sources which treat the previous question, are aware at most of only five instances of its use or attempted use in the Senate. This author has been able to find an additional five. It is quite possible that an exhaustive page-by-page search of the records of the Senate and the letters of contemporary figures would yield additional examples.

[51] In the second instance, i.e., Aug. 18, 1789, it is clear that the resolution moved immediately before the previous question was not the original or principal question. It is also clear that in this instance the previous question was moved on the resolution since the negative determination of the previous question did not prevent the Senate from passing immediately to a vote on the original or principal question—Shall the bill with the amendment pass?

In the first instance, i.e., Aug. 17, 1789, we cannot be certain that the resolution moved immediately before the previous question was not in fact the principal question at that point in the proceedings. It depends on whether a hiatus was possible between the defeat of the report and the resumption of the second reading stage. See Jefferson's Manual, *op. cit.*, sec. XXIX and *Senate Journal*, vol. I, pp. 59-60. If the resolution did exist as the principal question, there can be no doubt that the previous question was moved on it. However, even if the resolution did not exist as the principal question, it is still probable that the previous question was moved on the resolution rather than on what would have then been the principal question—Shall the bill pass to a third reading? Assuming that the resolution did not exist as the principal question, the fact that the Senate seems to have adjourned immediately after voting down the previous question does not necessarily mean that the previous question was moved on the principal question. To assert this is to presume that since the Senate adjourned, it must have been forced to adjourn because the whole bill had been suppressed. Yet adjournment could have come as a separate, voluntary act. Given the manner in which the previous question was used on the following day, it is more likely that even if the resolution did not exist as the principal question, the previous question was nonetheless applied to it rather than to the question on the bill. Senator Douglas seems to misunderstand this point. See *Cong. Rec.*, 87 Cong. 1, p. 233 (daily—Jan. 5, 1961).

That the Senate on Aug. 18, 1789, and possibly also on Aug. 17, 1789, allowed the previous question to be applied to a question that did not exist as the original or principal question raises the issue of whether the Senate initially permitted the previous question to be applied to subsidary questions. As far as the evidence furnished by these two instances is concerned, determination of the issue depends on whether the Senate regarded resolutions, moved in a context in which another question existed as the original or principal question, as subsidiary questions. Unfortunately, the answer to this question is not clear.

On the one hand, it can be maintained that the Senate distinguished resolutions, which stated a principle within a context in which another question existed as the original or principal question, from motions which

Brant and Douglas concede that in these two instances the previous question was moved for the purpose of avoiding or suppressing an undesired decision. Brant notes that this maneuver enabled "the economy bloc * * * to avoid an indefinite grant of spending power to the President and yet escape the odium of a vote against the defense of the frontier."[52]

(B) August 28, 1789 [53]

On August 28, 1789, during the discussion of a bill fixing the pay of Senators and Representatives William Maclay offered an amendment which sought to reduce the pay of Senators from six to five dollars per day. Maclay records in his Journal that his proposed amendment evoked a "storm of abuse" and that Izard, a Senator from South Carolina, "moved for the previous question." He further notes that Izard "was replied to that this would not smother the motion" and that when it was learned that "abuse and insult would not do, then followed entreaty." Maclay, however, remained undaunted. He knew that his amendment would be defeated; his object was simply to get a record vote on the amendment in the minutes. In this he was successful. The amendment was put to a vote and defeated, but the yeas and nays were recorded. The motion for the previous question was either not seconded or withdrawn since there is no mention of it in the *Senate Journal.*

In this instance, as in the last two, it is clear that use of the previous question was attempted for the purpose of avoiding or suppressing an undesired decision. However, the reasons why the motion for the previous question was not persisted in are not clear. The critical factor to be resolved is whether the motion was killed voluntarily because it was undesired or forcibly because power was lacking to insist on it.[54]

(C) January 12 and 16, 1792 [55]

On January 12, 1792, consideration of the nomination of William Short to be Minister resident at The Hague was resumed. After a committee had reported certain information concerning Short's fitness to be appointed a resolution was moved which stated that no Minister should at that time be sent to The Hague. The previous question was then moved in its negative form, i.e., "That the main

amended, postponed, or committed the original or principal question. See Jefferson's Manual, *op. cit.*, secs. XX and XXI. Thus, it can be maintained that a resolution, such as was moved on Aug. 18, 1789, was not technically regarded as a subsidiary question but rather as a kind of principal question. On the other hand, it can be argued that the Senate allowed the previous question to be applied to resolutions which did not exist as the original or principal question because it, as well as the House, initially permitted the previous question to be applied to subsidiary questions. In support of this contention the fact that resolutions were referred to by the Senate as "motions" can be cited. See *Senate Executive Journal*, vol. I, pp. 96–98. See also Senate rule VIII, *Annals*, 1 Cong. 1, 20–21 (Apr. 16, 1789). For additional evidence bearing on the status of resolutions see footnotes 64 and 65 below.

[52] *Cong. Rec.*, 87 Cong. 1, p. 244 (daily—Jan. 5, 1961).

[53] See Maclay's Journal, *op. cit.*, p. 138 and *Senate Journal*, vol. I, pp. 66–67. The Senate rules provided for a record vote at the request of one-fifth of the members present. *Annals*, 1 Cong. 1, 21 (Apr. 16 1789).

