On the Right of the Senate to Govern Itself
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Mr. President, I rise today to address a very simple yet momentous question: does the Senate have the power to govern itself? Specifically, can a majority of the Senate establish how it will be governed?

I have heard much careless talk over the past few months. Some charge that the Senate will soon "break the rules to change the rules" and "destroy the Senate as we know it." Some Senators claim that the Senate is about to abdicate all constitutional responsibility and is becoming a "rubber stamp." Others raise the specter of "lawlessness" and "banana republics." Worst of all, other Senators speak figuratively of detonating nuclear bombs and shutting down the Senate's business.

Mr. President, this kind of hysteria does a tremendous disservice not only to the Senate, but to our whole nation. Not only are the claims blatantly false, but they add to the already unacceptable level of incivility in political affairs. It is often said that we should disagree without being disagreeable – a sentiment with which I wholeheartedly concur. A good first step would be for my colleagues to stop making outrageous claims that Republicans want to destroy this institution.

The reality is that the Senate is now engaged in an historic effort to protect constitutional prerogatives and the proper checks and balances between the branches of government. Republicans seek to right a wrong that has undermined 214 years of tradition – wise, carefully thought-out tradition. The fact that the Senate rules theoretically allowed the filibuster of judicial nominations but were never used to that end is an important indicator of what is right, and why the precedent of allowing up-or-down votes is so well established. It is that precedent that has been attacked and which we seek to restore.

Fortunately, the Senate is not powerless to prevent a minority from running roughshod over its traditions. It has the power – and the obligation – to govern itself. As I will demonstrate today, that power to govern itself easily extends to that device that has come to be known as the "constitutional option."

Mr. President, the Constitution is clear about the scope of the Senate's power to govern itself. Article I, section 5, clause 2 of the Constitution states that "Each house may determine the Rules of its Proceedings." The Supreme Court has rarely interpreted this clause, but one case is important for our purposes, that of United States v. Ballin, 144 U.S. 1 (1892). That 1892 case dealt with the power of the majority in the House of Representatives to make rules, and contains two holdings that bear on our situation today.

First, the Supreme Court held that the powers delegated to the House or Senate through Article I, section 5, clause 2 are powers held by a simple majority of the quorum. The Constitution states that a majority of members constitutes a quorum, and the Supreme Court, therefore, held that "when a majority are present the house is in a position to do business." 144 U.S. at 5. The Supreme Court continued, "All that the Constitution requires is the presence of a

majority." 144 U.S. at 6. Thus, a majority is all the Constitution requires to make rules, to set precedents, and to operate no a day-to-day basis. The Supreme Court made this clear.

Second, the Supreme Court held that the "power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house." 144 U.S. at 5. By "house," the Court means the House of Representatives or the Senate. The import of this statement is crucial for present purposes. The power of the majority of Senators to define Senate procedures is one that exists at all times – whether at the beginning, middle, or end of Congress.

So, Mr. President, the constitutional background is simple and uncomplicated. We can govern ourselves. We can do it by majority vote. And we can do it at any time.

Let us look now at how the Senate employs its constitutional power to govern itself. There are four basic ways the Senate does so — in standing rules, in precedents, in standing orders, and in rulemaking statutes. I will discuss each in turn.

First, the Senate has adopted Standing Rules to govern some (but not all) Senate practices and procedures. I have seen much confusion in the press and, sadly, in this body, about those Standing Rules. Some argue that the Standing Rules are the be-all and end-all of Senate practice and procedure. This confusion is understandable outside the Senate, but Senators know that those rules are but one aspect of the overall tools – the "broader rules," we might say – that the Senate uses to govern itself.

That brings us to the second way that the Senate exercises its constitutional power: the creation of precedents. Precedents are created whenever the Presiding Officer rules on a point of order, when the Senate sustains or rejects an appeal of the Presiding Officer's ruling on a point of order, or when the Senate itself rules on a question that has been submitted to it by the Presiding Officer. As former Parliamentarian and Senate procedural expert Floyd Riddick has said, "The precedents of the Senate are just as significant as the rules of the Senate." [Oral History Interview, Senate Historical Office, Nov. 21, 1978, at page 429.] Let me repeat what Mr. Riddick said. "The precedents of the Senate are just as significant as the rules of the Senate." Indeed, as we will see, precedents have sometimes been created that directly contradict the Standing Rules of the Senate. I will return to this point later in my presentation, but I want everyone to remember what Mr. Riddick said.