[54] Resolution of this issue hinges on whether the Senate at this time permitted the previous question to be applied to a question that was technically regarded as an amendment or subsidiary question. One can argue that the Senate, as well as the House, initially permitted the previous question to be applied to questions that were technically regarded as amendments or subsidiary questions no matter what stand one takes on the issue of the status of resolutions. In contrast, one cannot argue that the previous question was not applied in this instance because power was lacking to do so unless one also argues that the Senate distinguished resolutions from motions. This is true because unless the manner in which the previous question was used on Aug. 18, 1789, can be distinguished, it would indicate that the mechanism could have been used 10 days later in this instance as well.

It is worth noting that, though Izard was informed that the previous question would not "smother" Maclay's motion, these words do not necessarily imply that the previous question could not have been used. They can be interpreted as signifying only that Maclay's motion, even if suppressed, could have been raised again when the bill came up for its third reading. See footnote 69 below.

[55] See *Senate Executive Journal*, vol. I, pp. 96–98 and *Cong. Rec.*, 87 Cong. 1, pp. 234–235 and 244 (daily—Jan. 5, 1961).

question be not now put," despite the fact that the rules provided only for the positive form of the mechanism. At this point, however, the Senate decided that "the nomination last mentioned, and the subsequent motion thereon, be postponed to Monday next." On that day, January 16, 1792, the Senate resumed its consideration of the nomination and the resolution moved on the nomination. The previous question was put in negative form and carried with the help of a tie-breaking vote by the Vice President. This removed the resolution which would have prohibited sending a resident Minister to The Hague. The Senate then proceeded to the Short nomination and approved it.[56]

Here again Brant and Douglas concede that the previous question was not used for the purpose of cloture, i.e., for the purpose of closing debate in order to force a vote. Instead, they recognize that it was used to avoid or suppress an undesired decision and they also argue that it was used to suppress a discussion of certain conditions at The Hague which might have jeopardized Short's appointment.

(*D*) *May 6, 1794* [57].

On May 6, 1794, James Monroe, then a Senator from Virginia, asked the permission of the Senate to bring in a bill "providing, under certain limitations, for the suspension of the fourth article of the Treaty of Peace between the United States and Great Britain." The previous question in its normal, affirmative form was moved on Monroe's motion and it was approved by a vote of 12 to 7. The main question was then put and permission to bring in the bill was denied by a vote of 14 to 2. Monroe and John Taylor, his fellow Senator from Virginia, were the only Senators in favor.

Once more we may conclude that the previous question was moved in an attempt to avoid or suppress an undesired decision. This can be deduced from the fact that neither the proponents nor the opponents of Monroe's motion had any reason to attempt to obstruct decision by prolonging debate. This certainly was not in Monroe and Taylor's interest; they wanted a decision on the motion, preferably an affirmative one. As for the opponents, their numbers were such that they had no need to obstruct decision. The only Senators, then, who had a motive for moving the previous question were those seven Senators who voted against the previous question. For these men the previous question offered a means of suppressing a decision they wished to avoid.

Unfortunately, the *Annals* do not record the name of the Senator who moved the previous question. Nonetheless, convincing evidence exists to support our deduction that the previous question was, moved by a Senator who voted nay on that motion. John C. Hamilton's account indicates that such a Senator, James Jackson of Georgia, was the man who moved the previous question. He reports that Jackson made the following announcement to the Senate:

> I deem the proposition ill-timed * * * I wish for peace, and am opposed to every harsh measure under the present circumstances. I will move the previous question; * * *.[58]

[56] This case presents another instance in which the previous question was applied and confined to a resolution that did not exist as the original or principal question. That the resolution did not exist as the original or principal question can be inferred, among other things, from the fact that it was referred to as a "subsequent motion." That the previous question was applied and confined to the resolution can be inferred from the fact that its defeat did not suppress the question on the nomination but only the resolution itself.

[57] See *Annals*, 3 Cong. 1, 94 and Henry H. Simms, *Life of John Taylor*, Richmond, 1932, p. 61.

[58] John C. Hamilton, *History Of The Republic Of The United States Of America*, New York, 1860, vol. V, p. 570. Hamilton was the son of Alexander Hamilton.

Debate continued after this statement, presumably because Jackson held back on his motion to allow the other Senators to have their say. Undoubtedly, the reasons why Jackson considered Monroe's motion as "ill-timed" related to the fact that only a few weeks before John Jay had been appointed special envoy to Great Britain and was at that very moment making preparations to depart on his historic mission.[59]

(E) April 9, 1798 [60]

On April 9, 1798, after the Senate had gone into closed session James Lloyd, a staunch Federalist Senator from Maryland, moved that the instructions to the envoys to the French Republic be printed for the use of the Senate. Six days previous on the 3d the President had submitted to Congress the instructions to and the dispatches from these envoys. Four days previous on the 5th the Senate had agreed to publish the dispatches for the use of the Senate. These papers were the famous ones in which Talleyrand's agents were identified as X, Y, and Z and the whole affair was seen by the Federalists as a great vindication and triumph for their party.