A third way that the Senate exercises its constitutional power is through Standing Orders, which can be adopted via legislation, Senate resolutions, or run-of-the-mill unanimous consent agreements. It is worth pausing to note that the Senate regularly overrides the Standing Rules and precedents of the Senate through unanimous consent agreements. Our Leaders get together and decide, for example, to change the time to hold a cloture vote, even though Rule 22 mandates that the vote shall occur one hour after the Senate comes into session on the second day after the cloture petition is filed. Yet the Leaders move the votes — in direct contradiction of the rules. Now, of course a "unanimous consent" agreement is, formalistically, "unanimous." But that temporary rule change, if you want to call it that, is done completely outside the Standing Rules.

Well, Mr. President, how can they do this? How can they ignore the Standing Rules of the Senate? The answer is simple, and goes to the essence of the situation before us today. As the Supreme Court held, the Constitution gives the Senate the power to make rules and govern itself on a continuous basis. We are not held hostage to the Standing Rules, nor are we required to go through the cumbersome process of amending the Standing Rules, when it is necessary to get something done. This has always been true.

A fourth way that the Senate exercises its constitutional power is through rule-making statutes. For example, for 30 years, the Budget Act has been placing severe restrictions on the right of Senators to debate. Indeed, the Congressional Research Service has identified twenty-six rule-making statutes that somehow limit the ability of individual Senators to debate and/or amend legislation. Think about that for a moment. We hear much pontificating on this floor about the supposedly sacred and untouchable right of Senators to debate on an unlimited basis. Yet arguably our most important function – that of ensuring that government services are budgeted and receive funding – is subject to carefully crafted restrictions of that right. We have 50 hours of debate, followed by a majority vote. For generations, Senators have judged some limits on debate are necessary, just as a matter of common sense.

Parenthetically, no matter how many times a few Senators say otherwise, this controversy has nothing to do with "free speech." As the Minority Leader has also acknowledged, this dispute "has never been about the length of the debate." (Cong Rec, Apr. 28, 2005) It is about blocking judicial nominees.

Mr. President, I would like to move to another important aspect of this discussion — the role of tradition and norms of conduct in the day-to-day functioning of the Senate. Although it is frequently said that the unique features of the Senate are individual Senators' rights to debate and amend, there is another, more central aspect to Senate procedure. As I see it, the overriding feature of the Senate is mutual self-restraint and respect for the settled norms of the body.

Let us consider a few examples. Senators limit their speech on an informal basis virtually every day. We cut short remarks so that others can speak. We acquiesce in unanimous consent agreements that will have the effect of denying ourselves any chance to speak on a subject. We decline to object to procedural unanimous consent requests even though we might have good reasons to want to slow down Senate business. We acquiesce in our Leaders' floor schedule. We work with bill managers to limit amendments so that the Senate can function, so that each individual Senator's "rights" do not become an impediment to the task of governing.

Senators have "rights," but we also have obligations to each other and to the nation. So we limit our rights on the basis of mutual respect and a belief in good government, but – candidly – also out of fear of retaliation. If I assert my rights too forcefully, I not only disrespect my colleagues, but I threaten my own public policy goals. The result is a complicated, multilateral "truce" of sorts that allows us to do the people's business in an orderly way. In a word, we gain stability. Institutional stability.

In short, the Senate is institutionally stable not because of the rules, the precedents, the standing orders, or the rulemaking statutes I discussed earlier. The body is stable because we respect each others' prerogatives and understand that any breach of the truce will produce a reaction. It is that basic understanding of physics – action, reaction – coupled with genuine good

will that allows us to function even with the many individual "rights" we possess. The rights only work because we so often choose not to exercise them. So it is not just rights that define the Senate, but also restraint.

Which brings us back to the filibuster of judicial nominations. It is certainly the case that the Standing Rules of the Senate do countenance the filibuster of judicial nominations. But it is equally the case that the longstanding norms of the Senate do not.

Until 2003, no judicial nominee with the demonstrable support of a majority of Senators had ever been denied an up-or-down vote on the Senate floor due to a filibuster. Even on the rare occasions where there were attempts, they failed. On a bipartisan basis.

And why, Mr. President? Because the filibuster of judicial nominations — used as a minority veto —was not part of our tradition. Again, out of respect for fellow members, for the President, for the Judiciary, and out of a recognition of the long term impact of such tactics, the Senate had always declined to march down this path. When I entered the Senate in 1995, I had grave concerns about some of the more activist nominees that President Clinton sent us. But I listened to my Chairman, Orrin Hatch, my Leader, Trent Lott, and many others. They taught that we had a longstanding Senate tradition against blocking judicial nominations by filibuster. So I joined Democrats and Republicans alike in preventing filibusters.