Lloyd first moved his motion on the 5th when the Senate agreed to publish 500 copies of the dispatches, but it was postponed on that day. When he moved it again on April 9, 1798, John Hunter, a Senator from South Carolina, moved the previous question.[61] The motion for the previous question was approved by a vote of 15 to 11, with Hunter voting nay. The main question, i.e., that the instructions be printed, was also approved by a vote of 16 to 11, Hunter again voting nay.

In this instance, once again, it is clear that the previous question was not used as a mechanism for cloture. Rather, it was brought forward as a means of avoiding or suppressing an undesired decision. This is attested to by the fact that the Senate was in closed session when the previous question was moved and by the fact that Hunter, the mover of the previous question, voted nay both on his own motion and on the main question. It is also supported by the fact that 10 of the 11 Senators who voted nay on the motion for the previous question also voted nay on the main question.[62]

(F) February 26, 1799 [63]

On February 18, 1799, President Adams proposed to the Senate that William Vans Murray be appointed minister plenipotentiary to the French Republic for the purpose of making another attempt to settle our differences with France by negotiation. This proposal caused dismay and consternation in the ranks of the Federalists. For

[59] Hildreth, *op. cit.*, vol. IV, pp. 488–490.

[60] *Annals*, 5 Cong. 2, 535–538 and Schouler, *op. cit.*, vol. I, pp. 396–398.

[61] Hunter was a Republican but apparently such a moderate one that the Federalists had hopes of capturing him. See "South Carolina Federalist Correspondence," *American Historical Review*, vol. XIV, No. 4, pp. 783 and 789 (July 1909). Moreover, there is some evidence to indicate that by April 1798, the Federalists had, at least to some extent, succeeded in their objective. See Charles R. King (ed.), *The Life And Correspondence Of Rufus King*, New York, 1895, vol. II, p. 311.

[62] The reasons why Hunter and his supporters desired to apply the previous question in this instance are not clear. Given the party status of Hunter and the mixed nature of his support, sheer political expediency does not seem to be an adequate explanation. Instead, the desire for the previous question may have been motivated by opposition to the publication of confidential communications and/or hopes for continued negotiations. See *Annals*, 5 Cong. 2, 535–538 and 1375–1380; Correspondence Of Rufus King, *op. cit.*, vol. II, pp. 310–313; and Writings Of Thomas Jefferson, *op. cit.*, vol. VII, pp. 224–246 (letters to James Madison, James Monroe, Edmund Pendleton, and Peter Carr in the period from Mar. 29, 1798, to Apr. 26, 1798).

[63] *Senate Executive Journal*, vol. I, pp. 313–319. See also Schouler, *op. cit.*, vol. I, pp. 441–444; Hildreth, *op. cit.*, vol. V, pp. 284–291; and *Cong. Rec.*, 87 Cong. 1, pp. 235 and 244–245 (daily—Jan. 5, 1961).

one thing, Adams acted suddenly on the basis of confidential communications he had received from abroad without informing anyone in the Cabinet or the Senate as to his intentions. For another thing, a strong pro-war faction existed among the Federalist members of Congress and the party as a whole had been engaged in driving a number of war preparedness measures through Congress. Moreover, ever since the X.Y.Z. affair the Federalists had been using the presumed wickedness and hostility of France as a weapon for humiliating and destroying the strength of the Jeffersonian Republicans. Lastly, a number of prominent Federalists distrusted Murray and thought him too weak.

The nomination of Murray was referred to a committee headed by Theodore Sedgwick, a Federalist Senator from Massachusetts. Meanwhile, pressure was brought to bear on Adams and he was threatened with a party revolt if he did not agree to modify his request for the appointment of Murray. The result was that on February 25, 1799, Adams sent a second message to the Senate asking that a commission, composed of Murray, Patrick Henry, and Oliver Ellsworth, be appointed in lieu of his original request.[64] The next day, February 26, 1799, a resolution was moved which proposed that the President's original message of the 18th be superseded by his message of the 25th. The previous question was moved and it passed in the affirmative. The effect of this decision was to bring about a vote on the resolution and it also was approved. The Senate then proceeded to consider the nominations of Murray, Henry, and Ellsworth to office and all three were approved on the following day.[65]

Brant and Douglas contend that this is clearly an instance in which the previous question was moved for the purpose of cloture. Unfortunately, the *Executive Journal* does not record the name of the Senator who moved the previous question or the names of the Senators who voted for and against the motion.[66] However, the evidence that is

[64] Sedgwick and his committee asked for and were granted a meeting with President Adams. Whether he agreed to substitute a commission for his original proposal at this meeting or later when he learned that the Federalists in the Senate had caucused and decided to reject the nomination of Murray is a matter that varies from account to account. See John C. Hamilton, *The Works Of Alexander Hamilton*, New York, 1851, vol. VI, pp. 396-400 (letters of Sedgwick and Pickering to Hamilton and of Hamilton to Sedgwick in the period from Feb. 19, 1799, to Feb. 25, 1799); Charles F. Adams, *The Life And Works Of John Adams*, Boston, 1856, vol. I, pp. 547-549; George Gibbs, *The Administrations Of Washington And John Adams*, New York, 1846, vol. II, pp. 203-205; and *Correspondence Of The Late President Adams Originally Published In The Boston Patriot*, Boston, 1809, letters IV-V, pp. 20-26.

[65] This seems to be another instance in which the previous question was applied to a resolution which did not exist as the original or principal question. The original or principal question on this occasion appears to have been the nomination of Murray. The committee to whom this subject had been referred was discharged on Feb. 25, 1799, when Adams' second message nominating a commission of three men was received. See *Senate Executive Journal*, vol. I, p. 317.

If the resolution involved in this instance did not exist as the original or principal question, events on this occasion can be interpreted to contain significant evidence bearing on the status of resolutions in the Senate. Less than a year later on Feb. 5, 1800, the Senate refused to permit the previous question to be applied to a motion that directly sought to amend an original or principal question. See discussion of this instance in text and footnote 69. These facts might lead one to conclude that at least in 1799 the Senate did distinguish between resolutions and motions with the result that resolutions were not seen as subsidiary questions, even when moved in a context in which another question existed as the original or principal question.

However, it is quite probable that the resolution moved on Feb. 26, 1799, had a distinct parliamentary status that in and of itself explains why the previous question could have been moved on it. That is to say, this resolution may well have been seen as an incidental question. According to Jefferson and Cushing, an incidental question is a question which arises out of another question; but, unlike a subsidiary question, its decision does not necessarily dispose of that question, e.g., a question of order. Moreover, whereas an incidental question is not equivalent to an original or principal question, once it is brought up it supersedes the question on the floor and becomes open to subsidiary motions. See Jefferson's Manual, *op. cit.*, secs. XXXIII and XXXVII and Cushing's Manual, *op. cit.*, par. S. 1443, 1456, and 1476 (footnote).

Thus, the use of the previous question on Feb. 26, 1799, can be explained by noting that the Senate probably saw the resolution as an incidental question. If this was the case, a comparison of events on Feb. 26, 1799, and Feb. 5, 1800, does not in any way indicate that the Senate distinguished between resolutions and motions.

[66] An examination of unprinted material in the National Archives undertaken for this writer by the staff of the General Records Division also failed to reveal the name of the Senator who moved the previous question or the names of the Senators who voted for and against the motion.

available strongly suggests that Brant and Douglas' conclusions are incorrect.

Brant and Douglas have no evidence on which to base their argument except the presumption that since the previous question was affirmatively decided and since an immediate vote seems to have followed, the previous question must have been used for cloture. However, as we have seen in the instances of May 6, 1794, and April 9, 1798, an affirmative decision of the previous question does not necessarily mean that the previous question was moved for the purpose of cloture. It may only mean that the men who desired the previous question for the purpose of avoiding or suppressing a decision could not command a majority. What occurs in such instances is not the forced closing of debate for the purpose of bringing a matter to a vote, but the closing of debate as a feature of a mechanism employed for the purpose of allowing a parliamentary body to decide whether it desires to face a particular matter. Indeed, as the behavior of Senator Jackson on May 6, 1794, suggests, such closing can well be postponed until a point is reached where it is generally agreed that the time for decision has arrived.

Thus, in order to determine how the previous question was used in this instance we must consider the motives that seem to have prompted it. If the previous question was used for cloture, the Federalists would have been the ones to move it. However, there is no reason to believe that the Federalists were motivated to act in this manner. The Jeffersonians do not appear to have staged a filibuster on the resolution. In truth, this would have played into the hands of the war Federalists by giving them an excuse to refuse any kind of peace mission while throwing all blame on the Jeffersonians. Nor is there any reason to believe that the Federalists moved the previous question because they feared the consequences of a discussion on the resolution. The anti-Adams Federalists well realized that it was essential to unite on the commission idea as the only possible compromise under the circumstances and the problem of defection or embarrassment through debate was a slight one, if it existed at all.[67]

In contrast, there are a number of reasons for believing that the Jeffersonians moved the previous question in an attempt to suppress the resolution. First, the Jeffersonians feared that the commission alternative might just be a subterfuge for torpedoing the negotiations.[68] They much preferred the appointment of Murray alone.

[67] See John A. Carroll and Mary W. Ashworth, *George Washington*, New York, 1957, vol. VII, p. 572; Henry Cabot Lodge, *Life and Letters Of George Cabot*, Boston, 1877, pp. 223 and 235; and John T. Morse, Jr., *John Adams*, Boston, 1889, pp. 302-303. See also references cited in footnote 64 above. Senator Humphrey Marshall of Kentucky seems to be the only Federalist who may have refused to go along with the commission compromise. See footnote 68 below. It should also be remembered that the Senate was in closed session on this occasion.