Ironically, some point to successful cloture votes for confirmed judges and then claim that those nominees were "filibustered." All that establishes is that both parties ensured a supermajority to end debate precisely to adhere to the historical norms. We took the steps to ensure that those judicial nominees who reached the Senate floor received the fair, up-or-down votes to which they were entitled.

Again, the standing rules might have permitted such obstruction, but the Senate norms and traditions did not. To the extent that the rules technically permitted such obstruction, the traditions had rendered the power obsolete and inert. In common law, there is a doctrine called desuetude, which means that obsolete or unenforced laws shall not have effect in the future, even if not formally repealed. In other words, a law that is de facto unenforced may be treated as ineffective de jure as well. We faced a similar situation in the Senate.

In effect, our tradition was our rule. To minimize the traditions of this body is to display a naive and legalistic misunderstanding of the history of the institution. To say we are a body of traditions is meaningless if we do not simultaneously acknowledge that our traditions have content and meaning.

There can be no question that the filibusters of the last Congress broke that Senate tradition, and, therefore, the settled way this body governed itself. By breaking the traditions of the Senate, members of the minority should have known that they would force the Senate to react.

Traditions should never change without consensus, and a consensus requires — at a minimum — a majority. The question, Mr. President, is what we are to do when norms and traditions are changed by the minority? What do we do when there is no consensus, just a minority with a determination to exploit dormant rules to further partisan ends?

The Senate can do one of two things. We can let our traditions be transformed and permit rule by the minority, or we can insist that the Senate maintain its traditional norms and take action to protect them. And that, Mr. President, brings us to the Constitutional Option itself.

The "Constitutional Option" is nothing more than the Senate governing itself as the Constitution provides – by acts of the majority of Senators. The Senate has been in this situation before. Four times over a 10 year period, the Senate majority reacted to a minority that was using rules that had not traditionally been used to obstruct Senate business. My colleague, Senator McConnell, will be discussing each of these instances in depth, but I would like to address one in particular, by way of illustration.

In 1977, two Senators attempted to block a natural gas deregulation bill after cloture had already been invoked. They were succeeding through a strategy of "filibuster by amendment." Post-cloture debate time had elapsed, but the obstructing Senators could still call up amendments, force quorum calls, and then force roll call votes on the amendments. Rule 22 prohibited dilatory or non-germane amendments, but Senate procedure did not provide any way to automatically rule these post-cloture amendments out of order. True, a Senator could raise a point of order against one of these dilatory amendments, but any favorable ruling could be appealed. A roll call vote could then be demanded on that appeal. And once that roll call vote began, the obstructing Senators could accomplish their slowdown in a different way — filibuster by roll call vote. To make matters worse, in 1977, before any point of order could even be made against an amendment, the amendment in question had to be read by the clerk. By objecting to the routine courtesy of waiving of the reading of the amendment, the obstructing Senators delayed Senate business even further.

Now, that all may seem complicated, but there's one undeniable truth about what these obstructing Senators were doing. It was all completely permitted under the Standing Rules and precedents of the Senate. At the same time, however, these tactics were in violation of settled Senate norms and practices. So what was the Senate to do?

The answer came when the then-Democratic Majority Leader made the decision that these new tactics were dilatory, in violation of traditional norms and could no longer prevail. He asked then-Vice President Walter Mondale to sit in the Chair in his capacity as President of the Senate. The Democratic Majority Leader then made a point of order that "when the Senate is operating under cloture the Chair is required to take the initiative under Rule 22 to rule out of order all amendments that are dilatory or which on their face are out of order." (Cong Rec, Oct. 3, 1977) Mondale sustained the point of order, even though it had no foundation in the rules or precedents of the Senate. Another Senator appealed the Mondale ruling, and the Democratic Majority Leader moved to table. The Senate then voted to table the appeal. In so doing, the Senate created a new precedent. But that precedent ran directly contrary to the Senate's longstanding procedures which had required Senators to raise points of order to enforce Senate rules. Under the new precedent established by the Senate, no such point of order would be necessary.

Again, this may seem complicated, but these small changes had dramatic effects. The Democratic Majority Leader then began to call up each of the dilatory amendments so that the Chair could rule them out of order, one-by-one, and the Chair obliged. Under normal circumstances, an appeal would have been in order, but the Majority Leader exercised his right

of preferential recognition to block any appeal. He quickly called up every single remaining amendment, Vice President Mondale ruled them out of order, and all the amendments were disposed of.

Nearly 20 years later, the Senator who orchestrated those events in 1977 explained to the Senate what he had done. He explained "I asked Mr. Mondale, the Vice President, to go please sit in the chair; I wanted to make some points of order and create some new precedents that would break these filibusters. And the filibuster was broken — back, neck, legs, and arms." (Cong. Rec., Jan. 5, 1995) So there should be no confusion about what happened that day.