[68] Writings of Thomas Jefferson, *op. cit.*, vol. VII, p. 372 (letter to Bishop James Madison—Feb. 27, 1799). Additional evidence bearing on the identity and motive of the Senator who moved the previous question is contained in the record of the vote on the nominations of Murray, Ellsworth, and Henry. No dissenting vote was cast on the question to agree to the nomination of Murray. This supports the view that the Jeffersonian Republicans favored him and the view that the war Federalists were willing to swallow him in the interests of party harmony. Six dissenting votes were cast on the question to agree to the nomination of Ellsworth. Five of these votes were cast by Jeffersonian Republicans. Three dissenting votes were cast on the question to agree to the nomination of Henry. All three of these votes were cast by Jeffersonian Republicans who had also voted against Ellsworth. Given these facts, it is quite likely that the mover of the previous question was one of the three Jeffersonian Republicans who felt so strongly about the issue that he voted against the nominations of both Ellsworth and Henry. These three Republican Senators, Bloodworth, Langdon, and Pinckney, also voted against referring Adams' original nomination of Murray to a committee, the purpose of this maneuver being to gain time for the Federalist leaders to bring pressure to bear on Adams.

A single Federalist Senator, Humphrey Marshall of Kentucky, voted against the nomination of Ellsworth. Marshall also was the only Federalist who voted against referring Adams' original nomination of Murray to a committee. Thus, it is possible that Marshall was the Senator who moved the previous

Second, tactically much was to be gained by confining the choice to simply approving or disapproving Murray. If he was approved, the Jeffersonians would have gotten exactly the kind of peace mission they desired; if he was disapproved, a party split in the ranks of the Federalists was likely and, what is more, the Federalists would stand before the public as a group of truculent warmongers.

Now it is true that the very reasons that would have led the Jeffersonians to attempt the previous question also helped to insure the defeat of the maneuver by solidifying the Federalists. Nonetheless, the Jeffersonians, not knowing exactly how united the Federalists were, could very well have thought the previous question worth a try. We may conclude, then, that in all probability this case is no different than the others we have considered. Despite the interpretations placed on it by Brant and Douglas, it seems to be simply another instance in which the previous question was attempted for the purpose of suppressing an undesired decision.

(G) February 5, 1800 [69]

On February 5, 1800, a bill for the relief of John Vaughn was brought up for its third reading. A motion was made to amend the preamble of the bill. On this motion the previous question was moved, but ruled out of order on the grounds that the mechanism could not be applied to an amendment. A motion was next made to postpone the question on the final passage of the bill until the coming Monday. This motion was defeated. Having disposed of the attempt to postpone, the majority then proceeded to vote down the amendment and approve the bill.

The purpose for which the previous question was used in this instance seems in no way to depart from the usual pattern. In this case the opponents of the amendment appear to have attempted to suppress it by applying the previous question. They failed in this but still succeeded in defeating the amendment in a direct vote.

(H) March 10, 1804 [70]

The impeachment trial of Judge John Pickering of the New Hampshire district court commenced on March 2, 1804. The Representatives selected by the House to manage the impeachment completed their case against Pickering on March 8, 1804. Two days later Samuel White, a Federalist Senator from Delaware, rose and offered a resolution which stated that the Senate was not at that time prepared to make a final decision on the Pickering impeachment.[71] The

question. He might have done so either because he remained an intransigent war Federalist or because on this occasion he happened to agree with the Jeffersonians. Nonetheless, Marshall is a much less likely candidate than any one of the three Jeffersonians who voted against both Ellsworth and Henry. Indeed, Marshall's votes in favor of Henry and Murray may indicate that he voted against Ellsworth on personal grounds rather than because he rejected the commission compromise accepted by all the other Federalists. Moreover, even if Marshall, a Federalist, did move the previous question in this instance, his purpose would not have been cloture. Given his votes against reference to a committee and against Ellsworth, his purpose would have been similar to that we have postulated for the Jeffersonians, i.e., to suppress the resolution to supersede and confine the issue to the simple acceptance or rejection of Murray. See *Senate Executive Journal*, vol. I, pp. 315, 318, and 319.

[69] *Annals*, 6 Cong. 1, 42-43. The fact that an attempt was made on this occasion to apply the previous question to an amendment may indicate that prior to 1800 the Senate, as well as the House, understood such usage as proper. On the other hand, it may only mean that the position of the Senate in its earliest days had been forgotten so that the point had to be settled again.

[70] For account of events on this day see *Annals*, 8 Cong. 1, 362-363; Memoirs Of John Quincy Adams, *op. cit.*, vol. I, pp. 302-303; and Everett S. Brown (ed.), *William Plumer's Memorandum Of Proceedings In The United States Senate*, New York, 1923, pp. 173-176. See also Haynes, *op. cit.*, vol. II, p. 850 and Henry Adams, *History Of The United States During The First Administration Of Thomas Jefferson*, New York, 1889, vol. II, pp. 153-159.

[71] Whether this resolution existed as a principal or incidental question is not entirely clear. However, it is clear that it did not exist as a subsidiary question. This can be inferred from the fact that it was open to subsidiary motions other than the previous question, e.g., the motion to amend. See *Annals*, 8 Cong. 1, 363.

resolution also stated a number of reasons in support of its contention: that Pickering had not been able to appear but could be brought to Washington at a later date, that Pickering had not been represented by counsel, and that evidence indicating that Pickering was insane had been introduced.

The Jeffersonian leadership in the Senate received this resolution with hostility. Their first reaction was to try to suppress it by having it declared out of order, but this maneuver failed.[72] That the Jeffersonians would have preferred not to face the resolution directly is quite understandable since it advanced potent legal grounds for inducing the Senate to refuse to convict Pickering, e.g., that the trial had not been impartial and that Pickering as an insane man could not legally be held responsible for his acts. However, the hostility of the Jeffersonians was based on more than the fact that the resolution endangered the success of the Pickering impeachment. By implication it also threatened the success of the upcoming impeachment of the hated Judge Chase. To lose the Pickering impeachment on the grounds stated in the White resolution would create a precedent which denied the Senate broad, quasi-political discretion in impeachment and limited it to the determination of whether "high crimes and misdemeanors" in a quasi-criminal sense had actually been committed.

Unfortunately, the three accounts we have of Senate proceedings on March 10, 1804, differ significantly.[73] One area of important difference concerns the exact order of events on this day. Both the *Annals* and the diary of William Plumer report that the previous question was moved by Senator Jackson, Republican of Georgia, after Senator Nicholas, Republican of Virginia, urged that the White resolution not be recorded, if defeated. Both these accounts report that Jackson's motion was followed by a statement of Senator White and by an amendment offered by Senator Anderson, Republican of Tennessee, which proposed to strike out of the resolution all material relating to Pickering's insanity and lack of counsel. In addition, both of these accounts report that after the moving of the Anderson amendment the Senate proceeded to vote down the White resolution. Despite these similarities an important difference does distinguish these two accounts. In the Plumer account Nicholas' statement, Jackson's motion, White's statement, and Anderson's motion are all made when the Senate is in closed session. In the *Annals* they are all made before the Senate is reported to have gone into closed session. We should also note that neither the *Annals* nor Plumer supply any further information regarding the previous question aside from the fact that it was moved. The *Annals* are similarly obscure with respect to the fate of Anderson's amendment, but Plumer records that this motion failed to secure a second which would explain why it was never brought to a vote.

Further complications are introduced when we add the report of events given in the diary of John Quincy Adams. Adams and Plumer were both members of the Senate at this time. In the Adams account no mention is made of the previous question or of White's statement.

[72] *Annals*, 8 Cong. 1, 363. For accounts of events from the beginning of the trial on Mar. 2, 1804, up through Mar. 9, 1804, see *Annals*, 8 Cong. 1, 326–362; Memoirs of John Quincy Adams, *op. cit.*, vol. I, pp. 297–302; and Plumer Memorandum, *op. cit.*, pp. 147–174.

[73] Once again an examination of unprinted material in the National Archives, conducted for this writer by the staff of the General Records Division, failed to reveal any information not already contained in the *Annals*.

Anderson's amendment is reported to have been moved when the Senate was in open session. Nicholas' remarks are reported as occurring later when the Senate was in closed session. In addition, in contrast to Plumer, Anderson's amendment is reported to have secured a second but to have been withdrawn when the Senate was in closed session.

A second important area of difference concerns the nature of the rules governing the Senate during the Pickering impeachment.[74] According to Adams, the rules restricted debate to closed session and required all decisions to be taken in open session by a yea and nay vote. Thus, he reports that when the Senate was in closed session on the White resolution the Jeffersonians were very impatient to return to open session so as to end debate and bring the resolution to a vote. Adams further explains that the reason Anderson withdrew his amendment was to end debate on it in order that the time the Senate was in closed session need not be prolonged.

The *Annals* and Plumer's diary do not directly contradict Adams' interpretation of the rules. Indeed, on the whole, the record of events in these accounts does not depart from Adams' rendition of what the rules required. However, on occasion they do present examples of action which suggest either that the Senate did not necessarily follow its own rules or that Adams' interpretation is not entirely correct. In the Plumer account of events on March 5, 1804, the Senate is reported to have voted on two motions when it was still in closed session. In the *Annals'* account of events on March 10, 1804, and Plumer's account of events on March 9, 1804, the Senate is reported to have entered into debate when it was in open session.

Senator Douglas and Irving Brant claim that the events of March 10, 1804, represent an instance in which the purpose and effect of moving the previous question was cloture.[75] They argue, on the basis of the Plumer account, that the Senate was in closed session when the previous question was moved.[76] They argue, on the basis of the Adams account, that the rules restricted debate to closed session and decisions to open session and that the Jeffersonians were impatient

[74] On March 2, 1804, the Senate passed the following resolution:

"Resolved, * * * All motions made by the parties or their counsel shall be addressed to the President of the Senate, and, if he shall require it, shall be committed to writing, and read at the Secretary's table; and, after the parties shall be heard upon such motion, the Senate shall retire to the adjoining committee room for consideration, if one-third of the members present shall require it; but all decisions shall be had in open court, by ayes and noes, and without debate, which shall be entered on the records."

On March 5, 1804, the Senate passed another resolution which stated, "That on the motion made and seconded, the Court shall retire to the adjoining committee room, if one-third of the Senators present shall require it." See *Annals*, 8 Cong. 1, 327 and 333.

The first resolution can be interpreted as restricting all debate to closed session and requiring all decisions to be made in open session. The significance of the second resolution would then be that it gave the Senate the privilege of going into closed session by a one-third vote on motions made by its own members as well as on motions made by the parties to the impeachment.