That was the Constitutional Option in action. The Senate faced a situation where a minority of Senators was frustrating Senate business in an untraditional way. The majority wished to proceed. The majority did not propose a formal rules change, refer the proposal to the Rules Committee, wait for its action, and then bring it to the floor under Rule 22's cloture provisions for such rule change proposals. That procedure was not followed. Instead, the Majority Leader recognized that the Senate had the constitutional power to bypass that route – which is exactly what the Senate did.

As I mentioned earlier, Mr. President, that same Democratic Leader would create several other precedents while serving as Majority Leader, in each case because he concluded that the existing standing rules and precedents of the Senate were inadequate, and that a majority of Senators had the power to alter the way the Senate governs itself. In 1979, for example, a new precedent was created to prevent legislation on appropriation bills, in direct contravention of the text of the Standing Rules at that time. In 1980, the Senate used the Constitutional Option to eliminate the ability to debate – and filibuster – the motion to proceed to a particular item on the Executive Calendar. That situation is remarkably similar to the one we face today. And in 1987, in a complicated set of maneuvers, the Senate created new precedents to limit minority rights and to declare that certain dilatory tactics during the Morning Hour were out of order.

Mr. President, I will not examine each of these historical events in detail here today. Instead, I ask unanimous consent to enter into the record a copy of a policy paper prepared by the Republican Policy Committee, which I chair, that examines each of these events in great detail.

These past precedents – in 1977, in 1979, in 1980, and in 1987 – bear directly on the situation the Senate faces today. In those instances, Senate business was being obstructed by dilatory tactics that had not traditionally been employed, but which were permitted under the rules. The Senate faced the same conundrum as it does today: must the Senate permit rule by the minority, or can it exercise its constitutional power to restore traditional practices? In each case, the Senate did the latter. It created precedents that altered the practices and procedures and in some cases the operation of the Standing Rules themselves in order to ensure that tradition was upheld.

Mr. President, what did <u>not</u> happen as a result of these earlier exercises of the constitutional option?

<u>First</u>, the Senate did not collapse or become "like the House" – the perennial (and somewhat condescending) fear of many Senators.

Second, Senators' speech rights are just as strong as ever. Nor were Americans "free speech" rights injured, as some Senators say will happen today.

Third, minority rights were not destroyed. The Senate minority is as vibrant as ever and has been remarkably successful at obstructing the business of the Senate, whether we are talking about the energy bill, medical liability lawsuit reform, asbestos litigation reform, or tax relief.

Before I close, I would like to address concerns that some of my conservative friends have expressed recently. Some are fretting that Republicans are taking a dangerous step by restoring the traditional up-or-down vote standard for judicial nominations.

My friends argue that Republicans may want to filibuster a future Democratic President's nominees. To that I say, I don't think so, and even if true, I'm willing to give up that tool. It was never a power we thought we had in the past, and it is not one likely to be used in the future. I know some insist that we will someday want to block Democrat judges by filibuster. But I know my colleagues. I have heard them speak passionately, publicly and privately, about the injustice done to filibustered nominees. I think it highly unlikely that they will shift their views simply because the political worm has turned. So I say to my friends: what you say we Republicans are losing is, in fact, no loss at all.

My friends also argue that the legislative filibuster will be next. I have even seen some media outlets insist that this exercise of the Constitutional Option for judicial filibusters will automatically apply to the legislative filibuster. That is completely false. Moreover, Mr. President, no Republican Senator wants to eliminate the legislative filibuster, and few, if any, Democrats do. Some once did, but they have recanted. In fact, the Junior Senator from California said she was "wrong … totally wrong" ever to have thought otherwise. (Weekly Standard, 3/28/05) Everyone here knows that political fortunes change. It is one thing to give up a supposed "right" that had never been used, such as this filibuster of judicial nominees. It is quite another to be so shortsighted as to eliminate such a powerful legislative tool. In fact, the first vote I ever cast as a United States Senator was to preserve the legislative filibuster — and I was in the majority!

But I think it is important to acknowledge, in the interest of intellectual honesty, that if the majority wanted to eliminate the filibuster for all matters, including legislation, it would certainly have that power. It would be wildly imprudent, contrary to tradition, and genuinely destructive of the institution. But that is what the Constitution provides — the power to the Senate to govern itself.

So, in closing, I say to my colleagues: what we are contemplating doing is in the best traditions of the Senate. We are restoring our consensus practices for managing the judicial confirmation process, using a tool that has repeatedly been used and always been available. I look forward to completing this debate so that we can start voting on individual judicial nominees and turn to the pressing legislative matters before the Senate.