On the other hand, the first resolution can be interpreted as applying only to motions made by the parties to the impeachment. The significance of the second resolution would then be that it gave the Senate the option of going into closed session by a one-third vote on motions made by its own members. In terms of this interpretation the Senate could debate and decide motions made by its own members in open or closed session, but it had the option of going into closed session if it desired by a one-third vote.

As is pointed out in the text, John Quincy Adams saw the first interpretation as the governing one. See Memoirs Of John Quincy Adams, *op. cit.*, vol. I, pp. 302-303. However, as is also indicated in the text, the claims of the first interpretation are impaired by the existence of a number of instances in which the Senate can be seen to have acted contrary to it. For a view which differs from that of Adams and supports the other possible interpretation, see Stidham, *op. cit.*, pp. 170-171.

[75] See *Cong. Rec.*, 87 Cong. 1, pp. 235-238 and 245-246 (daily—Jan. 5, 1961).

[76] Irving Brant argues that the *Annals* give a mistaken impression in suggesting that the previous question was moved in open session. His point is that the *Annals* indicate that debate took place immediately before the previous question was moved, but that the rules prohibited debate in open session. See *Cong. Rec.*, 87 Cong. 1, p. 245 (daily—Jan. 5, 1961). However, it is possible to interpret the rules to mean that debate was possible in open session, if the motion involved was moved by a member of the Senate. See footnote 74 above. Moreover, one can argue that the *Annals* would not have recorded any debate which took place in closed session. The fact that debate was recorded, then, would indicate that the Senate was in open session. See *Annals*, 8 Cong. 1, 326-367 and Stidham, *op. cit.*, pp. 170-171.

to end debate on the White resolution and bring it to a vote. Thus, they conclude that the previous question was moved to force an end to debate and a vote on the White resolution and that it actually had this effect since according to the rules decisions had to be taken in open session. The fact that neither Adams, Plumer, nor the *Annals* indicate that the motion for the previous question was actually put to a vote in open session does not disturb them. They point out that once the Senate had returned to open session debate was prohibited, with the result that the previous questio achieved its purpose of forcing a vote on the White resolution without having to be brought to a vote itself.

The validity of Brant and Douglas' interpretation of the order of events and the nature of the rules on March 10, 1804, cannot be determined conclusively one way or the other. Nonetheless, even if we accept the propositions they advance in these regards, we can still reject their conclusion that in this instance the purpose and effect of the previous question was cloture. First, merely moving the previous question would not and could not have ended debate and forced the Senate to return to open session. As long as the previous question was not voted on and determined affirmatively, the only way debate could be cut off and a vote on the White resolution forced would have been by passing a motion to open the doors. It is true that, if the motion for the previous question received a second, it would have cut off debate on the main question, i.e., on the White resolution. But debate could have and undoubtedly would have continued on the motion for the previous question itself. The Federalists would have objected strenuously to any Republican maneuver designed to avoid the necessity of directly facing the embarrassing issues contained in the White resolution. Given the fact that the previous question was moved after the White resolution had already been subject to discussion, we may conclude, in contrast to Brant and Douglas, that instead of serving to end debate the motion for the previous question threatened to prolong it.

Second, both the *Annals* and Plumer record that Anderson's amendment was moved after the previous question while the Senate was still in closed session. This indicates that the previous question either failed to secure a second or was withdrawn soon after it was moved. Otherwise, an amendment of the main question would not have been in order. Thus, Brant and Douglas cannot argue that the Senate returned to open session to vote on the motion for the previous question since the motion itself seems to have been killed while the Senate was still in closed session. The fact that Adams does not even mention the previous question in his account supports our contention that the previous question was killed before it could play a significant role in the events of the day. Given the care with which Adams documents each and every Jeffersonian move to avoid facing or discussing the White resolution, it is highly unlikely that he would have failed to mention the previous question if it had been used as Brant and Douglas suggest.

If we may dismiss the claims of Brant and Douglas, can we also assert that the events of March 10, 1804, merely furnish another illustration of the use of the previous question for the purpose of

suppressing an undesired discussion and/or decision? The answer is "Yes." We may note that on March 5, 1804, Jackson spoke and voted against allowing evidence bearing on Pickering's sanity to be introduced. We may note that on March 10, 1804, when the Senate returned to open session, he voted against the White resolution which listed insanity as a ground for not voting to convict Pickering. We may also note that Jackson moved the previous question immediately after Nicholas urged that the resolution not be recorded, if defeated. It is probable, therefore, that Jackson moved the previous question for the purpose of suppressing the White resolution rather than for the purpose of forcing a vote on it. If cloture were his aim and such an aim only would have been feasible if debate was in fact prohibited in open session, either that end could have been achieved more easily by simply moving to return to open session, or alternatively, if the Senate was already in open session, there would have been no reason not to press the previous question to its ultimate conclusion.

Why, then, would the previous question have been refused a second or withdrawn? The answer is that under the circumstances which existed the best way to get rid of the White resolution and clear the way for a vote on the impeachment was to face the resolution directly. The timing and the substance of Nicholas' words indicate that the Senate was just about ready to proceed to a vote on the White resolution. To introduce the previous question at such a point would be to complicate and prolong the proceedings. This is true whether or not the Senate could have actually voted on the previous question in closed session. In either event debate on the motion would still have been possible. It is also true whether the previous question was moved in open or closed session. Both the *Annals* and Plumer indicate that debate took place immediately before and after the previous question was moved. This means that, if the previous question was moved in open session, debate was possible in open as well as closed session.[77]

Thus, the reasons Adams suggests for the killing of Anderson's amendment probably apply to the previous question as well. The Jeffersonians desired to get rid of the White resolution and push on to a vote on the impeachment as fast as possible. They knew they had the votes to defeat the resolution. Moreover, though they might have preferred to suppress or amend the resolution, they also knew that they could not really save themselves from embarrassment by adopting either alternative. That Pickering had not appeared, that he had not been represented by counsel, and that evidence had been introduced indicating that he was insane were part of the record of the trial. Hence, it is not surprising that the Republicans elected to face the White resolution without delay. This was the course that promised the swiftest and surest attainment of their basic objective—the conviction of Pickering.[78]

[77] See footnotes 74 and 76 above.

[78] Adams is reported by the *Annals* and Plumer, but not by his own diary, to have argued that amendments to the White resolution were out of order because "a gentleman had a right to a vote upon any specific proposition he might please to submit." Whether this was actually required by the rules is conjectural. If it was, it offers an alternative explanation of why the previous question was killed. Yet Adams in his own diary notes that the Senate permitted amendments on the White resolution. Moreover, his only recorded objection was that these motions constituted "debate" and therefore should not have been allowed when the Senate was in open session. See *Annals*, 8 Cong. 1, 363; Memoirs of John Quincy Adams, *op. cit.*, vol. I, p. 302; and Plumer Memorandum, *op. cit.*, p. 174.

(I) December 24, 1804.[79]

On December 24, 1804, the Senate resumed consideration of a set of rules proposed to govern the Senate during the Chase impeachment. These rules had been recommended by a select committee whose chairman was William Giles, a Virginia Republican who led the anti-Chase forces in the Senate. Four days earlier, when the Senate was involved in a discussion of these rules, Stephen Bradley, an independent Republican from Vermont, had moved an amendment to one of the rules proposed by the Giles committee. Bradley, however, was ill on the 24th and was not present in the chamber. John Quincy Adams reports in his diary that he therefore moved that the whole subject be postponed until Bradley could attend. This bid for postponement of consideration was defeated. Adams relates that "Giles then offered to postpone or put the previous question upon Mr. Bradley's amendment; but this the Vice-President declared to be not in order."[80] Following Burr's ruling, the Senate proceeded to vote down the amendment and before the day was ended it agreed to adopt all or most of the rules recommended by the Giles committee, including the rule on which Bradley's amendment had been moved.[81]

This case presents another instance in which the previous question was attempted to suppress an undesired decision. Giles' intention was obviously to remove the amendment either through postponement or through the previous question as a preliminary to voting to adopt the rule. The practical effect of this would have been to kill the amendment, even though technically neither postponement nor the previous question would have permanently suppressed the amendment.[82]

IV. Conclusion

We may conclude that the Haynes-Stidham-Russell position is the correct one. The fact that a previous question mechanism existed and was used in the early Senate furnishes no precedent for the imposition of majority cloture in the Senate today. As we have shown in part I, the previous question was not understood functionally as a cloture mechanism. As we have shown in part II, it was not designed to operate as a cloture mechanism. As we have shown in part III, it was not in practice used as a cloture mechanism. Indeed, it is even improbable that the Senate could have used the previous question for cloture, given the obstacles which existed and the lack of any evidence to show that these obstacles could in fact be overcome.

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[79] See Memoirs Of John Quincy Adams, *op. cit.*, vol. I, pp. 318-326; *Annals*, 8 Cong. 2, 89-92; Plumer Memorandum, *op. cit.*, pp. 228-233; and Henry Adams, *op. cit.*, vol. II, pp. 218-228.

[80] Memoirs Of John Quincy Adams, *op. cit.*, vol. I, p. 324. The grounds of the ruling undoubtedly were that subsidiary questions could not be moved on another subsidiary question. This ruling, made by Burr, reaffirmed Jefferson's ruling of Feb. 5, 1800. See footnote 69 above. It is interesting to note that Giles had just entered the Senate that session. Previous to his entrance into the Senate, he had for over a decade been a leading Republican member of the House and the House, as late as 1802, permitted the previous question to be applied to subsidiary questions. See footnote 44 above.

[81] That the rule on which Bradley's amendment had been moved, as well as all or most of the other rules proposed by the Giles committee, were adopted on this occasion can be inferred by comparing Adams' report of the discussion on Dec. 24 and 31, 1804, with the list of rules recorded in the *Annals*. See Memoirs Of John Quincy Adams, *op. cit.*, vol. I, pp. 324-326 and *Annals*, 8 Cong. 2, 89-92.

[82] This point is based on the fact that the Senate rules did not require resolutions which applied only to the Senate to undergo three readings. See Jefferson's Manual, *op. cit.*, secs. XXI and XXII and *Annals*, 9 Cong. 1, 201.

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